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VOLUME 260

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1922

FROM OCTOBER 2, 1922, TO AND
INCLUDING JANUARY 29, 1923

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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.[2]
WILLIS VAN DEVANTER, Associate Justice.
MAHLON PITNEY, Associate Justice.[3]
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
JOHN H. CLARKE, Associate Justice.[4]
GEORGE SUTHERLAND, Associate Justice.[5]
PIERCE BUTLER, Associate Justice.[6]

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

[1] For allotment of The Chief Justice and Associate Justices among the several circuits, see pp. xii, xiii, xiv, *post*.

[2] Mr. Justice Day retired November 13, 1922, under the provisions of Jud. Code, § 260. See page ix, *post*.

[3] Mr. Justice Pitney retired December 31, 1922, under the provisions of an Act of December 11, 1922.

[4] Mr. Justice Clarke, by letter of September 1, 1922, addressed to the President, tendered his resignation as of September 18, 1922. See page v, *post*.

[5] On September 5, 1922, President Harding nominated George Sutherland, of Utah, to succeed Mr. Justice Clarke, resigned; he was confirmed by the Senate on the same day; the judicial oath was administered and he took his seat upon the bench on October 2, 1922.

[6] On November 23, 1922, President Harding nominated Pierce Butler, of Minnesota, to succeed Mr. Justice Day, retired; the nomination not having been acted upon at that session of Congress, the President renominated Mr. Butler on December 5, 1922, and he was confirmed by the Senate on December 21, 1922; the judicial oath was administered and he took his seat upon the bench on January 2, 1923.

RESIGNATION OF MR. JUSTICE CLARKE.

SUPREME COURT OF THE UNITED STATES.

MONDAY, NOVEMBER 20, 1922.

PRESENT: THE CHIEF JUSTICE, MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, AND MR. JUSTICE SUTHERLAND.

The CHIEF JUSTICE announced the following order of the Court:

It is ordered by the Court that the accompanying correspondence between members of the Court and Mr. JUSTICE CLARKE upon his retirement as an Associate Justice of the Court be this day spread upon the record, and that it also be printed in the reports of the Court:

THE SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C., OCTOBER 24, 1922.

DEAR BROTHER CLARKE: Your resignation as a member of this Court during the vacation has delayed a joint expression of our sincere regret at parting with you as a colleague.

Service as a federal judge in the lower courts had fitted you quickly to put your shoulder to the wheel here. The number and excellence of your opinions contained in the 13 volumes from 242 to 259, inclusive, of our reports, testify to the debt the country owes you for the share you have had in carrying the great burden that rested upon this court during the period of the Great War and the years immediately preceding and following it.

We shall miss much your earnest and constant application, your kindly and loyal spirit of companionship, and your generous courtesy. We wish to assure you of our affectionate regard and respect for you as a man and a public servant.

You still have, we hope, many years of usefulness before you. Our best wishes go with you.

Sincerely yours,

WILLIAM H. TAFT.
JOSEPH MCKENNA,
OLIVER WENDELL HOLMES.
WILLIAM R. DAY.
WILLIS VAN DEVANTER.
MAHLON PITNEY.
LOUIS D. BRANDEIS.

Hon. JOHN H. CLARKE,
Youngstown, Ohio.

YOUNGSTOWN, OHIO, NOVEMBER 13, 1922.

MY DEAR MR. CHIEF JUSTICE: The joint expression of friendship and regard of my former brethren of the Court which you send me is very grateful, and I am sure you all know that I fully and sincerely reciprocate the feeling. The recollection of the unvarying kindness of you all to me—the one thing I miss and the loss of which I feel—will always be one of the most precious possessions of my life.

It seemed best for me to resign my office while I still had strength sufficient to take up other duties, but I shall watch the work of you all with interest and sympathy, confident from my intimate associations with you that the great tradition of the Court for learning, independence, and impartial decision will be abundantly maintained.

Even here I can not withhold the expression of the hope that the bill pending in Congress to modify the imperative statutory jurisdiction of the Court may soon become

a law, so that you may not be so burdened with unimportant cases as you now are, and so may have more time and strength for the consideration of the many causes of great public concern constantly coming before you, the decision of which is so fateful to our Country.

Wishing for each one of you the health and strength so necessary to the discharge of your high duties, I am,

Sincerely yours,

JOHN H. CLARKE.

Hon. WILLIAM H. TAFT,
Chief Justice of the United States,
Washington, D. C.

RETIREMENT OF MR. JUSTICE DAY.

SUPREME COURT OF THE UNITED STATES.

TUESDAY, JANUARY 2, 1923.

PRESENT: THE CHIEF JUSTICE, MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, MR. JUSTICE SUTHERLAND, AND MR. JUSTICE BUTLER.

The CHIEF JUSTICE announced the following order of the Court:

It is ordered by the Court that the accompanying correspondence between members of the Court and Mr. JUSTICE DAY upon his retirement as an Associate Justice of the Court be this day spread upon the record, and that it also be printed in the reports of this Court:

DECEMBER 23, 1922.

DEAR BROTHER DAY: At the end of twenty-five years of judicial work you have retired to enjoy a well-earned respite from unremitting labor. This you began by one year's service on the bench of your native State. After a short but conspicuously useful and successful service as Secretary of State during the Spanish War and as chairman of the Peace Commission which negotiated the treaty of Paris closing that war, you went back to judicial work on the Circuit Court of Appeals for the Sixth Circuit for four years, whence you were called to this Court in March, 1903. The thorough preparation you had had for effective work here manifested itself at once. Your service has covered two decades. Your opinions appear in

sixty-seven volumes of our reports. But it is not only in the published opinions, their number, their clearness, and their force, great as they are, that the value of your service is to be measured. We who have sat with you in conference know how much you have contributed to our counsels from your wealth of judicial experience, your accurate knowledge of the scope of our previous decisions, and your remarkable familiarity with the adjudged limits of our jurisdiction.

We shall miss much your loyalty to the Court and its traditions, your affectionate fellowship, your wit and humor, and your unfailing tranquillity and good sense.

Your separation from the Court is a real personal sorrow to us, and we know that it is to you. To end such a close and confidential relation in a high, arduous, and common service to the State and Country extending over many years, must be this, when there has ever been present mutual respect and affection.

We sincerely hope that in your retirement and in a long evening of life you may find happiness, as well you may, in your extended and honorable record of public service and in the clear verdict of your countrymen that you have deserved well of the Republic.

Affectionately yours,

WILLIAM H. TAFT.
JOSEPH MCKENNA.
OLIVER WENDELL HOLMES.
WILLIS VAN DEVANTER.
MAHLON PITNEY.
JAMES CLARK MCREYNOLDS.
LOUIS DEMBITZ BRANDEIS.
GEORGE SUTHERLAND.

Hon. WILLIAM R. DAY,
1301 Clifton Street,
Washington, D. C.

1301 Clifton Street,
Washington, D. C., December 26, 1922.

To the Chief Justice and Associate Justices of the Supreme Court.

My Dear Brethren: Your kind letter of the 23d instant has been received. I am very grateful for this expression of your feeling toward me on the separation which follows my laying down of judicial work.

I need not say that the labors of nearly twenty years of service upon the Court have been necessarily arduous. They have been, nevertheless, enjoyable, and the association and companionship of those with whom they have been performed have been most agreeable to me, and I part with the Court with deep regret that it seems proper for me to take this step at this time.

I can not forego an expression of satisfaction that at no time has any serious inroad been made upon the great and necessary functions of the Court in adjudicating fundamental rights under our system of Government, although such power has been the subject of attack during the entire life of the Republic. If our institutions are to endure, as I believe they are, these powers must be lodged in an impartial and independent tribunal.

That you may live long to carry on the great work entrusted to you by the Constitution—is my heartfelt wish as I sever our official associations. For each and all of you I have an affectionate regard and esteem which I shall cherish as long as I shall live.

Cordially and fraternally,

William R. Day.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.[1]

ORDER OF ALLOTMENT OF JUSTICES.

There having been an Associate Justice of this Court appointed since the adjournment of the last term,

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

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

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

For the Third Circuit, MAHLON PITNEY, Associate Justice.

For the Fourth Circuit, WILLIAM H. TAFT, Chief Justice.

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

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

For the Seventh Circuit, GEORGE SUTHERLAND, Associate Justice.

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

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

October 16, 1922.

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[1] For next previous allotment see 259 U. S., p. iv.

SUPREME COURT OF THE UNITED STATES.

October Term, 1922.[1]

Order of Allotment of Justices.

Mr. Justice Day having resigned,

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, James C. McReynolds, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, George Sutherland, Associate Justice.

For the Eighth Circuit, Willis Van Devanter. Associate Justice.

For the Ninth Circuit, Joseph McKenna, Associate Justice.

November 15, 1922.

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[1] For next previous allotment, see p. xii, *ante.*

SUPREME COURT OF THE UNITED STATES.

October Term, 1922.[1]

Order of Allotment of Justices.

Mr. Justice Pitney having resigned,

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, Pierce Butler, Associate Justice.

For the Fourth Circuit, William H. Taft, Chief Justice.

For the Fifth Circuit, James C. McReynolds, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, George Sutherland, Associate Justice.

For the Eighth Circuit, Willis Van Devanter, Associate Justice.

For the Ninth Circuit, Joseph McKenna, Associate Justice.

January 22, 1923.

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[1] For next previous allotment, see p. xiii, *ante*.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1922.

STATE OF WYOMING *v.* STATE OF COLORADO ET AL.

IN EQUITY.

No. 3, Original. October Term, 1921. Petition for rehearing denied. Modified final decree entered October 9, 1922.

The original decree, herein modified, is reported in 259 U. S., at p. 496.

Mr. Victor E. Keyes, Attorney General of the State of Colorado, *Mr. William R. Ramsey, Mr. Delph E. Carpenter, Mr. Julius C. Gunter* and *Mr. L. Ward Bannister,* for defendants, submitted the petition.

1. On consideration of the defendants' petition for a rehearing heretofore presented by leave of the court, it is considered, ordered and decreed that the decree entered herein on June 5, 1922, be modified to read as follows:

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 Colorado 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 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 the headwaters of Deadman Creek, a Colorado tributary of the Laramie River, the relatively small amount of water appropriated therefrom prior to the year 1902 by and through what is designated in the evidence as the Wilson Supply Ditch; 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 costs of this suit be apportioned among and paid by the

parties thereto as follows: The State of Wyoming one-third, the State of Colorado one-third, and the two corporate defendants jointly one-third.

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.

2. In view of the modifications hereby made in the decree of June 5, 1922, the petition for rehearing in this cause is hereby denied.

LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA, *v.* STOCKTON, SOLE SURVIVING TRUSTEE OF DERBYSHIRE, DECEASED.

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

No. 16. Argued October 5, 1922.—Decided October 16, 1922.

The Income Tax Law of 1916, §§ 2 (b) and 11 (a), taxes income from trust estates, but exempts income received by any corporation organized and operated exclusively for charitable purposes no part of the net income of which inures to the benefit of any private stockholder or individual. Where a fund was held by a testamentary trustee to pay an annuity and, upon the annuitant's death to transfer the fund and accumulated interest to a hospital corporation, and the trustee lent the money to the hospital upon mortgage security receiving back only interest sufficient to satisfy his administrative charges and the annuity, *held*, that the remaining income, retained by the hospital, was not taxable. P. 8.

266 Fed. 676, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment recovered by the respondent Stockton, in an action to recover back money paid by him as income taxes.

Mr. Assistant Attorney General Ottinger, with whom *Mr. Solicitor General Beck* and *Mr. Charles H. Weston,* Special Assistant to the Attorney General, were on the brief, for petitioner.

The provision in § 11 (a) of the Act of September 8, 1916, exempting from tax "income received" by a charity, does not apply to trust income which the trustee is required to add to the principal of a fund which is to go ultimately to a charity.

The trust, as interpreted by the highest court of Pennsylvania, is an active one which can not be terminated, even with the consent of all the parties in interest. The Pennsylvania Hospital does not have legal title to the trust income or any right to its immediate possession, nor any control over its administration or management. The income of the trust is therefore not "received" by the Hospital, whether this word as used in § 11 (a) is interpreted as covering income to which a charity obtains legal title, or income to which it obtains the right of immediate possession, or income as to which it enjoys some right of control or management.

The fact that the trustee lends the balance of the trust income, after payment of the annuity, to the Hospital under a blanket mortgage and bond given by the Hospital, the Hospital paying interest on advances thus made, does not alter the situation. The moneys thus received by the Hospital are received by it, not as income, but as money borrowed, for which it is legally indebted to the trustee and which it may be required to repay to him. Certainly, the trustee and the Hospital can not enter into any voluntary arrangement which will exempt from tax income otherwise taxable.

The fact that § 11 (a) is included in a part of the law dealing exclusively with the tax on corporations and that it immediately follows § 10, which levies the tax on corporations, indicates that the exemption accorded by § 11

(a) was intended to apply solely to the taxes imposed by § 10. If this view be correct, § 11 (a) has no application to taxes imposed, as in the present case, under § 2 (b) in a part of the law dealing with the tax on individuals. But, even if this construction be not accepted, the tax exemption given in § 11 (a) with reference to "income received" can scarcely be broader in meaning or have any different scope than the tax imposed upon "income received" in § 10. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 346.

This decision as to what constitutes income "received" by a corporation is fully applicable to the Income Tax Act of 1916, which even more explicitly than the Income Tax Act of 1913 taxes the income "received" by a corporation within the taxable year. Since, therefore, the mere possibility, probability or certainty of future payments is not "income received" upon which an income tax is imposed, the exemption from tax of "income received" by a charitable corporation can not extend to income received by a third person as to which there is a possibility, probability, or even certainty that it will be paid to a charitable corporation at some future date.

The fact that the Act of 1916 did not make any exemption in favor of income accumulated in a trust fund to go ultimately to a charity is entirely consistent with the basis upon which Congress in that act provided for the taxation of trust income. Congress there clearly expressed its intention of taxing the income of trust estates without regard for the character or interest of the ultimate beneficiaries of the estate. The tax was upon the income of the estate as such.

The provisions of § 219 (b) of the Income Tax Act of 1918, which authorized income permanently set aside for a charity to be deducted in computing the income of trust estates, raise no inference that Congress intended to permit a like deduction to be made in computing the income of trust estates under the Act of 1916.

The policy pursued in the Act of 1916 of not taxing the income received by a charity, but taxing income which, while not received by a charity, might be received by it at some future time, accords with the taxation policy generally followed by state legislatures. 37 Cyc. 928, n. 6; *Boston Society* v. *Boston,* 129 Mass. 178; *Presbyterian Board* v. *Fisher,* 68 N. J. L. 143.

Where the tax law covers a certain kind of income or property, a general intention on the part of Congress to exempt it from tax will not, apart from express words giving effect to this intention, free it from the tax burden. *Cornell* v. *Coyne,* 192 U. S. 418, 431; *Swan & Finch Co.* v. *United States,* 190 U. S. 143, 146.

Mr. Maurice Bower Saul, with whom *Mr. Joseph A. Lamorelle* was on the brief, for respondent.

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

The question in this case is whether the Income Tax Law of September 8, 1916, c. 463, 39 Stat. 756, as amended by the Act of October 3, 1917, c. 63, 40 Stat. 300, requires the Contributors to the Pennsylvania Hospital, a corporation of Pennsylvania, created for charitable uses and purposes, no part of whose net income is for the benefit of any private stockholder or individual, to pay a tax on the income of a residuary estate devised to it by the will of Alexander J. Derbyshire in 1879 and inuring to its benefit under the following circumstances. The devise was subject to the payment of certain annuities. All of the annuitants are dead save one. The Supreme Court of that State decided that the income could not be paid outright to the Hospital until the death of all the annuitants and until then, must remain in control of the trustee appointed under the will. *Derbyshire's Estate,* 239 Pa. St. 389. The trustee transferred the whole resid-

uary fund as a loan for fifteen years to the Hospital, and secured himself by mortgage on property of the Hospital. Under the terms of the loan and mortgage, the Hospital only pays interest enough to satisfy the administrative charges and the annuity. It uses the remainder of the income from the fund for its expenses. It is thus actually receiving the full benefit of the income of $15,000 from the residuary fund, reduced only by the annuity of $800.

Section 2 (b) of the Income Tax Law of 1916, *supra,* is as follows:

"Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: *Provided,* That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed."

Section 11 (a) of the same act provides:

"That there shall not be taxed under this title any income received by any . . . corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

Upon these facts, Lederer, the internal revenue collector, assessed Stockton, the trustee, on the income from

the residuary estate for the years 1916 and 1917, under § 2 (b), and collected the same. The trustee brought suit in the United States District Court against the collector to recover the sums so paid as illegally collected. The District Court gave judgment for the trustee and this was affirmed by the Circuit Court of Appeals for the Third Circuit. 266 Fed. 675.

This residuary fund was vested in the Hospital. The death of the annuitant would completely end the trust. For this reason, the trustee was able safely to make the arrangement by which the Hospital has really received the benefit of the income subject to the annuity. As the Hospital is admitted to be a corporation, whose income when received is exempted from taxation under § 11 (a), we see no reason why the exemption should not be given effect under the circumstances. To allow the technical formality of the trust, which does not prevent the Hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress.

The judgment of the Circuit Court of Appeals is

Affirmed.

CHARLOTTE HARBOR & NORTHERN RAILWAY COMPANY *v.* WELLES ET AL., CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF DE SOTO COUNTY, FLORIDA.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 4. Submitted March 16, 1921; restored to docket for oral argument March 21, 1921; argued October 4, 1922.—Decided October 16, 1922.

A special improvement tax which was void when assessed, for want of statutory authority in the officers who undertook the improvement, may be validated by the legislature consistently with the due process clause of the Fourteenth Amendment. P. 11. *Forbes*

Pioneer Boat Line v. *Board of Commissioners,* 258 U. S. 338, distinguished.
78 Fla. 227, affirmed.

ERROR to a decree of the Supreme Court of Florida affirming a decree dismissing the bill in a suit to enjoin collection of a special road improvement tax, etc.

Mr. Kenneth I. McKay, with whom *Mr. James M. Gifford* was on the brief, for plaintiff in error.[1]

No appearance for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Bill in equity to declare illegal the creation of a special road and bridge district, designated as the Charlotte Harbor Special Road and Bridge District, in De Soto County, Florida, and to restrain the defendants in error, as and constituting the Board of County Commissioners, from paying out any funds in settlement of any supposed obligations contracted for work done in pursuance of the plan proposed. And further, to enjoin the Commissioners, until the final hearing in this cause, from contracting any further obligations, or paying out any further moneys, on account of the construction of roads and bridges under the plan proposed, and for such other and further relief as equity may require.

The ground of the suit and for the relief prayed is, that the district was constituted of territory which overlapped territory included in another district theretofore created, and that, therefore, the Board of Commissioners, to which the creation of the district was committed by the law of the State, as the law then existed, was without power to establish the district.

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[1]At the former hearing the case was submitted by *Mr. Gifford,* on behalf of the plaintiff in error.

The Board of Commissioners demurred to the bill, and alleged, as the grounds thereof, the insufficiency of the bill to authorize equitable relief, and, besides, alleged that complainant was estopped by not complaining earlier, and, by its delay, had permitted the expenditures of money by the Board of Commissioners.

The demurrer was sustained and a decree entered dismissing the bill. The decree was affirmed by the Supreme Court of the State and to its decision this writ of error is directed.

The opinion of the court considers and disposes of all state questions, including the one pertinent to our consideration; that is, that the legislature had power to create special road and bridge districts which overlapped, and having that power, it also had the power "to pass an Act curing or validating the action of the county commissioners in creating a special road and bridge district partly lying in another special road and bridge district." "This," the court said, "seems to be the general ruling. 8 Cyc. 1023, and numerous authorities cited in the footnote."

The court, therefore, sustained the act which is attacked, taking judicial notice of it, it having been passed pending the suit. C. 8024, Laws of Florida, Acts of 1919. The court said it was passed for the special purpose of validating the action of the Commissioners, "and legalizing and validating the assessments made for the construction of roads and bridges" in the newly created district, the indebtedness incurred and the warrants issued for the payment of the expenses incident thereto, or which should thereafter issue; and also validated and legalized the assessments and levy of taxes in the district.

The court further said that that doctrine had theretofore been recognized in the State. Cases were adduced, and (adopting the language of one of them,) the conclusion was expressed, that in consequence of such legisla-

tion, the complainant had no standing in court or right to any relief by reason of the matters complained of in its bill.

In a petition for rehearing, plaintiff in error attacked the reasoning and conclusion of the court, and asserted against them the inhibition of the Fourteenth Amendment of the Constitution of the United States which precludes a State from the taking of property without due process of law. The specification of the grounds is that "the said bill [to quote from it], attempts to legalize a proceeding of the County Commissioners of De Soto County, Florida, who were mere administrative officers and which proceeding was void ab initio and without jurisdiction, and under which proceeding certain taxes were levied against the property of your petitioner, prior to the passage of said Act of the Legislature, and therefore the said Act of the Legislature, in so far as it purports to create a liability on your orator for taxes previously assessed against your orator under a proceeding of said administrative officers is void ab initio and without jurisdiction." The court considered the petition for rehearing and denied it.

In support of the contention of the petition, plaintiff in error makes a distinction between a *curative* statute, which it is conceded a legislature has the power to pass, and a *creative* statute, which, it is the assertion, a legislature has not the power to pass. The argument in support of the distinction is ingenious and attractive, but we are not disposed to review it in detail.

The general and established proposition is that, what the legislature could have authorized, it can ratify if it can authorize at the time of ratification. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Wagner* v. *Baltimore*, 239 U. S. 207; *Stockdale* v. *Insurance Companies*, 20 Wall. 323. And the power is necessary, that government may not be defeated by omissions or inaccuracies in the ex-

ercise of functions necessary to its administration. To this accommodation, *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District,* 258 U. S. 338, is not militant. The case concedes the power of ratification and declares the principle upon which it is based and, necessarily, recognized the subjection and obligation of persons and property to government, and for government, and its continuation for the purposes of government. And the recognition precludes a misunderstanding of the case and its extension beyond its facts. It was concerned with an attempt to impose a charge for the use of a government canal, for which use, at the time availed of, there was no charge—an attempt, therefore, to turn a gratuity conferred and enjoyed into a legal obligation and subject it to a toll.

Decree affirmed.

KNIGHTS *v.* JACKSON, TREASURER AND RECEIVER GENERAL.

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

No. 167. Argued October 3, 1922.—Decided October 16, 1922.

The objection that a tax on a special class of persons and property for a public purpose by which they are not benefited, is a taking of property without due process of law, in violation of the Fourteenth Amendment, does not apply to the general income tax of Massachusetts (Acts, 1916, c. 269, §§ 2, 5 (b), as amended, 1919, c. 324, § 1) and use of funds so derived (Acts, 1919, c. 363) to reimburse cities and towns for increase of educational salaries. P. 14.
237 Mass. 493, affirmed.

ERROR to a judgment of the Supreme Judicial Court of Massachusetts dismissing a petition for mandamus.

Mr. Philip Nichols for plaintiff in error.

A tax on a particular class of property to raise revenue for a particular public purpose is a violation of the Four-

teenth Amendment when the property taxed derives no special and peculiar benefit from the expenditure of the revenue so raised. *Norwood* v. *Baker,* 172 U. S. 269; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412.

A general tax is a tax assessed upon all the taxable persons and all the taxable property within the taxing district, in order to pay the public expenses of the district as a whole.

Special assessments, on the other hand, are assessed on only a part of the taxable property in the district, in order to defray the expense of a particular public improvement, and are apportioned in proportion to the benefit received by the property taxed from the establishment of such improvement. *Illinois Central R. R. Co.* v. *Decatur,* 147 U. S. 197; *Taylor* v. *Palmer,* 31 Cal. 240; *Holley* v. *Orange,* 106 Cal. 420; *New London* v. *Miller,* 60 Conn. 112; *Harmon* v. *Bolley,* 187 Ind. 511; *Shreveport* v. *Prescott,* 51 La. Ann. 1905; *Dorgan* v. *Boston,* 12 Allen, 223, 235; Rosewater, Special Assessments, Studies in History, Economics and Public Law, 483.

A special tax is a tax levied for a particular public purpose upon the property benefited by the carrying out of that purpose, but apportioned according to ability to pay. Common examples of this tax are district taxes, which are assessed on all the property in a road district to pay for a road, or in a watch district to pay for police protection, or in a school district to pay for a school. Rosewater, *id.,* 483; Seligman, Essays on Taxation, 9th ed., pp. 416, 438.

The Massachusetts income tax is a property tax and not an excise. *Opinion of the Justices,* 220 Mass. 613, 623; *Hart* v. *Tax Commissioner,* 240 Mass. 37, 39; *Tax Commissioner* v. *Putnam,* 237 Mass. 522, 531; *Kimball* v. *Cotting,* 229 Mass. 541, 543; *Maguire* v. *Tax Commissioner,* 230 Mass. 503, 512; *Raymer* v. *Tax Commissioner,* 239 Mass. 410.

A perpetual appropriation out of the proceeds of a tax levied annually by a permanent statute is equivalent to the levy of a tax for the purpose of the appropriation. A taxpayer has a constitutional right to refuse to pay a tax which is not levied for a lawful purpose. *Citizens' Savings & Loan Assn.* v. *Topeka,* 20 Wall. 655; *Green* v. *Frazier,* 253 U. S. 233.

The statute diverting part of the proceeds of the income tax and the statute imposing an additional income tax must be considered together as parts of one and the same law. *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 140; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 414.

Mr. Edwin H. Abbot, Jr., with whom *Mr. J. Weston Allen,* Attorney General of the State of Massachusetts, was on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the Court.

In Massachusetts taxes of a kind that used to be imposed by the cities and towns now are imposed and collected by the Commonwealth and afterwards distributed to the cities and towns to be expended for various public purposes. In this way are collected and distributed, with necessary exceptions, taxes upon the interest from debts, dividends from stock and from partnerships, Gen. Acts 1916, c. 269, § 2, and upon the excess over two thousand dollars per annum of income derived from professions and business, again with necessary exceptions, *id.* § 5(*b*), both as amended. *Dane* v. *Jackson,* 256 U. S. 589. The latter tax, under § 5(*b*), was increased one per cent. for the years 1918 and 1919 by an Act of 1919, c. 324, § 1. The validity of these taxes *per se* is not disputed. They make a comprehensive income tax. But by an Act of 1919, c. 363, the Treasurer and Receiver General is directed to set

aside and pay over to the cities and towns from the proceeds of the income tax a sum sufficient to reimburse them for specified increases of salaries of school teachers, supervisors, superintendents and the like. Thereupon the plaintiff in error, a taxpayer, brought this suit, a petition for mandamus, to prevent the respondent from paying over as directed, contending that the Act of 1919, c. 363, imposed a public charge upon a special class of property and persons not specially benefited by the services and for that reason was a taking of property without due process of law in violation of the Fourteenth Amendment. The Supreme Judicial Court, waiving questions of procedure, held that the income tax was a general tax; that the proceeds of the tax became part of the general funds of the State; that these funds could be expended for education, and that there was no appropriation of such a character as to make the tax a special tax for a special purpose or use. The petition was dismissed.

We see no reason for not accepting the views taken by the Supreme Judicial Court. The plaintiff in error asks us to connect the increase of the tax for two years by the Act of 1919, c. 324, with the reimbursement directed by c. 363, which he assails. This cannot be done, especially not for the purpose of attributing to the Legislature an attempt to achieve by indirection a result supposed to be beyond its power. The reimbursement from the general funds of the Commonwealth was lawful and to make it the funds must be provided. The fact that the end was contemplated, if it was, in this particular increase, is no more than was necessary in some form to bring about the result.

Judgment affirmed.

NORTH CAROLINA RAILROAD COMPANY *v.* LEE, ADMINISTRATRIX OF LEE

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 33. Argued October 6, 1922.—Decided October 16, 1922.

1. A railroad corporation whose line, while leased to another, was taken over by the Government under the Federal Control Act, cannot, consistently with that act, be held for personal injuries occasioned by an accident during federal control, under a local rule making lessor railroads liable for the negligence of their lessees. P. 17.
2. Under the Federal Control Act, the Government operates a railroad not as lessee, but under a right in the nature of eminent domain. P. 17. *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, followed.

Reversed.

CERTIORARI to review a judgment of the Supreme Court of North Carolina affirming a judgment against the present petitioner in an action for death by negligence.

Mr. S. R. Prince, with whom *Mr. H. O'B. Cooper, Mr. John N. Wilson* and *Mr. L. E. Jeffries* were on the briefs, for petitioner.

Mr. R. C. Strudwick, with whom *Mr. John A. Barringer* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Southern Railway includes a line in North Carolina which is held under a ninety-nine year lease. On that line an employee was killed in March, 1919—apparently while engaged in intrastate commerce. His administratrix brought, in a court of the State, this action for damages, alleging that the line was then being operated

by the Southern as lessee, and that the lessee's negligence in operation caused the injury. Only the lessor, the North Carolina Railroad Company, was made defendant. Its liability was asserted under a local rule by which a railroad corporation is liable for injuries resulting from a lessee's negligence in operation. *Logan* v. *North Carolina R. R. Co.*, 116 N. Car. 940. The defendant set up the fact that, at the time of the accident, the Southern system was being operated solely by the Director General of Railroads under the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451. On that ground it requested a ruling that the plaintiff could not recover. This request was refused; and the court instructed the jury that, if the Government was operating the railroad, it was doing so in the capacity of a lessee and that the defendant "would still be responsible for the acts and conduct of the Government at the time it was operating" the same. The verdict was for the plaintiff; and the judgment entered thereon was affirmed by the Supreme Court of North Carolina without opinion. This Court granted a writ of certiorari. 255 U. S. 567. Thereafter, the liability of carriers during federal control was considered in *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554.

The Government operated this railroad not as lessee, but under a right in the nature of eminent domain. It operated through the Director General, not through the Southern Company as agent. The *Ault Case* holds that the Director General alone was made subject, by § 10 of the Federal Control Act, to the "liabilities as common carriers, whether arising under State or Federal laws or at common law." To permit an action for injuries suffered during federal control to be brought either against the Southern Company as lessee, or against the North Carolina Company as lessor, would be inconsistent with the provisions of that act. This is now recognized by the

Supreme Court of North Carolina. *Lane* v. *Southern Ry. Co.*, 182 N. Car. 774; *Barbee* v. *North Carolina R. R. Co.*, 182 N. Car. 775.

Reversed.

UNITED STATES *v.* WONG SING.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

No. 44. Argued October 11, 1922.—Decided October 23, 1922.

1. Under the Revenue Act of February 24, 1919, c. 18, § 1006, 40 Stat. 1130, in order that a person may be liable criminally as a purchaser of narcotic drugs it is not necessary that he be of the class who must register and pay special taxes. P. 20.
2. The act, as so construed, is constitutional, within the revenue power. P. 21.

Reversed.

Error to a judgment of the District Court quashing an indictment upon demurrer.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

No appearance for defendant in error.

Mr. Justice McKenna delivered the opinion of the Court.

Error to review the action of the District Court in dismissing an indictment against defendant in error. The indictment was in two counts. The first count charged that Wong Sing feloniously had in his possession and under his control, at a specified date, certain derivatives and preparations of morphine and cocaine for the purpose of sale and distribution, he not being registered under the provisions of the Act of Congress approved

December 17, 1914, c. 1, 38 Stat. 785, and its amendments, and not having paid the special tax required by the act.[1]

The second count charged that Wong Sing, at a specified date and time on such date, and at a specified place in Salt Lake City, within the jurisdiction of the court, knowingly, wilfully, unlawfully and feloniously purchased from a person or persons unknown to the grand jurors, morphine and cocaine, the exact quantity being unknown to the grand jurors; the said drugs not being in the original stamped packages, or from the original stamped packages; he not having then and there obtained the drugs from a registered dealer in pursuance of a prescription, written for legitimate medical uses by a practitioner registered under the Act of December 17, 1914, and its amendments; and the purchase not being by a patient from a registered practitioner in the course of his professional practice, and he, Wong Sing, not being then and there registered under the provisions of the act of Congress, and not having then and there, or theretofore, or at all, paid the special tax provided by the act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Wong Sing, upon being arraigned, pleaded not guilty, but subsequently withdrew the plea and demurred to the indictment "for failure to state an offense, and being insufficient." The demurrer was sustained and he was discharged from all liability thereon.

The court made a certificate, to be part of the record and proceedings, that the first count of the indictment was based upon § 8 of the Act of Congress of December 17, 1914, commonly called the Harrison Anti-Narcotic

[1] Counsel for the United States say that only the second count is material on this writ of error. The first count, however, is a part of the representation of the case.

Act, and that he sustained the demurrer to that count upon the authority of *United States* v. *Jin Fuey Moy,* 241 U. S. 394. And the court further certified that the second count of the indictment was based upon the amended Harrison Anti-Narcotic Act, contained in § 1006 of the Revenue Act of February 24, 1919, c. 18, 40 Stat. 1130, and that the count was predicated upon the following provisions: "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package . . . "; and that he construed " the word 'person' in the foregoing language to mean the persons enumerated in the first paragraph of section 1006, namely, 'every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided.' "

The demurrer was sustained, it was further certified, because the second count contained no appropriate allegation giving effect to the word " person " and hence fell within the ruling in the *Jin Fuey Moy Case;* otherwise, it was said, the amendment would be unconstitutional. And further, that the demurrer was treated as presenting that question of construction and was sustained only for that reason.

The construction by the court of § 1006 constitutes the question in the case. It is attacked by the United States as not justified, and *United States* v. *Doremus,* 249 U. S. 86, and *Webb* v. *United States,* 249 U. S. 96, are cited

We are unable to concur with the District Court. The provisions quoted by the court have a certain relation, but they have also a certain independence. The first

makes it "unlawful for any person to purchase" the drugs; the second enumerates other persons who have a larger connection with the drugs and requires them to register the fact and pay the tax prescribed. There could be no object in requiring a purchaser of the drugs to register but it fulfilled the purpose of the law to forbid a purchase "except in the original stamped package or from the original stamped package." The requirement fortifies the other injunctions of the statute.

In *United States* v. *Doremus,* and *Webb* v. *United States,* it was decided that the power of Congress exerted through the Act of 1914, though the act might be denominated a revenue measure, could, as a complement to it, make criminally unlawful the sale, barter or exchange of narcotic drugs except under certain prescribed conditions designed to make it effective as a revenue measure. The principle of the decision applies to the Act of 1919, upon which count two is based. If the law can put conditions upon sellers, it can put conditions with a like purpose upon purchasers, which is done here. Therefore, the apprehension of the District Court, if it should be so held, that the act would be unconstitutional under the decision in *United States* v. *Jin Fuey Moy,* 241 U. S. 394, was not justified. There is another distinction between the *Jin Fuey Moy Case* and this. In that case, which was under the Act of 1914, it was intimated that the persons affected by the act received definition from the requirement of registration. This case is under the Act of 1919, and it, as we have said, does not require registration.

It follows that the judgment of the District Court must be and it is,

Reversed and cause remanded for further proceedings in accordance with this opinion.

JACKMAN *v.* ROSENBAUM COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 3. Argued October 4, 1922.—Decided October 23, 1922.

1. The fact that a practice is of ancient standing in a State is a reason for holding it unaffected by the Fourteenth Amendment. P. 31.
2. Under a statute of Pennsylvania, following an old custom whereby adjoining lots are subject to party-wall servitudes, plaintiff's wall, which was built to the line, was torn down by the adjoining owner (being unsuitable for incorporation in a new one), and a party wall of reasonable width was erected on the line. *Held,* that due process of law did not require that he be repaid for necessarily incident damages. P. 30.

263 Pa. St. 158, affirmed.

ERROR to a judgment of the Supreme Court of Pennsylvania, affirming a judgment for the defendant in an action brought by the plaintiff in error for damages resulting from the destruction of a wall of his building and its replacement by a party wall, by the defendant, proceeding under a statute of Pennsylvania of June 7, 1895, P. L. 135, § 9.[1]

[1] This act provides for a bureau of building inspection in cities of the second class.

Anyone about to erect a party wall shall apply to the bureau, describing his property and furnishing plans and specifications of the party wall he desires to erect. The bureau then fixes a time for a meeting on the ground, notice of which shall be served on the adjoining owner. At the time appointed, the superintendent of the bureau, " or some suitable person by him appointed," shall have the line between the two parties surveyed and also " the land upon which the said party wall is to be erected, with the breadth and length of the same, and which wall shall be equally one-half upon the land of each of the adjoining owners, unless the adjoining owners shall

Mr. H. F. Stambaugh, with whom *Mr. Ernest C. Irwin* and *Mr. John M. Freeman* were on the brief, for plaintiff in error.

The declaration of the court below that the Act of 1895 is a valid exercise of the police power, does not preclude this Court from determining for itself whether the act, as interpreted by the state court, violates the Fourteenth Amendment.

The act deprives an owner of his property without due process of law, because it affords him no hearing on the question whether his property shall be occupied, and grants no compensation for property actually taken.

The right given by the act to an owner to occupy a portion of his neighbor's land is absolute. The decision rests entirely with him, no matter how unsuitable or ruinous the proposed party wall may be to the adjoining owner, or how strong and just the latter's protest. If the first owner elects to build a party wall, the requirement of the statute is satisfied. There is no hearing on this

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object that said wall as proposed is thicker than necessary for the purpose of any ordinary building. If such objection shall be made, then the superintendent, or the person by him appointed, shall determine how much of said wall shall be placed upon each of said lots and shall decide the same within forty-eight hours after the said objection has been made, and his decision shall be final and conclusive upon all parties."

The party first applying shall erect the wall at his own cost, which, and the proportions to be paid by each owner, shall be determined by the superintendent, or his agent; the adjoining owner shall not thereafter use the wall for any new structure until he has paid his proper proportion, as fixed.

The question of necessary alterations and repairs in existing walls shall also be referred to and determined by the superintendent and he may order an old party wall torn down and a new one erected and fix the proportion of the cost which each of the adjoining owners shall pay. The courts are given power to restrain the adjoining owner from making any new use of the wall until his proportion of the costs, as fixed by the superintendent, has been paid.

question, and no official or court may hear or determine what is fair and just.

If the adjoining owner objects that the proposed wall is "thicker than necessary for the purpose of any ordinary building", the superintendent has the discretion to determine "how much of said wall shall be placed upon each of said lots." The act does not direct him to determine what would be one-half the thickness of a wall necessary for any ordinary building. He can allow any portion up to one-half of the party wall to be placed upon the adjoining lot. As to what is "any ordinary building," and how much of the wall he shall allow to be put over the line, the statute prescribes no rule or standard to be applied by him in fixing the rights of the parties. Under the statute, his decision is "final and conclusive."

There is plainly a permanent occupation and appropriation of a substantial portion of the adjoining owner's land, for which the act provides no compensation. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226; *McCoy* v. *Union Elevated R. R. Co.,* 247 U. S. 354, 363; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 565; *Fayerweather* v. *Ritch,* 195 U. S. 276–279, 298; *Sweet* v. *Rechel,* 159 U. S. 380; *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 403, 417.

The police power does not authorize the taking of private property without compensation.

Under the act, as construed by the court below, no question of necessity for the taking, or of the suitability of the proposed party wall, or of the economy to be gained by its construction, or of the relative benefit to the owner who builds and the detriment to his neighbor, can be raised.

This power is as absolute as the power of eminent domain. The taking is at least for the life of the building which the first owner wishes to build, and is of a substantial portion of the adjoining property. In the case

at bar the foundation is projected 7½ feet onto the plaintiff's land, extending throughout the entire length of his lot, and downward 33 feet below the curb.

If the statute authorizes this, it equally authorizes occupation of a larger strip—a quarter or a half of the adjoining lot. Party walls may be built on both sides of the lot and have an equal width.

In *Wilkins* v. *Jewett,* 139 Mass. 29, a provincial statute, providing that anyone building in Boston might set half his partition wall on his neighbor's land, was held to be not in force in Massachusetts because of its unconstitutionality. See also *Traute* v. *White,* 46 N. J. Eq. 437; *Schmidt* v. *Lewis,* 63 N. J. Eq. 565; *Brooklyn Park Commissioners* v. *Armstrong,* 45 N. Y. 234; *Philadelphia* v. *Scott,* 81 Pa. St. 80.

This is not a case where the doctrine *sic utere tuo* justifies the taking or restriction of property rights without compensation. *Matter of Cheesebrough,* 78 N. Y. 232; *Vreeland* v. *Forest Park Comm.,* 82 N. J. Eq. 349; *McKeon* v. *Railroad Co.,* 75 Conn. 343; *Matter of Rapid Transit,* 197 N. Y. 81; *Bent* v. *Emery,* 173 Mass. 495; *Parker* v. *Commonwealth,* 178 Mass. 199; *Mt. Hope Cemetery* v. *Boston,* 158 Mass. 509.

Even when property is destroyed as a nuisance, and by state officials, the right to a jury trial on the question whether or not it actually constituted a nuisance is preserved to the owner. *Frank* v. *Talty,* 72 Ga. 428; *Verder* v. *Ellsworth,* 59 Vt. 354; *Loesch* v. *Koehler,* 144 Ind. 278; *Miller* v. *Horton,* 152 Mass. 540.

Without plaintiff's consent, the defendant came upon plaintiff's property, which was being operated as a theatre and rented at the rate of $40,000 a year. The building was rendered untenantable, became vacant and remained so for many months. The defendant tore out one side of the building, erected a dust screen twelve feet back from the line, and destroyed the plumbing, electric wiring,

decorations, etc., on that side, causing damage which it cost nearly $20,000 to repair.

Under the police power, the use of property can be regulated or restricted for the benefit of the community at large only, but not in the interest of a private individual or class. *Eubank* v. *Richmond,* 226 U. S. 137.

The statute not only authorizes an owner to determine the use which his neighbor can make of his property, but authorizes him to occupy it himself and prevent the neighbor from using it as he wishes. It confers on one owner the power virtually to control and dispose of the property rights of another. It creates no standard whatever by which this power may be exercised, i. e., no standard to determine the kind of a party wall, or the conditions under which it may be erected, or the amount of the neighbor's land which it may occupy. As this Court said in the *Eubank Case, supra,* the statute " enables the convenience or purpose of one set of property owners to control the property rights of others." Cf. *Missouri Pacific Ry. Co.* v. *Nebraska,* 217 U. S. 196; *Dobbins* v. *Los Angeles,* 195 U. S. 223; *Oregon Railroad & Navigation Co.* v. *Fairchild,* 224 U. S. 510.

The act is not a regulation in the interest of the public safety, health, morals or convenience.

An authoritative statement of the history of party-wall legislation and its purpose in England appears in Gibbons, Law of Dilapidations & Nuisances, 1st ed., (1838):

" The object of the statute is to prevent fire, and for that purpose it provides for the more effectual separation of houses by party walls, and was certainly not intended to encourage close and contiguous buildings. . . . This enactment strongly shows that it was not the intention of the legislature to authorize an encroachment by one person on the land of another; and the only case to which the Fourteenth Section can apply is where two houses, having a common party wall, are pulled down and rebuilt, and a new party wall built." (P. 110.)

In speaking of the statute 14 Geo. III, c. 78, Gibbons says (2d ed., p. 262), that "It did not confer any authority to one man to build half the side wall of his house on his neighbour's land." Cf. *Traute* v. *White,* 46 N. J. Eq. 437.

The early statutes in Pennsylvania likewise regulated the safety of party walls built by mutual agreement and did not authorize one owner to occupy the land of another without consent.

Section 9 of the Act of 1895 contains no requirement as to the strength, thickness or materials to be used in party walls, or that the builder do anything to make the wall safe. The same is true of the earlier Act of 1872, P. L. 986. These statutes merely authorize one owner to build a wall partly upon the land of his neighbor.

Other legislation regulates the strength and character of walls generally to be built in the City of Pittsburgh; but there is no requirement in any statute that a party wall be of a different or better construction or material than any other kind of wall. Cf. *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531.

The act, as construed by the court below, is an unreasonable exercise of the police power. No common-law right to erect a party wall partly upon another's land, without his consent, is recognized in Pennsylvania or elsewhere. *Hoffstot* v. *Voight,* 146 Pa. St. 632; *Shell* v. *Kemmerer,* 13 Phila. 502; *Whitman* v. *Shoemaker,* 2 Pears. 320; *Report of the Judges,* 3 Binn. 595 (1808); Jones, Easements (1898), § 641; Washburn, Easements, 2d ed., p. 550; *Sherred* v. *Cisco,* 4 Sanford, 480; *Boch* v. *Isham,* 7 Am. L. R. (N. S.) 8, note; Pingrey, Real Property, § 250; *Sanders* v. *Martin,* 2 Lea, 213; *Spalding* v. *Grundy,* 126 Ky. 510; *List* v. *Hornbrook,* 2 W. Va. 340.

In England, there never has been a compulsory proceeding to erect a party wall, where no wall existed before. 19 Charles II, c. 3; 6 Anne, c. 31; 7 Anne, c. 17;

11 Geo. I, c. 28; 33 Geo. II, c. 30; 4 Geo. III, c. 14; 6 Geo. III, c. 27; 12 Geo. III, c. 73; 14 Geo. III, c. 78; *Barlow* v. *Norman,* 2 Wm. Blackstone, 959.

Under these acts compensation was allowed to the adjoining owner for consequential damages caused by the raising of a party wall. *Wells* v. *Ody,* 32 Eng. C. L. Rep. 560; *Titterton* v. *Convers,* 5 Taunt. 465; *Reg.* v. *Ponsford,* 7 Jur. Part 1, p. 767; Metropolitan Building Act, 1855, 18 & 19 Vict., c. 122; *Crofts* v. *Haldane,* 8 B. & S. 194; *Weston* v. *Arnold,* 43 L. J., N. S. 123; Gibbons, Law of Dilapidations and Nuisances, *supra.* In *Thompson* v. *Hill,* 22 L. T. Rep. 820, and *Bryer* v. *Willis,* 23 L. T. Rep. 463, the existing party walls were not in compliance with the building act.

The declaration of the court below that the act is a settled rule of property in Pennsylvania, does not conclude the rights of the plaintiff under the Fourteenth Amendment in this Court. This Court must examine and determine that question for itself.

The decision of the Supreme Court of Pennsylvania, relied upon, was rendered after the plaintiff acquired his property and his rights therein had accrued. *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349; *Burgess* v. *Seligman,* 107 U. S. 20.

A single decision of the highest court of the State is not conclusive evidence of the law of the State and does not establish a settled rule of property which this Court must follow. *Barber* v. *Pittsburgh, Ft. Wayne & Chicago Ry. Co.,* 166 U. S. 83; *Ryan* v. *Staples,* 76 Fed. 721; *Chicago* v. *Robbins,* 2 Black, 418.

No settled rule of property permitting an owner to occupy the land of his neighbor, without compensation, can be found in the statutes or decisions of Pennsylvania. *Heron* v. *Houston,* 217 Pa. St. 1, is the first case where one party sought to compel the erection of a new party wall against his neighbor's protest. The question of

damages to the adjoining owner was never decided in the State prior to the decision in this case.

The statutory right to build a party wall partly upon another's land is in derogation of common-law rights and is to be strictly construed.

If it be conceded (which we deny) that the statutes give an owner an unassailable right to enter upon an adjoining lot to erect a party wall, still these statutes do not deny the adjoining owner the right to compensation.

Mr. A. Leo Weil, with whom *Mr. J. Smith Christy* was on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the Court.

The plaintiff in error, the original plaintiff, owned a theatre building in Pittsburgh, Pennsylvania, a wall of which went to the edge of his line. Proceeding under a statute of Pennsylvania, the defendant, owner of the adjoining land, began to build a party wall, intending to incorporate the plaintiff's wall. The city authorities decided that the latter was not safe and ordered it to be removed, which was done by the contractor employed by the defendant. The plaintiff later brought this suit. The declaration did not set up that the entry upon the plaintiff's land was unlawful, but alleged wrongful delay in completing the wall and the use of improper methods. It claimed damages for the failure to restore the plaintiff's building to the equivalent of its former condition, and for the delay, which, it was alleged, caused the plaintiff to lose the rental for a theatrical season. At the trial the plaintiff asked for a ruling that the statute relating to party walls, if interpreted to exclude the recovery of damages without proof of negligence, was contrary to the Fourteenth Amendment. This was refused, the Court ruling that the defendant was not liable for damages

necessarily resulting from the exercise of the right given by the statute to build a party wall upon the line, and, more specifically, was not liable for the removal of the plaintiff's old wall. There were further questions as to whether the work was done by an independent contractor and as to negligence, on which the jury brought in a verdict for the plaintiff for $25,000; but the Court of Common Pleas held that the party employed was an independent contractor and that the defendant was entitled to judgment *non obstante veredicto*. The Supreme Court affirmed the judgment, holding among other things that the statute imposed no liability for damages necessarily caused by building such a party wall as it permitted, and that, so construed, it did not encounter the Fourteenth Amendment of the Constitution of the United States. 263 Pa. St. 158.

In the State Court the judgment was justified by reference to the power of the State to impose burdens upon property or to cut down its value in various ways without compensation, as a branch of what is called the police power. The exercise of this has been held warranted in some cases by what we may call the average reciprocity of advantage, although the advantages may not be equal in the particular case. *Wurts* v. *Hoagland,* 114 U. S. 606; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; *Noble State Bank* v. *Haskell,* 219 U. S. 104, 111. The Supreme Court of the State adverted also to increased safety against fire and traced the origin to the great fire in London in 1666. It is unnecessary to decide upon the adequacy of these grounds. It is enough to refer to the fact, also brought out and relied upon in the opinion below, that the custom of party walls was introduced by the first settlers in Philadelphia under William Penn and has prevailed in the State ever since. It is illustrated by statutes concerning Philadelphia going back to 1721; 1 Dallas, Laws of Pennsylvania, 152; and by an

Act of 1794 for Pittsburgh, 3 Dallas, Laws, 588, 591, referring to the Act incorporating the borough of Reading. 2 Dallas, Laws, 124, 129.

The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by *Ownbey* v. *Morgan*, 256 U. S. 94, 104, 112. See *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Co.*, 197 U. S. 430, 434. Such words as "right" are a constant solicitation to fallacy. We say a man has a right to the land that he has bought and that to subject a strip six inches or a foot wide to liability to use for a party wall therefore takes his right to that extent. It might be so and we might be driven to the economic and social considerations that we have mentioned if the law were an innovation, now heard of for the first time. But if, from what we may call time immemorial, it has been the understanding that the burden exists, the land owner does not have the right to that part of his land except as so qualified and the statute that embodies that understanding does not need to invoke the police power.

Of course a case could be imagined where the modest mutualities of simple townspeople might become something very different when extended to buildings like those of modern New York. There was a suggestion of such a difference in this case. But, although the foundations spread wide, the wall above the surface of the ground was only thirteen inches thick, or six and a half on the plaintiff's land, and as the damage complained of was a necessary incident to any such building, the question how far the liability might be extended does not arise. It follows, as stated by the Supreme Court of Pennsylvania that "when either lot-owner builds upon his own prop-

erty up to the division line, he does so with the knowledge that, in case of the erection of a party wall, that part of his building which encroaches upon the portion of the land subject to the easement will have to come down, if not suitable for incorporation into the new wall." In a case involving local history as this does, we should be slow to overrule the decision of Courts steeped in the local tradition, even if we saw reasons for doubting it, which in this case we do not.

Judgment affirmed.

INTERSTATE COMMERCE COMMISSION *v.* UNITED STATES EX REL. MEMBERS OF THE WASTE MERCHANTS ASSOCIATION OF NEW YORK.

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

No. 245. Argued October 9, 10, 1922.—Decided October 23, 1922.

Mandamus will not lie to compel the Interstate Commerce Commission to set aside a decision upon the merits and to decide the matter in another, specified way. P. 34.

51 App. D. C. 136; 277 Fed. 538, reversed.

ERROR to a judgment of the Court of Appeals of the District of Columbia reversing a judgment of the Supreme Court of the District (which dismissed a petition for mandamus) and directing that mandamus issue.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. P. H. Marshall, with whom *Mr. Ernie Adamson* was on the brief, for defendants in error.

Mr. Richard W. Barrett, by leave of court, filed a brief as *amicus curiae.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In March, 1919, the Waste Merchants Association of New York filed with the Interstate Commerce Commission a complaint under § 13 of the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, 384, as amended. It alleged that existing tariffs on paper stock shipped in carload lots from New York Harbor imposed upon carriers the duty of loading cars; that the carriers had failed to perform this duty on shipments made by complainants' members; that these had been obliged to perform the service at their own expense; and that they were entitled, under § 15 of the act, to allowances therefor. The prayer was that the carriers be ordered to pay, by way of reparation, allowances for the loading service and also other damages for violation of law and that the carriers be ordered to observe the law in the future. The Director General of Railroads and one hundred and eighty-four transportation companies were made respondents; extensive hearings were had; the Commission filed a report embodying its findings of fact and conclusions; entered an order dismissing the complaint; and on August 7, 1920, overruled a petition for rehearing based on alleged errors in conclusions of fact and of law and newly discovered evidence. Then, on behalf of the Association members, this petition for a writ of mandamus was filed in the Supreme Court of the District of Columbia. It prayed that the Commission be directed to take jurisdiction of the claims, to allow damages and to fix the amount thereof. Upon a rule to show cause, objection was made to the jurisdiction of the court over the subject-matter; and the case was heard upon demurrer to the answer, which set up more fully the proceedings before the Commission. The Supreme Court of the District dismissed the petition on the ground that the relators, having par-

ticipated in and obtained benefits from the alleged violations of law, were not in a position to complain. Its judgment was reversed by the Court of Appeals of the District, on the ground that upon the facts found by the Commission complainants were clearly entitled to relief. The case was remanded with directions to issue the mandamus. 51 App. D. C. 136; 277 Fed. 538. It is here on writ of error.

We have no occasion to consider the merits of the controversy before the Commission. That it did not dismiss the complaint for lack of jurisdiction is clear. It heard the case fully. It found that the rates charged were not unreasonable or discriminatory in violation of the Commerce Act, nor unreasonable for the service actually performed, in violation of the Federal Control Act. It found that the conditions complained of were an incident of the World War; that the arrangement for loading was a voluntary one beneficial to complainants' members; that there was no provision in the tariffs for allowance to shippers who load cars; and that, therefore, such allowance could not legally be made by the carriers. The Commission dismissed the complaint because it held that the petitioners were not entitled to relief. *Waste Merchants Association* v. *Director General,* 57 I. C. C. 686.

Petitioners sought in the proceeding to set aside the adverse decision of the Commission on the merits and to compel a decision in their favor. The Court of Appeals granted the writ. This was error. Mandamus cannot be had to compel a particular exercise of judgment or discretion, *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Ness* v. *Fisher,* 223 U. S. 683; *Hall* v. *Payne,* 254 U. S. 343; or be used as a writ of error, *Commissioner of Patents* v. *Whiteley,* 4 Wall. 522. The case at bar is not like *Interstate Commerce Commission* v. *Humboldt S. S. Co.,* 224 U. S. 474, and *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, where the Com-

mission had wrongly held that it did not have jurisdiction to adjudicate the controversy; nor is it like *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission,* 252 U. S. 178, where the Commission wrongly refused to perform a specific, peremptory duty prescribed by Congress.

Whether a judicial review can be had by some other form of proceeding, we need not enquire. Compare *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U. S. 114, 116; *Philadelphia & Reading Ry. Co.* v. *United States,* 240 U. S. 334, 336; *Procter & Gamble Co.* v. *United States,* 225 U. S. 282.

Reversed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* NYE SCHNEIDER FOWLER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 24. Argued April 18, 1922.—Decided November 13, 1922.

1. A state statute making the initial railroad carrier liable to the shipper for the default of its connecting carrier, is not lacking in due process of law if the first carrier is allowed subrogation against the second, whether the subrogation be founded on statute, common law, or equitable considerations. P. 37.
2. A statute imposing on common carriers the duty of seasonably considering and settling claims for loss or damage of freight, under pain of being required to pay 7% on the recovery and reasonable attorney's fees, to be fixed by the court, in any case where the claimant recovers judgment for more than has been tendered him by the carrier, is not *per se* objectionable under the equal protection or due process clauses of the Fourteenth Amendment. P. 38.
3. Such statutes are to be judged by their application in the particular case; where the result is fair and reasonable, they will be sustained; *aliter* where it is so arbitrary, unequal and oppressive as to shock the sense of fairness inspiring the Fourteenth Amendment. P. 43.
4. In this case, involving numerous claims for loss or injury to hogs while in the carrier's custody, the amount of which the carrier

might have ascertained and so protected itself by a tender, and where the trial lasted four days, an attorney's fee of $200 for service in the trial court, and 7% interest on $800 ultimately recovered, was not an excessive penalty. P. 45. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Polt*, 232 U. S. 165, distinguished.

5. But imposition on the carrier of an additional attorney's fee of $100, fixed under the statute upon the basis of the service rendered, time and labor bestowed, and recovery secured, by the claimant's attorney in resisting an appeal by which the carrier obtained a large reduction of an excessive judgment, was unconstitutional. P. 46.

105 Neb. 151, reversed in part and affirmed in part.

ERROR to a judgment of the Supreme Court of Nebraska, affirming with reductions a judgment for damages, interest, and attorney's fees, and taxing a further attorney's fee for services in that court, in an action against a railroad company for loss and injury of live-stock freight.

Mr. Wymer Dressler, Mr. F. W. Sargent and *Mr. T. P. Littlepage,* for plaintiff in error, submitted.

Mr. Garrard Glenn, with whom *Mr. William B. Walsh* was on the brief, for defendant in error.

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

In this case, the constitutional validity of two statutes of Nebraska is questioned, the first subjecting the initial railroad of two connecting roads, receiving freight, to liability for safe delivery by the other, and the second making every common carrier liable for a reasonable attorney's fee in the court of first instance and on appeal, for collection from it of every claim for damage or loss to property shipped, not adjusted within 60 days, for intrastate shipments.

The Nye Schneider Fowler Company, defendant in error, is a corporation of Nebraska, at Fremont, Nebraska,

engaged in the business of bringing hogs into the State and shipping them to South Omaha for sale in the stockyards there. It brought this suit against the plaintiff in error, a common carrier, to recover damages in the sum of $2,097.21 and $900 attorney's fees, for loss or injury to hogs shipped in 105 intrastate shipments, averring due presentation of such claims and the refusal of the company to pay any amount whatever on them. The jury returned a verdict of $802.27, with interest at 7%, as provided in the statute. On motion, the court fixed the reasonable attorney's fees in the suit at $600, as part of the costs, and judgment for verdict and costs was accordingly entered. By the Supreme Court of the State, to which the defendant company appealed the cause, a remittitur was required and consented to for $209.01 on the amount recovered for loss and damage, and the fee of $600 taxed as costs was reduced to $200, but the Supreme Court taxed the plaintiff in error with an attorney's fee of $100 for services in the Supreme Court and judgment was entered accordingly. The questions made involved separate statutes and we shall take them up in order.

First. Section 6058 of the Revised Statutes of Nebraska, 1913, provides as follows:

"Any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers. Whenever two or more railroads are connected together, the company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight, to the consignee of the freight, in the same order in which such freight was shipped."

It is objected that this imposes on one railroad liability for the default of another without providing reimbursement by that other and so deprives the one of its property

without due process of law. But the Supreme Court of Nebraska has declared in this case that, in such a case under the statute, the initial carrier has a right of reimbursement under the general principle of subrogation. This conclusion is sound and is supported by *Texas & Pacific Ry. Co.* v. *Eastin & Knox,* 100 Tex. 556, and the general principle involved finds support in *Fisher* v. *Milwaukee Electric Ry. & Light Co.,* 173 Wis. 57; *Arnold* v. *Green,* 116 N. Y. 566, 571; *Syracuse Lighting Co.* v. *Maryland Casualty Co.,* 226 N. Y. 25, and *Holmes* v. *Balcom,* 84 Me. 226. Counsel for the plaintiff in error contend that the legislature has granted no such right of subrogation in this statute, that it is not a right but purely a matter of equity under the circumstances. We can not follow this distinction. We have here a construction of this statute by the Supreme Court of the State, in which that tribunal holds that, under all the circumstances to which this statute can apply, subrogation does exist. The initial carrier is, therefore, certainly protected within the jurisdiction within which the statute operates, and, as no doubt can arise as to the enjoyment of the right, it is immaterial whether it was originally founded on the common law or was developed in the broader justice of equity jurisprudence.

Second. Authority for taxing of attorney's fees as part of the costs in such cases is founded in c. 134, Laws of Nebraska, 1919, amending § 6063, Revised Statutes, 1913, which reads as follows:

"Every claim for loss or damage to property in any manner, or overcharge for freight for which any common carrier in the State of Nebraska may be liable, shall be adjusted and paid by the common carrier delivering such freight at the place of destination within sixty days, in cases of shipment or shipments wholly within the state, and within ninety days in cases of shipment or shipments between points without and points within the state, after

such claim, stating the amount and nature thereof accompanied by the bill of lading or duplicate bill of lading or shipping receipt showing amount paid for or on account of said shipment, which shall be returned to the complainant when the claim is rejected or the time limit has expired, shall have been filed with the agent, or the common carrier at the point of destination of such shipment, or at the point where damages in any other manner may be caused by any common carrier. In the event such claim, which shall have been filed as above provided, within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at seven per cent per annum from the date of filing of such claim, and shall also be liable for a reasonable attorney's fee to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction, and in the event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney fee to be fixed by such court or courts: Provided, in bringing suit for the recovery of any claim for loss or damage as herein provided if consignee or consignor, or real party in interest, shall fail to recover a judgment in excess of the amount that may have been tendered in an offer of settlement of such claim by the common carrier liable hereunder, then such consignee or consignor, or real party in interest, shall not recover the interest penalty or attorney's fee herein provided."

The Supreme Court of the State has held that provision for attorney's fees in this section is in the nature of reimbursement of costs and not a penalty. *Smith* v. *Chicago, St. Paul, M. & O. Ry. Co.*, 99 Neb. 719; *Marsh & Marsh* v. *Chicago & Northwestern Ry. Co.*, 103 Neb. 654. But this does not meet the objection pressed on us.

These are costs imposed on the defeated defendant in the litigation, but not on the defeated plaintiff. This is an inequality, and the question is whether it is a just discrimination and one which the legislature may make and not take the defeated defendant's property without due process or deny it the equal protection of the law. We have considered in our more recent decisions the constitutional validity of inequalities of this general character as between claimants and common carriers created by state legislation, and it may perhaps be worth while to review the decisions to see what general rule runs through them, with a view of applying it to the case before us.

In the first of these cases, *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, a defendant railroad company attacked a statute of Texas under which it had been required to pay an attorney's fee to the plaintiff. The statute provided that any person having a claim for personal services, for overcharges for freight, or for claims for stock killed if it did not exceed $50, which was duly presented and not settled in 30 days, might, if he recovered the full amount in a suit, recover also an attorney's fee not exceeding $10, if he had an attorney. This Court, three judges dissenting, held that the statute denied the equal protection of the laws to railroads, because it was only a penalty to compel them to pay their debts, and that to single them out as a group of general debtors was not just classification.

In *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews,* 174 U. S. 96, a statute relating to the liability of railroads for damages for fire caused by their negligent operation, allowed the plaintiff if he recovered a reasonable attorney's fee. This was held a valid classification of defendants, because it was a police measure to prevent fire likely to be caused by operation of railroads and the attorney's fee stimulated care to prevent it.

In *Seaboard Air Line Ry.* v. *Seegers,* 207 U. S. 73, a state statute imposed a penalty of $50 on all common car-

riers for failure to adjust damage claims within 40 days, if in the subsequent litigation the plaintiff recovered the full amount claimed. The statute was sustained in a case where the claim was $1.75. It was held not to be a statute imposing a penalty merely for the non-payment of debts, or against railroad corporations alone, as in the *Ellis Case,* but one based solely upon the nature of the business peculiarly within the knowledge of the carrier, who could determine the loss more accurately and with less delay than the plaintiff. It was said that the design was to secure a reasonably prompt settlement of proper claims, and especially small claims which most need such penal provisions to protect them.

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wynne,* 224 U. S. 354, a state statute required railroad companies to pay claims for livestock killed or injured by their trains, within 30 days after notice, with a penalty, for failure to do so, of double damages and attorney's fee, if claimant recovered what he sued for. The plaintiff had made a claim for $500 for the killing of two horses by defendant's train. On refusal, suit was brought for $400 and recovery had for that amount. It was held that, to apply the statute, as the state court did, to a case in which plaintiff had demanded more than he sued for, made an arbitrary exercise of power and deprived defendant of its property without due process of law.

In *Kansas City Southern Ry. Co.* v. *Anderson,* 233 U. S. 325, the same statute which was held invalid in the *Wynne Case* was again before the Court for consideration as applied to a case where plaintiff had not demanded more than he sued for and recovered, and the validity of the statute was upheld.

In *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co.,* 226 U. S. 217, the statute required every common carrier to settle claims for lost or damaged

freight within 60 days and made it liable for $25 damages in each case in addition to the actual damages, but limited the penalty to claims of less than $200. The claim was $4.76, and there was a recovery of the claim and penalty. Such a statute was held a reasonable incentive to the prompt settlement without suit of just demands of a class admitting of special legislative treatment. It was objected to the statute that it intended the assessment of a penalty, whether the recovery was less than the claim or not. But the Court refused to consider the objection, on the ground that it sufficed to hold that, as applied to cases like those before it, the statute was valid; and that it would not deal with imaginary cases or speculate on what application the state court would make of the statute in another class of cases.

In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Polt,* 232 U. S. 165, the state statute made a railroad company absolutely responsible for loss of property destroyed by fire communicated from its locomotives, and provided that, unless it paid or offered to pay the full amount of the damage within 60 days from notice, the owner should have double damages, unless he recovered less than the amount offered by the company before suit. The plaintiff demanded and sued for $838.20. The company offered $500. The verdict was for $780. The Court said that the rudiments of fair play required by the Fourteenth Amendment were wanting when a defendant in such a case was compelled to guess rightly what a jury would find or pay double if that tribunal added a cent to the amount tendered, though the tender was futile because of an excessive demand.

In *Missouri, Kansas & Texas Ry. Co.* v. *Cade,* 233 U. S. 642, a statute regulating the presentation and collection of claims for personal service, material furnished, overcharges for freight, for lost or damaged freight, or for stock killed or injured, against any person or corporation,

less than $200 in amount, required that they be settled in 30 days and, if not, the person injured could bring suit, and, if he recovered the full amount of his claim, he should be entitled, in addition to the amount and costs, to a reasonable attorney's fee not exceeding $20. It was held that the attorney's fee here was manifestly only costs of suit and that, as the statute applied to every one and any person might be plaintiff or defendant, the mere distinction between the costs to be taxed against the plaintiff and those against the defendant did not deny the equal protection of the laws, because the plaintiff usually had the burden in the case, and, as the outlay for an attorney's fee was a necessary consequence of the litigation, it was reasonable to impose it upon the party whose refusal to pay the just claim rendered the litigation necessary.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg,* 238 U. S. 56, a statute requiring prompt furnishing of cars by carriers, and prompt loading by shippers, and which imposed the same penalty per car upon delinquents of either group, but which added attorney's fee to the penalty imposed on the carriers in case of recovery by a shipper, was held to deny to the carriers the equal protection of the laws, because in such a case there was no ground for putting the carriers in a different class from the shippers and imposing a special burden on them, when they were both in identically the same situation.

The general rule to be gathered from this extended review of the cases is, that common carriers engaged in the public business of transportation may be grouped in a special class to secure the proper discharge of their functions, and to meet their liability for injuries inflicted upon the property of members of the public in their performance; that the seasonable payment of just claims against them for faulty performance of their functions is a part of their duty, and that a reasonable penalty may be imposed on them for failure promptly to consider and

pay such claims, in order to discourage delays by them. This penalty or stimulus may be in the form of attorney's fees. But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and "violate the rudiments of fair play" insisted on in the Fourteenth Amendment, will be held to infringe it. In this scrutiny of the particular operation of a statute of this kind, we have sustained it in its application to one set of facts by the state court and held it invalid when applied to another. In some of the cases in which the statutes are sustained there is a fixed penalty or a limited attorney's fee. In others, the attorney's fee is merely required to be reasonable and fixed by the court. In some, there is a limit in the amount of the claims to which the statute applies, and in others, not. In some statutes held valid, the penalty or fee is allowed only on condition that the full amount claimed be recovered, in others, that the amount sued for be recovered. In the one case, the statute imposed no condition upon the imposition of a penalty that the full amount claimed or sued for should be recovered, but the Court refused to consider the validity of the penalty from that standpoint because the facts did not require it. In another case, the requirement that a tender of the amount recovered could alone save double damages was held invalid, because requiring a guess as to the verdict of the jury.

It is obvious that it is not practical to draw a line of distinction between these cases based on a difference of particular limitations in the statute and the different facts in particular cases. The Court has not intended to establish one, but only to follow the general rule that when, in their actual operation in the cases before it, such statutes work an arbitrary, unequal and oppressive result for

the carrier which shocks the sense of fairness the Fourteenth Amendment was intended to satisfy in respect of state legislation, they will not be sustained.

Coming now to the case before us, we find that the statute affects all common carriers, that it imposes on them the duty of considering and settling claims for loss of and damage to freight within 60 days, and provides that, if they do not so settle them and in a subsequent suit more is recovered than the amount tendered, the amount found due shall carry 7% interest from the presentation of the claim, as a penalty, and reasonable attorney's fees. If an appeal be taken and the plaintiff succeed, an additional attorney's fee may be included. The statute is confined to freight claims. It does not place a limit on them, but, as we have seen, the cases do not require this. The statute does require a tender, but in this case the claims were wholly rejected. No tender of any amount was even attempted. The claims numbered 105 when presented and sued on. They were reduced to 72. The trial lasted four days.

It is said here, as it was said in the *Polt Case* in 232 U. S. 165, that the company can not be subjected to a penalty for not guessing rightly the verdict of a jury. But the cases are very different. There the penalty was double damages for a failure to guess rightly as to the jury's view of damages from a fire to a house, when the extent of the damage was not peculiarly within the company's knowledge. Here the damages were for hogs, injured during the custody of the carrier, and whose value was determined by weight and market price and not difficult of ascertainment after a bona fide effort, and there was no effort at a tender at all. Here the penalty is only 7% interest on the actual recovery, and reasonable attorney's fees as costs. The amount of the attorney's fee, $200 for a case involving the preparation for trial of 72 different claims and a four days' trial, does not shock one's sense of fairness.

It is further separately assigned for error that the Supreme Court imposed upon plaintiff in error an attorney's fee of $100 when it won the case on appeal by reducing the amount recovered in the trial court. The original § 6063, Revised Statutes of Nebraska, only provided for an attorney's fee to be fixed by the court; but c. 134, Laws of Nebraska, 1919, added the words "and in event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney fee to be fixed by such court or courts." This might have been construed to mean that the plaintiff could only have an attorney's fee in the appellate court or courts, if he maintained the judgment he had obtained in the court of first instance. But the Supreme Court of the State, and that controls our view, has evidently interpreted the words "the plaintiff shall succeed" to mean success in securing a judgment for more than the amount tendered, if any, and it is in light of this interpretation that we must consider the reasonableness of the statute and the validity of the fee fixed in this case.

The evident theory of the amendment of §6063, as thus interpreted, is that the burden of the litigation, both in the trial and appellate court, could be avoided by reasonable assiduity of the defendant carrier in availing itself of its peculiar sources of knowledge, ascertaining the actual damage and making a genuine tender of what it believes to be due, and, if the ultimate recovery is not more than the tender, that the claimant shall have neither interest nor attorney's fee. Under the circumstances, does the statute thus construed work a fair result? Here is an excessive claim of $2,000 reduced to $800 by a trial in one court, with an attorney's fee fixed at $600, and then an appeal by which the claim is reduced to $600, and the fee to $200. It is said that there were 105 claims reduced by the litigation to 72, and that claimant might have brought a separate suit on each and so had an attorney's

fee in each claim on which it recovered anything, making a larger aggregate of fees than it has secured. But we do not think this consideration can play any part in the case as it is. The claimant doubtless united the claims for its own convenience and to save its own time and that of its counsel.

Then it is said the fee in the Supreme Court is left to the discretion of that court, which can be trusted to do the fair thing as a chancellor often does, by dividing the costs on an equitable basis. But the difficulty with this view is that the construction which the Supreme Court has given the statute does not reserve to itself this power. It says that in such a statute the fee must be reasonable, in that it is to be based on a consideration of the value of the attorney's service to the claimant and the amount of time and labor expended by him, bearing a fair proportion to the amount of the judgment recovered. These are the usual and proper elements in fixing compensation for a lawyer's service. In other words, the Supreme Court, if any amount over the tender is recovered by its judgment, must fix a fee compensating the attorneys for the claimant for their work on the appeal, however excessive the recovery below and however much reduced on the appeal, if more than the original tender. Thus what we have here is a requirement that the carrier shall pay the attorneys of the claimant full compensation for their labors in resisting its successful effort on appeal to reduce an unjust and excessive claim against it. This we do not think is fair play. Penalties imposed on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid under the Fourteenth Amendment. *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U. S. 340. While the present case does not involve any such penalties as were there imposed, we think the principle applies to the facts of this case. We hold that so much of the statute as imposed an attorney's

fee upon the carrier in this case in the Supreme Court was invalid. The judgment of the Supreme Court is to this extent reversed and in other respects affirmed. The costs in this court will be taxed one-third to the defendant in error, and two-thirds to the plaintiff in error.

Reversed in part and Affirmed in part.

WICHITA RAILROAD & LIGHT COMPANY *v.* PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS ET AL.

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

No. 27. Argued April 24, 1922.—Decided November 13, 1922.

1. Jurisdiction acquired by the District Court on the ground of diverse citizenship, is not divested by the intervention, by leave of the court, of a party, opposed to and of like citizenship with the plaintiff, but whose presence is not essential to a decision of the original controversy. P. 53.
2. The jurisdiction of the District Court arising from diverse citizenship extends to the entire suit, and to every question, state or federal, involved in its determination. P. 54.
3. Where a plaintiff in equity successfully moves the District Court for judgment on the pleadings, reserving the right to adduce evidence and be heard on issues of mixed law and fact presented, a decree of the Circuit Court of Appeals, reversing the decree in his favor, should accord that opportunity, and not dismiss the bill. P. 54.
4. Under the Public Utility Law of Kansas, Laws 1911, c. 238, in order that an increase of rates, proposed by a gas company, may supersede lower rates fixed by its contract with another, it is not enough that the change be filed with and consented to by the Commission, under § 20; there must, under § 13, be an express finding by the Commission, after full hearing and investigation, that the existing rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential; and without such finding the Commission's order is void. P. 56.

5. Such a finding may not be supplied by inference and reference to the averments of the petition invoking the action of the Commission. P. 59.
6. Delegation of pure legislative power is against constitutional principle; therefore, administrative agencies granted authority over rates are enjoined to follow designated procedure and rules of decision as a condition to the validity of their action. P. 58.

268 Fed. 37, reversed.

The Wichita Railroad & Light Company, a corporation of West Virginia, is an electric street railroad and light-furnishing company doing business in Wichita, Kansas, and will be known as the Wichita Company. The Kansas Gas and Electric Company, also a West Virginia corporation, and to be known as the Kansas Company, is engaged in the business of furnishing electric light and power to consumers in Kansas. In 1910, the two companies made a contract by which the Kansas Company agreed to furnish and the Wichita Company agreed to accept and pay for electrical energy, at certain rates, until 1930; and the contract was fulfilled by both until 1918. Then the Kansas Company filed a petition with the Public Utilities Commission of Kansas, to be known as the Commission, in which it alleged that, on account of the increase in the cost of production and distribution,

"the net income of your petitioner for the year ending December 31, 1917, was approximately $190,000 less than it would and should have been if your petitioner had been able to operate under the normal conditions that existed in 1914, at which time its said rates were first installed as aforesaid; that if said rates are continued in effect hereafter the result thereof will be disastrous to your petitioner, depriving it of a reasonable return upon the value of its said property, and making it impossible to find a market for the securities it must issue and sell in order to provide funds with which to make improvements,

additions and betterments which are necessary, if it is to furnish proper and adequate service to the communities in which it operates."

The petition further recited that in December, 1916, being of opinion that it could reduce its rates for residential and commercial lighting, it proposed a gradual reduction and filed a schedule for the purpose, which the Commission had not acted on, that in January, 1917, it did reduce its rates, but that, if a further reduction under the schedule for 1918 were made, the loss of net earnings to the petitioner would be $220,000.

The petition continued:

"Your petitioner is of the opinion that in order to meet this situation, and in order to increase the net earnings of your petitioner in an amount sufficient to offset the loss resulting to it from the conditions above stated, an order should be entered by the Commission authorizing petitioner to add to its existing rates the surcharge hereinafter set out. There are approximately 19,900 consumers now served by your petitioner; the proposed surcharge does not affect consumers using 100 kilowatt hours or less per month, and, therefore, 17,000 of said total of 19,900 consumers are not affected. In apportioning the surcharge equitably among the remainder of said consumers, your petitioner has taken into consideration the fact that in the generation of electrical energy for large power consumers fuel is approximately 75 per cent of the cost of the generation, and that, therefore, a surcharge which has for its purpose the reimbursement of the utility company for increase in the cost of fuel, should be so adjusted that the surcharge should increase in proportion to the amount of energy consumed. The percentage of increase fixed by such surcharge over existing rates is, therefore, increased in proportion to the amount of consumption. The last

step in said surcharge schedule affects 6 consumers, and the last two steps 38 consumers.

"Wherefore, your petitioner asks that an order be made by your Honorable Commission authorizing your petitioner to add to its existing rates for electricity in the State of Kansas, and until the further order of the Commission the following surcharges:

For the first 100 kwh per month, no surcharge.

For the next 1,000 kwh per month, 12 mills net per kwh.

For the next 10,000 kwh per month, 9.5 mills net per kwh.

For the next 1,000,000 kwh per month, 8. mills net per kwh.

For all excess kwh per month, 3.5 mills net per kwh."

The order of the Commission upon this petition recited that it "came duly on for order by the Commission upon the pleadings of the respective parties and the evidence introduced thereunder; and the Commission upon consideration of said pleadings and evidence and being duly advised in the premises, finds that the Kansas Gas & Electric Company should be authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas, until the further order of the Commission, the following net surcharge:

For the first 100 kwh per month, no surcharge.

For the next 14,900 kwh per month, 1 mill surcharge per kwh.

For the next 20,000 kwh per month, 2 mills surcharge per kwh.

For all excess over 35,000 kwh per month, 3 mills surcharge per kwh."

The rates thus fixed were substantially higher than the contract rates.

The Wichita Company, thereupon, filed a bill in equity in the United States District Court for Kansas seeking to

enjoin the Commission from putting the new rates in force as against it. After averring the diverse citizenship of the parties and a sufficient jurisdictional amount involved, the bill alleged that the order impaired the contract which it had with the Kansas Company, in violation of Article I, § 10 of the Federal Constitution, that the rates fixed were unjust and unjustly discriminatory as against the complainant, that it was the largest customer of the Kansas Company, and that the increase of its rate as compared with that of others violated every equitable rule of rate-making and deprived the plaintiff of its property without due process, and denied it the equal protection of the laws, in violation of the Fourteenth Amendment. A temporary injunction was issued. The answer of the Commission averred that the proceedings were regular and authorized by the statute of Kansas, that the Wichita Company had participated in them, and denied that the surcharges were discriminatory or unjust. The Kansas Company then applied for leave to intervene, and leave was granted. It answered the bill much as the Commission did, but with more elaboration, denying that the order was discriminatory or unjust, and averring that the contract of 1910 was necessarily subject to the legitimate exercise of the police power of the State, and that an order of the Commission regularly made in the exercise of that power could not be regarded as working an impairment of the obligation of the contract in the sense of the contract clause of the Federal Constitution.

The Wichita Company made a motion for judgment on the pleadings, on the ground that the order of the Commission was void on its face, but saved and reserved to itself " all of its rights in the presentation of evidence and proof and hearing upon the merits of the issues of fact and law otherwise than as above stated, involved in this

cause, in the event it should be determined that final judgment and decree should not be entered pursuant to this motion."

The District Court gave judgment for the Wichita Company on the pleadings and enjoined the Commission and the Kansas Company from putting into force the increased rates. The Circuit Court of Appeals reversed the decree of the District Court and directed a dismissal of the bill, Judge Sanborn dissenting.

The Wichita Company has appealed to this Court.

Mr. Henry I. Green, with whom *Mr. Thomas F. Doran* was on the briefs, for appellant.

Mr. H. L. McCune, with whom *Mr. A. E. Helm* was on the briefs, for appellees.

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

The appellees urge that the concession of the appellant that contracts in respect to the rates to be charged by a public utility are subject to suspension or abrogation by the police power of the State validly exercised through an administrative agency takes out of this case any federal question, because the issue then is only a state question, to wit, whether, under the state statute, the police power was validly exercised. Upon this ground they insist that the bill should have been, and must be now, dismissed for want of jurisdiction and without any inquiry into the other issues of law and fact. The original bill set out two grounds of jurisdiction, first that of diverse citizenship, and, second, that the case arose under the Federal Constitution in that the order violated the contract clause of the Federal Constitution, and also the Fourteenth Amendment. The intervention of the Kansas Company, a citi-

zen of the same State as the Wichita Company, its opponent, did not take away the ground of diverse citizenship. That ground existed when the suit was begun and the plaintiff set it forth in the bill as a matter entitling it to go into the District Court. Jurisdiction once acquired on that ground is not divested by a subsequent change in the citizenship of the parties. *Mullen* v. *Torrance,* 9 Wheat. 537, 539; *Clarke* v. *Mathewson,* 12 Pet. 164, 171; *Koenigsberger* v. *Richmond Mining Co.,* 158 U. S. 41, 49; *Louisville, New Albany & Chicago Ry. Co.* v. *Louisville Trust Co.,* 174 U. S. 552, 566. Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties. See Equity Rule 37. *Adler* v. *Seaman,* 266 Fed. 828, 841; *King* v. *Barr,* 262 Fed. 56, 59; *Jennings* v. *Smith,* 242 Fed. 561, 564. The Kansas Company, while it had an interest and was a proper party, was not an indispensable party. *In re Engelhard,* 231 U. S. 646.

The jurisdiction of the District Court was not limited to federal questions presented by the bill, but extended to the entire suit and every question, whether federal or state, involved in its determination.

The appellant assigns for error that the Circuit Court of Appeals, by directing a dismissal of the bill, refused it a hearing on the truth of the averments of the answer as to the validity of the order, and also on the issue made by the bill and answer as to whether the rates, as fixed by the Commission, deprived it of its property without due process of law and denied it the equal protection of the laws. In this ruling we think there was error.

The stress in the hearing on the motion was put on the two contentions, one, that the order of the Commission was void on its face for lack of a necessary finding that the existing contract rates were unreasonably low, and the other, that the facts averred in the petition of the

Kansas Company to the Public Utilities Commission were not sufficient to justify such a finding if it had been made. The District Court sustained the contention; the Court of Appeals denied it. The motion for judgment being overruled, the complainant should have been accorded an opportunity, the right to which it had carefully reserved, to traverse the allegations of fact by the Kansas Company as to the basis for the order of the Commission and also to maintain by evidence and argument the issue as to due process of law and the equal protection of the law. The charge that the order made a classification denying due process and the equal protection of the law was a mixed question of law and fact, upon which the complainant had a right to be heard. Neither court passed on it. For this reason, if there was nothing else, the decree of the Circuit Court of Appeals would have to be reversed. *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 114.

There still remain for our consideration the questions upon which the courts below differed.

The Public Utility Law of Kansas, c. 238 of the Session Laws of 1911, creates a commission and makes full provision for its procedure and powers. Section 13 provides that:

"It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates, . . . fares . . . and if after full hearing and investigation the commission shall find that such rates . . . are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates . . . as shall be just and reasonable."

Section 14 and § 15 require the complaint against rates, etc., to be in writing, and a formal public hearing of which due notice is to be given to the parties interested.

Section 15 directs how the notice shall be given and how long before the hearing and its contents.

Section 16 provides that if upon such hearing the rates, etc., of any public utility are found to be unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, the Commission shall have power to fix and substitute therefor rates, etc., "as it shall find, determine or decree to be just, reasonable and necessary." It provides that all orders and decisions of the Commission whereby any rates, etc., are altered, changed, modified, fixed or established, shall be served on the public utility affected thereby and that such public utility, unless an action is commenced, in a court of proper jurisdiction, to set aside "the findings, orders and decisions" of the Commission or to review and correct the same, shall carry the provisions of the order into effect.

Section 20 provides that, whenever any public utility shall desire to make a change in any rate or rates, it shall file with the Commission a schedule showing the changes desired to be made and put in force by such public utility, but that no change shall be made in any rate without the consent of the Commission and within thirty days after such changes have been authorized by the Commission copies of such schedule shall be filed in every station, office or depot of such public utility for public inspection.

It is said that the order in this case was authorized by § 20 and therefore that all that was needed was the filing of a schedule of changed rates and the consent of the Commission, and that no finding was required as in § 13 and § 16. This construction of § 20 is doubtless correct, but it shows that the filing of a schedule of changed rates under that section cannot accomplish the result of abrogating contract rates. It could not do so any more than would the original filing of a schedule of rates under § 11 requiring every public utility to publish and file with the Commission all schedules of rates do this. The consent of the Commission in § 20 is made necessary only to prevent changing schedules without notice to the Commis-

sion and thus to secure a proper supervision of schedules. Such consent does not involve a hearing or a finding and a decision. The section does not, therefore, cover, or measure the essentials of, the proceeding in this case before the Commission which the order shows was upon pleadings and *inter partes*. We find nothing in *State ex rel. Caster* v. *Kansas Postal-Telegraph Cable Co.*, 96 Kans. 298, which gives a different construction to § 20.

The majority opinion in the Circuit Court of Appeals in maintaining the validity of the order in this case relies on § 18 of the act, which provides that all orders, rates, etc., fixed by the Commission shall be in force thirty days thereafter and shall be *prima facie* reasonable until changed by the Commission or by a court; and holds from this that it must presume that there was substantial evidence to warrant the findings. But as we have seen there is no finding of reasonableness or unreasonableness. Nor can we suppose that the presumption was to obtain until there was such a finding.

The Supreme Court of Kansas, in applying the statute, recognizes that a contract for rates with a public utility can not be abrogated except after a finding by the Commission that they are unreasonable. This is made clear by the decision in *Kaul* v. *American Independent Telephone Co.*, 95 Kans. 1. In that case, a number of customers sought to enjoin a telephone company from disconnecting their lines because they did not pay the schedule rates published and filed with the Commission under the law of 1911 we are considering. The complainants showed an agreement by the Telephone Company made before the Act of 1911, by which the Telephone Company had engaged to furnish them the service at lower than the published schedule rates on file with the Commission. The injunction was granted. The court said:

"While that commission is vested with broad regulatory powers it is not shown nor claimed that it has found

the contract rates to be unreasonable. Granting, without deciding, that the commission has the power under the law to determine whether or not the rates prescribed by the contract are reasonable and valid, and to revise them if found to be unreasonable, it does not appear that it has exercised the power, nor that they have been presented to it for its consideration. The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract. In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates."

The proceeding we are considering is governed by § 13. That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that after full hearing and investigation the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void.

This conclusion accords with the construction put upon similar statutes in other States. *Public Utilities Commission* v. *Springfield Gas & Electric Co.,* 291 Ill. 209; *Public Utilities Commission* v. *Baltimore & Ohio Southwestern R. R. Co.,* 281 Ill. 405. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative

boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.

It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this. It is doubtful whether the facts averred in the petition were sufficient to justify a finding that the contract rates were unreasonably low; but we do not find it necessary to answer this question. We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State.

We think the motion for judgment on the pleadings should have been granted.

The decree of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

FREUND ET AL. *v.* UNITED STATES.

UNITED STATES *v.* FREUND ET AL.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 29, 37. Argued October 5, 6, 1922.—Decided November 13, 1922.

1. Broad provisions in a government contract, authorizing the Government to change the obligations imposed on the other party, should be interpreted, not as permitting government officials to remould the contract at will, but as confined to what was fairly and reasonably within the contemplation of the parties when the contract was made. P. 62.
2. Where a contractor undertook a circuit mail-carriage service from and back to a city post-office site via scheduled stations, with stops en route to collect mail from letter carriers, to be paid for at so much for every mile traveled, a stipulation in the contract authorizing the Postmaster General to establish service to and from like offices, stations, etc., to those named in the schedules, to be paid for at the contract rate per mile of travel, did not authorize substitution of a much heavier service, in transporting all mail between railroad stations and another post-office site, involving increased equipment and expense, and paid for at the same mileage rate but without counting trips on which no mail was carried. P. 64.
3. Contractors who were encouraged by agents of the Post Office Department to enter into a mail-carriage contract and give a heavy bond, without notice of the Department's purpose to substitute a more onerous service under color of the contract but not within its terms, and who performed the new service, under protest, rather than incur the risk to themselves and their bondsmen of throwing up the contract, *held*, not to have acquiesced in the change. P. 68.
4. A mail-carriage contractor who, under duress of the Post Office Department, performs service not called for by his contract, is entitled to recover, in the Court of Claims, the reasonable value of such service, including a fair profit. P. 69.

56 Ct. Clms. 15, reversed.

APPEALS from a judgment allowing, in part, a claim for service in carrying the mails.

Mr. William R. Harr, with whom *Mr. Charles H. Bates* was on the brief, for Freund et al.

Mr. A. A. Wheat, with whom *Mr. Solicitor General Beck* and *Mr. William C. Herron* were on the brief, for the United States.

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

This is a suit against the Government to recover $34,012.90 as the remainder unpaid of an amount earned by 16 months' service in carrying the mails by wagons in the City of St. Louis. After official advertisement, a bid was made by appellants April 4, 1911, and accepted April 20, 1911, for service on a particular route described by a schedule, for a certain annual gross sum, which, being divided by the miles to be covered, made a certain rate per mile. A contract was signed May 22nd. The contract was for four years, beginning July 1, 1911. The route was for seven daily circuit trips from and back to the new St. Louis Post Office. That office was not ready for occupancy on July 1, 1911, or for 16 months thereafter, and the old Post Office, which was thirteen blocks from the new one, continued to be used. The Post Office Department, relying on certain clauses in the contract, and upon a notice given to bidders, substituted another route and ordered the contractor to begin performance on July 1st, at what the Department held to be the same rate per mile of service. The contractors protested, but, threatened with suit upon their bond, performed the service and accepted periodical payments on the new route until October 28, 1912, the date of occupying the new Post Office, when the route bid upon and contracted for was initiated and the contractors did the work under it till the term ended. The cost to the contractors of doing the work on the substitute route was $43,726.89,

and they were paid by the Government $24,289.62. Thus their loss was in round numbers $19,500 during the 16 months of the substituted route. After October 12, 1912, on the original route, the contractors made a profit of 42 per cent. on its cost in what remained of the term.

The contractors' claim was that the substitution of the new route for the one they bid on was not within the terms of the contract, but was unconscionable, and that they were entitled to recover for the work done on the new route on a *quantum meruit*. The Court of Claims held that it was not necessary to determine whether the new route was properly substituted for the old, because the contractors had acquiesced in this view by their performance, but that the Government had not, in adapting the mileage rate of the original route under the contract to the new route, done justice to the contractors in the number of miles allowed, and on this basis gave judgment for $7,346.66. From this the contractors appealed. The Government brings a cross appeal, claiming that, as the contractors accepted full pay under the contract as construed and expressed by the Department, they should recover nothing.

It is, of course, wise and necessary that government agents in binding their principal in contracts for construction or service should make provision for alterations in the plans, or changes in the service, within the four corners of the contract, and thus avoid the presentation of unreasonable claims for extras. This court has recognized that necessity and enforced various provisions to which it has given rise. But sometimes such contract provisions have been interpreted and enforced by executive officials as if they enabled those officers to remould the contract at will. The temptation of the bureau to adopt such clauses arises out of the fact that they avoid the necessity of labor, foresight and care in definitely drafting the contract, and reserve power in the bureau. This does

not make for justice; it promotes the possibility of official favoritism as between contractors, and results in enlarged expenditures, because it increases the prices which contractors, in view of the added risk, incorporate in their bids for government contracts. These considerations, especially the first, have made this Court properly attentive to any language or phrase of these enlarging provisions which may be properly held to limit their application to what should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into. These observations are justified and illustrated by decisions of this Court in *United States* v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414, and *Hunt* v. *United States*, 257 U. S. 125.

The Court of Claims, after giving the two schedules in full, sums up the contrast between them as follows:

"The service bid upon was a circuit service on seven circuits, on a mileage basis, each circuit beginning and ending at the new post office and for which the contractor was paid for every mile traveled regardless of the quantity of mail carried or whether for any part of the distance no mail was carried. The restated service [i. e., on the new route] was a trip service for which payment was made on a mileage basis when mail was carried, but no payment was made for a return trip if mail was not carried or for distance traveled by empty vehicles in going to a point from which mail was to be moved.

"The service bid upon involved the handling of the mails for a small area and was a comparatively light service. The restated service required the hauling of incoming and outgoing mails for the entire city and involved handling several times the weight of mail. The service bid on required 6 automobiles. The restated service required 18 wagons of different capacity exceeding several times in aggregate capacity that required for the bid on service. The mileage of each wagon when carrying

mail, was allowed and paid for. The larger bulk of mail required proportionately more time in loading and unloading.

" The bid upon service, with the exception of one early trip on each of these circuits, was all to be performed within 12 hours from approximately 8 A. M. to 8 P. M. The restated service required trips during practically every hour of the twenty-four."

By a note in the advertisement, by paragraph ten in the contract, and by a further somewhat more elaborate stipulation in the contract, provision was made for changes. The last contained all that was in the others, and was as follows:

" It is hereby stipulated and agreed by the said contractors and their sureties that the Postmaster General may change the schedule, vary, increase, or decrease the trips on this route, or extend the trips to any new location of the post offices, railroad stations, steamboat landings, mail stations, or points of exchange with cable or electric cars named in the schedule for service for said route, in said advertisement, establish service to and from *like* offices, stations, landings, or points not named therein, and vary, increase, or decrease the trips thereto, and discontinue service between any of the post offices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars, or between any of them: *Provided,* That for any increase or decrease in the service authorized by the Second Assistant Postmaster General, the pay of the contractors shall be increased or decreased, as the case may be, at the rate per mile of travel agreed to be paid for service under this contract, as shown by the annual rate of compensation and the annual miles of travel, based on the frequency and distances shown in the schedule of service for said route in said advertisement."

There are two limitations in this very broad provision which deserve notice. One is that the offices, stations,

landings and points, not named in the schedule, to and from which the Postmaster General was permitted to establish service, were to be *like* those named in the schedule, and the other is that the substituted service was to be such that the method of fixing pay in the original contract could be applied to it. Now it is clear to us that the substituted route did not establish a route to like stations and points. The findings give the two schedules and we reproduce them in the margin.[1] An examination

[1] *Route No. 445004. (Mileage basis)—Regulation screen-wagon service at St. Louis, Mo.—Mail-station service.*

From—	By—	To—	Distance.	Number of trips daily except Sunday (306).	Number of trips on Sunday.	Total number of trips holidays (7).	Running time.
			Miles.				*Min.*
Circuit No. 1: Post Office (new site).	Central Station (old post office).	Post office (new site) and 4 stops per trip en route to receive mail collections from letter carriers.	2.00	23	5	5	25
Circuit No. 2: Post Office (new site).	Cupples and Merchants stations.	Post office (new site) and 1 stop per trip en route to receive mail collections from letter carriers.	2.60	9	5	5	30
Circuit No. 3: Post Office (new site).	Progress and Bridge stations.	Post office (new site) and 7 stops per trip en route to receive mail collections from letter carriers.	3.00	9	5	5	30
Circuit No. 4: Post Office (new site).	Cupples and Merchants stations.	Post office (new site) and 6 stops per trip en route to receive mail collections from letter carriers.	2.80	11	0	0	30
Circuit No. 5: Post Office (new site).	Merchants and Central (old post office) stations.	Post office (new site) and 2 stops per trip en route to receive mail collections from letter carriers.	2.80	11	0	0	30
Circuit No. 6: Post Office (new site).	Bridge and Progress stations.	Post office (new site) and 2 stops per trip en route to receive mail collections from letter carriers.	3.00	11	0	0	30
Circuit No. 7: Post Office (new site).	Progress Station.	Post office (new site) and 5 stops per trip en route to receive mail collections from letter carriers.	2.20	11	0	0	30

(*Footnote continued on p. 66.*)

shows that the one was a light service of circuits from the Post Office and back again to take up collections from

(*Footnote continued from p. 65.*)

"POSTOFFICE DEPARTMENT,
"SECOND ASSISTANT POSTMASTER GENERAL,
"*Washington, June 30, 1911.*

"POSTMASTER, *St. Louis, Mo.*

"SIR: An order has been issued to-day on route No. 445004, screen-wagon service at St. Louis, Mo., restating the service from July 1, 1911, making total annual travel 57,679.60 miles and pay $18,265.61 per annum, being pro-rata of original contract price.

From—	To—	Length of trip, miles.	No. of trips daily except Sundays and holidays (306).	No. of trips on Sunday (52).	Additional trips a week (52).
GPO	Union Depot	1.18	71 71. Holidays (7).	37	4
Union Depot	GPO	1.18	32 32. Holidays (7).	25	2
GPO	United Rys. of St. Louis (8th and Market)	0.21	29 23. Holidays (7).	6	.....
United Rys. of St. Louis (8th and Market)	GPO	0.21	31 12. Holidays (7).	4	.....
GPO	United Rys. of St. Louis (8th and Locust)	0.09	.....	.....	.....
United Rys. of St. Louis (8th and Locust)	GPO	0.09	8 3. Holidays (7).	1	.....
GPO	Cupples Sta	0.50	10 5. Holidays (7).	.....	.....
Cupples Sta	GPO	0.50	10 5. Holidays (7).	.....	.....
GPO	Merchants Sta	0.50	9 4. Holidays (7).	.....	.....
Merchants Sta	GPO	0.50	9 5. Holidays (7).	.....	.....
GPO via Merchants Sta.	Bridge Sta	0.76	2 1. Holiday (7).	.....	.....
Bridge Sta. via Merchants Sta.	GPO	0.76	1	.....	.....
GPO	Bridge Sta	0.60	3 2. Holidays (7).	.....	.....
Bridge Sta	GPO	0.60	.....	.....	.....
GPO	Progress	0.70	1. Holiday (7). 8 4. Holidays (7).	.....	.....
Progress	GPO	0.70	5 3. Holidays (7).	.....	.....
Progress Sta	Annex Sta	0.60	2	.....	.....
Merchants Sta. via Bridge Sta.	GPO	0.76	2 2. Holidays (7).	.....	.....
18th and Olive (345001)	Annex Sta	0.50	3	.....	.....
18th and Clark (345001)	Annex Sta	0.09	2	.....	.....

"Respectfully,

"(Signed) JOSEPH STEWART,
"*Second Assistant Postmaster General.*"

letter carriers. The other was the heavy work of transporting all the arriving and departing mail of the city from the railway stations to the old Post Office and back again. On the one, the contractors received pay for every mile traveled. On the other, the pay was made dependent on the carriage of mail and no empty trips of going or returning were included in the mileage paid for although the schedule made many of them necessary. It is impossible, therefore, save by forcing, to adapt the rate per mile of one route to the other. What has been said shows how different was the equipment needed, how variant the tonnage carried, what disparity between the hours of readiness required, and the differing methods of calculating compensation. This substituted route was undoubtedly necessary in the transportation of mails in the City of St. Louis, but it was for a different purpose from that of the original route. The Department merely took advantage of general words in the appellants' contract to meet an emergency presented by the delay in finishing the new Post Office and the refusal of another contractor to continue this indispensable service beyond his term, to thrust this entirely new task upon the appellants here.

It is sought in the argument for the Government to distinguish this case from the *Stage Company Case* and the *Hunt Case,* on the ground that in them the compensation was for a lump sum, and the new work required was not to be paid for at all, while here the additional or variant work was to be done at a rate of so many cents per mile. We do not think this is a real difference. The radical change made in the character of the work to be done on the substituted route and the wholly inadequate price to be paid for it as found by the Court of Claims make the injustice just as clear as in the cited cases. We hold that the substitution of the new route and schedule for the one bid upon was not within the terms of the contract.

But it is said that, in view of the attitude of the Government, the conduct of the contractors constituted such an acceptance of the new route as within the original contract as to rebut any implication of a different contract for a reasonable price on the part of the Government. Consideration of this argument requires a review of the circumstances. The findings show that the advertisement for bids referred bidders to the city postmaster for any additional information concerning the matter, and that he advised these contractors when they doubted whether they could get their equipment ready by July 1st, that the new Post Office could not be completed at that time, that the work bid for could not begin then, and that the Department would take care of the situation. They, thereupon, made their bid, accompanying it as required with a bond for $25,000. The bid was accepted by the Department with a special notice as to the necessity of being ready with equipment July 1st, and enclosing the contract. The city postmaster being applied to again by the anxious bidders, assured them that the matter would be adjusted in due time and urged them to sign the contract. Accordingly, on May 22nd, the contractors signed and, on May 23rd, forwarded the contract to the Department with a request for extension of time. This was denied, and on application to the Department June 20th for relief because of the assurance of the postmaster, they were told that they would be given a substituted route then in the course of preparation. They objected that they could not prepare for this substituted route which as already said was a mere continuance of old service by another contractor. They were told that they must be ready for the restated route at the time appointed and on June 30th they were furnished with a schedule of the new service. The contractors protested to the Second Assistant Postmaster General, to the postmaster at St. Louis and to one Porter, a representative of the Department at

St. Louis, saying that they were not required to perform this service by the terms of the contract because it was entirely different from that contemplated; and that they would be ruined financially. Porter, whose authority is not otherwise shown, told them that his business was to see that the service commenced on July 1st, and if they did not begin, the contract would be readvertised and they would be sued on their bond. The contractors then hired the equipment and outfit of the old contractor, with the result already stated that they lost $19,500 in 16 months.

We think that there was no acceptance of the new route under the circumstances which would bar a recovery for what the services were reasonably worth. The *Hunt Case* was not a stronger case than this; and in the *Stage Company Case* the right to recover for work not properly and legally included in the contract was not even questioned, although in both cases the work demanded was done and periodical payments accepted. It is said on behalf of the Government that those cases are to be distinguished from this because the contractor was in the midst of his work under his contract and he could not be expected to throw it up with all the uncertainties and certain losses he would sustain, while here the contractors had not begun work or extended preparation. But while the cases are different, the difficulties faced by the contractors here were quite as formidable. They had been nursed into making the bid and giving the bond by the assurance as to the possible date of beginning the contract by the postmaster to whom they had been officially referred for information. They thus became bound under their bond to sign and complete the contract before they had been otherwise advised as to the actual date when their service would begin. At the time the contract was executed, the Department had formed the purpose to thrust on the contractors this burdensome route; but it

did not advise them of it until ten days before July 1st, and, indeed, did not give them the exact schedule until the day before they were to begin it. Then the only course open to them was either to engage the old contractor's equipment at a heavy loss or throw up the original contract and run the risk of the Government's reletting at a higher bid and charging the possible heavy difference in cost to it against them on their bond for a five-year contract. We can not ignore the suggestion of duress there was in the situation or the questionable fairness of the conduct of the Government, aside from the illegality of the construction of the contract insisted on, and have no difficulty, therefore, in distinguishing this case from the so-called *Railroad Mail Cases* (*Eastern R. R. Co.* v. *United States,* 129 U. S. 391; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States,* 198 U. S. 385; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 225 U. S. 640; *New York, New Haven & Hartford R. R. Co.* v. *United States,* 251 U. S. 123; and *New York, New Haven & Hartford R. R. Co.* v. *United States,* 258 U. S. 32), which are cited on behalf of the United States.

We think that the contractors are entitled to recover the reasonable value of their services for the 16 months including a fair profit.

This relieves us of considering the conclusion reached by the Court of Claims.

The judgment is reversed, the cross appeal of the United States is dismissed, and the case is remanded to the Court of Claims, with directions to find the value of the services rendered by appellants on the substituted or restated route including a fair profit, and to enter judgment for the balance found due.

Reversed.

NATIONAL UNION FIRE INSURANCE COMPANY *v.* WANBERG.

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

No. 32. Submitted October 6, 1922.—Decided November 13, 1922.

1. The law of North Dakota (Comp. Laws 1913, § 4902), providing that every insurance company engaged in the business of insuring against loss by hail in that State, shall be bound, and the insurance shall take effect, from and after twenty-four hours from the taking of an application therefor by a local agent of the company, and requiring such a company, if it would decline the insurance upon receipt of the application, forthwith to notify the applicant and the agent by telegram,—does not deprive such companies of their liberty of contract, and so of their property, without due process of law, or deny them the equal protection of the laws. P. 73.
2. The public interest arising from sudden and localized losses of crops inflicted by hail in North Dakota, and the high rate of insurance for such risks, as well as other distinctions, justify special legislative treatment of this kind of insurance. P. 74.
3. The fact that the time requirements of the statute may bear more heavily upon foreign than upon local insurance companies, is a circumstance incident to the conduct of business in the State, of which a foreign company cannot complain. P. 75.
4. The statute does not force the company to contract, since it does not compel acceptance of applications or deny the right to require prepayment of premium, or the right to cancel insurance in the usual way; the time allowed for rejecting applications, though short, is not unreasonable, under the circumstances; nor is the company left without means of distributing its risks in locality, so as to avoid disastrous losses from particular storms. P. 76.
5. The statute being valid, an applicant's agreement that his application shall not take effect until received and accepted at the company's agency, is void, and does not bind him. P. 77.

46 N. Dak. 369, affirmed.

ERROR to a judgment of the Supreme Court of North Dakota affirming a recovery upon a contract of hail insurance.

Mr. Nathan H. Chase and *Mr. William H. Barnett* for plaintiff in error.

Mr. W. B. Overson and *Mr. William G. Owens* for defendant in error.

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

This is a writ of error to the Supreme Court of North Dakota, brought to reverse its judgment affirming one of the District Court of William County of that State for $1,254.25, with interest and costs, upon a contract of hail insurance, against the National Union Fire Insurance Company, a corporation of Pennsylvania. The judgment rests for its validity on § 4902 of the Compiled Laws of North Dakota, 1913, as follows:

"Every insurance company engaged in the business of insuring against loss by hail in this State, shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and hour the application for such insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of the application, it shall forthwith notify the applicant and agent who took the application, by telegram, and in that event, the insurance shall not become effective. Provided, that nothing in this article shall prevent the company from issuing a policy on such an application and putting the insurance in force prior to the expiration of said twenty-four hours."

The facts as stipulated were:

At ten o'clock in the forenoon of July 12, 1917, Wanberg on his farm at Tioga in North Dakota, signed and delivered to Everson, the agent of the defendant company, an application on the blank furnished by the company for insurance on his crops in the sum of $1,400 against loss or damage by hail or any other cause, except

fire, floods, winter kill or failure of insured to use good husbandry. He also paid to Everson the premium of $140. Everson had authority as agent only to solicit and receive such applications and the premium therefor and to transmit them to the company's western office at Waseca, Minnesota, where applications were acted upon and policies issued. The company was duly licensed under the laws of North Dakota to transact its business in the State. On the afternoon of July 13, 1917, Everson mailed the application with the premium less commission to the office at Waseca, where it arrived on Sunday, July 15th, and was delivered on Monday the 16th. In the meantime, at six o'clock in the evening of July 14th, a hail storm injured Wanberg's growing crops to the extent of the amount of the judgment. On Tuesday, July 17th, and without knowledge of the loss, the Waseca agency returned the application and premium to Everson saying that at that late date it would not be accepted. The application contained a provision that it should take effect from the day it was received and accepted, as evidenced by the issuance of a policy thereon at the Waseca, Minnesota, agency for the company.

The only error we can consider which was duly reserved is that § 4902 as applied to this case violates the Fourteenth Amendment in that it operates to deprive the company of liberty of contract, and therefore of its property, without due process of law, and of the equal protection of the laws.

The decision of this Court in *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389, settled the right of a state legislature to regulate the conduct by corporations, domestic and foreign, of insurance as a business affected with a public interest. This includes provision for " unearned premium fund or reserve; . . . the limitation of dividends, the publishing of accounts, valued policies, standards of policies, prescribing investment, requiring

deposits in money or bonds, confining the business to corporations, preventing discrimination in rates, limitation of risks and other regulations equally restrictive." (233 U. S. 412.) It includes moreover the restrictions of defense to recovery on policies and the forbidding of stipulations to evade such restrictions. *Orient Insurance Co.* v. *Daggs,* 172 U. S. 557; *Whitfield* v. *Aetna Life Insurance Co.,* 205 U. S. 489. But it is said the line of possible and valid regulation has here been passed by affirmatively imposing a contract on an insurance company before it has had a chance to consider the circumstances and decide that it wishes to make it, indeed, that it declares that to be an agreement with heavy obligation which is in fact no agreement at all. Thus it is argued that by this statute mandatory obligation is substituted for freedom of contract, which is just that against which the Fourteenth Amendment was intended to secure persons. We agree that this legislation approaches closely the limit of legislative power, but not that it transcends it. The statute treats the business of hail insurance as affected with a public interest. In that country, where a farmer's whole crop, the work and product of a year, may be wiped out in a few minutes, and where the recurrence of such manifestations of nature is not infrequent, and no care can provide against their destructive character, it is of much public moment that agencies like insurance companies to distribute the loss over the entire community should be regulated so as to be effective for the purpose. The danger and loss to be mitigated are possible for a short period. The storms are usually fitful and may cover a comparatively small territory at a time, so that, of two neighbors, one may have a total loss and the other may escape altogether. The risk justifies a high rate of insurance. It differs so much in these and other respects from other insurance that it may properly call for special legislative treatment. The statute applies to all companies engaged

in such insurance. There is no discrimination and no denial of the equal protection of the laws. The fact that the time requirements of the statute may bear more heavily on foreign companies whose principal offices may be far removed than upon those whose headquarters are within the State is a circumstance necessarily incident to their conduct of business in another State of which they can not complain. They can not expect the laws of the State to be bent to accommodate them as a matter of strict legal right, however wise it may be for a legislature to give weight to such a consideration in securing the use of foreign capital for its people. Moreover, as the business of such insurance companies is purely intrastate, *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, the State has power to require them to accept conditions different from those imposed on domestic corporations (*Paul* v. *Virginia,* 8 Wall. 168; *Hooper* v. *California,* 155 U. S. 648, and cases cited) though this is not, of course, unlimited. *Terral* v. *Burke Construction Co.,* 257 U. S. 529, 532, 533.

The legislature was evidently convinced that it would help the public interest if farmers could be induced generally to take out hail insurance and "temper the wind" so injurious to the agriculture of the State, and that they would be more likely to avail themselves of this protection if they could effect the insurance promptly and on the eve of the danger. The legislature said, therefore, to companies intending to engage in hail insurance, "To accomplish our purpose we forbid you to engage in this kind of business unless you agree to close your contracts within twenty-four hours after application is made. You must so extend the scope of the authority of your local agents, or must so speed communication between them and your representatives who have authority, as to enable an applicant to know within the limits of a day whether he is protected, so that, if not, he may at once go to

another company to secure what he seeks. If, therefore, you engage in this exigent business, and allow an application to pend more than twenty-four hours, you will be held to have made the contract of insurance for which the farmer has applied."

This does not force a contract on the company. It need not accept an application at all or it can make its arrangements to reject one within twenty-four hours. It is urged that no company, to be safe and to make the business reasonably profitable, can afford to place more than a certain number of risks within a particular section or township, and that what is called " mapping " must be done to prevent too many risks in one locality and to distribute them so that the company may not suffer too heavily from the same storm. Applications are often received by agents in different towns for the crops in the same section or township, so that, if local agents were given authority finally to accept applications, this " mapping," essential to the security of the company in doing the business at all, would be impossible. It seems to us that this is a difficulty easily overcome by appointing agents with larger territorial authority and sub-agents near them, or by the greater use of the telegraph or telephone in consulting the home office or more trusted local agencies. While the time allowed is short, we can not say that it is unreasonable in view of the legitimate purpose of the legislation and the possibilities of modern business methods.

There is nothing in the statute under discussion which requires a company to receive applications or prevents it from insisting on the payment of a premium in advance before receiving them, or from reserving the usual right on the part of the insurer at any time to cancel the contract of insurance on service of due notice with a return of a proper proportion of the premium. Not infrequently companies in their own interest in some kinds of insurance, entrust to local insurance agents authority to bind

their principals temporarily until the application can be examined and approved by the head office. The statute here in question has been in force since 1913, and it does not seem to have driven companies out of the hail insurance business, an indication that they are able profitably and safely to adjust themselves and their methods to its requirements. Whether it is wise legislation is not for us to consider. All we have to decide, and that we do decide, is that it is not so arbitrary or unreasonable as to deprive those whom it affects of their property or liberty without due process of law.

It is pointed out on behalf of the company that the very application which the defendant in error signed contained an express consent that the policy should not take effect until the company's agency at Waseca, Minnesota, should have an opportunity to examine it and should accept it. It is clear that if the statute is valid such a consent is void because it defeats the very object of the statute. This is settled by *Whitfield* v. *Aetna Life Insurance Co.*, 205 U. S. 489, and *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, already cited.

The judgment of the Supreme Court of North Dakota is

Affirmed.

BREWER-ELLIOTT OIL & GAS COMPANY ET AL. *v.* UNITED STATES ET AL.

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

No. 52. Argued October 12, 13, 1922.—Decided November 13, 1922.

1. Where an act of Congress setting apart and confirming a reservation to the Osage Indians, out of lands formerly occupied but ceded by the Cherokees, described the west boundary as "the main channel of the Arkansas River," and a deed to the United States for the Osages, made by the Cherokees in pursuance of this and

other acts and of a treaty, described the land only by whole townships, and by fractional townships "on the left bank of the Arkansas River," *held*, that the deed was to be interpreted in conformity with the act, and that the act carried title to land in the river bed out to the main channel. Pp. 82, 87.

2. Congress has power to make grants of lands below high water mark of navigable waters in a Territory, to carry out public purposes appropriate to the objects for which the United States holds the Territory. P. 83. *Shively* v. *Bowlby*, 152 U. S. 1, 47.
3. This principle was not affected as to lands within the Louisiana Purchase by the purpose, declared in the treaty with France, that statehood should ultimately be conferred on the inhabitants of the territory purchased. P. 85.
4. A navigable river is one which is used, or is susceptible of being used in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the modes customary on water. P. 86.
5. The evidence in this case affords no ground for rejecting the finding of the two courts below, that the Arkansas River, along the Osage Reservation in Oklahoma, is not, and never has been, a navigable stream. P. 86.
6. A grant of land in the bed of a non-navigable river made by the United States while holding complete sovereignty over the locality including it, cannot be divested by a retroactive rule or declaration of the State subsequently created out of that territory, classifying the river as navigable. P. 87.
7. Such a grant being attacked upon the ground that the river was navigable and its bed not subject to be granted by the United States, the question of navigability is not a local but a federal question. P. 87. *Wear* v. *Kansas*, 245 U. S. 154, distinguished.

270 Fed. 100, affirmed.

APPEAL from a decree of the Circuit Court of Appeals, affirming a decree of the District Court in favor of the United States, in a suit brought on its own behalf, and as trustee for the Osage Tribe of Indians, to cancel oil and gas leases granted the appellants by the State of Oklahoma covering land constituting part of the bed of the Arkansas River within the Osage Reservation; and to enjoin operations under the leases and quiet title in the United States as trustee.

Mr. W. A. Ledbetter, with whom *Mr. Geo. F. Short,* Attorney General of the State of Oklahoma, *Mr. S. P. Freeling, Mr. H. L. Stuart, Mr. R. R. Bell* and *Mr. E. P. Ledbetter* were on the brief, for appellants.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* was on the brief, for appellees.

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

This is an appeal from a decree of the Circuit Court of Appeals of the Eighth Circuit affirming that of the District Court for Western Oklahoma. The bill in equity was filed by the United States for itself and as trustee for the Osage Tribe of Indians, against the Brewer-Elliott Oil & Gas Company, and five other such companies, lessees, under oil and gas leases granted by the State of Oklahoma, of portions of the bed of the Arkansas River, opposite the Osage Reservation in that State. It averred that the river bed thus leased belonged to the Osages, and not to Oklahoma, and that the leases were void, that the defendants were prospecting for, and drilling for, oil in the leased lots in the river bed, and were erecting oil derricks and other structures therein, and prayed for the canceling of the leases, the enjoining of defendants from further operations under their leases, and a quieting of the title to the premises in the United States as trustee.

The State of Oklahoma intervened by leave of court and in its answer denied that the Osage Tribe or the United States as its trustee owned the river bed of which these lots were a part, but averred that it was owned by the State in fee. The other defendants adopted the answer of the State.

After a full hearing and voluminous evidence, the District Court found that at the place in question the Arkansas River was, and always had been, a non-navigable

stream, that by the express grant of the Government, made before Oklahoma came into the Union, the Osage Tribe of Indians took title in the river bed to the main channel and still had it. It entered a decree as prayed in the bill. The Circuit Court of Appeals held that, whether the river was navigable or non-navigable, the United States, as the owner of the territory through which the Arkansas flowed before statehood, had the right to dispose of the river bed, and had done so, to the Osages. It also concurred in the finding of the District Court that the Arkansas at this place was, and always had been, non-navigable, and that the United States had the right to part with the river bed to the Osage Tribe when it did so. It affirmed the decree.

The Osage Tribe derived title to their reservation from the Act of Congress of June 5, 1872, entitled "An Act to confirm to the Great and Little Osage Indians a Reservation in the Indian Territory," c. 310, 17 Stat. 228. The act with its recitals is printed in the margin.[1] The de-

[1] Chap. CCCX. An Act to confirm to the Great and Little Osage Indians a Reservation in the Indian Territory.

Whereas by the treaty of eighteen hundred and sixty-six between the United States and the Cherokee nation of Indians, said nation ceded to the United States all its lands west of the ninety-sixth meridian west longitude, for the settlement of friendly Indians thereon; and whereas by act of Congress approved July fifteenth, eighteen hundred and seventy, the President was authorized and directed to remove the Great and Little Osage Indians to a location in the Cherokee country west of the ninety-sixth meridian, to be designated for them by the United States authorities; and whereas it was provided by the same act of Congress that the lands of the Osages in Kansas should be sold by the United States, and so much of the proceeds thereof as were necessary should be appropriated for the payment to the Cherokees for the lands set apart for the said Osages west of the ninety-sixth meridian; and whereas under the provisions of the above-mentioned treaty and act of Congress and concurrent action of the authorities of the United States and the Cherokee nation, the said Osages were removed from their former

scription of the tract conveyed is "Bounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas river, and on the north by the south line of the State of Kansas."

The Act of March 3, 1873, c. 228, 17 Stat. 530, 538, directed the Secretary of the Treasury to transfer $1,650,600 from Osage funds to pay for lands purchased by the Osages from the Cherokees. The Act of March 3, 1883, c. 143, 22 Stat. 603, 624, appropriated $300,000 to be paid to the Cherokees for this and other lands on condition of their executing a proper deed. The conveyance from the Cherokees to the United States in trust for the Osages recites the Cherokee Treaty of 1866, 14 Stat. 799, the

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homes in the State of Kansas to a reservation set apart for them in the Indian Territory, at the time of the removal supposed to be west of the said ninety-sixth meridian, and bounded on the east thereby, and upon which said Osages have made substantial and valuable improvements; and whereas by a recent survey and establishment of the ninety-sixth meridian it appears that the most valuable portion of said Osage reservation, and upon which all their improvements are situated, lies east of the said meridian; and whereas it therefore became necessary to select other lands in lieu of those found to be east of the established ninety-sixth meridian for said Osage Indians; and whereas a tract has accordingly been selected, lying between the western boundary of the reservations heretofore set apart for said Indians and the main channel of the Arkansas river, with the south line of the State of Kansas for a northern boundary, and the north line of the Creek country and the main channel of the Arkansas river for a southern and western boundary; and whereas the act of Congress approved July fifteenth, eighteen hundred and seventy, restricts the said reservation for said Osage Indians to "a tract of land in compact form equal in quantity to one hundred and sixty acres for each member of said tribe"; and whereas in a letter of the Cherokee delegation, addressed to the Secretary of the Interior on the eighth day of April, eighteen hundred and seventy-two, on behalf of the Cherokee nation, containing their approval of and assent to the proposition to provide for the settlement of the Osage and Kaw

Acts of June 5, 1872, March 3, 1873, and March 3, 1883, and conveys to the United States the tract of country described in the Act of June 5, 1872, except that, instead of its being bounded by the main channel of the Arkansas River, it is described as townships and fractional townships, "the fractional townships being on the left bank of the Arkansas River." The deed purports to be executed under authority of an act of the Cherokee Nation, which directed a deed under the Act of March 3, 1883, requiring conveyance, satisfactory to the Secretary of the Interior, to the United States in trust for the Osages now occupying said tract, " as they occupy the same."

We have no doubt that the title to the river bed is to be determined by the language of the Act of June 5, 1872,

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Indians on that portion of the Cherokee country lying west of the ninety-sixth degree west longitude, south of Kansas, east and north of the Arkansas river: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to provide said Osage tribe of Indians with a reservation, and secure to them a sufficient quantity of land suitable for cultivation, the following-described tract of country, west of the established ninety-sixth meridian, in the Indian Territory, be, and the same is hereby, set apart for and confirmed as their reservation, namely: Bounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas river, and on the north by the south line of the State of Kansas: *Provided,* That the location as aforesaid shall be made under the provisions of article sixteen of the treaty of eighteen hundred and sixty-six, so far as the same may be applicable thereto: *And provided further,* That said Great and Little Osage tribe of Indians shall permit the settlement within the limits of said tract of land [of] the Kansas tribe of Indians, the lands so settled and occupied by said Kansas Indians, not exceeding one hundred and sixty acres for each member of said tribe, to be paid for by said Kansas tribe of Indians out of the proceeds of the sales of their lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee nation of Indians.

Approved, June 5, 1872.

and that the meaning of the Cherokee deed is to be interpreted not as if its words stood alone but in the light of the acts of Congress in pursuance of which it was made, and especially of the Act of 1872, under which the Osages took possession, and which was enough to vest in them good title to the land described therein without the deed of 1883. *Choate* v. *Trapp,* 224 U. S. 665, 673; *Jones* v. *Meehan,* 175 U. S. 1, 10; *Francis* v. *Francis,* 203 U. S. 233, 237, 238.

Coming then to consider the effect of the words of the Act of 1872 in bounding the Osage reservation by "the main channel of the Arkansas river," we are met by the argument that the United States had no power to grant the bed of the Arkansas River, a navigable stream, to the Indians, because it held title to it only in trust to convey it to the States to be formed out of the Louisiana Purchase which when admitted to the Union must, in order to be equal in power to the other States, be vested with sovereign rights over the beds of navigable waters and streams. The case of *Pollard's Lessee* v. *Hagan,* 3 How. 212, is cited to sustain this proposition. That was a case where a Spanish claimant of land under navigable waters in Alabama, seeking to establish title against the State, relied on a confirmation of an invalid Spanish grant by the United States enacted after Alabama became a State. Such a confirmation was held to be ineffective against the sovereign title of the State. The language of Mr. Justice McKinley, who spoke for the Court, fully sustains the argument made here that, even before statehood, the United States was without power to convey title to land under navigable water and deprive future States of their future ownership. Such a view was not necessary, however, to the case before the Court, and has since been qualified by the Court through Chief Justice Taney in *Goodtitle* v. *Kibbe,* 9 How. 471, 478. *Ward* v. *Race Horse,* 163 U. S. 504, relied on by counsel for appellants,

does not sustain their contention. The gist of the Court's holding there was that a right to hunt upon the unoccupied lands of the United States so long as game might be found thereon, granted by the United States in an Indian treaty made before the statehood of Wyoming, was not to be construed as intended to continue thereafter or to give immunity from the Wyoming game laws.

The whole subject has been clarified after the fullest examination of all the authorities in a most useful opinion by Mr. Justice Gray, speaking for the Court in *Shively* v. *Bowlby,* 152 U. S. 1. On page 47 the learned Justice says:

"VIII. Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true."

And he then reviews the cases and thus states the Court's conclusion (pp. 48, 49):

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

"IX. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek. . . .

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in

order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community."

We do not think the declared purpose of the Louisiana Purchase Treaty with France that statehood should be ultimately conferred on the inhabitants of the territory purchased, relied on by the appellants, varies at all the principles to be applied in this case. They are the same in respect to territory of the United States whether derived from the older States, Spain, France or Mexico. If the Arkansas River were navigable in fact at the *locus in quo,* the unrestricted power of the United States, when exclusive sovereign, to part with the bed of such a stream for any purpose, asserted by the Circuit Court of Appeals, would be before us for consideration. If that could not be sustained, a second question would arise whether vesting ownership of the river bed in the Osages was for "a public purpose appropriate to the objects for which the United States hold the Territory," within the language of Mr. Justice Gray in *Shively* v. *Bowlby,* above quoted.

We do not find it necessary to decide either of these questions, in view of the finding as a fact that the Arkansas is and was not navigable at the place where the river bed lots, here in controversy, are.

A navigable river in this country is one which is used, or is susceptible of being used in its ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. It does not depend upon the mode by which commerce is conducted upon it, whether by steamers, sailing vessels or flat boats, nor upon the difficulties attending navigation, but upon the fact whether the river in its natural state is such that it affords a channel for useful commerce. *Oklahoma* v. *Texas,* 258 U. S. 574; *Economy Light & Power Co.* v. *United States,* 256 U. S. 113; *The Montello,* 20 Wall. 430; *The Daniel Ball,* 10 Wall. 557, 563. Voluminous testimony was introduced in the District Court upon the issue of navigability. That court considered it all with evident care and had no difficulty in reaching the conclusion that the Arkansas River along the Osage Reservation was not, and had never been, navigable within the adjudged meaning of that term, and that the head of navigation is and was the mouth of the Grand River, near which was Fort Gibson, and this is a number of miles below the Reservation. The Circuit Court of Appeals reviewed this finding and fully concurred in its correctness. Neither the argument nor the record discloses any ground which can overcome the weight which the findings of two courts must have with us. *Washington Securities Co.* v. *United States,* 234 U. S. 76, 78; *Texas & Pacific Ry. Co.* v. *Louisiana R. R. Commission,* 232 U. S. 338; *Chicago Junction Ry. Co.* v. *King,* 222 U. S. 222, 224; *Dun* v. *Lumbermen's Credit Association,* 209 U. S. 20, 24. It is a natural inference that Congress in its grant to the Osage Indians in 1872 made it extend to the main channel of the river, only

because it knew it was not navigable. This would be consistent with its general policy. Rev. Stats., § 2476; *Oklahoma* v. *Texas,* 258 U. S. 574; *Scott* v. *Lattig,* 227 U. S. 229, 242; *Railroad Company* v. *Schurmeir,* 7 Wall. 272, 289. If the Arkansas River is not navigable, then the title of the Osages as granted certainly included the bed of the river as far as the main channel, because the words of the grant expressly carry the title to that line.

But it is said that the navigability of the Arkansas River is a local question to be settled by the legislature and the courts of Oklahoma, and that the Supreme Court of the State has held that at the very point here in dispute, the river is navigable. *State* v. *Nolegs,* 40 Okla. 479. A similar argument was made for the same purpose in *Oklahoma* v. *Texas, supra,* based on a decision by the Supreme Court of Oklahoma as to the Red River. *Hale* v. *Record,* 44 Okla. 803. The controlling effect of the state court decision was there denied because the United States had not been there, as it was not here, a party to the case in the state court. *Economy Light & Power Co.* v. *United States,* 256 U. S. 113, 123. In such a case as this the navigability of the stream is not a local question for the state tribunals to settle. The question here is what title, if any, the Osages took in the river bed in 1872 when this grant was made, and that was thirty-five years before Oklahoma was taken into the Union and before there were any local tribunals to decide any such questions. As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the Federal Government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and, if the bed of a non-navigable stream had then become the property

of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other States which required or permitted a divesting of the title. It is not for a State by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked.

It is true that, where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the public land laws may be determined according to local rules; but this is subject to the qualification that the local rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee. Thus the right of the riparian owner under such grant may be limited by the law of the State either to high or low water mark or extended to the middle of the stream. *Packer* v. *Bird,* 137 U. S. 661, 669.

We said in *Oklahoma* v. *Texas,* 258 U. S. 574, 594:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies. Where it is disposing of tribal land of Indians under its guardianship the same rules apply."

In government patents containing no words showing purpose to define riparian rights, the intention to abide the state law is inferred. Mr. Justice Bradley, speaking for the Court in *Hardin* v. *Jordan,* 140 U. S. 371, 384, said:

"In our judgment the grants of the government for lands bounded on streams and other waters, without reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

Some States have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river, granted and vesting before statehood, depends for its validity on non-navigability of the stream in fact. In such a case, navigability *vel non* is not a local question. In *Wear* v. *Kansas,* 245 U. S. 154, upon which the appellants rely, the patent of the United States under which Wear derived title was a grant, made before statehood, of land bordering on the Kansas River without restriction, reservation or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on a navigable stream did not convey the bed of the river. The United States by its unrestricted patent was properly taken to have assented to its construction according to the local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a non-navigable stream, was immaterial. In either view the result there would have been the same. The case of *Donnelly* v. *United States,* 228 U. S. 243, is to be similarly distinguished, if, indeed, it can be said after the qualification of the opinion, 228 U. S. 708, 711, to require distinguishing.

The decree of the Circuit Court of Appeals is affirmed.

RYAN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 64. Argued October 16, 1922.—Decided November 13, 1922.

1. Under §§ 2733 and 2737, Rev. Stats., and the Act of March 3, 1881, c. 132, 21 Stat. 429, the Secretary of the Treasury was authorized to appoint inspectors of customs, at New York, at $4.00 per day. P. 91.
2. The Act of December 16, 1902, c. 2, 32 Stat. 753, authorized the Secretary to increase the per diem of such inspectors $1.00 but did not require it; nor did the appropriation acts of June 30, 1906, c. 3912, 34 Stat. 636, and March 4, 1907, c. 2919, *id.* 1373, make such increase mandatory. P. 92.

56 Ct. Clms. 103, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for additional pay as a customs inspector.

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

Mr. Assistant Attorney General Lovett, with whom *Mr. Solicitor General Beck* and *Mr. Harvey B. Cox* were on the brief, for the United States.

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

Ryan, the claimant and appellant, by his amended petition in the Court of Claims, sought to recover from the United States $3,465, being $1.00 per diem from April 16, 1910, to and including October 10, 1919. He was during that period a customs inspector at New York, and received $4.00 per day. He says that by law he was entitled to $5.00 per day, and he brings suit to recover the difference. The Court of Claims gave judgment for the Government. The question for our decision is what was

Ryan's lawful compensation during this period of nine and a half years.

Ryan entered the customs service as a probationary junior clerk, Class C, in 1899, after passing a civil service examination. He was promoted from one place to another in the service until as the result of a promotion examination he became inspector, Class 2, at $4.00 a day, and executed an oath as such on April 16, 1910. This appointment was made in pursuance of authority granted by the Secretary of the Treasury to the Collector at New York to appoint three inspectors of customs at $4.00 a day, Class 2. By the same authority 22 more inspectors of the same class were appointed before July 1, 1910. On that day, the Collector at New York, with the approval of the Secretary, effected a reorganization by which 74 inspectors were appointed to Class 2, at $4.00 a day—296 to Class 4 at $5.00 per day, and 52 to Class 5, at $6.00 per day. The appointment of the claimant and others in April, 1910, as inspectors of Class 2, $4.00 per day, marked their entrance into the service, and they were not reappointed under the reorganization but remained as inspectors of Class 2 under their original appointments.

Was this appointment of Ryan at $4.00 a day authorized by law? Section 2733, Rev. Stats., provides that each inspector of customs shall receive for every day he shall be actually employed in aid of customs, $3.00. Section 2737 provides that the Secretary of the Treasury may increase the compensation of inspectors of customs in such ports as he may think it advisable so to do, and may designate, by adding to the present compensation of such officers, a sum not exceeding $1.00 a day. By Act of March 3, 1881, c. 132, 21 Stat. 429, the Secretary was given authority to appoint inspectors of customs at a compensation less than $3.00 per day when in his judgment the public service would permit. There is certainly nothing in the foregoing provisions, still in force, which prevented

the Secretary from appointing inspectors in New York at $4.00 a day. By virtue of this authority, before 1902, he had increased the pay of all inspectors at New York to $4.00.

By Act of December 16, 1902, c. 2, 32 Stat. 753, the Secretary was authorized to increase the compensation of inspectors of customs at the port of New York as he might think advisable and proper by adding to their then compensation a sum not exceeding $1.00 per day, such additional compensation to be for work performed at unusual hours for which no compensation was then allowed, and as reimbursement of expenses for meals and transportation while in the performance of official duties. Under the foregoing, in 1903, the Secretary increased the pay of inspectors then in office in New York to $5.00 per day, Class 4. The Act of 1902 is wholly permissive in its language. It does not require an increase of $1.00 a day or any part of it to inspectors in New York. It only authorizes it.

It is contended, however, that the Act of 1902 has been construed by Congress in two deficiency appropriation acts to be mandatory and to require that all inspectors appointed in New York shall receive $5.00 a day. The acts relied on are that of June 30, 1906, c. 3912, 34 Stat. 634, 636, and that of March 4, 1907, c. 2919, 34 Stat. 1371, 1373. In substantially the same language they appropriated money to pay inspectors of the port of New York "the difference between the per diem salary of four dollars paid them during the months of October, November, and December, nineteen hundred and five, and their proper per diem salary for the same period (five dollars per diem), in accordance with the Act of Congress approved December sixteenth, nineteen hundred and two." These deficiency appropriations related to 331 inspectors at New York whose pay had been fixed at $5.00 a day under the Act of 1902, prior to October 1, 1905, and which on that

date was reduced by the Secretary of the Treasury to $4.00. On January 1, 1906, their pay was increased again to $5.00.

It would be straining provisions of a deficiency act applying to special instances to hold that it was intended to change a plainly permissive statute into a mandatory one. The much more natural interpretation of the language used is that Congress thought that the pay of these inspectors which had been increased to $5.00 a day under the Act of 1902 by the Secretary, had thus become fixed by law and so that the Secretary had no power to reduce them. This fully satisfies the words relied on without amending the statute or making it mean what it plainly does not mean.

Counsel for appellant press upon the Court, also, its decision in *Cochnower* v. *United States,* 248 U. S. 405, as a basis for recovery here. In that case, the claimant, a customs inspector in New York, had been, with all his fellows, advanced to $5.00 a day (Class 4), under the Act of 1902. The Secretary had, thereafter, reduced him and his fellows to $4.00 a day (Class 2), and counsel for the Government asserted authority to do this under the Act of March 4, 1909, c. 314, 35 Stat. 1065, by which the Secretary was empowered to "increase and fix the compensation of inspectors of customs, as he may think advisable, not to exceed in any case the rate of six dollars per diem." The Court held that authority to increase did not give authority to decrease, and that as the pay of the inspectors in that case had been fixed at $5.00, it was the legal pay and they could recover the balance due. The Court took the same view which before the Act of 1909 Congress seemed to have taken in the deficiency acts we have just discussed. Neither the language of Congress in the deficiency acts nor the *Cochnower Case* has any application to the one before us, because here the claimant entered the service as a new appointee at $4.00 a day

(Class 2), which, as we have seen, the Secretary had full authority to fix, and his pay was not increased during the period for which he seeks recovery.

This conclusion makes it unnecessary for us to consider any other question in the record.

Affirmed.

UNITED STATES *v.* BOWMAN.

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

No. 69. Argued October 17, 1922.—Decided November 13, 1922.

1. A criminal statute dealing with acts that are directly injurious to the Government and are capable of perpetration without regard to particular locality, and subjecting all who commit them to punishment, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect. P. 97.
2. Section 35 of the Criminal Code, as amended October 23, 1918, c. 194, 40 Stat. 1015, is applicable to citizens of the United States who, on the high seas, or in a foreign country, conspired to defraud the United States Shipping Board Emergency Fleet Corporation, of which the United States was the stockholder, by obtaining and aiding to obtain the allowance and payment of a false and fraudulent claim against the Corporation, and who, in a foreign country, made and caused such claim to be made. P. 100.
3. Penal statutes should be fairly construed, according to the legislative intent. P. 102.
4. Citizens of the United States while in a foreign country are subject to penal laws passed by the United States to protect itself and its property, and for infractions abroad are triable, under Jud. Code, § 41, in the district where they are first brought. P. 102.

287 Fed. 588, reversed.

ERROR to a judgment of the District Court quashing an indictment on demurrer.

Mr. Solicitor General Beck with whom *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, was on the brief, for the United States.

No appearance for defendant in error.

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

This is a writ of error under the Criminal Appeals Act (c. 2564, 34 Stat. 1246) to review the ruling of the District Court sustaining a demurrer of one of the defendants to an indictment for a conspiracy to defraud a corporation in which the United States was and is a stockholder, under § 35 of the Criminal Code, as amended October 23, 1918, c. 194, 40 Stat. 1015.

During the period covered by the indictment, i. e., between October, 1919, and January, 1920, the steamship Dio belonged to the United States. The United States owned all the stock in the United States Shipping Board Emergency Fleet Corporation. The National Shipping Corporation agreed to operate and manage the Dio for the Fleet Corporation, which under the contract was to pay for fuel, oil, labor and material used in the operation. The Dio was on a voyage to Rio de Janeiro under this management. Wry was her master, Bowman was her engineer, Hawkinson was the agent of the Standard Oil Company at Rio de Janeiro, and Millar was a merchant and ship repairer and engineer in Rio. Of these four, who were the defendants in the indictment, the first three were American citizens, and Millar was a British subject. Johnston & Company were the agents of the National Shipping Corporation at Rio. The indictment charged that the plot was hatched by Wry and Bowman on board the Dio before she reached Rio. Their plan was to order, through Johnston & Company, and receipt for, 1000 tons of fuel oil from the Standard Oil Company, but to take only 600 tons aboard, and to collect cash for a delivery of 1000 tons through Johnston & Company, from the Fleet Corporation, and then divide the money paid for the undelivered 400 tons among the four defendants. This

plan was to be, and was, made possible through the guilty connivance of the Standard Oil agent Hawkinson and Millar the Rio merchant who was to, and did collect the money. Overt acts charged included a wireless telegram to the agents, Johnston & Company, from the Dio while on the high seas ordering the 1000 tons of oil. The Southern District of New York was the district into which the American defendants were first brought and were found, but Millar, the British defendant, has not been found.

The first count charged a conspiracy by the defendants to defraud the Fleet Corporation in which the United States was a stockholder, by obtaining and aiding to obtain the payment and allowance of a false and fraudulent claim against the Fleet Corporation. It laid the offense on the high seas, out of the jurisdiction of any particular State and out of the jurisdiction of any district of the United States, but within the admiralty and maritime jurisdiction of the United States. The second count laid the conspiracy on the Dio on the high seas and at the port of Rio de Janeiro as well as in the city. The third count laid it in the city of Rio de Janeiro. The fourth count was for making and causing to be made in the name of the Standard Oil Company, for payment and approval, a false and fraudulent claim against the Fleet Corporation in the form of an invoice for 1000 tons of fuel oil, of which 400 tons were not delivered. This count laid the same crime on board the Dio in the harbor of Rio de Janeiro. The fifth count laid it in the city and the sixth at the port and in the city.

No objection was made to the indictment or any count of it for lack of precision or fullness in describing all the elements of the crimes denounced in § 35 of the Criminal Code as amended. The sole objection was that the crime was committed without the jurisdiction of the United States or of any State thereof and on the high seas or

within the jurisdiction of Brazil. The District Court considered only the first count, which charged the conspiracy to have been committed on the Dio on the high seas, and having held that bad for lack of jurisdiction, *a fortiori* it sustained the demurrer as to the others.

The court in its opinion conceded that under many authorities the United States as a sovereign may regulate the ships under its flag and the conduct of its citizens while on those ships, and cited to this point *Crapo* v. *Kelly,* 16 Wall. 610, 623–632; *United States* v. *Rodgers,* 150 U. S. 249, 260–1, 264–5; *The Hamilton,* 207 U. S. 398, 403, 405; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347; *Wilson* v. *McNamee,* 102 U. S. 572, 574; *United States* v. *Smiley,* 6 Sawy. 640, 645. The court said, however, that while private and public ships of the United States on the high seas were constructively a part of the territory of the United States, indeed peculiarly so as distinguished from that of the States, Congress had always expressly indicated it when it intended that its laws should be operative on the high seas. The court concluded that because jurisdiction of criminal offenses must be conferred upon United States courts and could not be inferred, and because § 35, like all the other sections of c. 4, contains no reference to the high seas as a part of the *locus* of the offenses defined by it, as the sections in cc. 11 and 12 of the Criminal Code do, § 35 must be construed not to extend to acts committed on the high seas. It confirmed its conclusion by the statement that § 35 had never been invoked to punish offenses denounced if committed on the high seas or in a foreign country.

We have in this case a question of statutory construction. The necessary *locus,* when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a

government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. We have an example of this in the attempted application of the prohibitions of the Anti-Trust Law to acts done by citizens of the United States against other such citizens in a foreign country. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347. That was a civil case, but as the statute is criminal as well as civil, it presents an analogy.

But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense. Many of these occur in c. 4, which bears the title " Offenses

against the operations of the Government." Section 70 of that chapter punishes whoever as consul knowingly certifies a false invoice. Clearly the *locus* of this crime as intended by Congress is in a foreign country and certainly the foreign country in which he discharges his official duty could not object to the trial in a United States court of a United States consul for crime of this sort committed within its borders. Forging or altering ship's papers is made a crime by § 72 of c. 4. It would be going too far to say that because Congress does not fix any *locus* it intended to exclude the high seas in respect of this crime. The natural inference from the character of the offense is that the sea would be a probable place for its commission. Section 42 of c. 4 punishes enticing desertions from the naval service. Is it possible that Congress did not intend by this to include such enticing done aboard ship on the high seas or in a foreign port, where it would be most likely to be done? Section 39 punishes bribing a United States officer of the civil, military or naval service to violate his duty or to aid in committing a fraud on the United States. It is hardly reasonable to construe this not to include such offenses when the bribe is offered to a consul, ambassador, an army or a naval officer in a foreign country or on the high seas, whose duties are being performed there and when his connivance at such fraud must occur there. So, too, § 38 of c. 4 punishes the wilfully doing or aiding to do any act relating to the bringing in, custody, sale or other disposition of property captured as prize, with intent to defraud, delay or injure the United States or any captor or claimant of such property. This would naturally often occur at sea, and Congress could not have meant to confine it to the land of the United States. Again, in § 36 of c. 4, it is made a crime to steal, embezzle, or knowingly apply to his own use ordnance, arms, ammunition, clothing, subsistence, stores, money or other property of the United

States furnished or to be used for military or naval service. It would hardly be reasonable to hold that if any one, certainly if a citizen of the United States, were to steal or embezzle such property which may properly and lawfully be in the custody of army or naval officers either in foreign countries, in foreign ports or on the high seas, it would not be in such places an offense which Congress intended to punish by this section.

What is true of these sections in this regard is true of § 35, under which this indictment was drawn. We give it in full in the margin.[1]

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[1] Section 35 of the Criminal Code, as amended October 23, 1918, c. 194, 40 Stat. 1015, is as follows:

Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by

It is directed generally against whoever presents a false claim against the United States, knowing it to be such, to any officer of the civil, military or naval service or to any department thereof, or any corporation in which the United States is a stockholder, or whoever connives at the same by the use of any cheating device, or whoever enters a conspiracy to do these things. The section was amended in 1918 to include a corporation in which the United States owns stock. This was evidently intended to protect the Emergency Fleet Corporation in which the

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obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or willfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than $500 or imprisoned not more than two years, or both.

United States was the sole stockholder, from fraud of this character. That Corporation was expected to engage in, and did engage in, a most extensive ocean transportation business and its ships were seen in every great port of the world open during the war. The same section of the statute protects the arms, ammunition, stores and property of the army and navy from fraudulent devices of a similar character. We can not suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section.

Nor can the much quoted rule that criminal statutes are to be strictly construed avail. As said in *United States* v. *Lacher,* 134 U. S. 624, 629, quoting with approval from Sedgwick, Statutory and Constitutional Law, 2d ed., 282: "penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment." They are not to be strained either way. It needs no forced construction to interpret § 35 as we have done.

Section 41 of the Judicial Code provides that "the trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance. The other defendant is a subject of Great Britain. He has never been apprehended, and it will be time enough to consider what, if any, jurisdiction the Dis-

trict Court below has to punish him when he is brought to trial.

The judgment of the District Court is reversed, with directions to overrule the demurrer and for further proceedings.

Reversed.

ORTEGA COMPANY *v.* TRIAY, RECEIVER OF JACKSONVILLE TRACTION COMPANY.

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

No. 75. Argued October 18, 19, 1922.—Decided November 13, 1922.

1. Under legislation empowering it to make reasonable and just rates to be observed by all railroad companies and common carriers in the State, the Railroad Commission of Florida has power to authorize a railroad company to increase its fare. P. 108.
2. Section 30 of Article XVI of the Florida constitution, in investing the legislature "with full power to pass laws . . . to prevent . . . excessive charges by persons and corporations engaged as common carriers in transporting persons and property," did not by implication withhold power to authorize increases. P. 108.
3. A covenant to operate at a certain fare, made by the vendee in consideration of a sale of an electric railroad, cannot prevent a change of fare directed by public authority, acting in the public interest, under laws existing when the covenant was made.

Affirmed.

APPEAL from a decree of the District Court refusing a preliminary injunction and dismissing the bill, in a suit to enforce a covenant for the operation of an electric railroad for a specified fare, and to restrain the appellee from collecting a higher fare as allowed by a public commission.

Mr. Herman Ulmer and *Mr. W. T. Stockton,* with whom *Mr. Geo. C. Bedell* was on the brief, for appellant.

Mr. Peter O. Knight, with whom *Mr. John L. Doggett* was on the brief, for appellee.

Mr. Justice McKenna delivered the opinion of the Court.

The case is in narrow compass. Its purpose is to enjoin the appellee as receiver of the Jacksonville Traction Company, grantee of the Jacksonville Electric Company as hereinafter stated, and a corporation of Massachusetts, from collecting more than a particular fare, five cents, and to compel the specific performance of an alleged contract providing for such fare.

The grounds of the suit are set forth with great detail but may be epitomized narratively as follows: The Ortega Company was in 1910 and prior thereto the owner of, and operated, a line of electric railroad from the City of Jacksonville to a point in a place designated as "Ortega," in Duval County, Florida. The Ortega Company sold the railroad to R. J. Richardson, February 12, 1910, in pursuance of a contract, and March 6, 1911, Richardson and his wife conveyed the railroad to the Jacksonville Traction Company. Richardson was at all the times agent of the Jacksonville Electric Company.

The conveyance from the Ortega Company contained, among other provisions, the following covenant: "The Jacksonville Electric Company further covenants and agrees that said street railroad shall be operated in such manner that passengers for a single fare of five cents may travel from any point reached by street cars in the City of Jacksonville to the terminus in Ortega and vice versa, over the lines of the Jacksonville Electric Company, and the line conveyed by the Ortega Company." And it was covenanted that "said single fare of five cents shall be sufficient compensation for a continuous journey either way, with such transfers as may be necessary."

The Jacksonville Electric Company went into the possession of the railroad and operated it as agreed upon the basis of a five-cent fare.

At the time of the conveyance, the railroad and its appurtenances were reasonably of the value of $33,157.37, and the conveyance was made in consideration of the covenant and a cash consideration of $10,000—less certain deductions. The cash consideration was of minor import; the principal consideration was the covenant.

At the time of making the contract with the Electric Company, the Ortega Company was engaged in the development of a large tract of land lying in Duval County at the terminus of the Ortega line, and the Company sold the railroad for approximately $26,000 less than its reasonable value upon the express covenant of the Electric Company to operate the line upon a five-cent basis. The continued violation of the covenant will deprive the Ortega Company of property worth many thousand dollars, and will result in irreparable injury to the Company, "the nature and character of which injury redress at law would be uncertain and inadequate, and the damages resulting therefrom impossible of ascertainment."

April 18, 1911, the Jacksonville Electric Company conveyed the railroad to the Jacksonville Traction Company and that company went into possession of the road and operated it in accordance with the covenant.

On October 30, 1919, appellee Triay was appointed receiver of the Traction Company and ever since has been, and still is, acting as receiver, managing and operating the railways and properties of the Traction Company, including the Ortega line.

From the time of the conveyance to the Jacksonville Electric Company until December 15, 1920, that Company and the Traction Company and appellee, as receiver, successively operated the road on a five-cent basis.

On the day of January, 1920, appellee filed with the Railroad Commission of Florida a petition asking that

the Commission assume jurisdiction of the rates and fares of the Traction Company and authorize an increase in them. The request was granted December 2, 1920, and a fare of seven cents was authorized and has since been charged.

The Railroad Commission was created by the legislature of the State in 1897, Laws 1897, c. 4549, and was required, (by the same law,) to "make reasonable and just rates of freight and passenger tariff to be observed by all railroad companies and all others engaged as common carriers doing business in this State." The requirement was repeated by an act passed in 1913, and by the latter act it was made the duty of the Commission to make reasonable and just rules and regulations to enforce the observance by the carriers of their tariffs.

The only provision of the constitution of the State dealing with the powers of the legislature is § 30 of Article XVI, which provides as follows: "The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

By reason of the constitutional provision and limitation, so much, the petition proceeds, of the legislative provisions above stated, as attempts to confer upon the Commission the power to increase the rates and charges of appellee, is unconstitutional and void, and the order of the Commission is void and of no effect, and impairs the obligation of the contract between the Ortega Company and the Electric Company and constitutes a taking of the property of the Ortega Company without due process of law contrary to the Constitution of the United States.

An injunction was prayed pending the suit, and that appellee be compelled to operate the Ortega line at a five-cent fare as covenanted, and that the Ortega Company be granted such further relief as proper and agreeable to equity.

A motion to dismiss the bill for want of equity was made upon the ground that, under the laws and constitution of Florida, the Railroad Commission had the power it exercised in authorizing the Traction Company to increase the fares and charges from five cents to seven cents; and that such power, since the adoption of the constitution in 1885, could not be limited by private contract rights, such rights necessarily yielding to the public welfare as expressed in the laws and constitution of the State.

The court took that view and, quoting § 30 of Article XVI of the constitution relied on by the Ortega Company, rejected that company's construction of it and decided that the Commission could raise as well as lower rates, and that the Supreme Court of the State had so adjudged. The court, therefore, denied the motion of the Ortega Company for a temporary injunction and dismissed the bill.

There are certain admissions of appellant that are pertinent to our consideration: (1) In the absence of constitutional restrictions, a State has the power to raise or lower rates of public utility corporations, and may exercise it through railroad commissions. (2) The power is not lessened or limited by the existence of private contracts. The power is considered as part of the contract. (3) The power exercised to either raise or lower a rate is not in itself and without more an impairment of the obligation of a contract or the taking of property without due process of law.

This power, and its exercise, it is contended, is not applicable to the facts presented in the instant case

because, under the Florida constitution, the legislature is prohibited from increasing rates; it can only lower them. To support this view of the constitution, appellant presents a somewhat elaborate and involved argument terminating in the assertion that § 30 of Article XVI of the constitution grants the legislature "power to prevent excessive charges by common carriers." And this, the further contention is, necessarily means the power to reduce, not to increase. In one direction only, is the contention, may the legislature modify rates, and "that direction is down." And it is added, with emphasis, "the power to prevent excessive charges—power to lower excessive charges—power to reduce excessive charges—all mean the same thing."

The power exercised by the Commission not being possessed, a valid contract, it is asserted, existed between the Ortega Company and the other companies; and that "the order of the Railroad Commission increasing the rate of fares impairs its obligation." And a federal question is presented "for this court to determine, unhampered by state decisions."

It is to be observed that § 30 of Article XVI of the constitution was adopted in 1885, that is, prior to the covenant relied on by the Ortega Company, and that also, prior to the covenant, the Railroad Commission was created and power given it to "make reasonable and just rates of freight and passenger tariffs, to be observed by all railroads." The contention is that if the latter act be construed to give a greater power than § 30 gives, the act is void and § 30 is only to be considered as constituting the obligation of the covenant and this court has the power to construe it "unhampered by state decisions."

The contention is direct and we may accept the power ascribed to us and, exercising it, we say unhesitatingly that we concur with the District Court that under § 30 and the legislation of the State the Commission is com-

petent to increase as well as to decrease rates. And such, we think, as the District Court decided, is the effect given § 30 and the legislation of the State by the Supreme Court of the State, although we cannot say that in any case there is a precise contrast between the power to increase as distinguished from the power to decrease rates, which is now the point in controversy. We think, however, the power to increase as well as to decrease rates is an inevitable deduction from the reasoning of the cases.

In *State of Florida ex rel. Railroad Commissioners* v. *Atlantic Coast Line R. R. Co.*, 60 Fla. 465, it was said that " the Railroad Commissioners have such powers only as are expressly or impliedly conferred upon them by statute." But, it was further said, "Authority that is indispensable or useful to the valid purposes of a remedial law may be inferred or implied from authority expressly given." Applying this it was further said that a " wide discretion is accorded to them [the Railroad Commissioners] in the exercise of such authority."

In *State of Florida ex rel. Railroad Commissioners* v. *Atlantic Coast Line R. R. Co.*, 61 Fla. 799, it was decided that the difficulty of enumerating all of the powers conferred upon the Commissioners in the interest of the general welfare made it necessary to confer some in general terms, " and general powers given are intended to confer other powers than those specifically enumerated."

In *State of Florida ex rel. Railroad Commissioners* v. *Florida East Coast Ry. Co.*, 57 Fla. 522, § 30 of Article XVI is quoted, and it was said of it that it was " not a grant of power to the legislature, nor is it a limitation upon the power of the legislature, but it is an express recognition of a power existing in the legislative department of the State government."

It will be observed, therefore, that the Board of Railroad Commissioners is constituted by the legislature and that the powers are conferred upon the board in general

terms to be exercised in the public welfare, and a wide discretion is accorded it which is not constrained by peremptory directions. The powers are quasi legislative, the public welfare being their test and measure. *State ex rel. Swearingen* v. *Railroad Commissioners,* 79 Fla. 526, 532. There is nothing in the words "excessive charges" in § 30 of Article XVI, nor in their context, that requires the regulation of the charges to be downward and not upward, if the charges authorized be not excessive.

Necessarily, therefore, we affirm the action of the District Court; but while this denies the relief the Ortega Company prays against appellee, we do not wish to be understood as adjudging that the Company may not be entitled to some remedy for the non-observance of the contract by the Traction Company. See *Louisville & Nashville R. R. Co.* v. *Crowe,* 156 Ky. 27.

Affirmed.

BRATTON ET AL. *v.* CHANDLER ET AL., INDIVIDUALLY AND AS COPARTNERS UNDER THE FIRM NAME OF CHANDLER & WALDEN, ET AL.

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

No. 239. Argued October 10, 1922.—Decided November 13, 1922.

1. A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. P. 114.
2. The law of Tennessee providing for licensing real estate brokers and salesmen and creating a real estate commission, where it authorizes the commission to "require and procure" proof of the honesty, etc., of any applicant, before issuing him a license (Laws 1921, c. 98, § 8), does not contemplate that such proof may be procured by the commission secretly, without giving the applicant notice or opportunity to learn its nature and source and to meet it. P. 114.

Reversed.

APPEAL from a decree of the District Court granting a temporary injunction restraining the appellant state officials from executing, as respects the appellees, a statute requiring real estate brokers to obtain licenses.

Mr. M. M. Neil and *Mr. Nathan William MacChesney,* with whom *Mr. Frank M. Thompson,* Attorney General of the State of Tennessee, *Mr. Thomas H. Jackson* and *Mr. James L. McRee* were on the briefs, for appellants.

Mr. Elias Gates, with whom *Mr. Julian C. Wilson* and *Mr. Walter P. Armstrong* were on the brief, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The appellees, as complainants in the District Court in their capacity as copartners, or as individuals, assailed the constitutionality under the Fourteenth Amendment of the Constitution of the United States, of a statute of Tennessee passed in 1921, entitled, "An Act to define, regulate and license real estate brokers and real estate salesmen; to create a State Real Estate Commission, and to provide a penalty for a violation of the provisions hereof." Pub. Acts, 1921, c. 98.

Appellants Bratton, Adams and Brownlow were appointed Commissioners under the act, and they and the appellant Bates, as Attorney General of Shelby County, or as District Attorney General (he is described as the latter in the answer) of the County, were, it is alleged, charged with the duty of enforcing the act.

The pleadings are very elaborate and need not be reproduced. The court restrained the execution of the statute until its further order, basing its action upon the provisions of the statute, which the court decided did not afford to applicants for licenses due process of law. To review the order and the grounds of it, this appeal is directed.

The act constitutes a Commission to be appointed by the Governor of the State, and in twenty-one sections defines the powers and duties of the Commission, the qualifications of applicants for licenses, and the procedure they must observe.

The District Court (three judges sitting) gave a very studious and comprehensive consideration to the provisions of the act, but rested its decision adverse to the constitutionality of the act upon § 8. The determining pertinency of the section the court expressed by saying that "the first step in the proposed regulation" of the real estate business "is the granting and issuing of licenses as provided in Section 8" of the act. That "section gives color and purpose to every other section in the Act and without which the other sections would be meaningless."

We may then accept the controlling and comprehensive effect of the section and concentrate attention and decision upon it, pretermitting all others, or comment upon them.

The condemning comment of the court was that § 8 authorized the Commission, not only to require an applicant to furnish evidence of his qualifications, but to *procure* independently of the applicant any proof it may deem desirable, and this without any provision for notice or opportunity to meet the evidence so procured, nor even to be advised of the nature or source of the evidence. Because of this delinquency, the court was of opinion that the act did not afford due process of law and was, therefore, unconstitutional and void.

Are the comment and conclusion justified? The section requires an application for a license to be made in writing and provides, with circumstantial detail, what it shall contain, and concludes as follows: "The Commission is hereby authorized to require and *procure* [italics ours] any and all satisfactory proof as shall be deemed

desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for a real estate broker's or salesman's license, or, of any of the officers or members of any such applicant, prior to the issuance of any such license. The Commission is expressly vested with the power and authority to make, prescribe and enforce any and all such rules and regulations connected with the application for any license, as shall be deemed necessary to administer and enforce the provisions of this Act."

The District Court, in further comment upon the provision, expressed a doubt that any rulings or regulations that might be promulgated by the Commission would cure the defect of the statute and added, "however, that question is not here presented, for it does not appear from the pleadings in this case that any such rules have been promulgated though the Commission is functioning in manner and form as authorized by the statute."

So determined was the court in the view it had of § 8, that it rejected the immunity which § 19 gave from the unconstitutionality which might taint any section or provision of the act from extending to other sections or provisions. "Be it further enacted," is the declaration of § 19, "That should the courts declare any section or provision of this Act unconstitutional, such decision shall affect only the section or provision so declared to be unconstitutional, and shall not affect any other section or part of this Act."

The court justified its rejection of § 19 because, in its view, the section had "no application in determining the validity of the sections in which the unconstitutional provision is found." To this conclusion the court considered itself constrained because, to eliminate the offensive part of § 8 "would emasculate the entire section," and the Commission "would be a mere automaton without authority to determine the fundamental questions of the

right of the applicant for a license," because it would be confined to and be compelled to accept as conclusive, the evidence presented by the applicant, which the court considered " was not the legislative intent." And hence the court's conclusion was that § 8 was " so closely related to the valid sections that without it they could serve no purpose within the contemplation of the legislature ", citing *Weaver* v. *Davidson County,* 104 Tenn. 315; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 565.

The views of the court are stated with great force, but we are unable to yield to them—their reasoning or conclusions. By § 8, as we have said, the Commission is " authorized to *require* and *procure* [italics ours] any and all satisfactory proof as shall be deemed desirable in reference " to the conditions and qualifications of applicants for licenses. The words are " require and procure." They seem to have independent and cumulative meaning, one demanding publicity, the other permitting secrecy. But to this possibility we are not disposed; we prefer the admonition of the cases and their decision as expressed in *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401, as follows: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 408."

In the cited case the admonition is said to express an elementary rule; and we think the statute of Tennessee attracts, instead of repels, the admonition. The statute is drawn with care to details and their importance, importance to the business regulated and the persons who will desire to engage in it; action under it was intended, therefore, to be open and direct, not to be remitted in any part to secrecy, prejudice or intrigue.

In conclusion, we may say, that if the word " procure " is more than a tautological repetition of the word "require", it was only to confer the power of affirmative

direction upon the Commission, necessarily to be exercised in supplement to the action of the applicant and with the same publicity and opportunity of the applicant to meet adverse evidence. And the act, construed as we construe it, will take no power from the Commission necessary to the performance of its duties, and will leave no power with it that it can exercise to the detriment of any right assured to an applicant for a license by the Constitution of the United States.

The decree of the court ordering the issuance of a temporary injunction is

Reversed and the case remanded for further proceedings in accordance with this opinion.

DUESENBERG MOTORS CORPORATION *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 80. Argued October 19, 1922.—Decided November 13, 1922.

1. A contractor who incurred expense under a contract to manufacture articles for the Government for use in the late war, but whose opportunity to perform and earn the contemplated profits was cut short by the sudden cessation of hostilities, the declaration of the armistice and the consequent termination of the contract in accordance with its terms, took the chances of this contingency and cannot recover damages. P. 124.
2. *Held*, in this case, that delay of the Government in furnishing necessary specifications as contemplated by a contract for the manufacture of air-plane motors of a foreign model, due to an honest but mistaken belief, shared by the contractor, that the model was perfected and adequate specifications in existence, was not an actionable breach of representation, in view of the conduct and dealings of the parties for the expedition of the work, the absence of any protest over the delay and the absence of averment that it prevented the contractor from being fully occupied with preparatory and other work under the contract. P. 123.

3. Time was of the essence for the Government, but not for the contractor. P. 124.

56 Ct. Clms. 96, affirmed.

APPEAL from a judgment of the Court of Claims dismissing, on demurrer, a petition claiming (1) the profits that would have been made by the claimant, under a contract with the Government for manufacture of air-plane motors, but for the Government's alleged failure to supply the necessary specifications as agreed; (2) amounts paid by the claimant, because of the delay, as interest on money borrowed from the Government and private sources for use in executing the contract; and (3), if (1) cannot be recovered, the amount lost by the claimant through terminating its commercial business to accept the contract.

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

The contract of January 4, 1918, for the Bugatti motors is the one upon which this suit is based. Time was of the essence of this contract. It required deliveries to begin in March and end in September, 1918, and held the contractor to the most rigid rule of promptness. This provision necessarily implied that the United States must do everything required of the Government in time to permit the contractor to comply with its obligations.

The contract provision for "specifications to follow" necessarily implied that the specifications must be furnished in time to permit the deliveries to be made on time.

The failure to furnish specifications in such time—they were not complete until September 25, 1918—was a breach of contract by the United States which entitles the contractor to recover for the losses caused thereby.

These propositions rest upon elementary principles: "What is implied is as effectual as what is expressed." "Specifications to follow" implies within a reasonable

time; but this means a reasonable time within the intent of this contract, when its parts are construed together. The schedule of deliveries, beginning in March, 1918, shows that intent, as do the many expressions of the need of promptness.

Upon breach of contract by one party, the other may continue work without waiver of its right to damages. *American Smelting & Refining Co.* v. *United States,* 259 U. S. 75. See also *Mansfield* v. *New York Central R. R. Co.,* 102 N. Y. 205; *McMaster* v. *State,* 108 N. Y. 542; *Tobey* v. *Price,* 75 Ill. 645; *Merrimack Mfg. Co.* v. *Qunitard,* 107 Mass. 127; *Garfield &c. Co.* v. *Fitchburg R. R.,* 166 Mass. 119.

The principle is of special application to a war contract, where refusal to continue would have resulted in confusion in the Government's plans. The rule of law should conform to the obligation of patriotism.

The provision of the contract authorizing changes in the drawings or specifications does not include a failure to furnish specifications. The changes permitted under any such provision are changes of detail which do not essentially alter the nature of the article to be furnished. Such changes would not interfere with the general processes of production and would not operate as a complete suspension of the work. Failure to furnish specifications suspends progress to the total extent of their absence. Besides, the provision for changes apparently relied upon by the court below was in an earlier contract, and whether it was imported into this one is open to question.

The loss of the profit which the contractor would have made before the date of termination is the measure of damages for the delay which caused the loss. It is not here claimed as a loss due to the termination of the contract, but as a loss due to the delay which prevented completion before termination. It is claimed under the definition of actual damages stated in *Philadelphia, W. &*

B. R. R. Co. v. *Howard,* 13 How. 307. *St. Louis Beef Co.* v. *Casualty Co.,* 201 U. S. 173; *United States* v. *Behan,* 110 U. S. 338; *United States* v. *Speed,* 8 Wall. 77; *Roehm* v. *Horst,* 178 U. S. 1.

The plaintiff is entitled to recover the interest paid to the Government on the loans it made the plaintiff, because, by delaying the specifications, it prevented complete deliveries and payment to the contractor of cost and profit, from which the borrowed money would have been paid. This comes clearly within the rule of damages stated in the cases already cited. *Hattiesburg Lumber Co.* v. *Herrick,* 212 Fed. 834; *Bank of Columbia* v. *Hagner,* 1 Pet. 455; *Guerini Stone Co.* v. *Carlin Construction Co.,* 248 U. S. 334.

The payment of interest on a bank loan, made necessary by the same default, is no less a direct item of damage to the contractor than the payment of interest to the United States. The cost of revenue stamps on the notes, also claimed, follows the same principle.

The provisions of § 177, Jud. Code, forbidding judgment in the Court of Claims for interest upon a claim, have no application to this item.

When appellant undertook this contract, it had to discontinue its commercial business and suffered a loss in so doing. It was expected that this loss would be made good out of the fixed profit on the completed motors, as well as the uncertain profit on spare parts. The failure of the contractor to realize the entire profit and thus absorb the loss was due to the failure of the United States to furnish the specifications on time. That the loss still rests upon the contractor is therefore the fault of the United States and the contractor should be reimbursed therefor. See *Baird* v. *United States,* 5 Ct. Clms. 348; affd. 131 U. S. appendix cvi. If the contractor is allowed the amount of its profits as damages under the first item, this item is not allowable, as it is discharged by the profits.

The United States is entitled to credit upon it in the proportion which the profits actually received bear to the total profits which would have been received had the default of the United States not occurred.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. Justice McKenna delivered the opinion of the Court.

Action in the Court of Claims against the United States for expenses in endeavoring to perform certain contracts with the United States made during the war with Germany, or for anticipated profits.

The contracts were for aeronautical equipment for war purposes. There were a first and primary contract and seven other contracts called supplemental agreements. The latter contained modifications of the first or primary contract, and each agreement contained modifications of those which preceded.

The first or primary contract, dated November 20, 1917, provided for 500 United States standard twelve-cylinder engines, sometimes referred to as Liberty engines. By an agreement dated December 11, 1917, the number was increased to 1,000. By another agreement dated January 4, 1918, the type of motor was changed and a motor called the Bugatti motor was substituted; and there were other agreements.

From this general statement it will be seen that the contract and agreements are determining elements in the claims sued upon. A full recital of them, however, would extend this opinion to an embarrassing length. We shall confine ourselves, therefore, to those which we regard of determining pertinence.

Upon demurrer of the United States, the Court of Claims decided the contractor entitled to no relief and dismissed its petition. This action is contested, and it is earnestly insisted that the contracts made time their essence and required speed and dispatch from the contractor, and demanded in their performance precedence upon all other work, involving necessarily, sacrifice and expense upon the part of the contractor. And time, it is contended, being of the essence of the contracts, this necessarily implied that the United States must have done everything to permit the contractor to comply with its obligations. The Government, however, was delinquent; and it is alleged that "the drawings and specifications referred to in the contract (Exhibit A) as being attached thereto (but which were not in fact so attached) were furnished piece-meal from time to time but not so as to enable the claimant to enter into quantity production; and the only work which was practicable under said contract was in making extensive alterations in the plant of claimant company to adapt it to the uses of the Government for the purpose of carrying out the contract (Exhibit A), to assemble a competent engineering staff, and to make other preparations for the performance of said contract, all of which the claimant did at great expense."

And further delinquency is charged in not performing the agreement which substituted the Bugatti motors, and Article I of the agreement is quoted as follows:

"That, subject to all the provisions of Article I in said contract No. 2318 contained, the Contractor shall make for the Government, instead of the articles described in Article I of said contract, two thousand (2,000) Bugatti motors, and such spare parts for said motors as the Government may order from time to time during the period of the construction of said motors, in accordance with specifications to follow."

The specifications were not furnished, it is said, until September 25, 1918; and that the delay was a breach of

the contract; and the contractor is entitled to recover for the losses caused thereby.

To this the Court of Claims answered that the contract contemplated a revision of the schedule (times of delivery) in regard to the engines. The provision to which that purpose was attributed is, that " in view of the present uncertain factors inherent in the articles, and in the establishment of the industry of producing them, it is understood that this schedule may require revision, . . ." The schedule designated June, 1918, as the month of complete production.

Changes were provided for in another article, and by still another it was provided that if in the opinion of the Chief Signal Officer of the United States the public interests so required, the Government might, upon thirty days' notice, terminate the contract. And there was provision for settlement of disputes.

Dates are important to be considered. The supplemental contract in which Article I appears, and which adopts Article I of the first contract, is dated January 4, 1918. Another agreement which was supplementary to that agreement was dated January 15, 1918, and still another dated February 11, 1918.

In none of these agreements, continuing as they did the obligations of the parties to them and the means of their performance, is there a word of complaint that the Government had been or was delinquent on account of not furnishing specifications or in any way. In the agreement of February 11, 1918, in Article II, it is provided that:

" In the interest of both parties hereto and in order to expedite the delivery of the said supplies, the Government will advance to the contractor under the Principal Agreement the sum of Four Hundred Thousand Dollars ($400,000) on the terms and security hereinafter mentioned, and will make payment directly to the contractor by check dated February 25, 1918."

There was another agreement, dated February 14, 1918, which continued in effect, except as modified, all that preceded. There was no protest or complaint of any kind, no accusation of default or delay on the part of the Government.

There was a seventh agreement, made September 26, 1918, and another, made October 23, 1918, for advance payments to the contractor.

The agreements are of significant strength. Their legal effect and that of the contract cannot be determined by any one provision but the totality of them must be regarded and their relations and purposes.

A war of magnitude was waging. The Government was eager for efficient instrumentalities and the contractor was enticed by the profit of their manufacture. The matters were urgent, but they were beset with contingencies. The Government could terminate the contract in the interest of the public welfare; and the war might cease. The latter did happen. However, before it happened and, before, it may be, there were signs of its happening, there were dealings and adjustments of preparation between the Government and the contractor. They took care of, and were intended to take care of, changing purposes, and no dissatisfaction was expressed. One of the changes was, as we have said, from the construction of 500 Liberty motors to 1,000, the completion and delivery of which was to be in June, 1918, and, as we have said, another change was the substitution of 2,000 Bugatti motors for the Liberty engines, and for such spare parts as the Government might order from time to time; the motors to be delivered by September, 1918. By the supplemental agreements which provided for those changes, it was also provided that their cost was to be paid by the Government, and the profit of the contractor was changed from $625 for each article to $750, and the Government agreed to advance the contractor $1,250,000, to be repaid with interest at 6%.

Upon this change to the Bugatti motors comes the first claim of the contractor, based upon Article I of the agreement of January 4, 1918, by which it was provided as follows: "That subject to all the provisions of Article I in said contract No. 2318 contained, the Contractor shall make for the Government, instead of the articles described in Article I of said contract, two thousand (2,000) Bugatti motors, and such spare parts for said motors as the Government may order from time to time during the period of the construction of said motors, *in accordance with specifications to follow.*" (Italics ours.)

No time is specified. It is, however, contended that necessarily a reasonable time must have been intended and was not observed. The specifications, it is alleged, did not follow until September 25, 1918, when the entire time for the production of the motors was within a few days of expiring, whereby it became impossible to produce any of the articles within the time limit of the contract.

It is not alleged, however, that the failure to furnish the specifications was willful on the part of the Government or fraudulent. On the contrary, it is alleged, that there was a belief upon the part of the government officers by whom and under whom the supplemental agreement was made that there were in existence complete specifications of the articles, which needed only to be obtained from France; that the motors had passed the experimental stage and were ready for production. It is, however, alleged that the statements in the contract operated as a representation to the contractor that such was the fact, and that production in quantity could begin at or shortly after the entry into the agreement. It is further alleged that, when the first motor was received shortly after the date of the agreement, it developed that extensive changes would be necessary, and the contractor was directed to proceed meanwhile actively with production

on the separate parts to the extent possible in view of the undeveloped character of the specifications of the engine. This was done in conjunction with the officers of the Government.

It will be observed that it is not alleged that the belief of the government officers was not consistently entertained nor that the contractor did not share it. Nor is it said that the work on the separate parts and the preparations for the performance of the contract did not engage the contractor's time. Indeed, the fact is that, by January 4, there were changes to the advantage of the contractor, and again by the agreement of February 11, 1918, and another as late as October 23, 1918, by which the Government agreed to advance to the contractor $1,250,000. And still no complaint. On the contrary there was acceptance of assistance.

It is manifest there were uncertainties on both sides and that, as they developed, preparations were necessary to meet them, and, in meeting them, the contractor did not regard the Government in any way delinquent. It was the abrupt and unexpected suspension of hostilities and the declaration of an armistice that was the cause of loss to the contractor, and the disappointment of profits from its contracts which it was preparing to realize and would have realized. But it took that chance and has not now a legal claim against the Government for reimbursement of its outlays. We need not distinguish between the outlays nor dwell upon them. They were outlays of the speculation, and subject to sacrifice and loss with its disappointment.

We have seen that counsel make much of the effect of the Government's urgency, and, it is contended, time in consequence became an essential of the contract. This, the contention is, influenced the contractor and necessarily determines the obligation of the Government. The Government was undoubtedly urgent, made so by its seri-

ous situation and tremendous responsibilities, but such was not the situation of the contractor. Time to perform its contract was all that was necessary to it, and but for the armistice it would have had time. If the armistice could have been foreseen, the relative situations might have been different. Expedition would not then have been exigent to the Government's purposes, but would then have been necessary to the contractor, if profits were to be realized from the production of the motors. There was no prophecy of the armistice—its sudden happening terminated the further execution of the contractor's undertaking, preventing, as we have said, the realization of profits. And, we repeat, this chance the contractor took and must abide the result.

Judgment affirmed.

KEOKUK & HAMILTON BRIDGE COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 58. Argued October 13, 1922.—Decided November 13, 1922.

1 The Court will not reëxamine the findings of fact made by the Court of Claims upon evidence. P. 126.

2. An unintentional injury to a bridge pier in the making of navigation improvements by the Government, *held* at most in the nature of a tort, and not a taking of property by the United States for which damages might be recovered on the theory of contract. P. 126.

55 Ct. Clms. 480, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition in an action to recover the value of a pier, alleged to have been destroyed, and hence taken, by the act of the United States.

Mr. F. T. Hughes, for appellant, submitted.

Mr. Solicitor General Beck for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The appellant had an authorized bridge across the Mississippi River with a pivot pier and draw to permit the passage of vessels. As a necessary incident it maintained what is called a protection pier extending down stream. In consequence of later authorized constructions it became necessary to deepen the channel on the easterly side of the pier, and the part of this work with which we are concerned was done by the United States. The bed of the stream by the side of the pier was solid rock and into this the United States drilled and blasted it with dynamite. The work was done in the usual way and with more than ordinary care; but by the action of the water driven upon the pier by the blasts, and possibly by the concussion of the blasts themselves, portions of the pier fell into the river, and some damage was inflicted. It could have been repaired for $1,000. The Company however rebuilt the bridge to fit it for heavier traffic, and brought this suit alleging that the pier was destroyed and in that way taken by the United States.

An appreciable part of the claimant's argument consists in an attempt to reopen the findings of fact and to maintain that the pier was destroyed, as giving more force to the contention that it was taken. This, of course, is vain. *Union Pacific Ry. Co.* v. *United States,* 116 U. S. 154. *Talbert* v. *United States,* 155 U. S. 45. We must assume, as we have stated from the findings of the Court of Claims, that the pier was not destroyed but simply was damaged in a way that could have been repaired for a moderate sum. However small the damage, it may be true that deliberate action in some cases might generate the same claim as other forms of deliberate withdrawal of property from the admitted owner. *United States* v.

Cress, 243 U. S. 316, 329. But without considering how the line would be drawn, when such action took place in the improvement of navigation, it is enough to say that this is an ordinary case of incidental damage which if inflicted by a private individual might be a tort but which could be nothing else. In such cases there is no remedy against the United States. See *Bedford* v. *United States,* 192 U. S. 217, 224.

Judgment affirmed.

McKEE ET AL. *v.* GRATZ.

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

No. 61. Argued October 13, 16, 1922.—Decided November 13, 1922.

1. The Missouri statute declaring that title to all birds, game and fish shall be in the State, Rev. Stats. Mo. 1909, § 6508; 1919, § 5581; speaks only in aid of the State's power of regulation, leaving the land owner's property in these things otherwise unaffected. P. 135.
2. Unlike wild birds and fish, live mussels, which have practically a fixed habitat in the bottom of a stream and little ability to move, are in the possession of the owner of the land, as are, even more obviously, the shells taken from such mussels and piled upon the bank. P. 135.
3. Such possession is enough to warrant recovery of substantial damages for conversion by a trespasser. P. 136.
4. But a license to take such mussels from uninclosed and uninhabited places may be implied from custom, the more readily where statutory prohibitions are limited to enclosed and cultivated land and private ponds, as by Rev. Stats. Mo. 1919, § 5662, 3654. P. 136.
5. The existence of such custom and license, and whether it extends beyond occasional uses to systematic extraction of mussels in large quantities for commercial purpose, *held,* for the jury. P. 136.
6. Live mussels in a stream are not part of the realty within the meaning of Rev. Stats. Mo. 1909, § 5448; 1919, § 4242, allowing triple damages in certain cases for the digging up and carrying away

of stones, mineral, etc., "or other substance or material being part of the realty." P. 137.

7. Damages recoverable by the land owner for mussels taken by trespass but in a belief of right due to a mistaken interpretation of the state game laws, are limited to the value at the time of conversion. P. 137.

270 Fed. 713, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals, reversing a judgment for the present petitioners, in an action for damages brought by the respondent Gratz, to recover the manufactured value of over 300 tons of mussel shells which were dug from a stream-bed on his land (then of his assignor) and converted into buttons; also for triple damages, under a Missouri statute.

Mr. Lon O. Hocker, with whom *Mr. William Hoffman, Mr. Arthur Hoffman, Mr. Frank H. Sullivan* and *Mr. Ralph T. Finley* were on the briefs, for petitioners.

The mollusks taken from the Little River were shell fish controlled by the same rules of law as other fishes. *Martin* v. *Waddell,* 16 Pet. 414; 11 R. C. L., p. 1015; *Moulton* v. *Libbey,* 37 Me. 472; *Caswell* v. *Johnson,* 58 Me. 164; *Weston* v. *Sampson,* 8 Cush. 764; First Opinion of Court of Appeals, 258 Fed. 335; Second Id., 270 Fed. 713.

For plaintiff to recover in this action, his assignors must have had prior possession of or plenary title to the mollusks or shells taken therefrom. *Northern Pacific R. R. Co.* v. *Lewis,* 162 U. S. 373; *United States* v. *Loughrey,* 172 U. S. 213.

The plaintiff's assignors could not maintain trespass against defendants merely because mollusks were taken by others from their premises and the shells thereof sold and shipped to defendants. *Brown* v. *Peaslee,* 69 N. H. 458; *Neild* v. *Burton,* 49 Mich. 53; *Talmadge* v. *Scudder,* 2 Wright (Pa.) 517; *Catlin* v. *Warren,* 16 Bradw. (Ill. App.) 418.

The land owner has no title to the wild animals in his forest, nor to the fishes in his stream. The ownership is in the sovereign. 19 Cyc. 988; *McCready* v. *Virginia,* 94 U. S. 394; 11 R. C. L., p. 105; 3 Minor Institutes, p. 12; Farnham on Waters, § 1426; *Parker* v. *People,* 111 Ill. 603; *Peters* v. *State,* 96 Tenn. 682; *State* v. *Thereault,* 70 Vt. 617.

The land owner takes no title to fishes or game reduced to possession by a trespass on his premises. *Geer* v. *Connecticut,* 161 U. S. 523; *Beach* v. *Morgan,* 67 N. H. 529; 11 R. C. L., p. 1039.

Both by the civil and common law, in the absence of inhibitory legislation, one who reduces game or fishes *ferae naturae* to possession, acquires title, though he so reduce them on the lands of another. *Geer* v. *Connecticut,* 161 U. S. 523-526.

It is within the power of the State to take unto itself whatever right the land owner might otherwise assert at common law to game or fishes reduced to possession by a trespass on his premises. *Geer* v. *Connecticut, supra; State* v. *Weber,* 205 Mo. 36; *State* v. *Heger,* 194 Mo. 707; *State* v. *Warner,* 197 Mo. 650.

Missouri has regulated the taking of fish and game for many years. *State* v. *Warner, supra.*

Under the legislation in that State, title to game and fishes taken in trespass vests, not in the proprietor of the premises, but in the State. Mo. Laws 1905, p. 139, reënacted as Laws 1909, p. 159, and now found in Rev. Stats. Mo. 1919, § 5581.

Title to the beds of public navigable streams in Missouri is in the sovereign. *Benson* v. *Morrow,* 61 Mo. 345; *State* v. *Longfellow,* 169 Mo. 109; *McKinney* v. *Northcutt,* 114 Mo. App. 146.

Title to smaller streams (such as the Little River) is in the riparian proprietor subject to the public right of user. Mo. Constitution 1875, Art. I, § 1; *McKinney* v. *North-*

cutt, 114 Mo. App. 146; *Weller* v. *Mining Co.,* 176 Mo. App. 243; *Stuart* v. *Clark,* 2 Swan (Tenn.) 9; *Gaston* v. *Mace,* 33 W. Va. 14; *Webster* v. *Harris,* 111 Tenn. 668.

The public right of user includes the public right of fishery. *Willow River Club* v. *Wade,* 100 Wis. 86; *Lincoln* v. *Davis,* 53 Mich. 375.

The custom of the particular community makes it so. *Strother* v. *Lucas,* 12 Pet. 445.

The facts show an implied license in the community to do on the premises what defendants' vendors did, valid until revoked by fair notice to desist. *Marsh* v. *Colby,* 39 Mich. 626; *Knowles* v. *Dow,* 22 N. H. 387; *Driscoll* v. *Lime & Cement Co.,* 37 N. Y. 637; *Stevens* v. *Howerton,* 49 Ind. App. 151; *Noftager* v. *Barkdall,* 148 Ind. 531; *Thayer* v. *Jarnes,* 44 Wis. 388.

A trespasser who has acted under mistake of right and without wrongful intent may acquire title by accession. *Wooden-Ware Co.* v. *United States,* 106 U. S. 432, 444; *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 294; *Powers* v. *United States,* 119 Fed. 562; *Fisher* v. *Brown,* 70 Fed. 570. The term "wilful" is not synonymous with "unlawful and without right." *Furnace Co.* v. *Tie Co.,* 153 Mo. App. 449, 450; *State* v. *Hussey,* 60 Maine, 410; *State* v. *Massey,* 97 N. Car. 465; *Felton* v. *United States,* 96 U. S. 699, 702; *United States* v. *Stock Yards Co.,* 162 Fed. 562; Words & Phrases (2d Series), vol. 4, p. 1294.

The test in such cases is whether or not the property taken has been changed in form or has been so enhanced in value by the labor and expenditure contributed by the trespasser that it would be unjust to permit the owner to recover the property in its converted form. 1 R. C. L. 123, § 10; 1 C. J. 385; *Wetherbee* v. *Green,* 22 Mich. 311; *Lewis* v. *Courtright,* 77 Ia. 190.

The fiction of title created by the general principle that a wilful trespasser cannot acquire title as against the

original owner by virtue of his own wrong cannot apply in this case, because (a) the shell gatherers acted in good faith upon a well-founded belief that they had a right to gather the mussels, and (b) the petitioners are innocent purchasers from an unintentional or inadvertent trespasser. *Railway Co.* v. *Hutchins,* 32 Oh. St. 571.

Mr. S. Mayner Wallace for respondent.

The rights of the parties should be determined just as if the thing taken had been so much lime. After being dug, boiled and shucked, the shells were piled and stored, for from ten days to one month, on the same lands, before being taken to the factory.

But, if the law pertaining to the ownership of animals be applied, the earthy, harmless, inoffensive, phlegmatic mussel ought not to be classed as a wild animal; but, rather, as a tame or domestic animal, in which event the land owners' rights of property were, of course, absolute, at all times. *State* v. *Taylor,* 27 N. J. L. 117; *Fleet* v. *Hegeman,* 14 Wend. 42; *State* v. *Van Vlack,* 101 Wash. 503; *Duchess of Sutherland* v. *Watson,* 6 MacPher. 199 (6 Scot. Sess. Cas., 3d Ser., p. 199).

"Whether any particular animal be of one class or the other, is to be determined by our knowledge of the habits of the class to which it belongs, as derived from the general observation and experience of naturalists." 3 Minor Inst., p. 7. Dogs, *Sentell* v. *New Orleans & Carrollton R. R. Co.,* 166 U. S. 698; bees, *Parsons* v. *Manser,* 119 Iowa, 88; young pheasants, *Reg.* v. *Garnham,* 2 F. & F. 347; wild cattle, *Davis* v. *Green,* 2 Hawaii, 367.

Where a trespasser reduces a wild animal to possession, the same thereupon becomes the absolute property of the owner of the soil. Rabbits, *Blades* v. *Higgs,* 11 H. L. Cas. 621; grouse, *Lonsdale* v. *Rigg,* 11 Exch. 654; fish and game, *Arkansas* v. *Mallory,* 73 Ark. 236. See Behring Sea Arbitrators' Decision, 32 Am. L. Reg. & Rev. 901. *Geer* v. *Connecticut,* 161 U. S. 519, and *Beach* v. *Morgan,*

67 N. H. 529, distinguished. See *Percy Summer Club* v. *Astle,* 163 Fed. 1; *Hardin* v. *Jordan,* 140 U. S. 371.

The Missouri statute of 1905; § 6508, Rev. Stats. Mo., 1909; § 5581, Rev. Stats. Mo., 1919, providing that title to all birds, game and fish shall be in the State "for the purpose of regulating and controlling the use and disposition of the same," is not adverse to plaintiff's position, even if it be said, *arguendo,* that damages are sought for the taking of the mussel rather than for the shell. The opposite construction would render such an enactment unconstitutional, if applied in circumstances here disclosed. The statute refers only to game, fish and birds that are "not now held by private ownership," and was enacted after the plaintiff's assignors acquired the land. But the statute only intends to make effective the State's police-power-interest, not to affect the citizen's private-property-ownership, as developed in the course of the common law.

Since Magna Carta and the Charter of the Forest, the ownership of birds, fish and game, so far as vested in the sovereign, has been uniformly regarded, not in a proprietary sense, but as a trust for the benefit of all the people in common. *Hartman* v. *Tresise,* 36 Colo. 146; *Arkansas* v. *Mallory,* 73 Ark. 236; *Schulte* v. *Warren,* 218 Ill. 108; *Rogers* v. *Jones,* 1 Wend. 237; *State* v. *Blount,* 85 Mo. 547; *State* v. *Weber,* 205 Mo. 46.

The land owner's possession, and right to the possession, of the shells (dug and stored on their lands), as against defendants, who had no better, or any, right or title, is, in and of itself, sufficient. The *jus tertii* is not available to defendants. *Armory* v. *Delamirie* (Smith's L. Cas.), 1 Str. 504; *United States* v. *Loughrey,* 172 U. S. 219; *Peru Co.* v. *Harker,* 144 Fed. 673; *Rosencranz* v. *Swofford Bros. Co.,* 175 Mo. 518.

The fact of navigability *vel non,* under the present record, is a question which is probably not now open; the trial court found that the waters were not navigable.

The opinion of the Court of Appeals demonstrates that the waters were non-navigable in fact and in law. And see *Brewer-Elliott Oil Co.* v. *United States,* 270 Fed. 102; [s. c. 260 U. S. 77]; Act March 2, 1919, c. 95 § 4, 40 Stat. 1275, 1287; *Slovensky* v. *O'Reilly,* 233 S. W. 478. But, even if navigable, the rights of the parties would still be the same; for the general right of user of such a navigable stream is strictly limited to highway purposes. *Hobart-Lee Tie Co.* v. *Grabner,* 206 Mo. App. 96.

The public right of navigation does not include or give the right to fish, hunt or trap where title to the underlying land is privately held. Annotation, 11 A. L. R. 241; fish, *Schulte* v. *Warren,* 218 Ill. 108; muskrats, *Johnson* v. *Burghorn,* 212 Mich. 19.

That the plaintiff's assignors had the exclusive right of fishing, is clear from the foregoing, and from the following, authorities: *Hardin* v. *Jordan,* 140 U. S. 371; *State* v. *Blount,* 85 Mo. 547; *Thompson* v. *Tennyson,* 148 Ga. 701; *Hartman* v. *Tresise,* 36 Colo. 146; *State* v. *West Tennessee Land Co.,* 127 Tenn. 575; *Hooker* v. *Cummings,* 20 Johns. 90.

There was no plea of any custom or of any implied license. Custom, from which any benefit may be derived, must be a lawful custom. *Adams* v. *Clark,* 189 Ky. 279.

The right to hunt or fish asserted is a *profit a prendre;* and the law seems clear that "a claim by custom to enjoy a *profit a prendre* in the soil of another is invalid and insupportable, for the reason that to allow such a claim would result in the destruction of value in the subject of the profit." 9 R. C. L., p. 745.

The value of the manufactured product, into which the shells passed, furnishes the proper measure of damages recoverable under the first count; and the Missouri statute, allowing treble damages in certain instances, applies under the second count.

Defendants made no inquiry, concerning ownership, prior to their getting the shells. Their agent asked for,

but did not obtain permission. See *Union Naval Stores Co.* v. *United States,* 240 U. S. 284; *Mason* v. *United States,* 273 Fed. 135; *Gray* v. *Parker,* 38 Mo. 160; *Sligo Furnace Co.* v. *Tie Co.,* 153 Mo. App. 442; 7 A. L. R. 901, et seq; Rev. Stats. Mo. 1909, § 5448; Rev. Stats. Mo. 1919, § 4242; Statham's Abridgment (Klingelsmith's), vol. 11, p. 1253; *Duchess of Sutherland* v. *Watson,* 6 MacPher. 199 (6 Scot. Sess. Cas., 3d Ser., p. 199); *Parker* v. *Lord Advocate* [1902], 4 Sess. Cas., 5th Ser., p. 707; s. c. [1904], 6 Sess. Cas., 5th Ser., p. 37; *Marsh v. McNider,* 88 Iowa, 390; *Oregon Iron Co.* v. *Hughes,* 47 Ore. 313; *Barnett Co.* v. *Oil Co.,* 254 Fed. 481; Rev. Stats. Mo., 1919, § 7058; *Jones* v. *De Merchant,* 26 Man. 455; 28 D. L. R. 561; *Silsbury* v. *McCoon,* 3 N. Y. 379.

Mr. Frank M. Swacker, by leave of court, filed a brief as *amicus curiae.*

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the respondent, who is also a cross-petitioner, to recover the value of mussel shells removed from the lands of the respondent's assignor and manufactured by the petitioners into buttons. It was brought in a Court of the State of Missouri, but was removed to the District Court of the United States. There were two counts; one simply for the conversion of the shells and a second alleging that the shells were part of the realty and that the plaintiff was entitled to treble damages under Rev. Stats. Mo. 1909, § 5448. (Rev. Stats. Mo. 1919, § 4242.) At the trial the District Court directed a verdict for the defendants, and the judgment was affirmed by the Circuit Court of Appeals. 258 Fed. 335. The main question was disposed of on the ground that by the Statutes of Missouri, Rev. Stats. 1909, §§ 6508, 6551, the title to the mussels was in the State.

As to the second count it was held that the mussels were not part of the realty. Later, a rehearing was granted, and while the Court adhered to its former opinion on the second count, it rightly, as we think, held that the statutes declaring the title to game and fish to be in the State spoke only in aid of the State's power of regulation and left the plaintiff's interest what it was before. See *Missouri* v. *Holland,* 252 U. S. 416, 434. It assumed that the defendants were trespassers and sent the case back for a new trial on that footing, the damages to be confined to the value of the shells at the date of conversion and not to include that subsequently added by manufacturing them into buttons. 270 Fed. 713.

The mussels were taken alive from the bottom of what seems to have been at times a flowing stream, at times a succession of pools, were boiled on the banks and the shells subsequently removed. As to the plaintiff's title, it is not necessary to say that the mussels were part of the realty within the meaning of the Missouri Statutes or in such sense as to make the plaintiff an absolute owner. It is enough that there is a plain distinction between such creatures and game birds or freely moving fish, that may shift to another jurisdiction without regard to the will of land owner or State. Such birds and fishes are not even in the possession of man. 252 U. S. 434. 2 Kent, Comm. 349. *Young* v. *Hichens,* 6 Q. B. 606. On the other hand it seems not unreasonable to say that mussels having a practically fixed habitat and little ability to move are as truly in the possession of the owner of the land in which they are sunk as would be a prehistoric boat discovered under ground or unknown property at the bottom of a canal. *Elwes* v. *Brigg Gas Co.,* 33 Ch. D. 562. *Reg.* v. *Rowe,* Bell, C. C. 93. *Barker* v. *Bates,* 13 Pick. 255. This is even more obvious as to the shells, when left piled upon the bank, as they were, to

await transportation. *Northern Pacific R. R. Co.* v. *Lewis,* 162 U. S. 366, 378, 382. Possession is enough to warrant recovery of substantial damages for conversion by a trespasser. We say nothing about the character of the stream as to navigability. The jury at least might find that there was nothing in that to prevent the application of what we have said. We are slow to believe that there were public rights extending to the removal of mussels against the land owner's will.

But it cannot be said as matter of law that those who took the mussels were trespassers; or even wrongdoers in appropriating the shells. The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country. *Marsh* v. *Colby,* 39 Mich. 626. In Missouri the implication is fortified by the limit of statutory prohibitions to enclosed and cultivated land and private ponds. Rev. Stats. 1919, §§ 5662, 3654. There was evidence that the practice had prevailed in this region. Whether those who took these mussels were entitled to rely upon it, and whether, if entitled to rely upon it for occasional uses, they could do so to the extent of the considerable and systematic work that was done were questions for the jury. They could not be disposed of by the Court. The implication of a license of the kind that we have mentioned from general understanding and practice does not encounter the difficulties that have been suggested in implying a license from conduct alone in cases where the same conduct after twenty years might generate an easement, it being a plain contradiction to imply *ad interim* a license which would prevent the acquisition of a prescriptive

right. *Chenery* v. *Fitchburg R. R. Co.,* 160 Mass. 211, 212.

As to the rule of damages in case the plaintiff recovers, in the absence of a decision by the Supreme Court of the State we should not regard the mussels as part of the realty within the meaning of the statute relied upon in the second count, and so far as appears at present we see no reason for charging the defendants, if at all, with more than the value of the mussels at the time of conversion, as ruled below. *Wetherbee* v. *Green,* 22 Mich 311. *Wooden-Ware Co.* v. *United States,* 106 U. S. 432. *Union Naval Stores Co.* v. *United States,* 240 U. S. 284. The result is that this judgment of the Circuit Court of Appeals is affirmed, but not all the principles laid down by it, and that the case will stand for trial by jury in the District Court.

Judgment affirmed.

BROWNE *v.* THORN ET AL., PARTNERS, DOING BUSINESS AS THORN & MAGINNIS.

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

No. 88. Argued October 20, 1922.—Decided November 13, 1922.

1. In an action by brokers to recover from their customer the balance of their account for purchases and sales of cotton made on their exchange pursuant to his orders, it is not a defence that the transactions were gambling because he had no intention to receive or deliver the actual cotton, if his intention in that regard was not disclosed to the brokers. P. 139.
2. Hedging—a means whereby manufacturers and others who have to make contracts of purchase and sale in advance, secure themselves against fluctuations of the market by counter contracts—is *prima facie* lawful. P. 139.
3. Section 4 of the "United States Cotton Futures Act", must be read in the light of construction of similar language of the Statute

of Frauds, and does not require that bought and sold notes should name the principals and be signed by both brokers.[1] P. 140.

4. Evidence of an understanding between the parties *held* to justify interpreting a telegraphic "stop" order from a customer to his brokers as directing sale of his cotton at the prices specified in the order, or, if those could not be got, at the next best price possible. P. 140.

272 Fed. 950, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals, affirming a judgment for the plaintiffs in an action by brokers, to recover from their customer, Browne, the balance of their account for purchase and sale of cotton, on a cotton exchange of which they were members. The case went twice to the court below. See 257 Fed. 519; 272 Fed. 950.

Mr. James B. McDonough for petitioner.

Mr. Ira D. Oglesby and *Mr. L. C. Going,* with whom *Mr. Jos. E. Johnson* and *Mr. Ben Cravens* were on the brief, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the Court.

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[1]Act of August 11, 1916, c. 313, Part A, 39 Stat. 446, 476.

"Sec. 3. That upon each contract of sale of any cotton for future delivery made at, on, or in any exchange, board of trade, or similar institution or place of business, there is hereby levied a tax in the nature of an excise of 2 cents for each pound of the cotton involved in any such contract."

"Sec. 4. That each contract of sale of cotton for future delivery mentioned in section three of this Act shall be in writing plainly stating, or evidenced by written memorandum showing, the terms of such contract, including the quantity of the cotton involved and the names and addresses of the seller and buyer in such contract, and shall be signed by the party to be charged, or by his agent in his behalf. If the contract or memorandum specify in bales the quantity of the cotton involved, without giving the weight, each bale shall, for the purposes of this Act, be deemed to weigh five hundred pounds."

This is a suit brought by the respondents, cotton brokers, to recover the balance of an account for the purchase and sale of 2,000 bales of cotton on the New Orleans Cotton Exchange. At a first trial a verdict was directed for the defendant on the ground that broker's seller's slips coupled with oral evidence that corresponding buyer's slips were executed, or vice versa, were not competent evidence of the transactions, under the United States Cotton Futures Act. Act of August 11, 1916, c. 313, Part A, § 4, 39 Stat. 446, 476. The judgment was reversed by the Circuit Court of Appeals after a very satisfactory discussion. 257 Fed. 519. There followed a second trial in which the verdict was for the plaintiffs and a judgment, sustained by the Circuit Court of Appeals, 272 Fed. 950, that is brought here by writ of error, supplemented by a petition for a writ of certiorari. There is no ground for the writ of error on the record, although the plaintiff in error now, in view of *Hill* v. *Wallace*, 259 U. S. 44, argues that the Cotton Futures Act is void except in the taxing provision enacted as an alternative to compliance with its regulations. A petition for certiorari was granted at the October Term, 1920, 256 U. S. 689.

The first ground relied upon for the petition is that the transactions were gambling transactions. That was the petitioner's contention at the trial, but to put it at the lowest, there was evidence to the contrary, the question was left to the jury with instructions that if the plaintiffs knew that the defendant had no intention to deliver or receive the actual cotton they could not recover, and the jury found for the plaintiffs. The defendant contended that his undisclosed intention was enough to defeat the plaintiff's claims; but that is not the law. It is objected that the judge instructed the jury that hedging was lawful, hedging being explained as a means by which manufacturers and others who have to make contracts of purchase or sale in advance secure themselves against the fluctuations

of the market by counter contracts. Prima facie such transactions are lawful. *Chicago Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 249.

The bought and sold notes executed on the Exchange mentioned only the names of the brokers and neither was signed by both the brokers. It is said that the act of Congress, § 4, was not satisfied. We agree with the Circuit Court of Appeals that the language of § 4 of the Cotton Futures Act must be read in the light of the decisions upon the similar language of the Statute of Frauds and that the notes were sufficient; assuming without discussion that in this case it was necessary to prove that § 4 was followed. See *Bibb* v. *Allen*, 149 U. S. 481.

Perhaps the most serious of the petitioner's defences was that the 2,000 bales of cotton were sold without authority. As stated by his counsel, on Germany's announcing unrestricted submarine warfare, cotton fell and the petitioner telegraphed to the defendants to sell 2,000 bales. The telegram read as follows: "Stop ten seventeen twenty and ten seventeen fifteen"—which is understood to carry a direction to sell one thousand bales at 17.20 cents per pound and one thousand at 17.15. But there was clear and sufficient evidence that such stop orders as they were called were understood to direct not only sale at the price mentioned but, if that could not be got, a sale at the next best possible price. The respondents sold at fourteen cents which was the best that could be done. We think it unnecessary to go into further detail to show that the judgment should be affirmed.

Judgment affirmed.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY *v.* FRUCHTER, AN INFANT, &c.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY *v.* FRUCHTER.

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

Nos. 35, 36. Argued October 6, 9, 1922.—Decided November 13, 1922.

A boy of eight years, by climbing to the topmost girder of a municipal bridge used for conveying a street across a railroad, and thence up a latticed tower, touched a live electric wire twenty-nine feet above the street, and was injured. *Held*, upon the circumstances stated in the opinion, that the railroad company, (which maintained the wires and the bridge framework,) could not be deemed liable upon the theory of license or invitation. P. 143. *United Zinc Co.* v. *Britt*, 258 U. S. 268.

271 Fed. 419, reversed.

CERTIORARI to judgments of the Circuit Court of Appeals, affirming judgments in the District Court against the petitioner, in two actions for personal injuries.

Mr. James W. Carpenter for petitioner.

The attractive-nuisance doctrine was not applicable, for defendant owed the plaintiff no active or affirmative duty. Defendant's duty to the public in relation to the bridge was confined by statute to maintenance of the bridge superstructure as such, and no negligence in whole or in part could be predicated on its attractiveness to children. There was no excuse nor justification for plaintiff's trespass on defendant's property, since (a) it was not attractive or alluring to him,—the bird attracted him, the property was a mere incident; (b) the relative inaccessibility of the property and the obvious danger in-

volved in scaling the intervening bridge superstructure was notice to all, having the physical capacity to reach it, of defendant's intent to use and occupy it exclusively; (c) the attitude of both the city and the defendant was forcibly resistant to the public use of the respective properties as a play or hunting ground; and (d) defendant had no notice of any use of its property by boys. Furthermore, there was no proof that either insulation or the evidential protective devices would not seriously interfere with the wires' functions in interstate commerce.

The New York rule of non-liability to infant trespassers or licensees for injuries received from inherent dangers in private premises is so thoroughly established that it has become a fixed rule of property and action by which the courts below were bound in comity. National interests require the affirmation of the principle declared by the Court of Appeals for the Third Circuit. 169 Fed. 1.

If the defendant owed the infant any duty, there was no evidence of negligence.

Mr. Harold R. Medina, with whom *Mr. Leon Sanders, Mr. George M. Curtis, Jr., Mr. Young B. Smith* and *Mr. Jacob Zelenko* were on the brief, for respondents.

The defendant's liability is governed by those rules of law applicable to persons maintaining a dangerous thing in or adjacent to a public highway.

Upon the decisions of the federal courts, the defendant was under a legal duty to take reasonable steps to guard against injuries to children of tender years which were likely to occur because of the close proximity of the live wire to a place and structure alluring to children and about which, well known to the defendant, young children were in the habit of playing.

It was not necessary for the plaintiffs to prove that the structure and wire maintained by the defendant, as distinguishable from the city's bridge and defendant's strut,

were alluring to children. It is sufficient that the defendant maintained a dangerous wire in close proximity to something which was alluring to children or in close proximity to a place where defendant knew, or should have known, children were likely to be attracted.

The remaining contentions of the defendant with reference to the essentials of the attractive-nuisance doctrine are unsound.

The defendant's duty in the premises was in no sense diminished by § 93 of the Railroad Law of New York.

It is well settled that the question of liability for negligence when not modified or regulated by statute, is one of general common law and the federal court is not bound to follow the decisions of the state court. Furthermore, the New York decisions sustain the judgments in these cases.

Mr. Justice McReynolds delivered the opinion of the Court.

Since 1908, One Hundred and Forty-Ninth Street, New York City, has been carried over and across the tracks of the New York, New Haven & Hartford Railroad by a public municipal steel truss bridge of standard construction. The bridge is fifty-four feet wide, two hundred and seventy feet long and is formed of posts, beams, girders, etc., connected and strengthened by trellis or lattice work. The top girders, or beams, are twenty-three feet above the street. The local law imposes upon the railroad the duty of maintaining the framework; the municipality is required to keep the roadway in repair.

Fastened to the top girder at the end of the bridge are two upright steel lattice towers, posts or struts. Cross arms attached to these six feet above their bases, support bare wires carrying electric current used for operating trains. The nearest wire is nineteen inches from the strut.

With considerable difficulty and some danger active boys can climb to the highest parts of the bridge. They did often climb upon it; some reached the struts. They were frequently chased away by a policeman and the railroad guard, and seem generally to have understood that to play there was forbidden; when an officer came in sight they kept off. At each corner of the bridge there was a notice board displaying the words: "Live wires, Danger, Keep Off."

In June, 1916, the plaintiff David Fruchter, eight years old, by using the trellis work climbed from the street to the top of the bridge in quest of a bird's nest. He then saw a bird on the wire above and to catch it climbed up the strut and reached out; the bird flew away; his hand touched the wire and severe injuries resulted. He sued for damages; and the father also seeks to recover for loss of services and expenses incurred. The causes were tried together. The Circuit Court of Appeals affirmed judgments for the plaintiffs February, 1921. 271 Fed. 419.

At the time of the accident the boy was attending school. Whether he could then read the warning words upon the notice boards is left in doubt; upon the witness stand he both affirmed and denied that he could. He further stated that before climbing upon the bridge he looked to see whether a policeman was present, and admitted that if one had been there he would not have gone up.

The court below accepted the theory that the jury could have found the structure was well known to be both dangerous and attractive to children and that failure to supply proper guards, human or mechanical, constituted negligence within the doctrine of *Railroad Co.* v. *Stout,* 17 Wall. 657, and *Union Pacific Ry. Co.* v. *McDonald,* 152 U. S. 262.

In *United Zinc & Chemical Co.* v. *Britt,* 258 U. S. 268, 275, we pointed out the theory upon which liability may

exist for injuries suffered by an infant although the circumstances would give no cause of action to an adult. "Infants have no greater right to go upon other peoples' land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. . . . There can be no general duty on the part of a landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there."

Considering the peculiar circumstances of the present cause, it is clear that if the plaintiff had been an adult he could not recover; and we are unable to find any sufficient evidence from which the jury could have properly concluded that the railroad company either directly or by implication invited or licensed him to climb upon the strut to a point from which he could touch the bare wire thirty feet above the street. The motion for an instructed verdict should have been granted.

The judgment of the court below is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

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STATE OF OHIO EX REL. SENEY, PROSECUTING ATTORNEY OF LUCAS COUNTY, OHIO, *v.* SWIFT & COMPANY ET AL.

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

No. 67. Argued October 16, 1922.—Decided November 13, 1922.

Where a litigant appeals to the Circuit Court of Appeals in a case involving the jurisdiction of the District Court and other questions, but confines the controversy there to the jurisdictional question alone, the judgment of the Circuit Court of Appeals sustaining its own jurisdiction and affirming the District Court is final, and this Court is without power to review it. Jud. Code, §§ 128, 238; Judiciary Act of 1891. P. 148.

Appeal to review 270 Fed. 141, dismissed.

APPEAL from a decree of the Circuit Court of Appeals, sustaining its jurisdiction and affirming a decree of the District Court that dismissed the appellant's complaint upon the merits after removal of the suit from a state court.

Mr. Allen J. Seney, with whom *Mr. Roy R. Stuart* was on the briefs, for appellant.

The State of Ohio and not the prosecuting attorney is the real party in interest. Valentine Anti-Trust Law, § 6400; Smith Cold Storage Law, §§ 1155–13; 1155–19; General Code of Ohio, §§ 2916, 11241.

These Anti-Trust and Cold Storage Laws are both penal statutes. The federal courts do not enforce such. *Montgomery* v. *Postal Telegraph-Cable Co.,* 218 Fed. 471; *Texas* v. *Day Land Co.,* 41 Fed. 228, 230.

The action is brought in the name of the prosecuting attorney, solely for the benefit of the State. *State ex rel.* v. *Railroad Co.,* 36 Oh. St. 434.

The Circuit Court of Appeals, in its opinion, notwithstanding it concluded that there was diversity of citizen-

ship, found, as a matter of both fact and law, that the State of Ohio was the real party in interest and hence the plaintiff.

The judgment was not final in the Circuit Court of Appeals because jurisdiction was not dependent entirely on diverse citizenship. Jud. Code, § 128. Sections 128, 239 and 240, Jud. Code, when read together, give ample authority to this Court to decide in this case on the appeal the question that is raised here:—Is the State of Ohio party plaintiff or is Allen J. Seney party plaintiff?

Jurisdiction of this Court to review the judgment of the Circuit Court of Appeals is determined by an examination of the petition for removal. *Southern Pacific Co.* v. *Stewart,* 245 U. S. 562.

Mr. H. W. Fraser for appellees.

Mr. Justice McReynolds delivered the opinion of the Court.

Styling himself the plaintiff, and declaring that he proceeded officially on behalf of the State, Allen J. Seney, prosecuting attorney, instituted the original proceeding against Swift & Company and The Northern Refrigerating Company, in the Court of Common Pleas for Lucas County, Ohio. He charged that those companies were parties to certain agreements and transactions in respect of stored pork products denounced by the Valentine Anti-Trust Law and the Smith Cold Storage Law, and prayed for an order restraining delivery of the products to Swift & Company, for a receiver, and for an injunction forbidding further unlawful acts.

In due time, alleging that the controversy was solely between it and Allen J. Seney, prosecuting attorney, and complete determination could be had without the presence of The Northern Refrigerating Company, Swift & Company asked removal of the cause to the United States

District Court. Shortly stated, the petition set up the following grounds:

1. The controversy is controlled by, and necessarily involves, the Constitution or laws of the United States.

2. Defendant cannot enforce, in the judicial tribunals of Ohio, its equal civil rights as a citizen of the United States.

3. The parties are citizens of different States.

Swift & Company filed the record in the District Court, and later presented an answer and cross petition. Upon the claim that the cause was not removable and the District Court lacked jurisdiction, the relator moved to remand to the state court on the record as it then stood, and neither party offered affidavits or other evidence in support of or in opposition thereto. This motion being overruled, he refused to litigate the merits. Thereafter, evidence was introduced to show that the pork was in interstate transportation, resting under a storage-in-transit privilege, and had never been intended for sale in Ohio. A final judgment dismissed the complaint. The court based its conclusion in part upon findings of an adequate affirmative defense.

The relator appealed to the Circuit Court of Appeals, where he relied wholly upon the jurisdictional question. That court said, "The only question now in controversy in this court is whether the court below acquired jurisdiction by the petition for removal," but ruled that the final decree appealed from involved something more than jurisdiction, and sustained the appeal. It considered the three specified grounds for removal, held the first and second unsubstantial, the third sufficient, and affirmed the trial court. 270 Fed. 141. Thereupon, this appeal was taken and the relator again seeks to present the single question upon which he relied below.

After final judgment in the District Court, other defenses being waived, the cause might have come here by direct appeal upon the jurisdictional question only

(*Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92, 96); but other matters were involved which could have been reviewed. He chose to go to the Circuit Court of Appeals, and there assailed the removal and nothing more.

The District Court's jurisdiction depended upon the substantial grounds alleged in the petition for removal. *Southern Pacific Co.* v. *Stewart*, 245 U. S. 359, 363, 364. Without traversing the facts alleged therein, the relator has always maintained that none of such grounds was good. The Circuit Court of Appeals adopted his views as to Nos. 1 and 2 (*supra*) but declared the third—diversity of citizenship—a substantial one. Generally, at least, suitors may not maintain a position here which conflicts with that taken below; and the only point now open, in any view, is that the claim of diverse citizenship lacks substantiality. *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92, 97, 98. The court below, upon full consideration, rejected this contention.

Section 128, Judicial Code, provides that circuit courts of appeals shall exercise appellate jurisdiction over final decisions of district courts in all classes of cases except those wherein appeals and writs of error may be taken directly to the Supreme Court.[1]

[1] Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

Section 238, Judicial Code, provides that appeals and writs of error may be taken from final judgments of the district courts directly to the Supreme Court when jurisdiction of the court is in issue, in prize causes, cases involving the construction or application of the Constitution of the United States, etc.[2]

The Act of March 3, 1891, c. 517, 26 Stat. 826, from which these sections take their origin, has been uniformly construed as intended to distribute jurisdiction among the appellate courts, prevent successive appeals, and relieve the docket of this Court. If appellant, in the way now attempted, can secure two reviews of a cause wherein he has presented to the court below no controverted question except the jurisdictional one, a fundamental purpose of the statute will be frustrated. *Robinson* v. *Caldwell,* 165 U. S. 359, 362; *Loeb* v. *Columbia Township Trustees,* 179 U. S. 472, 478; *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71, 73, 74; *Carolina Glass Co.* v. *South Carolina,* 240 U. S. 305, 318; *El Banco Popular, etc.* v. *Wilcox,* 255 U. S. 72, 75; *The Carlo Poma,* 255 U. S. 219, 221; *Alaska Pacific Fisheries* v. *Alaska,* 249 U. S. 53, 60, 61.

And we accordingly hold, that whenever the suitor might have come here directly from the District Court upon the sole question which he chose to controvert in the

[2] Sec. 238. Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Circuit Court of Appeals, the judgment of the latter becomes final, and we cannot entertain an appeal therefrom.

The suggestion of counsel that this Court must have denied the writ of certiorari heretofore applied for because of the pending appeal, is not well founded. Such writs are only granted under special circumstances, adequately specified in former opinions. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 257, 258.

Dismissed.

THE SAO VICENTE.[1]

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

Nos. 279–283. Argued October 3, 1922.—Decided November 13, 1922.

A consul general is not competent, merely by virtue of his office, to appear and claim immunity on behalf of his government and its property, in admiralty proceedings. P. 154.

Certiorari to review 281 Fed. 111, and 115, dismissed.

THESE were writs of certiorari, issued upon petition of the Consul General of Portugal, for the purpose of bringing up admiralty proceedings described in the opinion. The writs were directed to decrees of the Circuit Court

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[1] The docket titles of these cases are: No. 279, *Transportes Maritimos do Estado, Claimant of S. S. "Sao Vicente,"* v. *Tietjen & Lang Drydock Company.* No. 280, *Transportes Maritimos do Estado, Claimant of S. S. "Murmugao,"* v. *Maxwell Rose, doing business as Battery Operating Company and Whitehall Stevedoring Company.* No. 281, *Transportes Maritimos do Estado, (in personam,)* v. *Maxwell Rose, doing business as Battery Operating Company and Whitehall Stevedoring Company.* No. 282, *Transportes Maritimos do Estado, Claimant of S. S. "Murmugao",* v. *Thomas De Simone.* No. 283, *Transportes Maritimos do Estado, (in personam,)* v. *Thomas De Simone.*

of Appeals which dismissed for want of jurisdiction appeals from the decrees of the District Court.

Mr. F. Dudley Kohler for petitioner.

The Sao Vicente and Murmugao were owned and operated by the independent sovereign Government of Portugal and they and their owner were immune from suit in the United States court.

The immunity of the petitioner's vessels is not affected by the fact that they carried commercial cargo. *The Pampa,* 245 Fed. 137; *The Carlo Poma,* 259 Fed. 369; *The Maipo,* 252 Fed. 627; 259 Fed. 367; *Briggs* v. *Light Ships,* 11 Allen, 157; *The Parlement Belge,* L. R. 5 P. D. 197; *The Porto Alexandre* [1920] P. D. 30; *The Scotia* [1903] A. C. 501; *The Jassy* [1906] P. D. 270; *The Constitution,* L. R. 4 P. D. 39.

The petitioner did not waive its rights to immunity or its objections to the jurisdiction of the United States courts.

There can be no implied waiver of objection to the jurisdiction of our courts by a sovereign.

The filing of bonds or stipulations in these cases cannot be regarded as a waiver of objection to jurisdiction of our courts.

The decisions of the District Court and the Circuit Court of Appeals in these actions are and permit a positive violation of the sovereignty of an independent foreign sovereign Government with which the United States is at peace; and are in conflict with the decisions of this Court and with the general principles of the law as laid down by the federal courts.

The procedure by appeals to the Court of Appeals and then by writ of certiorari was proper practice and the petitioner is properly before the Court.

Mr. John M. Woolsey, Mr. E. Curtis Rouse and *Mr. Meyer Kraushaar,* with whom *Mr. Robert S. Erskine, Mr.*

J. Dexter Crowell and *Mr. Emanuel Celler* were on the briefs, for respondents.

Mr. Justice McReynolds delivered the opinion of the Court.

The above entitled causes are here on writs of certiorari, issued upon the sole petition of George S. Duarte, who described himself therein as the duly accredited Consul General of the Republic of Portugal in the United States of America, without more. The petition sets out the proceedings below; declares, "The Portuguese Government does not intend to avoid its just obligations to citizens of the United States, but it claims that if there is any question between it and such citizens they are matters for adjudication by the Diplomatic Departments of the two Governments and it does object to the violation of its sovereignty contrary to all rules of international law and international comity;" and alleges, as one reason for granting the writ, that "an important question of international law and comity is involved." There is nothing to show that the Consul General had authority or right to take any action concerning the matters in question, except as may be inferred from his official position. Considering the possible international aspect of the controversy, we granted the petition, and appropriate writs issued. Counsel have been heard, both orally and by briefs.

Nos. 279, 280 and 282 are separate proceedings *in rem,* commenced in the United States District Court, Southern District of New York, against The Sao Vicente and The Murmugao, to recover for materials, supplies, work and labor furnished to them. In each cause, after arrest of the steamer, the Transportes Maritimos do Estado, intervening for its interest, appeared before the court and made claim, averring that it was in possession when the process issued, and was the true and *bona fide* owner. It asked

to defend accordingly; gave bond for costs and value; and secured the vessel's discharge. Thereafter, the steamer answered denying the allegations of the libel, and as a distinct and complete defense alleged that it was owned and operated by the Transportes Maritimos do Estado, a Department of the Government of Portugal not subject to suits in courts of the United States. This special defense was declared insufficient and final decrees were duly entered. Appeals to the Circuit Court of Appeals were dismissed (*The Carlo Poma,* 255 U. S. 219), that court being of opinion that the only controverted point was the jurisdiction of the trial court. 281 Fed. 111 and 115.

Nos. 281 and 283 are separate proceedings *in personam,* commenced in the same District Court against Transportes Maritimos do Estado, alleged to be a foreign corporation organized under the laws of the Republic of Portugal, to recover for services, goods, wares and merchandise furnished to its steamers The Cunene and The Santo Antao. The Murmugao was attached. The respondents answered, made general denials, and, as a distinct and complete defense, alleged The Cunene and The Santo Antao were owned and operated by a Department of the sovereign Government of Portugal, and that the court was therefore without jurisdiction. This defense was held insufficient. Appeals to the Circuit Court of Appeals were dismissed upon the view that they involved only the question of jurisdiction.

We are of the opinion that the writs of certiorari were improvidently awarded and must be dismissed. The Consul General was not party to any of the proceedings below, and is not competent, merely by virtue of his office, to appear here for his Government and claim immunity from process in the manner attempted. In *The Anne,* 3 Wheat. 435, 445, a prize proceeding for condemnation, a claim was interposed in behalf of the Spanish Consul, for restitution of the vessel because of asserted violation of the

neutral territory of Spain. Speaking through Mr. Justice Story, this Court said:

"And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign? We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case; and therefore, we consider this claim as asserted by an incompetent person, and on that ground, it ought to be dismissed."

And see *United States* v. *Wong Kim Ark,* 169 U. S. 649, 678; *In re Baiz,* 135 U. S. 403, 424; *Ex parte Muir,* 254 U. S. 522, 532; *The Pesaro,* 255 U. S. 216, 218.

Dismissed.

KEOGH *v.* CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL.

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

No. 51. Argued October 12, 1922.—Decided November 13, 1922.

1. Approval of rates as reasonable and non-discriminatory, by the Interstate Commerce Commission, fixes their character as such in relation to a shipper who took part in the proceedings. P. 161.
2. A combination of carriers to fix rates may be illegal and subject to proceedings by the Government, under the Anti-Trust Act, even though the rates are reasonable and non-discriminatory, and, it seems, even though they have been approved by the Interstate Commerce Commission. P. 161.
3. But a private shipper cannot recover damages from the carriers in such a case, under § 7 of the Anti-Trust Act, upon the ground that he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed, because:

(a) The fact that a rate results from a conspiracy in violation of the Anti-Trust Act does not render it necessarily illegal; and, as the legality of rates is determined by the Act to Regulate Commerce, and the shipper who suffers from illegal (unreasonable or discriminatory) rates has his remedy in damages under that act, it seems that Congress did not intend to provide him a further remedy for such illegal rates under § 7 of the Anti-Trust Act, and *a fortiori* none where the rates fixed by the conspiracy were found legal by the Commission. P. 162.

(b) The right of action given by § 7 of the Anti-Trust Act to one "injured in his business or property," implies violation of a legal right; but the legal right of a shipper respecting a carrier's rates is measured by the published tariff, and, to enforce a departure from this through a recovery under § 7, would be, in effect, to give the shipper an illegal preference. P. 163.

(c) Recovery would depend upon the plaintiff's proving that lower rates, which, but for the conspiracy, the carriers would have maintained, would have been non-discriminatory—a question which, generically, must first be submitted to the Interstate Commerce Commission, yet which, specifically, is not within its cognizance, because hypothetical. P. 163.

(d) The damages, if any, resulting to the shipper from the establishment of the higher rates could not be proved by facts from which their existence and amount were logically and legally inferable, but are purely speculative. P. 164.

271 Fed. 444, affirmed.

ERROR to a judgment of the Circuit Court of Appeals, affirming a judgment of the District Court for defendant railroad companies and individuals, in an action brought by Keogh under § 7 of the Anti-Trust Act to recover damages alleged to have resulted from a combination to fix railroad rates, in restraint of interstate commerce.

Mr. H. P. Young, with whom *Mr. W. T. Alden, Mr. C. R. Latham* and *Mr. Charles Martin* were on the briefs, for plaintiff in error.

Sections 1 and 2 of the Anti-Trust Act prohibit all contracts and combinations which directly restrain trade or commerce.

Competition is the natural law of trade and the Anti-Trust Act was intended to prevent any contracts or combinations which destroy or stifle competition.

The mere fact that the rates fixed and maintained by the combination of the defendant companies were not excessive or unreasonable does not constitute a defense to an action under the Anti-Trust Act. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 65; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 179; *United States* v. *Joint Traffic Association,* 171 U. S. 505, 571; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 339; *United States* v. *Union Pacific R. R. Co.,* 226 U. S. 61, 83; *Northern Securities Co.* v. *United States,* 193 U. S. 197, 340; *Thomsen* v. *Cayser,* 243 U. S. 66, 86; *Grenada Lumber Co.* v. *Mississippi,* 217 U. S. 433.

The right of a railroad company to charge reasonable rates does not include the right to enter into an agreement or combination to maintain reasonable rates.

It was the duty of the defendants to compete, and the Anti-Trust Act has a stricter application to them than to combinations of persons or corporations engaged in private pursuits. *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 336; *Thomsen* v. *Cayser,* 243 U. S. 66, 85; *United States* v. *Union Pacific R. R. Co.,* 226 U. S. 61, 86.

The natural effect of competition is to lower rates, and the direct and immediate effect of the agreement or combination described in the declaration was to increase the rates over the prevailing competitive rates.

The declaration alleges that plaintiff was compelled to pay more than a reasonable competitive rate, and that his business was injured and he suffered a loss of profits. These are proper elements of damage under the statute.

A general allegation of damages is sufficient, especially where no special demurrer or motion to make more specific is filed. The amount of such damages should have been submitted to the jury.

The findings of the Interstate Commerce Commission are not a bar to this suit, nor even admissible in evidence. The Commission has no power to decide questions arising under the Anti-Trust Act, and it has so held in the decisions relied upon in the special pleas of defendants.

The Commission is an administrative body and its findings have only the effect provided by statute. The act creating it does not give its findings any effect in other than proceedings under the Commerce Act. Even where the Commission makes a money award, its order is only *prima facie* evidence of the facts therein stated. *Meeker* v. *Lehigh Valley R. R. Co.,* 236 U. S. 412.

The finding of the Commission relates to a maximum rate which carriers must not exceed. It has no power to name the specific rate to be charged, nor can it determine the reasonable rates that would prevail under natural or competitive conditions.

Plaintiff is entitled under the Constitution to have a jury pass upon the issues and assess the damages.

Even in an action under the Commerce Act to recover damages for excessive freight charges, wherein the award of damages made by the Commission is admitted as *prima facie* evidence, the plaintiff is entitled to a jury trial.

The mere fact that the increased rates were filed with the Commission and published by the defendants separately, does not exempt them from liability under the Anti-Trust Act for their unlawful acts in agreeing jointly upon the rates. The Commerce Act cannot be made a refuge for violators of the Anti-Trust Act.

Mr. Bruce Scott, with whom *Mr. R. V. Fletcher, Mr. Kenneth F. Burgess* and *Mr. J. C. James* were on the brief, for defendants in error.

Mr. Justice Brandeis delivered the opinion of the Court.

This action, under § 7 of the Anti-Trust Act, July 2, 1890, c. 647, 26 Stat. 209, was brought by Keogh in the federal District Court for Northern Illinois, Eastern Division, in November, 1914. Eight railroad companies and twelve individuals were made defendants. The case was heard upon demurrer to a special plea; the demurrer was overruled; judgment was entered for defendants, plaintiff electing to stand upon his demurrer; and this judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit. 271 Fed. 444. The case is here on writ of error.

The cause of action set forth was this: Keogh is a manufacturer of excelsior and flax tow at St. Paul, Minnesota. The defendant corporations are interstate carriers engaged in transporting freight from St. Paul to points in other States. Prior to September 1, 1912, these carriers formed an association known as the Western

Trunk Line Committee. The individual defendants are officers and agents of the carriers and represent them in that Committee. It is a function of the Committee to secure agreement in respect to freight rates among the constituent railroad companies, which would otherwise be competing carriers. By means of such agreement, competition as to interstate rates from St. Paul on excelsior and tow was eliminated; uniform rates were established; and interstate commerce was restrained. The uniform rates so established were arbitrary and unreasonable; they were higher than those theretofore charged; and they were higher than the rates would have been if competition had not been thus eliminated. Through this agreement for uniform rates Keogh was damaged. The declaration contains a schedule of the amounts paid by him in excess of those which would have been paid under rates prevailing before September 1, 1912, and which, but for the conspiracy, would have remained in effect. He claims damages to the extent of this difference in rates. He also alleges as an item of damages that the increase in freight rates lessened the value of his St. Paul factory through loss of profits.

Defendants set up the fact that every rate complained of had been duly filed by the several carriers with the Interstate Commerce Commission; that upon such filing the rates had been suspended for investigation, upon complaint of Keogh, pursuant to the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, 384, as amended; that after extensive hearings, in which Keogh participated, the rates were approved by the Commission; and that they were not made effective until after they had been so approved. The character of the proceedings before the Commission was more fully shown by reference to *Keogh* v. *Chicago, Burlington & Quincy R. R. Co.*, 24 I. C. C. 606; also *Rates on Excelsior and Flax Tow from St. Paul, Minn.*, 26 I. C. C. 689; *Rates*

on Excelsior and Flax Tow from St. Paul, Minn., 29 I. C. C. 640; *Morris, Johnson, Brown, Manufacturing Co.* v. *Illinois Central R. R. Co.*, 30 I. C. C. 443; *The Excelsior and Flax Tow Cases*, 36 I. C. C. 349.

The case is presented on these pleadings. Whether there is a cause of action under § 7 of the Anti-Trust Act is the sole question for decision. Keogh contends that his rights are not limited to the protection against unreasonably high or discriminatory rates afforded him by the Act to Regulate Commerce; that under the Anti-Trust Act he was entitled to the benefit of competitive rates; that the elimination of competition caused the increase in his rates; and that, as he has been damaged thereby, he is entitled to recover. The instrument by which Keogh is alleged to have been damaged is rates approved by the Commission. It is, however, conceivable that, but for the action of the Western Trunk Line Committee, one, or more, of these railroads would have maintained lower rates. Rates somewhat lower might also have been reasonable. Moreover, railroads had often, in the fierce struggle for business, established unremunerative rates. Since the case arose prior to the Transportation Act 1920, February 28, c. 91, § 418, 41 Stat. 456, 474, 485, the carriers were at liberty to establish or maintain, even unreasonably low rates provided they were not discriminatory. Compare *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 277; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 565.

All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission. *Los Angeles Switching Case*, 234 U. S. 294. But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction

under § 4, and by forfeiture under § 6. That was settled by *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, and *United States* v. *Joint Traffic Association,* 171 U. S. 505. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government. It does not, however, follow that Keogh, a private shipper, may recover damages under § 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed. There are several reasons why he cannot.

A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce. Under § 8 of the latter act the exaction of any illegal rate makes the carrier liable to the "person injured thereby for the full amount of damages sustained in consequence of any such violation" together with a reasonable attorney's fee. Sections 9 and 16 provide for the recovery of such damages either by complaint before the Commission or by an action in a federal court. If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.,* 242 U. S. 288. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See *Meeker* v. *Lehigh Valley R. R. Co.,* 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier?

Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. *Texas & Pacific R. R. Co.* v. *Mugg,* 202 U. S. 242; *Louisville & Nashville R. R. Co.* v. *Maxwell,* 237 U. S. 94; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson,* 233 U. S. 173; *Dayton Iron Co.* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.,* 239 U. S. 446; *Erie R. R. Co.* v. *Stone,* 244 U. S. 332. And they are not affected by the tort of a third party. Compare *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink,* 250 U. S. 577. This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under § 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief. Compare *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 440.

The character of the issues involved raises another obstacle to the maintenance of the action. The burden resting upon the plaintiff would not be satisfied by proving that some carrier would, but for the illegal conspiracy, have maintained a rate lower than that published. It would be necessary for the plaintiff to prove, also, that

the hypothetical lower rate would have conformed to the requirements of the Act to Regulate Commerce. For unless the lower rate was one which the carrier could have maintained legally, the changing of it could not conceivably give a cause of action. To be legal a rate must be non-discriminatory. And the proceedings before the Commission in this controversy illustrate how readily claims of unjust discrimination arise. See *Morris, Johnson, Brown, Manufacturing Co.* v. *Illinois Central R. R. Co.*, 30 I. C. C. 443. For this reason, it is possible that no lower rate from St. Paul on tow and excelsior could have been legally maintained without reconstituting the whole rate structure for many articles moving in an important section of the country. But it is the Commission which must determine whether a rate is discriminatory; at least, in the first instance. See *Abilene Case, supra; Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. It has been suggested that this requirement does not necessarily bar an action involving that issue; for a court might suspend its proceeding until the question of discrimination had been determined by the Commission. But here the difficulty presented could not be overcome by such a practice. The powers conferred upon the Commission are broad. It may investigate and decide whether a rate has been, whether it is, or whether it would be discriminatory. But by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination. And that hypothetical question is one with which plaintiff would necessarily be confronted at a trial.

Finally, not only does the injury complained of rest on hypothesis (compare *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 222–224); but the damages alleged are purely speculative. Under § 7 of the Anti-Trust Act, as under § 8 of the Act to Regulate Commerce, *Pennsyl-*

vania R. R. Co. v. *International Coal Mining Co.,* 230 U. S. 184, recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture.[1] To make proof of such facts would be impossible in the case before us. It is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate. *Southern Pacific Co.* v. *Darnell-Taenzer Co.,* 245 U. S. 531. Here the instrument by which the damage is alleged to have been inflicted is the legal rate, which, while in effect, had to be collected from all shippers. Exaction of this higher legal rate may not have injured Keogh at all; for a lower rate might not have benefited him. Every competitor was entitled to be put—and we must presume would have been put—on a parity with him. And for every article competing with excelsior and tow, like adjustment of the rate must have been made. Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer.

Affirmed.

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[1] Compare *Central Coal & Coke Co.* v. *Hartman,* 111 Fed. 96; *Motion Picture Patents Co.* v. *Eclair Film Co.,* 208 Fed. 416; *Locker* v. *American Tobacco Co.,* 218 Fed. 447; *American Sea Green Slate Co.* v. *O'Halloran,* 229 Fed. 77, 79; *Noyes* v. *Parsons,* 245 Fed. 689.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY *v.* SETTLE ET AL., PARTNERS UNDER THE FIRM NAME OF W. H. SETTLE & CO.

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

No. 83. Argued October 20, 1922.—Decided November 13, 1922.

1. Whether a shipment of goods is interstate, and is therefore subject to the rates provided by the carrier's interstate tariff, depends upon the essential character of the movement, and this character is not necessarily determined by the contract between shipper and carrier. P. 169.
2. Neither through billing, uninterrupted movement, continuous possession by the carrier nor unbroken bulk is an essential of interstate shipment, though these are common incidents of through shipment, and their presence or absence may be important evidence of the intention with which a shipment was made, when that question is in issue. P. 171.
3. Where the shipper bills his goods from one State to a point in another, paying the interstate rate, and, after receiving delivery of the loaded cars at the latter point, reships them within a few days to another point in the second State on local bills, paying the local freight rate, intending throughout to move them to this destination from the point of origin and interrupting the movement only that he may take advantage of a difference in his favor between the through rate and the sum of those paid, his intention, thus carried out, determines, as a matter of law, the essential nature of the entire movement as a movement in interstate commerce. P. 171.
4. In such a case the through interstate rate is the only lawful rate; and the misuse of the intermediate rates unjustly depletes the carrier's revenues and opens the door to discrimination, contrary to the Act to Regulate Commerce. P. 172.

272 Fed. 675, reversed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court adverse to the Railroad Company in its action to recover the

difference between the amount due on interstate shipment of lumber measured by the through interstate tariff, and a less amount paid under a combination of interstate and local rates. See 272 Fed. 675; 249 Fed. 913.

Mr. George Hoadly, with whom *Mr. Judson Harmon* and *Mr. Edward Colston* were on the brief, for plaintiff in error.

Mr. Harry C. Barnes, for defendants in error, submitted.

Mr. Justice Brandeis delivered the opinion of the Court.

The Baltimore & Ohio Southwestern Railroad has freight stations at Oakley and at Madisonville, both within the city limits of Cincinnati. It duly published, in connection with other carriers, interstate carload rates on lumber from southern points to Oakley and to Madisonville. It also duly published intrastate carload rates from Oakley to Madisonville. The interstate rates to Madisonville were higher than the interstate rates to Oakley plus the local rate from Oakley to Madisonville. W. H. Settle & Co., who are lumber dealers, with a place of business at Madisonville, had lumber shipped from the South to Oakley; paid the freight to that point; received at that station delivery of the loaded cars on the team tracks or in the bulk yard; and, without unloading any of the cars, reshipped them within a few days to Madisonville on local bills of lading, paying the local freight rate. Thus, the shippers secured transportation of the lumber to Madisonville by paying less in freight charges than would have been payable according to the interstate tariff, if the cars had been billed through to Madisonville. At the time these cars were shipped from points of origin, and continuously thereafter, it had been the intention of the shippers that the cars should go to Madisonville. They were billed to Oakley and physical possession was

taken by the shipper there, in order to get the benefit of the lower freight charges resulting from the combination of rates. The railroad insisted that, in view of this fact, the through rate to Madisonville applied; and it brought an action against the shippers, in the Federal District Court for Southern Ohio, Western Division, to recover the difference between the amounts actually received and the through rate to Madisonville. A demurrer to the petition, which set up the above facts, was overruled by the trial court; judgment entered thereon was reversed by the Circuit Court of Appeals for the Sixth Circuit; and the case was remanded to the District Court. 249 Fed. 913. The railroad then discontinued that suit and brought this one in the same court. The action was tried before a jury; the facts above stated were shown; the shippers got the verdict; and judgment entered for them was affirmed by the Circuit Court of Appeals. 272 Fed. 675. The case is here on writ of error.

It is admitted that if the reshipment from Oakley to Madisonville was part of a through interstate movement, the railroad was entitled to recover. The question is presented whether, in view of the undisputed facts, the original and continuing intention so to reship made the reshipment, as matter of law, part of a through interstate movement. The following instruction given and excepted to shows sufficiently how the question arose:

"As a matter of law, the existence of an original and continuing intention in the minds of the defendants Settle and Clephane to reship this lumber from Oakley to Madisonville, for the purpose of saving expense, is not, of itself, sufficient to convert the shipments into through shipments, if there was otherwise a good-faith delivery at Oakley. . . . If there was a good-faith delivery of this lumber at Oakley, to Settle and Clephane, the fact they always had an intention in their mind, and persevered in that intention, of reshipping it to Madisonville

for the purpose of saving money on freight, that would not necessarily constitute a through shipment in interstate commerce."

No material fact, evidential or ultimate, had been left in dispute. There was no room for any issue of good faith to be determined by the jury. Physical delivery of the cars to the shippers had been made at Oakley, after payment of the freight and other charges. The shippers had no place of business at Oakley. The delivery there was the completion of one stage in the contemplated movement to Madisonville. After a brief interval the second stage was begun under the local bill of lading. It was conceivable that the shippers might find a customer who would take the lumber at Oakley; and, in that event, the rail movement would have ended there. But that was not probable or expected; nor was it the reason for shipping to Oakley. The movement had been divided by the shippers into two stages—instead of using through billing—because they believed that by so doing they could secure transportation to Madisonville at less than the through interstate rate. Whether under the Act to Regulate Commerce lower intermediate rates can be so used in combination, is the precise question for decision.

The contention of the shippers is that the character of a movement, as intrastate or interstate, and, hence, what the applicable rate is, depends solely upon the contract of transportation entered into between shipper and carrier at the point of origin of the traffic; that when an interstate shipment reaches the destination named in this contract and, after payment of charges, delivery is taken there by the consignee, the contract for interstate transportation is ended; that any subsequent movement of the commodity is, of necessity, under a new contract with the carrier and at the published rate; and that, since this lumber came to rest at Oakley before that new movement, the reshipment from there to Madisonville (both

stations being within the State of Ohio), was an intrastate movement. This contention gives to the transportation contract an effect greater than is consistent with the purposes of the Act to Regulate Commerce. The rights of shipper against carrier are determined by law through the provisions of the tariff which are embodied in the applicable published rate. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson,* 233 U. S. 173; *Western Union Telegraph Co.* v. *Esteve Brothers & Co.,* 256 U. S. 566. And whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498; *Ohio Railroad Commission* v. *Worthington,* 225 U. S. 101; *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111; *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.,* 229 U. S. 336. And in *Baer Brothers Mercantile Co.* v. *Denver & Rio Grande R. R. Co.,* 233 U. S. 479, 490, this Court held that a carrier cannot, by separating the rate into its component parts, charging local rates and issuing local way bills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of the benefit of an appropriate rate for a through interstate movement.

If the intention with which the shipment was made had been actually in issue, the fact that possession of the cars was taken by the shipper at Oakley and that they were not rebilled for several days, would have justified the jury in finding that it was originally the intention to end the movement at Oakley and that the rebilling to Madisonville was an afterthought. But the defendant Clephane admitted at the trial that it was intended from the beginning that the cars should go to Madisonville;

and this fact was assumed in the instructions complained of. In other words, Madisonville was at all times the destination of the cars; Oakley was to be merely an intermediate stopping place; and the original intention persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet the through interstate tariffs apply. See *Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold,* 241 U. S. 371; *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136; *Central Railroad Co. of New Jersey* v. *United States,* 257 U. S. 247. Compare *Philadelphia & Reading Ry. Co.* v. *Hancock,* 253 U. S. 284.

Through rates are, ordinarily, made lower than the sum of the intermediate rates. This practice is justified, in part, on the ground that operating costs of a through movement are less than the aggregate costs of the two independent movements covering the same route. But there may be traffic or commercial conditions which compel, or justify, giving exceptionally low rates to move-

ments which are intermediate. The mere existence of such intermediate rates confers no right upon the shipper to use them in combination to defeat the applicable through rate. Here, there had been published interstate rates for the transportation from the southern points to Madisonville. For such transportation the interstate rates to Madisonville were the only lawful rates. To permit the applicable through interstate rate to be defeated by use of a combination of intermediate rates would open wide the door to unjust discrimination. And it would unjustly deplete the revenues of the carrier. The sole question, therefore, which could arise in this case was whether the movement actually entered upon at point of origin, and persisted in, was transportation of the lumber to Madisonville.

Before the decisions above referred to it was commonly assumed that, while a carrier, or one of its employees, might not act as a reconsigning agent for a shipper in order to enable him to use a combination of lower intermediate rates and thus avoid the higher charges incident to the through interstate movement, the shipper might so use the combination, provided he consigned the car to himself at the intermediate point, there paid the charges, took possession, and then reshipped the car on the local rate to its real destination.[1] The distinction made was without basis in reason. To permit carriers' revenues from interstate rates to be depleted by such misuse of a combination of intermediate rates would be no less inconsistent with the provisions and purposes of the Act to Regulate Commerce than to permit them to be used as a means of discrimination. And, since the decisions cited

[1] See *Morgan* v. *Missouri, Kansas & Texas Ry. Co.*, 12 I. C. C. 525, 528; *Wood Butter Co.* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 16 I. C. C. 374; *Big Cañon Ranch Co.* v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 20 I. C. C. 523, 526. Compare *Kurtz* v. *Pennsylvania Co.*, 16 I. C. C. 410, 413.

above were rendered, the principle there declared has been steadfastly applied by the Interstate Commerce Commission for the purpose of protecting revenues of railroads against such attacks.[1] See also *McFadden* v. *Alabama Great Southern R. R. Co.*, 241 Fed. 562. The decision in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 204 U. S. 403, relied upon by defendants in error, is entirely consistent with these later decisions of this Court, although some expressions in the opinion are not.

The mere fact that cars received on interstate movement are reshipped by the consignee, after a brief interval, to another point, does not, of course, establish an essential continuity of movement to the latter point. The reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began. Shipments to and from distributing points often present this situation, if the applicable tariffs do not confer reconsignment or transit privileges.[2] The distinction is clear between cases of that character and the one at bar, where the essential nature of

[1] *Kanotex Refining Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 34 I. C. C. 271; 46 I. C. C. 495; *Rates on Railroad Fuel and Other Coal*, 36 I. C. C. 1, 8; *Lumber Rates from Newcastle, Cal.*, 37 I. C. C. 596, 597; *Lumber from Easton, Wash.*, 39 I. C. C. 188, 189; *Miller Brothers* v. *St. Louis & San Francisco R. R. Co.*, 42 I. C. C. 261, 262; *Memphis Merchants Exchange* v. *Illinois Central R. R. Co.*, 43 I. C. C. 378, 391; *Woolworth* v. *Union Pacific R. R. Co.*, 46 I. C. C. 437, 438; *Sugar Land Mfg. Co.* v. *Beaumont, Sour Lake & Western Ry. Co.*, 56 I. C. C. 212.

[2] *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*, 233 U. S. 334, was a case of this character. See also *Southern Pacific Co.* v. *Arizona*, 249 U. S. 472; *Bracht* v. *San Antonio & Aransas Pass Ry. Co.*, 254 U. S. 489; *Illinois Grain to Chicago*, 40 I. C. C. 124; *Kettle River Co.* v. *Missouri Pacific Ry. Co.*, 52 I. C. C. 73, 77. On the other

the traffic as a through movement to the point of ultimate destination is shown by the original and persisting intention of the shippers which was carried out.

Reversed.

MR. JUSTICE MCREYNOLDS dissents.

ZUCHT, BY HER NEXT FRIEND, ETC. *v.* KING ET AL.

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

No. 84. Argued October 20, 1922.—Decided November 13, 1922.

1. A city ordinance is a law of a State within the meaning of Jud. Code, § 237. P. 176.
2. It is the duty of this Court to decline jurisdiction whenever it appears that the constitutional question upon which jurisdiction depends was not, at the time of granting the writ, a substantial question. P. 176.
3. City ordinances making vaccination a condition to attendance at public or private schools and vesting broad discretion in health authorities to determine when and under what circumstances the requirement shall be enforced are consistent with the Fourteenth Amendment and, in view of prior decisions, a contrary contention presents no substantial constitutional question. P. 176.
4. The question whether city officials have administered a valid ordinance in such a way as to deny the plaintiff the equal protection of the laws, is not one of those upon which the judgment of a state court may be brought here by writ of error. P. 177.

Writ of error to review 225 S. W. 267, dismissed.

ERROR to a judgment of the court below affirming a judgment of a trial court which dismissed the bill in a suit for injunction, mandamus and damages.

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hand there are many instances where the grant by tariffs of extensive transit or reconsignment privileges have rendered what otherwise would be independent local movements, a part of the through interstate shipment. See *In Matter of Substitution of Tonnage at Transit Points,* 18 I. C. C. 280; *The Transit Case,* 24 I. C. C. 340.

Mr. Don A. Bliss for plaintiff in error.

Mr. R. L. Ball and *Mr. A. W. Seeligson,* for defendants in error, submitted. *Mr. T. H. Ridgeway, Mr. Raymond Marshall, Mr. B. W. Teagarden* and *Mr. C. W. Trueheart* were also on the brief.

Mr. Justice Brandeis delivered the opinion of the Court.

Ordinances of the City of San Antonio, Texas, provide that no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination. Purporting to act under these ordinances, public officials excluded Rosalyn Zucht from a public school because she did not have the required certificate and refused to submit to vaccination. They also caused her to be excluded from a private school. Thereupon Rosalyn brought this suit against the officials in a court of the State. The bill charges that there was then no occasion for requiring vaccination; that the ordinances deprive plaintiff of her liberty without due process of law by, in effect, making vaccination compulsory; and, also, that they are void because they leave to the Board of Health discretion to determine when and under what circumstances the requirement shall be enforced without providing any rule by which that board is to be guided in its action and without providing any safeguards against partiality and oppression. The prayers were for an injunction against enforcing the ordinances, for a writ of mandamus to compel her admission to the public school, and for damages. A general demurrer to the bill of complaint was sustained by the trial court; and, plaintiff having declined to amend, the bill was dismissed. This judgment was affirmed by the Court of Civil Appeals for the Fourth Supreme Judicial District, 225 S. W. 267; a motion for rehearing was overruled; and an application

for a writ of error to the Supreme Court of Texas was denied by that court. A petition for a writ of certiorari filed in this Court was dismissed for failure to comply with Rule 37. 257 U. S. 650. The case is now here on writ of error granted by the Chief Justice of the Court of Civil Appeals. It is assigned as error that the ordinances violate the due process and equal protection clauses of the Fourteenth Amendment; and that as administered they denied to plaintiff equal protection of the laws.

The validity of the ordinances under the Federal Constitution was drawn in question by objections properly taken below. A city ordinance is a law of the State within the meaning of § 237 of the Judicial Code as amended, which provides a review by writ of error where the validity of a law is sustained by the highest court of the State in which a decision in the suit could be had. *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548, 555. But, although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character. *Sugarman* v. *United States,* 249 U. S. 182, 184. Long before this suit was instituted, *Jacobson* v. *Massachusetts,* 197 U. S. 11, had settled that it is within the police power of a State to provide for compulsory vaccination. That case and others had also settled that a State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative. *Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 358. And still others had settled that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law. *Lieberman* v. *Van De Carr,* 199 U. S. 552. A long line of decisions by this Court had also set-

tled that in the exercise of the police power reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing. *Adams* v. *Milwaukee,* 228 U. S. 572. *Miller* v. *Wilson,* 236 U. S. 373, 384. In view of these decisions we find in the record no question as to the validity of the ordinance sufficiently substantial to support the writ of error. Unlike *Yick Wo* v. *Hopkins,* 118 U. S. 356, these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.

The bill contains also averments to the effect that in administering the ordinance the officials have discriminated against the plaintiff in such a way as to deny to her equal protection of the laws. These averments do present a substantial constitutional question. *Neal* v. *Delaware,* 103 U. S. 370. But the question is not of that character which entitles a litigant to a review by this Court on writ of error. The question does not go to the validity of the ordinance; nor does it go to the validity of the authority of the officials. Compare *Taylor* v. *Taft,* 203 U. S. 461; *Champion Lumber Co.* v. *Fisher,* 227 U. S. 445; *Yazoo & Mississippi Valley R. R. Co.* v. *Clarksdale,* 257 U. S. 10, 16. This charge is of an unconstitutional exercise of authority under an ordinance which is valid. Compare *Stadelman* v. *Miner,* 246 U. S. 544. Unless a case is otherwise properly here on writ of error, questions of that character can be reviewed by this Court only on petition for a writ of certiorari.

Writ of error dismissed.

TAKAO OZAWA *v.* UNITED STATES.

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

No. 1. Argued October 3, 4, 1922.—Decided November 13, 1922.

1. Section 2169 of the Revised Statutes, which is part of Title XXX dealing with naturalization, and which declares: "The provisions of this Title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent," is consistent with the Naturalization Act of June 29, 1906, and was not impliedly repealed by it. P. 192.
2. Revised Statutes, § 2169, *supra,* stands as a limitation upon the Naturalization Act, and not merely upon those other provisions of Title XXX which remain unrepealed. P. 192.
3. The intent of legislation is to be ascertained primarily by giving words their natural significance; but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, the court must look to the reason of the enactment, inquiring into its antecedents, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning, in order that the purpose may not fail. P. 194.
4. The term "white person," as used in Rev. Stats., § 2169, and in all the earlier naturalization laws, beginning in 1790, applies to such persons as were known in this country as "white," in the racial sense, when it was first adopted, and is confined to persons of the Caucasian Race. P. 195.
5. The effect of the conclusion that "white person" means a Caucasian is merely to establish a zone on one side of which are those clearly eligible, and on the other those clearly ineligible, to citizenship; individual cases within this zone must be determined as they arise. P. 198.
6. A Japanese, born in Japan, being clearly not a Caucasian, cannot be made a citizen of the United States under Rev. Stats., § 2169, and the Naturalization Act. P. 198.

QUESTIONS certified by the court below, arising upon an appeal to it from a judgment of the District Court of Hawaii which dismissed a petition for naturalization. The case was argued with *Yamashita* v. *Hinkle, post,* 199, and was decided at the same time.

Mr. George W. Wickersham, with whom *Mr. David L. Withington* was on the briefs, for Takao Ozawa.

The Act of June 29, 1906, establishes a uniform rule of naturalization, and that rule is not controlled or modified by § 2169, Rev. Stats.

The constitutional grant of power, the title of the act, its scope and terms, show that, save in definitely excepted cases, it is a complete, exclusive and uniform rule of naturalization.

Congress exercised this power in the first Congress, second session, and passed the Act of March 26, 1790, 1 Stat. 103, entitled, "An Act to establish an uniform rule of naturalization." This act was repealed by a like act with a like title in 1795, and that by the Act of April 14, 1802, 2 Stat. 153, which in turn was entitled, "An Act to establish an uniform rule of naturalization." This in turn became Title XXX of the Revised Statutes, which comprised the uniform rule of naturalization until the passage of the Act of June 29, 1906, which purports to be and is entitled, "An Act To establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States."

This act purports to be a complete act. It provides, in § 3, for exclusive jurisdiction of naturalizing aliens, and in § 4, " that any alien may be admitted to become a citizen of the United States in the following manner, and not otherwise; " followed by five paragraphs prescribing the conditions of admission, among them, in paragraph two, that the petition shall set forth " every fact material to his naturalization and required to be proved upon the final hearing of his application." In § 27 the form of this petition is given, containing the allegations which Congress believed were " material to his naturalization and required to be proved," but nothing with reference to color or race.

The intent of Congress to enact, and its belief that it had enacted, a uniform rule for naturalization, covering the entire subject and even giving to the rules and regulations the force of law, are clear. *In re Brefo,* 217 Fed. 131; *United States* v. *Rodiek,* 162 Fed. 469; *Bessho* v. *United States,* 178 Fed. 245; *In re Leichtag,* 211 Fed. 681; *In re Mallari,* 239 Fed. 416; *Hampden County* v. *Morris,* 207 Mass. 167; *United States* v. *Ginsberg,* 243 U. S. 472; *United States* v. *Ness,* 245 U. S. 319; *United States* v. *Peterson,* 182 Fed. 289, 291.

The unrepealed sections of Title XXX and a few other special acts provide for naturalization in cases excepted from the uniform law. *In re Kumagai,* 163 Fed. 922; *In re Loftus,* 165 Fed. 1002; *United States* v. *Meyer,* 170 Fed. 983; *In re McNabb,* 175 Fed. 511; *In re Leichtag, supra; United States* v. *Lengyel,* 220 Fed. 720; *In re Sterbuck,* 224 Fed. 1013; *In re Tancrel,* 227 Fed. 329.

Section 2169 is not restrictive in terms, and if restrictive only applies to Title XXX, Rev. Stats., and the cases excepted from the general rule. Section 2169, as originally enacted, is an enlarging provision, derived from the Act of 1870, c. 254, 16 Stat. 256, which extended the naturalization laws to aliens of African nativity and to persons of African descent. It is not a restrictive declaration; and the introduction into it of the words "being free white persons and to aliens," by the Act of 1875, c. 80, 18 Stat. 318, does not change the provision from an enlarging to a restrictive one. There is nothing in the language used to show the intention of Congress to restrict naturalization to free white persons and Africans by this amendment of 1875.

If construed otherwise, naturalization from the passage of the Revised Statutes to the amendatory Act of 1875, would have been restricted to those of African nativity or descent.

The Chinese Exclusion Act of May 6, 1882, c. 126, § 14, 22 Stat. 58, 61,—passed after it had been held that the

language of § 2169 excluded the Chinese, *In re Ah Yup,* 5 Sawy. 155; and a half Indian, *In re Camille,* 6 Fed. 256,— supports this view. In any event, § 2169 is applicable only to Title XXX and does not apply to the Act of June 29, 1906.

The origin of the Act of 1906 shows that it was intended to be a complete scheme for naturalization, the test being " fitness for citizenship," with no discrimination against Japanese. Message of President Roosevelt, December 5, 1905, 40 Cong. Rec., pt. 1, p. 99. This policy, announced by President Roosevelt, has been steadily followed in legislation in respect both to naturalization and immigration, including the Immigration Act of 1917.

These acts show the traditional policy of the United States to welcome aliens, modified only by restrictions against contract laborers, those morally, mentally and physically unfit for citizenship and the Chinese, but with no restrictions against the Japanese race.

Numerous Chinese Exclusion Acts have been passed; but there is no line in any statute before or since 1875 which indicates any intention to classify the Japanese with those excluded or to discriminate against them in any way.

This Court in a recent case, in reviewing the history of the Immigration Acts, has held that the purpose of applying these prohibitions against the admission of aliens is to exclude classes (with the possible exception of contract laborers) who are undesirable as members of the community, even if previously domiciled in the United States. *Lapina* v. *Williams,* 232 U. S. 78; *In re Gee Hop,* 71 Fed. 274–275.

The Immigration Act of 1917, and the circumstances of its passage in Congress, show the clear intention of that body to make no declaration that Japanese are excluded from naturalization. Any other construction would be violative of the existing treaty with Japan.

The Act of May 9, 1918, amending the Act of June 29, 1906, tends to support the view that § 2169 is only restrictive of Title XXX of which it is a part. No court, excepting Judge Lowell, *In re Halladjian,* 174 Fed. 834, has taken into consideration what that section plainly says.

Section 2169, if applicable to the Act of 1906, must be construed like the Act of March 26, 1790, and, so construed, "free white persons" means one not black, not a negro; which does not exclude Japanese.

At the time the original law was passed, which provided for the admission of "aliens being free white persons," there can be no question but white was used in counterdistinction from black, and "free white persons" included all who were not black. The latter were chiefly slaves, regarded as an inferior race.

"White person," as construed by this Court and by the state courts, means a person without negro blood. *United States* v. *Perryman,* 100 U. S. 235; *Dred Scott* v. *Sandford,* 19 How. 393, 420; *Du Val* v. *Johnson,* 39 Ark. 182, 192.

The primary definition of these words, as given by the great dictionaries, is one who is white, not black, nor a negro.

The insertion by Congress of the word "free" in § 2169, in 1875, a word which had a definite meaning in 1790, but has no meaning if construed as a new enactment in 1875, shows the intention to reënact the old section with the old meaning.

Giving the words "free white persons" their common and popular acceptation in 1875, no "uniform rule" can be laid down, based on color, race or locality of origin, and there is nothing in the laws of the United States, its treaties, in the history of the time, or the proceedings of Congress, to show that Japanese were intended to be excluded. Up to 1875, there had been no Japanese immigration, no suggestion of their exclusion. America had

recently opened Japan to the western civilization, which Japan was gladly welcoming.

Judicial construction of the phrase, up to 1875, does not sustain such an exclusion. See *Dred Scott* and *Du Val Cases, supra; Lynch* v. *Clarke,* 1 Sandf. 583; *People* v. *Hall,* 4 Cal. 399; *People* v. *Elyea,* 14 Cal. 145. Cf. 2 Kent's Comm., p. 72.

No "uniform rule," applicable in all cases, can be drawn from the decisions since 1875. *Low Wah Suey* v. *Backus,* 225 U. S. 460; *In re Ah Yup,* 5 Sawy. 155; *In re Hong Yen Chang,* 84 Cal. 163; *In re Po,* 28 N. Y. S. 383; *In re Alverto,* 198 Fed. 688; *In re Mozumdar,* 207 Fed. 115; *In re Dow,* 213 Fed. 355; *Ex parte Shahid,* 205 Fed. 812; *In re Dow,* 226 Fed. 145; *United States* v. *Balsara,* 180 Fed. 694; *In re Camille,* 6 Fed. 256; *In re Mudarri,* 176 Fed. 465; *In re Saito,* 62 Fed. 126; *In re Kumagai,* 163 Fed. 922; *Bessho* v. *United States,* 178 Fed. 245; *In re Knight,* 171 Fed. 299; *In re Yamashita,* 30 Wash. 234; *In re Nian,* 6 Utah, 259; *In re Rodriquez,* 81 Fed. 337.

The policy of the United States has been to include into its citizenship by annexation vast numbers of members of races not Caucasian, including many Mongolians. The annexation of Hawaii converted thousands of Japanese, not to mention other nationalities, into American citizens. The most recent is the Porto Rico Act, which makes the Porto Ricans, who are as dark as the Japanese, American citizens.

The petitioner in the court below presented an incomplete list of fourteen naturalizations in various courts, and that court says it is understood that about fifty Japanese have been naturalized in state and federal courts. In fact, the census of 1910 shows 209 American born citizens, 420 naturalized, and 389 with first papers, who are Japanese.

The words "free white persons," neither in their common and popular meaning, nor in their scientific defini-

tion, define a race or races, or prescribe a nativity or locus of origin. They deal with personalities and the qualities of personalities, and are only susceptible of meaning those persons fit for citizenship and of the kind admitted to citizenship by the policy of the United States. The words deal with individuals, not with races, nor with natives of any country or of any particular descent.

The word "free" is an essential part of the clause. Under the Constitution, it is used in opposition to slave. It imports a freeman, a superior, as against an inferior class.

"White" we have already sufficiently defined, and shown that the words "free white persons" had in 1875 acquired a signification in American statute law as expressing a superior class as against a lower class, or, to speak explicitly, a class called "white" as against a class called "black"; the white man against the negro.

"Person" is "a living human being; a man, woman or child; an individual of the human race." *United States* v. *Crook*, 25 Fed. Cas. 695. The provisions of the Fourteenth Amendment in reference to persons "are universal in the application to all persons within the territorial jurisdiction without regard to any difference of race, or color, or nationality." *Yick Wo* v. *Hopkins*, 118 U. S. 369. The same rule has been applied to include aliens under the Fifth and Sixth Amendments. *Wong Wing* v. *United States*, 163 U. S. 235.

No case has considered this point or given emphasis in the construction of the section to the words "free" and "persons," which are as important to the construction as the word "white." Nearly all think the section deals with races.

The question certified does not deal with individuals, but with a people, and the affirmative answer would exclude a Japanese who is "white" in color and is of the Caucasian type and race.

The Japanese are "free." They, or at least the dominant strains, are "white persons," speaking an Aryan tongue and having Caucasian root stocks; a superior class, fit for citizenship.

The Japanese are assimilable.

Congress in repeating without qualification the words "white persons" has left the subject in great uncertainty. All authorities without exception agree on dismissing the idea of white as a characteristic to be demonstrated by ocular inspection. If it is sought to interpret it as an ethnological term, authorities are so conflicting that it opens the way to serious inequalities of application. To apply the ambulatory definition which some of the learned judges have adopted, is to rob the law of all definiteness and to leave it to the whim of the particular judge or court. The only safe rule to adopt is to take the term as it undoubtedly was used when the naturalization law was first adopted, and construe it as embracing all persons not black, until the Act of 1870, and after that date, as having no practical significance. If this would run counter to the intention of Congress, that body can readily amend the act so as to make clear the legislative intention. But the subject certainly should not be left in the uncertain state in which it now is.

So far as the petitioners in the Yamashita case [*post,* 199,] are concerned, all that appears is that they were born in Japan and that they were duly naturalized by a state court in 1902. Every intendment of fact in favor of the jurisdiction therefore must be presumed. They may have been pure blooded Ainos, and as such "Caucasian" within the meaning of that term, as employed by most of the ethnologists and in a majority of the decisions construing the term "white persons" to mean those of the Caucasian race, so that in any event the judgment of the lower court must be reversed.

Mr. Solicitor General Beck, with whom *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, was on the brief, for the United States.

The Act of June 29, 1906, is not complete in itself but is limited in its application to the eligible classes of persons mentioned in § 2169, Rev. Stats. At the time of the passage of the Act of 1906, through a uniform course of judicial construction of statutory language, continued in the law for over a century, it had become settled that Japanese and all other people not of the white or Caucasian race were not eligible for naturalization as "white persons." *In re Ah Yup,* 5 Sawy. 155; *In re Hong Yen Chang,* 84 Cal. 163; *In re Gee Hop,* 71 Fed. 274; *In re Po,* 28 N. Y. S. 383; *In re Nian,* 6 Utah, 259; *In re Camille,* 6 Fed. 256; *In re Burton,* 1 Alaska, 111; *In re Saito,* 62 Fed. 126.

The Act of 1906 did not extend the privilege of naturalization to any persons not theretofore eligible. Section 2169, Rev. Stats., was not repealed, and was specifically reaffirmed by the Act of May 9, 1918, c. 69, 40 Stat. 542, making special provision for the naturalization of Filipinos, Porto Ricans, and aliens who served in the military and naval forces of the United States. *Petition of Charr,* 273 Fed. 207, 210–212.

Since the passage of the Act of 1906, the courts without exception have continued to hold that § 2169 was still in force, its limitation still binding. *In re Alverto,* 198 Fed. 688; *In re Kumagai,* 163 Fed. 922; *In re Knight,* 171 Fed. 299; *In re Young,* 198 Fed. 715; *Bessho* v. *United States,* 178 Fed. 245; *United States* v. *Balsara,* 180 Fed. 694; *In re Yamashita,* 30 Wash. 234; *In re Dow,* 226 Fed. 145; *Petition of Charr,* 273 Fed. 207; *In re Halladjian,* 174 Fed. 834; *In re Bautista,* 245 Fed. 765; *In re Singh,* 257 Fed. 209; 246 Fed. 496; *In re Lampitoe,* 232 Fed. 382; *In re Mozumdar,* 207 Fed. 115.

So the ultimate question is, is the Japanese a white person, and it presents itself as a question of statutory

construction. In the first place it is said that we must give to these words the meaning which they had in the minds of the legislators of 1790, which is probably true; and that they were then used as a sort of "catchall" and meant all men except Negroes and Indians, which is surely untrue. It is undoubtedly true that the men of 1790 used the words as they understood them, and that their purview of possible and probable immigration comprised only Negroes and white men. But there is no warrant for believing that in their minds the whole human race consisted of black men, red men, and white men. To do so is to deny them the intelligence which they surely possessed. But on the other hand, to argue that they cast their eyes over the earth and considered the races thereof, and then, with deliberation, chose to exclude Chinese, Japanese, and the other yellow and brown peoples, is to give them credit for an imagination which they did not have. To ascertain their intent, it is not necessary to entangle one's common sense in a web of theory. The men who settled this country were white men from Europe and the men who fought the Revolutionary War, framed the Constitution and established the Government, were white men from Europe and their descendants. They were eager for more of their kind to come, and it was to men of their own kind that they held out the opportunity for citizenship in the new nation. It is quite probable that no member of the first Congress had ever seen a Chinese, Japanese or Malay, or knew much about them beyond the fact that they were people living in remote and almost inaccessible parts of the world having manners, customs and language which seemed strange, and unwilling to mingle with western people. Chinese immigration to this country did not begin until after the discovery of gold in California, and the census of 1870 was the first to report Japanese, 55 in number.

It is a matter of common knowledge that for many years Japan, and to a somewhat less degree, China, maintained a policy of isolation, and this policy continued from the middle of the seventeenth century until the Perry Expedition in 1853. American thought and statesmanship were directed toward Europe, not toward Asia. It was Europe and its "set of primary interests" with which Washington was concerned in his farewell address, and it was against interweaving our destiny with that of any part of Europe, or entangling our peace and prosperity in the toils of European ambitions that he warned his countrymen. It was European trade that was sought and, beyond doubt, European immigration which was desired and expected. Citizenship has always been deemed a choice possession, and it is not to be presumed that our fathers regarded it lightly, to be conferred promiscuously according to a "catchall" classification. It could only be obtained by those to whom it was given, and the men of 1790 gave it only to those whom they knew and regarded as worthy to share it with them, men of their own type, white men. This does not imply the drawing of any narrow or bigoted racial lines, but a broad classification inclusive of all commonly called white and exclusive of all not commonly so called. This has been the rule followed by the courts, and the cases already cited, many of which show exhaustive research and wealth of learning, leave very little to be said. A reading of the opinions of the judges who have written in these cases reveals impressive unanimity in one respect. Each person admitted, with the single exception of the Filipino (*In re Bautista, supra,* a special case), was admitted because he was deemed as matter of fact to be white; each person refused was refused because he was deemed as matter of fact not to be white. The ethnological discussions have covered a wide range of most interesting subjects, particularly in the border-line cases, the Syrian case (*In re*

Dow, 226 Fed. 145), and the Armenian case (*In re Halladjian,* 174 Fed. 834). But the present case can not be regarded as a doubtful case. The Japanese is not, and never has been, regarded as white or of the race of white people.

While the views of ethnologists have changed in details from time to time, it is safe to say that the classification of the Japanese as members of the yellow race is practically the unanimous view. Unless it could be demonstrated that the Japanese were of the white race, ethnological differences would be unimportant, even if otherwise relevant.

Mr. U. S. Webb, Attorney General of the State of California, and *Mr. Frank English,* by leave of court, filed a brief as *amici curiae.*

Mr. Justice Sutherland delivered the opinion of the Court.

The appellant is a person of the Japanese race born in Japan. He applied, on October 16, 1914, to the United States District Court for the Territory of Hawaii to be admitted as a citizen of the United States. His petition was opposed by the United States District Attorney for the District of Hawaii. Including the period of his residence in Hawaii, appellant had continuously resided in the United States for twenty years. He was a graduate of the Berkeley, California, High School, had been nearly three years a student in the University of California, had educated his children in American schools, his family had attended American churches and he had maintained the use of the English language in his home. That he was well qualified by character and education for citizenship is conceded.

The District Court of Hawaii, however, held that, having been born in Japan and being of the Japanese race,

he was not eligible to naturalization under § 2169 of the Revised Statutes, and denied the petition. Thereupon the appellant brought the cause to the Circuit Court of Appeals for the Ninth Circuit and that court has certified the following questions, upon which it desires to be instructed:

"1. Is the Act of June 29, 1906 (34 Stats. at Large, Part I, Page 596), providing 'for a uniform rule for the naturalization of aliens' complete in itself, or is it limited by Section 2169 of the Revised Statutes of the United States?

"2. Is one who is of the Japanese race and born in Japan eligible to citizenship under the Naturalization laws?

"3. If said Act of June 29, 1906, is limited by said Section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?"

These questions for purposes of discussion may be briefly restated:

1. Is the Naturalization Act of June 29, 1906, limited by the provisions of § 2169 of the Revised Statutes of the United States?

2. If so limited, is the appellant eligible to naturalization under that section?

First. Section 2169 is found in Title XXX of the Revised Statutes, under the heading "Naturalization," and reads as follows:

"The provisions of this Title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

The Act of June 29, 1906, entitled "An Act To establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens

throughout the United States", consists of thirty-one sections and deals primarily with the subject of procedure. There is nothing in the circumstances leading up to or accompanying the passage of the act which suggests that any modification of § 2169, or of its application, was contemplated.

The report of the House Committee on Immigration and Naturalization, recommending its passage, contains this statement:

"It is the opinion of your committee that the frauds and crimes which have been committed in regard to naturalization have resulted more from the lack of any uniform system of procedure in such matters than from any radical defect in the fundamental principles of existing law governing in such cases. The two changes which the committee has recommended in the principles controlling in naturalization matters, and which are embodied in the bill submitted herewith are as follows: First. The requirement that before an alien can be naturalized he must be able to write either in his own language or in the English language, and read, speak, and understand the English language; and, Second. That the alien must intend to reside permanently in the United States before he shall be entitled to naturalization." House Report No. 1789, 59th Cong., 1st sess., p. 3.

This seems to make it quite clear that no change of the fundamental character here involved was in mind.

Section 26 of the act expressly repeals §§ 2165, 2167, 2168, 2173 of Title XXX, the subject-matter thereof being covered by new provisions. The sections of Title XXX remaining without repeal are: Section 2166, relating to honorably discharged soldiers; § 2169, now under consideration; § 2170, requiring five years' residence prior to admission; § 2171, forbidding the admission of alien enemies; § 2172, relating to the status of children of naturalized persons, and § 2174, making special provision in respect of the naturalization of seamen.

There is nothing in § 2169 which is repugnant to anything in the Act of 1906. Both may stand and be given effect. It is clear, therefore, that there is no repeal by implication.

But it is insisted by appellant that § 2169, by its terms is made applicable only to the provisions of Title XXX and that it will not admit of being construed as a restriction upon the Act of 1906. Since § 2169, it is in effect argued, declares that "the provisions of *this Title* shall apply to aliens, being free white persons . . . ," it should be confined to the classes provided for in the unrepealed sections of that title, leaving the Act of 1906 to govern in respect of all other aliens, without any restriction except such as may be imposed by that act itself.

It is contended that thus construed the Act of 1906 confers the privilege of naturalization without limitation as to race, since the general introductory words of § 4 are: "That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise." But, obviously, this clause does not relate to the subject of eligibility but to the "manner," that is the procedure, to be followed. Exactly the same words are used to introduce the similar provisions contained in § 2165 of the Revised Statutes. In 1790 the first Naturalization Act provided that, "Any alien, *being a free white person,* . . . may be admitted to become a citizen, . . ." C. 3, 1 Stat. 103. This was subsequently enlarged to include aliens of African nativity and persons of African descent. These provisions were restated in the Revised Statutes, so that § 2165 included only the procedural portion, while the substantive parts were carried into a separate section (2169) and the words "An alien" substituted for the words "Any alien."

In all of the Naturalization Acts from 1790 to 1906 the privilege of naturalization was confined to white persons

(with the addition in 1870 of those of African nativity and descent), although the exact wording of the various statutes was not always the same. If Congress in 1906 desired to alter a rule so well and so long established, it may be assumed that its purpose would have been definitely disclosed and its legislation to that end put in unmistakable terms.

The argument that because § 2169 is in terms made applicable only to the title in which it is found, it should now be confined to the unrepealed sections of that title is not convincing. The persons entitled to naturalization under these unrepealed sections include only honorably discharged soldiers and seamen who have served three years on board an American vessel, both of whom were entitled from the beginning to admission on more generous terms than were accorded to other aliens. It is not conceivable that Congress would deliberately have allowed the racial limitation to continue as to soldiers and seamen to whom the statute had accorded an especially favored status, and have removed it as to all other aliens. Such a construction can not be adopted unless it be unavoidable.

The division of the Revised Statutes into titles and chapters is chiefly a matter of convenience, and reference to a given title or chapter is simply a ready method of identifying the particular provisions which are meant. The provisions of Title XXX affected by the limitation of § 2169, originally embraced the whole subject of naturalization of aliens. The generality of the words in § 2165, "An alien may be admitted . . . " was restricted by § 2169 in common with the other provisions of the title. The words " this Title " were used for the purpose of identifying that provision (and others), but it was the *provision* which was restricted. That provision having been amended and carried into the Act of 1906, § 2169 being left intact and unrepealed, it will require some-

thing more persuasive than a narrowly literal reading of the identifying words " this Title " to justify the conclusion that Congress intended the restriction to be no longer applicable to the provision.

It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Heydenfeldt* v. *Daney Gold Mining Co.,* 93 U. S. 634, 638. We are asked to conclude that Congress, without the consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change, nevertheless, by failing to alter the identifying words of § 2169, which section we may assume was continued for some serious purpose, has radically modified a statute always theretofore maintained and considered as of great importance. It is inconceivable that a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions, would have been deprived of its force in such dubious and casual fashion. We are, therefore, constrained to hold that the Act of 1906 is limited by the provisions of § 2169 of the Revised Statutes.

Second. This brings us to inquire whether, under § 2169, the appellant is eligible to naturalization. The language of the naturalization laws from 1790 to 1870 had been uniformly such as to deny the privilege of

naturalization to an alien unless he came within the description "free white person." By § 7 of the Act of July 14, 1870, c. 254, 16 Stat. 254, 256, the naturalization laws were "extended to aliens of African nativity and to persons of African descent." Section 2169 of the Revised Statutes, as already pointed out, restricts the privilege to the same classes of persons, viz: "to aliens [being free white persons, and to aliens] of African nativity and persons of African descent." It is true that in the first edition of the Revised Statutes of 1873 the words in brackets, "being free white persons, and to aliens" were omitted, but this was clearly an error of the compilers and was corrected by the subsequent legislation of 1875 (c. 80, 18 Stat. 316, 318). Is appellant, therefore, a "free white person," within the meaning of that phrase as found in the statute?

On behalf of the appellant it is urged that we should give to this phrase the meaning which it had in the minds of its original framers in 1790 and that it was employed by them for the sole purpose of excluding the black or African race and the Indians then inhabiting this country. It may be true that these two races were alone thought of as being excluded, but to say that they were the only ones within the intent of the statute would be to ignore the affirmative form of the legislation. The provision is not that Negroes and Indians shall be *excluded* but it is, in effect, that only free white persons shall be *included*. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges. As said by Chief Justice Marshall in *Dartmouth College*

v. *Woodward,* 4 Wheat. 518, 644, in deciding a question of constitutional construction: "It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception." If it be assumed that the opinion of the framers was that the only persons who would fall outside the designation "white" were Negroes and Indians, this would go no farther than to demonstrate their lack of sufficient information to enable them to foresee precisely who would be excluded by that term in the subsequent administration of the statute. It is not important in construing their words to consider the extent of their ethnological knowledge or whether they thought that under the statute the only persons who would be denied naturalization would be Negroes and Indians. It is sufficient to ascertain whom they intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded.

The question then is, Who are comprehended within the phrase "free white persons?" Undoubtedly the word "free" was originally used in recognition of the fact that slavery then existed and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded.

We have been furnished with elaborate briefs in which the meaning of the words "white person" is discussed

with ability and at length, both from the standpoint of judicial decision and from that of the science of ethnology. It does not seem to us necessary, however, to follow counsel in their extensive researches in these fields. It is sufficient to note the fact that these decisions are, in substance, to the effect that the words import a racial and not an individual test, and with this conclusion, fortified as it is by reason and authority, we entirely agree. Manifestly, the test afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation. Beginning with the decision of Circuit Judge Sawyer, in *In re Ah Yup,* 5 Sawy. 155 (1878), the federal and state courts, in an almost unbroken line, have held that the words " white person " were meant to indicate only a person of what is popularly known as the Caucasian race. Among these decisions, see for example: *In re Camille,* 6 Fed. 256; *In re Saito,* 62 Fed. 126; *In re Nian,* 6 Utah, 259; *In re Kumagai,* 163 Fed. 922; *In re Yamashita,* 30 Wash. 234, 237; *In re Ellis,* 179 Fed. 1002; *In re Mozumdar,* 207 Fed. 115, 117; *In re Singh,* 257 Fed. 209, 211–212; and *Petition of Charr,* 273 Fed. 207. With the conclusion reached in these several decisions we see no reason to differ. Moreover, that conclusion has become so well established by judicial and executive concurrence and legislative acquiescence that we should not at this late day feel at liberty to disturb it, in the absence of reasons far more cogent than any that have been suggested. *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 472.

The determination that the words "white person" are synonymous with the words "a person of the Caucasian race" simplifies the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases. The effect of the conclusion that the words "white person" mean a Caucasian is not to establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be determined as they arise from time to time by what this Court has called, in another connection (*Davidson* v. *New Orleans*, 96 U. S. 97, 104) "the gradual process of judicial inclusion and exclusion."

The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold.

The briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree; but these are matters which cannot enter into our consideration of the questions here at issue. We have no function in the matter other than to ascertain the will of Congress and declare it. Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved.

The questions submitted are, therefore, answered as follows:

Question No. 1. The Act of June 29, 1906, is not complete in itself but is limited by § 2169 of the Revised Statutes of the United States.

Question No. 2. No.

Question No. 3. No.

It will be so certified.

TAKUJI YAMASHITA ET AL. *v.* HINKLE, SECRETARY OF STATE OF THE STATE OF WASHINGTON.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 177. Argued October 3, 4, 1922.—Decided November 13, 1922.

1. Persons of the Japanese race, born in Japan, are not entitled, under Rev. Stats., § 2169, to become naturalized citizens of the United States. P. 200. *Ozawa* v. *United States, ante,* 178.
2. A judgment purporting to naturalize persons whose ineligibility appears on its face, is without jurisdiction and void. P. 201.

Affirmed.

CERTIORARI to a judgment of the Supreme Court of Washington which denied the application of the petitioners for a writ of mandamus to require the respondent, as Secretary of State of Washington, to receive and file their articles of incorporation. This case was argued with *Ozawa* v. *United States, ante,* 178.

Mr. George W. Wickersham, with whom *Mr. Corwin S. Shank* was on the brief, for petitioners.

Mr. L. L. Thompson, Attorney General of the State of Washington, with whom *Mr. E. W. Anderson* was on the brief, for respondent.

Mr. U. S. Webb, Attorney General of the State of California, and *Mr. Frank English,* by leave of court, filed a brief as *amici curiae.*

Mr. Justice Sutherland delivered the opinion of the Court.

This case presents one of the questions involved in the case of *Takao Ozawa* v. *United States,* this day decided, *ante,* 178, viz.: Are the petitioners, being persons of the Japanese race born in Japan, entitled to naturalization under § 2169 of the Revised Statutes of the United States?

Certificates of naturalization were issued to both petitioners by a Superior Court of the State of Washington prior to 1906, when § 2169 is conceded to have been in full force and effect.

The respondent, as Secretary of State of the State of Washington, refused to receive and file articles of incorporation of the Japanese Real Estate Holding Company, executed by petitioners, upon the ground that, being of the Japanese race, they were not at the time of their naturalization and never had been entitled to naturalization under the laws of the United States, and were therefore not qualified under the laws of the State of Washington to form the corporation proposed, or to file articles naming them as sole trustees of said corporation. Thereupon petitioners applied to the Supreme Court of the State for a writ of mandamus to compel respondent to receive and file the articles of incorporation, but that court refused and petitioners bring the case here by writ of certiorari.

Upon the authority of *Takao Ozawa* v. *United States, supra,* we must hold that the petitioners were not eligible to naturalization, and as this ineligibility appeared upon the face of the judgment of the Superior Court, admitting petitioners to citizenship, that court was without juris-

diction and its judgment was void. *In re Gee Hop,* 71 Fed. 274; *In re Yamashita,* 30 Wash. 234.

The judgment of the Supreme Court of the State of Washington is therefore

Affirmed.

GASTON, WILLIAMS & WIGMORE OF CANADA, LTD. *v.* WARNER.

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

No. 59. Argued October 13, 1922.—Decided November 13, 1922.

The Canadian owner of a British ship of a Canadian port made a contract in New York with W, a citizen of that State, authorizing him to offer the vessel for a specified price and agreeing to pay him a specified commission for securing a purchaser. W introduced purchasers with whom the owner agreed for a charter and sale at that price, the ship to be delivered and the price paid at New York; but, it subsequently appearing that the owner was bound by contract with, and regulations of, the British Government not to sell without that Government's consent, which could not be obtained, the contract of sale was rescinded. *Held,* That W's contract, made without reference to nationality or location of the ship or to foreign law, was governed by, and valid under, the law of New York, and that the owner's disability to consummate the transaction was not a defense to W's action for his commission, even if, under the British law, the contract of sale was void. P. 203.

272 Fed. 56, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals, which affirmed a recovery by the respondent in his action against the petitioner for commission on the sale of a ship.

Mr. Cletus Keating for petitioner.

Mr. Joseph P. Nolan for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The parties to this action on December 11, 1916, in New York City, entered into a contract, the essential terms of which appear in the following letter from petitioner to respondent:

"Referring to our conversation this afternoon, I beg to advise that you are authorized to offer the steamer 'Eskasoni' for sale for four hundred and seventy-five thousand dollars, $475,000.

"Details as to terms of payment, transfer of steamer, etc., can be talked over when you have purchasers."

Respondent was a citizen of the State of New York and a resident of New York City. Petitioner was a foreign corporation, organized and existing under the laws of the Dominion of Canada. The steamship referred to was a British steamship of St. Johns, Newfoundland, owned by the petitioner. It was agreed that the respondent should receive two and one-half per cent. commission for securing a purchaser for the ship. Respondent undertook the employment and subsequently introduced to petitioner two prospective purchasers, with whom petitioner entered into a written contract for the charter and sale of the ship for the sum mentioned. Five thousand dollars was paid down on account, out of which respondent received two and one-half per cent., or $125.

Subsequently it appeared that the petitioner was bound by a contract with the British Government to comply with the instructions and rules of that government in the operation of its vessels, and whereby it agreed not to charter any vessel to anyone to whom that government should object. Among the governmental regulations then in force was one which provided that:

"A person shall not, without permission in writing from the Shipping Comptroller, directly or indirectly and

whether on his own behalf or on behalf of or in conjunction with any other person, purchase, or enter into or offer to enter into any agreement or any negotiations with a view to an agreement for the purchase of any ship or vessel."

Any act in contravention of this regulation was declared to be an offense.

Permission to make the sale in question was never obtained and the petitioner was notified by its Consul that such permission would be withheld by the British Government. The petitioner thereupon refused to consummate the sale and returned to the purchasers the $5,000 which they had paid.

The respondent brought an action against petitioner in the District Court of the United States, Southern District of New York, to recover the balance of his commission, which resulted in a judgment in his favor. On error from the Circuit Court of Appeals for the Second Circuit, that court affirmed the judgment of the lower court, and the petitioner brings the case here on writ of certiorari.

The District Court declined to charge, as requested by petitioner, that, if the jury believed the evidence to the effect that the contract under British law was illegal and void, this would constitute a good defense to the action. On the contrary, that court instructed the jury in effect that the invalidity of the contract under British law would constitute no defense to the action, and directed a verdict for the respondent, which was returned in the sum of $11,750; and judgment was entered accordingly.

The contract, as stated, was made in New York, and it does not appear that the contracting parties in making it had in view any other law than that of the place where it was made. It is, therefore, to be governed as to its validity and operation by the law of the State of New York. *Bulkley* v. *Honold,* 19 How. 390, 392; *Scudder* v.

Union National Bank, 91 U. S. 406, 412. Tested by that law the contract is valid. By the terms of the contract respondent was "authorized to offer the steamer 'Eskasoni' for sale for four hundred and seventy-five thousand dollars." Nothing was said as to where the ship then was, what flag she carried nor what law was to govern the transaction. The contract of charter and sale provided for the payment of the consideration in several installments in New York City and for the delivery of the ship to the purchasers at that port.

When, in pursuance of this contract, respondent procured purchasers for the ship at the stated sum, with whom petitioner entered into contract, the transaction, so far as the respondent was concerned, was completed and he became entitled to the payment of the stipulated commission. The fact that the contract of charter and sale was subsequently canceled because petitioner was unable to secure the consent of the British Government to the sale could have no effect upon the respondent's rights. The contract with respondent, as well as the contract of charter and sale, was made and was to be performed within the State of New York, and being valid under the law of that State, the respondent is not to be deprived of his compensation simply because petitioner found itself unable to consummate the latter contract by reason of its inability to perform a condition made necessary by the provisions of the law of another country. See *Aber* v. *Pennsylvania Co., etc.,* 269 Pa. St. 384.

Even if the contract of sale was void by British law, all other questions aside, respondent's connection with it was not such as to deprive him of his commission. His action was not to enforce that contract, but his own. *Irwin* v. *Williar,* 110 U. S. 499, 509–510.

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

Affirmed.

Counsel for Petitioners.

SOUTHERN PACIFIC COMPANY ET AL. *v.* OLYMPIAN DREDGING COMPANY.

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

No. 78. Argued October 19, 1922.—Decided November 13, 1922.

1. By the Act of September 19, 1890, c. 907, 26 Stat. 453, Congress assumed jurisdiction of the subject of obstructions to navigation and committed to the Secretary of War all necessary administrative power over such obstructions. P. 208.
2. Under § 7 of that act, a new bridge over a navigable stream cannot lawfully be constructed by a railroad company before the location and plans have been approved by the Secretary of War; authority from the state legislature is not enough. P. 208.
3. The power of the Secretary to approve or disapprove includes the power to condition an approval. P. 208.
4. Where a railroad company, operating a lawful bridge, obtained the Secretary's approval for a new one nearby, upon the condition that it remove the old one and remove the piers from the riverbed to a specified depth below lowest water level as shown by an existing and specified gauge, and fully complied with the condition, leaving the channel unobstructed, *held*, that the condition was an authoritative determination of what was reasonably necessary to insure free and safe navigation, upon which the company was entitled to rely; and that where, many years later, the Government, by dredging, lowered the bed and surface of the river so that stumps of the piles that had constituted the old piers protruded above the new bed, forming an obstruction which damaged a vessel, the Railroad Company was not liable. P. 209.

270 Fed. 384, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed a decree of the District Court dismissing a libel in admiralty for damages due to collision of the present respondent's vessel with an obstruction in a navigable channel.

Mr. William R. Harr, with whom *Mr. William F. Herrin, Mr. E. J. Foulds* and *Mr. Geo. K. Ford* were on the brief, for petitioners.

Mr. Thomas E. Haven, with whom *Mr. Frank Hall, Mr. James S. Spilman, Mr. Fred G. Athearn, Mr. A. E. Chandler* and *Mr. Milton T. Farmer* were on the brief, for respondent.

Mr. Justice Sutherland delivered the opinion of the Court.

In 1895 the California Pacific Railroad Company, one of the petitioners, was authorized by the Legislature of the State of California to construct, and did construct, a railroad bridge across the Sacramento River. For some years prior to that time this company had owned and both petitioners had used another bridge situated in the near vicinity. Upon the construction of the new bridge in 1895 the old bridge was abandoned and demolished. The plans and location of the new bridge, so authorized by the legislature, received the formal approval of the Secretary of War, in conformity with § 7 of the Act of September 19, 1890, c. 907, 26 Stat. 454, as amended by § 3 of the Act of Congress of July 13, 1892, c. 158, 27 Stat. 110, subject to the following condition:

"That said Railway Company, within 90 days after the completion of the new bridge shall remove every portion of the present existing bridge, the old piers to be removed from the bed of the river to a depth of seven (7) feet below the level of the lowest low water, being a reading of 7.5 feet on the K Street gauge, Sacramento, California."

The new bridge was finished in 1895 and the destruction of the old bridge was completed early in the following year. The condition imposed by the Secretary of War was fully complied with. Indeed it appears that the piles constituting the piers of the old bridge were cut down three or four feet lower than was required, to a level with or below the then existing bed of the river.

Subsequent to the removal of the piles the Government of the United States constructed a wing dam above and

carried on dredging operations immediately below the bridge, so that the bed of the river was gradually lowered until, in 1918, when the injury in question occurred, the surface of the water was about seven feet lower than at the time the piles were destroyed, although the depth of the water remained approximately the same, with the result that the old stumps protruded several feet above the then existing bed of the river.

There is nothing to indicate that either of the petitioners had actual knowledge of the changed conditions which brought about the protrusion of the old piles above the bed of the river, or any knowledge that these piles were a menace to navigation.

On July 13, 1918, the dredger "Thor," owned by respondent, on her way down the river, drifting with the current, struck on one or more protruding stumps, the upper portion of which had been destroyed, with the result that her hull was pierced and she sank.

The respondent filed a libel in the United States District Court for the Southern District of California against petitioners, asking damages for collision and, after hearing, that court dismissed the libel. The Circuit Court of Appeals, reversing the District Court, held that petitioners were liable for this injury, notwithstanding their full compliance with the condition imposed by the Secretary of War, upon the ground that it was reasonably probable in 1895 that the channel of the river would shift and the conditions ensue which brought about the lowering of the river bed, and that, consequently, it was their duty to anticipate and to guard against the effect of these conditions upon the piles and their failure to do so was actionable negligence.

We are unable to agree with this conclusion. By the Act of September 19, 1890, 26 Stat. 453–454, Congress inaugurated a new policy of general, direct control over the navigable waters of the United States. The act pro-

vided for the alteration of existing bridges which interfered with free navigation (§§ 4 and 5); prohibited the dumping of waste material in such waters so as to obstruct navigation (§ 6); made it unlawful to build wharves, piers, and other structures named, without the permission of the Secretary of War, in such manner as to obstruct or impair navigation; or to commence the construction of any bridge over any such waters under any act of a state legislature until the location and plans therefor had been submitted to and approved by the Secretary of War; or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War (§ 7). The amendment of 1892 did not alter § 7 in any respect material to this inquiry.

By this legislation Congress assumed jurisdiction of the subject of obstructions to navigation and committed to the Secretary of War administrative power in so far as administration was necessary. Under § 7, it was not enough for the California Pacific Railroad Company to secure the authority of the California legislature to build the new bridge; it was necessary in addition to have the location and plans approved by the Secretary of War before the bridge could be lawfully constructed. That the Secretary of War was authorized to impose the condition heretofore quoted does not admit of doubt. The power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval. In the light of this general assumption by Congress of control over the subject and of the large powers delegated to the Secretary, the condition imposed by that officer cannot be considered otherwise than as an authoritative determination of what was reasonably necessary to be done to insure free and safe navigation so far as the obstruction in question was concerned.

To hold, as did the Circuit Court of Appeals, that this determination afforded no protection to petitioners, but that they relied upon it only at their peril, we think, is a conclusion without warrant. Having complied with the direction of the Secretary, and having no further interest in anything at that point on the river, it seems altogether unreasonable to hold them to an indefinite and speculative responsibility for future changed conditions. The piles had been removed early in 1896, with an over-generous observance of the directions of the Secretary. As matters then stood, the removal of the piles, so far as they constituted any obstruction or menace to navigation was complete; that they afterwards became an obstruction was due to changes of a most radical character in the channel of the river brought about, in the main, by the dredging operations of the Government itself. Was the petitioner guilty of negligence in not anticipating the effect of these changes, which did not culminate in the conditions complained of until twenty-two years later? The question must be answered in the negative.

The order of the Secretary of War, directing the removal of the old piles from the bed of the river to the depth there specified, was a valid order, since it was the condition upon which his approval of the location and plans of the new bridge was made. The new bridge was in the near vicinity of the old bridge, for which it was, in fact, a substitute. The effect which the continued maintenance of the latter after the completion of the former might have had upon the navigability of the river at that point is not disclosed. The Secretary of War evidently concluded that the situation was such as to require the removal of the old bridge and piles, but not such as to require the removal of the latter beyond the depth fixed by his order. Whether the limitation in this respect was grounded alone upon what the Secretary considered would be sufficient to secure the safety of navigation, or upon the

fact that to leave the stumps in the bed of the river would be of some positive service in stabilizing the shifting bed of the stream, or useful in some other way, does not appear. It was not for the petitioners, however, to question either his reasons or his conclusions. They were justified in proceeding upon the assumption that what the Secretary, in the exercise of his lawful powers, declared to be no obstruction to navigation was in fact no obstruction. The language which this Court employed in *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 195, is pertinent:

". . . Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that Executive officers conform their action to the mode prescribed by Congress."

See also *Union Bridge Co.* v. *United States,* 204 U. S. 364, 385; *The Douglas,* 7 Prob. Div. [1882], 157; *Frost* v. *Washington County R. R. Co.,* 96 Me. 76; *Maine Water Co.* v. *Knickerbocker Steam Towage Co.,* 99 Me. 473; *The Plymouth,* 225 Fed. 483.

Even if we leave out of consideration altogether the order of the Secretary of War, it is still difficult to see upon what just ground petitioners could be held liable.

The changes which occurred in the bed of the river were not due to natural causes, whose effect could reasonably have been anticipated, but were due to the arti-

ficial operations of the Government the effect of which appeared only after the lapse of a long period of years.

We agree with what was said by the District Court, in deciding the instant case, upon that subject:

"While the Railroad Company was perhaps required to take notice of ordinary changes in the course or channel of the stream from natural causes and provide against any injury that might result from such changes, it could not, in my opinion, be required to take notice of such radical changes as occurred here by the acts of the Government over which it had no control and which it had no reason to anticipate or provide against."

The opinion of the Circuit Court of Appeals is that the question of liability was not affected by the fact that the conditions imposed by the Secretary of War were complied with, holding that these conditions or restrictions did not define the measure of liability to third persons rightfully navigating the river, and *Maxon* v. *Chicago & Northwestern Ry. Co.,* 122 Fed. 555, is relied upon in support of this view. That was a case, however, where a railroad company had constructed a bridge in conformity with the license granted by the War Department. The obstruction which caused the injury complained of consisted of stone and other material thrown into the river by the railroad company at the foot of and about one of the bridge abutments, and extending out into the channel; but it was no part of the bridge structure and was entirely unauthorized. The court held that the tug which collided with the obstruction had a right to the use of the channel to its full width and having no knowledge or warning of the presence of the obstruction was entitled to recover for the resulting injury. The stone and other material were unlawfully thrown into the stream and constituted from the beginning an unlawful obstruction. In the instant case the piles forming part of the old bridge were lawfully placed and lawfully maintained until they were

ordered removed by the Secretary of War. His order for their removal was complied with, and the channel was left by petitioners wholly unobstructed, in law and in fact. The obstruction did not develop until years afterward and was due to causes which they were not bound to anticipate and provide against and for which they were in no degree responsible.

The decree of the Circuit Court of Appeals is therefore reversed and that of the District Court affirmed.

Reversed.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY *v.* LOUISIANA PUBLIC SERVICE COMMISSION ET AL.

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

No. 650. Argued on return to rule to show cause why supersedeas and injunction should not be set aside and injunction dissolved, November 13, 1922.—Decided November 20, 1922.

1. Upon appeal from an order merely refusing a preliminary injunction, under Jud. Code, § 266, there is nothing upon which a supersedeas may operate. P. 215.
2. Under Jud. Code, § 266, a single judge in allowing an appeal from an order of the District Court, constituted of three judges, denying a preliminary injunction, is without power to grant a continuance of a temporary restraining order pending the appeal, and his order to that effect is void. P. 216.
3. Equity Rule 74, which authorizes a justice or judge who took part in a decision granting or dissolving an injunction to suspend, modify, or restore the injunction pending appeal, does not apply to an appeal from an order refusing a preliminary injunction under Jud. Code, § 266. P. 217.
4. Where an interlocutory injunction has been refused in a case governed by Jud. Code, § 266, an application for injunction pending appeal must be presented to the three judges, and, except in

extraordinary circumstances, only after notice; and its allowance must be evidenced by their signatures or by announcement in open court with the three judges sitting, followed by a formal order tested as they direct. P. 218.

5. The granting of such an injunction, pending appeal, is within the power of this Court, but application therefor will generally be referred to the court of three judges who heard the case upon its merits and are familiar with the record. P. 219.

Motion by the appellees to set aside an order of supersedeas and injunction granted by a District Judge in connection with an appeal from an order of the District Court, constituted of three judges, refusing an interlocutory injunction in appellant's suit to enjoin appellees, members of a state commission, from reducing its rates for telephone service. Application to this Court by appellant for an injunction maintaining the *status quo*. For the opinion of the court below denying the interlocutory injunction, see 283 Fed. 215.

Mr. J. Blanc Monroe, with whom *Mr. Jas. C. Henriques, Mr. Monte M. Lemann, Mr. C. M. Bracelen, Mr. Hunt Chipley* and *Mr. E. D. Smith* were on the brief, for appellant.

In a case in which irreparable injury will otherwise ensue, the enforcement of an order of a state administrative commission can and should be stayed pending an appeal to this Court from a decree of a three-judge court denying a preliminary injunction of that order. *Southern Ry. Co.* v. *Watts,* 259 U. S. 576; *Hovey* v. *McDonald,* 109 U. S. 161; *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission,* 222 U. S. 582; *Louisville & Nashville R. R. Co.* v. *Siler,* 186 Fed. 176; *Ohio River & W. Ry. Co.* v. *Dittey,* 203 Fed. 537; *Grand Trunk Ry. Co.* v. *Michigan R. R. Commission,* 198 Fed. 1009; *Phoenix Ry. Co.* v. *Geary,* 209 Fed. 694; s. c. 239 U. S. 277, 281; *Louisville & Nashville R. R. Co.* v. *Railroad Commission,* 208 Fed. 35.

While the stay order in this case was signed by one judge, that signing was done with the knowledge and consent of the other two judges of the three-judge court.

In the circuit in which this case originated, it is the practice for the judge in whose district the case arises to sign the order for stay and supersedeas when the three judges decline the preliminary injunction.

Mr. Huey P. Long, with whom *Mr. W. M. Barrow* was on the brief, for appellees.

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

This is a motion by the appellees to set aside the supersedeas and injunction granted by District Judge Foster at the time he allowed an appeal from an order of three judges, Circuit Judge Bryan, District Judge Clayton, and himself, denying an application for an interlocutory injunction under § 266 of the Judicial Code.

The original bill was filed by the Cumberland Telephone and Telegraph Company against the Louisiana Public Service Commission seeking an injunction to prevent the latter, a State Board of competent authority, from reducing the existing telephone rates, as it proposed, on the ground that such action would compel the plaintiff to furnish service at rates which would be confiscatory and violate its rights secured by the Fourteenth Amendment. District Judge Foster granted a restraining order as permitted by § 266, to remain in force until the application for an interlocutory injunction could be heard by three judges. The court, thus constituted, heard the application on voluminous evidence, and denied the application, Judge Foster dissenting. Upon the entry of the order, the complainant applied to the District Court for an appeal and for an injunction against the defendant Commission, until the determination of the cause on appeal. District

Judge Foster, sitting alone, made an order in the District Court allowing the appeal, granted a supersedeas and continued the original restraining order, made by him before the hearing by the three judges, until the appeal could be determined, in order to maintain the *status quo.* A bond was required in $100,000, which is conditioned that appellant shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good and also that it shall repay to defendants such damages as they may suffer and "for the repayment to plaintiff's subscribers, and to each of them, of the excess charges collected from each of said subscribers as a result of the issuance and continuance of the preliminary restraining order issued herein, over and above what would have been collected from said subscribers had said restraining order not been rendered, the said repayment to be made as, when, and if it shall have been finally determined herein that the order of the Louisiana Public Service Commission of May 13, 1922, is a legal order binding upon the plaintiff herein."

The present motion is to set aside the supersedeas and the restraining order. That was the form of the application in the original proceeding for mandamus, which by order of the court has been treated in argument as a motion on this appeal. So far as the supersedeas, to which the motion is directed, is concerned, it had no effect, because there was nothing to supersede, except an execution for costs, and that was suspended by the mere allowance of the appeal. There was no decree for money, there was no decree at all in favor of the complainants upon which execution could issue. *Hovey* v. *McDonald,* 109 U. S. 150, 160. The supersedeas would not continue the injunction or maintain the *status quo ante* of restraint upon the defendant. *Slaughter-House Cases,* 10 Wall. 273, 297; *Hovey* v. *McDonald, supra,* 161; *Leonard* v. *Ozark Land Co.,* 115 U. S. 465, 468; *Knox*

County v. *Harshman,* 132 U. S. 14, 16; *Merrimack River Savings Bank* v. *Clay Center,* 219 U. S. 527. The effective part of the order of Judge Foster, if valid, was the continuance of the restraining order, which is called in the motion and argument the injunction. The motion to set this aside must be granted.

Section 266 of the Judicial Code is a codification of § 17 of the Act of June 18, 1910, c. 309, 36 Stat. 557, amended by the Act of March 3, 1913, c. 160, 37 Stat. 1013. The legislation was enacted for the manifest purpose of taking away the power of a single United States Judge, whether District Judge, Circuit Judge or Circuit Justice holding a District Court of the United States, to issue an interlocutory injunction against the execution of a state statute by a state officer or of an order of an administrative board of the State pursuant to a state statute, on the ground of the federal unconstitutionality of the statute. Pending the application for an interlocutory injunction, a single judge may grant a restraining order to be in force until the hearing of the application, but thereafter, so far as enjoining the state officers, his power is exhausted. The wording of the section leaves no doubt that Congress was by provisions *ex industria* seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation, regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecessary conflict between federal and state authority always to be deprecated. This Court had occasion to consider the purport and significance of § 17 of the Act of June 18, 1910, embodied in § 266, in *Ex parte Metropolitan Water Co.,* 220 U. S. 539, and there held that, after a District Judge had granted a preliminary

restraining order in such a case as provided, the same judge could not set aside his own order; and such act by him was without jurisdiction. This Court, therefore, issued a mandamus directing him to annul the order of vacation. We are of opinion that a single judge has no power, in view of § 266, to affect the operation of the order of the court constituted by the three judges granting or denying the interlocutory injunction applied for. To hold that he may grant a temporary injunction varying the order of the three judges would be to make the legislation a nullity and work the result which Congress was at great pains to avoid. Arguments to show that the order only continued the *status quo,* that a disturbance of it will work irreparable injury and that the bond herein required secures all parties in interest are beside the point. This is a question of statutory power and jurisdiction, not one of judicial discretion or equitable consideration.

Equity Rule No. 74, which authorizes a justice or judge who took part in a decision of an equity suit granting or dissolving an injunction to make an order suspending, modifying or restoring the injunction pending the appeal upon proper terms, does not apply to such an appeal or to such a case as this. This appeal is not from a final decree. It is a special proceeding in which the power of a single judge is definitely limited.

It is argued that the order of injunction pending the appeal here was the act of the court of three judges. It is certain that Judge Foster was the only judge sitting in the District Court when the *ex parte* application was made by complainant company for the allowance of the appeal, the granting of the injunction and the fixing of the amount of the bond. It is certain that these orders were signed only by him and did not purport to be authorized by three judges. The claim is based on a quotation from remarks made by Judge Foster in overruling the application made to him by the defendant, the Public

Service Commission, to set aside the injunction. The Judge said:

"Now let us go a little further. Here is a question submitted to three Judges let us say. This is not the action of an individual judge. The question of supersedeas was a matter of discussion among the court composed of Judge Bryan, Judge Clayton and myself, and I showed you, Mr. Long, [counsel for the Public Commission], Judge Bryan's letter, in which he says that he thought that the Cumberland Telephone Company would be entitled to a supersedeas in this case, but that was a matter to be taken up by the District Court, by myself.

"Now, when I granted an appeal with supersedeas, that is the action of the court, it is merely a matter of practice that I signed the order. Now that supersedeas ought always to be granted to prevent irreparable injury."

This statement does not make the order here in question the act of the three judges. Judge Bryan's letter, so far as we are able to judge from this reference, was a mere expression of opinion that Judge Foster as District Judge had the power to grant the injunction, an opinion with which we do not agree. The letter was not an attempt by Judge Bryan to become a participant in the order. Nor is there any showing that Judge Clayton took part in the matter. A discussion in conference of the judges as to the granting of an injunction pending an appeal before it was applied for does not supply what is needed to give efficacy to such order by a single judge. Compliance with the statute requires the assent of the three judges given after the application is made evidenced by their signatures or an announcement in open court with three judges sitting followed by a formal order tested as they direct. Notice of application for the injunction to opposing counsel should be required except in extraordinary circumstances. We have no proper evidence of the participation of the three judges in the injunction here and therefore grant the

motion to set it aside as void and made without jurisdiction.

The appellees ask that if we conclude to set aside the injunction, we entertain a motion to grant one now to preserve the *status quo*. The fact that a majority of the three judges of the District Court denied the interlocutory injunction suggests the want of merit in the application here. We, of course, appreciate that notwithstanding a denial of an injunction on its merits, a court may properly find that pending a final determination of the suit on the merits in a court of last resort, a balance of convenience may be best secured by maintaining the *status quo* and securing an equitable adjustment of the finally adjudicated rights of all concerned through the conditions of a bond. *Hovey* v. *McDonald,* 109 U. S. 150, 161; Equity Rule No. 74. But the court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits and, therefore, is familiar with the record. Records in cases like this are often very voluminous. Such is the record in this case. Without abdicating our unquestioned power to grant such an application as this, and conceding that exceptional cases may arise, we are generally inclined to refer applications of this kind to the court of three judges who have heard the whole matter, have read the record, and can pass on the issue without additional labor. That was the course taken by this Court in *Southern Ry. Co.* v. *Watts,* 259 U. S. 576. A similar order will be made here. The action of the District Court thus constituted, however, will not revive or vitalize the order of injunction granted by Judge Foster; for that was void, and the parties affected by it must be left to such course as they may be advised. We are not now called upon to construe or determine the validity or effect of the bond taken in that proceeding.

The orders in this Court will be two:

First. The motion of appellees is granted and the order of injunction granted by Judge Foster when allowing the appeal is set aside as without jurisdiction.

Second. The application to this Court for an injunction maintaining the *status quo* is referred to the District Court constituted of three judges for its determination.

The costs on this motion will be taxed to the appellant.

UNITED STATES *v.* MINNIE ATKINS ET AL.

NANCY ATKINS ET AL. *v.* UNITED STATES, MINNIE FOLK, NÉE ATKINS, ET AL.

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

Nos. 45, 46. Argued October 11, 12, 1922.—Decided November 20, 1922.

An act of the Commission to the Five Civilized Tribes in enrolling a name as that of a Creek Indian alive on April 1, 1899, amounted, when duly approved by the Secretary of the Interior, to a judgment in an adversary proceeding, establishing the existence of the individual and his right to membership, and is not subject to be attacked by the United States in a suit against those who claim his land allotment, in which the Government alleges that the person enrolled never existed and that the enrollment was procured by fraud on the Commission and resulted from gross mistake of law and fact. P. 224.

268 Fed. 923, affirmed.

APPEALS from a decree of the Circuit Court of Appeals affirming a decree of the District Court in a suit brought by the United States upon the grounds of fraud and mistake to cancel an enrollment on the Creek tribal roll and an allotment certificate and patent issued thereunder,

and to quiet the title to the land so allotted in the United States and the Creek Nation, as against the defendants and interveners, who claimed under such enrollment and allotment. The District Court dismissed the bill, *quoad* the United States, and adjudicated the title as between the other parties.

Mr. H. L. Underwood, with whom *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Riter* were on the brief, for the United States.

The finding of the Dawes Commission was subject to impeachment at the suit of the United States for fraud or mistake.

The Government's bill alleged that through the connivance of Minnie Atkins the name of Thomas Atkins was placed upon the 1895 roll of Creek citizens as a member of her family. The materiality of this lay in the fact that the Dawes Commission, in preparing the final citizenship roll from which allotments of Creek tribal lands were made, relied upon and accepted this 1895 roll as evidence showing those who were entitled to enrollment.

Had there been a hearing, with the United States or the Creek Tribe actively contesting the enrollment of the name of Thomas Atkins,—had witnesses been heard on the question of whether he ever existed, the decision of the Commission would have been impervious to attack. *Vance* v. *Burbank,* 101 U. S. 514; *United States* v. *Wildcat,* 244 U. S. 111.

The rule of *Vance* v. *Burbank* has only been applied, in this Court at least, to cases where there has been a contest proceeding where full hearing has been had and testimony introduced or the opportunity to do so given. *De Cambra* v. *Rogers,* 189 U. S. 119; *Estes* v. *Timmons,* 199 U. S. 391; *Love* v. *Flahive,* 205 U. S. 195; *Ross* v. *Stewart,* 227 U. S. 530; *Ross* v. *Day,* 232 U. S. 110.

The District Court, however, seemed to consider the fact that the Creek Council had notice of the proceedings before the Commission, and hence might have made objection to the enrollment of any name, rendered the proceeding an adversary one. Mark, the notice was not as to this specific individual case, but general notice or knowledge that the Commission was making inquiry and determination upon which to predicate enrollments generally.

The Government has fully as much notice of proceedings to acquire public lands as it had of the Dawes Commission proceedings, and yet the former are held to be *ex parte,* and fraud intrinsic therein is held ample basis for relief in equity. *McCaskill Co.* v. *United States,* 216 U. S. 504; *Diamond Coal & Coke Co.* v. *United States,* 233 U. S. 236; *Washington Securities Co.* v. *United States,* 234 U. S. 76. The same is true of naturalization proceedings. *Johannessen* v. *United States,* 225 U. S. 227; *United States* v. *Ness,* 245 U. S. 319.

In *United States* v. *Minor,* 114 U. S. 233, a suit to cancel a patent for fraud, this Court distinguished *Vance* v. *Burbank,* and definitely pointed out the scope and extent of the rule of the latter case. That the rule of the *Vance Case* is limited to cases where there has been a hearing in which the issues sought to be impeached have been tried, is evidenced by a later statement in *Hilton* v. *Guyot,* 159 U. S. 113, 207. See *Chicago, Rock Island & Pacific Ry. Co.* v. *Callicotte,* 267 Fed. 799; certiorari denied, 255 U. S. 570; *Marshall* v. *Holmes,* 141 U. S. 589; *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175. The decision in *United States* v. *Wildcat* is not to the contrary, for it is plainly limited to cases other than those involving fraud or mistake.

Independently of the question of fraud, we contend that if no such person as Thomas Atkins ever existed, the enrollment of that name as a citizen of the Creek

Nation and the allotment and patenting of a tract of land in his name was a nullity and conveyed no title, and that no rights or interest thereunder could vest in any person. Cf. *Iowa Land & Trust Co.* v. *United States,* 217 Fed. 11; *Moffat* v. *United States,* 112 U. S. 24; *Thomas* v. *Wyatt,* 25 Mo. 24.

The Government asserts that all the parties defendant are strangers to the title to this land. Surely it is entitled to be heard on that issue.

The principle applicable to this case is that of *Scott* v. *McNeal,* 154 U. S. 34.

Equity will grant relief against a judgment, the enforcement of which would be unconscionable, or which was rendered through mistake or accident, the party seeking relief not knowing of the existence of a defense or being prevented from availing himself of it by accident or mistake. *Pickford* v. *Talbott,* 225 U. S. 651.

The evidence establishes, and the courts below should have found, that Thomas Atkins was a myth; hence the patent issued in his name conveyed no title. *Vitelli & Son* v. *United States,* 250 U. S. 355.

Mr. Joseph M. Hill, with whom *Mr. Napoleon B. Maxey, Mr. Malcolm E. Rosser* and *Mr. Henry L. Fitzhugh* were on the briefs, for Nancy Atkins et al.

Mr. C. B. Stuart, with whom *Mr. E. C. Hanford, Mr. M. K. Cruce* and *Mr. Lee Bond* were on the briefs, for Minnie Atkins et al.

Mr. Justice McReynolds delivered the opinion of the Court.

Under authority of acts of Congress the [Dawes] Commission to the Five Civilized Tribes enrolled Thomas Atkins as a Creek Indian alive on April 1, 1899; the Secretary of the Interior approved; an allotment was selected for him; a patent issued and was recorded as required by

law. Minnie Atkins undertook, as his sole heir, to convey the land to certain named defendants. Alleging that Thomas Atkins never existed and that his enrollment came about through fraud and gross mistake of law and fact, the United States brought this proceeding against many defendants to annul the allotment certificate and patent and to quiet title in the Tribe.

Minnie Atkins maintains that the enrolled Thomas was her son; that he was born prior to April 1, 1899, and died thereafter, leaving her as sole heir. Nancy Atkins claims to be the mother and sole heir. She filed a cross bill asking that the title to the land be confirmed to her and those claiming through her. Henry Carter asserts that he is the individual enrolled as Thomas Atkins.

The trial court ruled that the enrollment by the Commission amounted to an adjudication that Thomas Atkins was a living person on April 1, 1899, entitled to membership; that this finding was not subject to collateral attack under a mere allegation of his nonexistence; and that it could not be annulled for fraud unless the fraud alleged and proved was such as to have prevented a full hearing within the doctrine approved by *United States* v. *Throckmorton,* 98 U. S. 61; *Vance* v. *Burbank,* 101 U. S. 514; *Hilton* v. *Guyot,* 159 U. S. 113. The relief asked by the United States was accordingly denied. Having considered the voluminous testimony, it found Minnie Atkins to be the mother of Thomas and owner of the land subject to the rights of those claiming under her. The Circuit Court of Appeals affirmed a final decree embodying these conclusions. 233 Fed. 177; 268 Fed. 923.

In *United States* v. *Wildcat,* 244 U. S. 111, 118, 119, it was insisted that the Indian died prior to April 1, 1899, and that his enrollment as of that date was beyond the jurisdiction of the Dawes Commission and void within the doctrine of *Scott* v. *McNeal,* 154 U. S. 34. Much consideration was given to the statutes creating and defining

the powers of the Commission and the effect of an enrollment. This Court said:

"There was thus constituted a *quasi*-judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress by this legislation evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal lands. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commission was established and endowed with authority to hear and determine the matter. . . .

"When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter, upon the approval of the Secretary, should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake.

"We cannot agree that the case is within the principles decided in *Scott* v. *McNeal,* 154 U. S. 34, and kindred cases, in which it has been held that in the absence of a subject-matter of jurisdiction an adjudication that there was such is not conclusive, and that a judgment based upon action without its proper subject being in existence is void. . . . We think the decision of such tribunal, when not impeached for fraud or mistake, conclusive of the question of membership in the tribe, when followed, as was the case here, by the action of the Interior Department confirming the allotment and ordering the patents conveying the lands, which were in fact issued."

It must be accepted now as finally settled that the enrollment of a member of an Indian tribe by the Dawes

Commission, when duly approved, amounts to a judgment in an adversary proceeding determining the existence of the individual and his right to membership subject, of course, to impeachment under the well established rules where such judgments are involved.

The questions of fact relating to the conflicting claims advanced by Minnie Atkins, Nancy Atkins and Henry Carter have been determined in favor of Minnie by both courts below upon survey of all the evidence; and we find nothing which would justify us in overruling their well considered action.

The decree of the court below is affirmed.

KLINE ET AL., AS THE BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT NO. 20, OF THE CITY OF TEXARKANA, ARKANSAS, *v.* BURKE CONSTRUCTION COMPANY.

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

No. 81. Argued October 19, 20, 1922.—Decided November 20, 1922.

1. Where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect would be to defeat or impair the jurisdiction of the federal court. P. 229.
2. But where the actions in both causes are *in personam*, seeking only money judgments, jurisdiction in the one is not affected by the other, and there is no basis for such an injunction. P. 230.
3. The right of a citizen to prosecute his cause against a citizen of another State in the federal court is not a right granted by the Constitution; and it affords no ground upon which that court may assume jurisdiction to enjoin the defendant from prosecuting a counter action, on the same contract, in a state court. P. 233.

271 Fed. 605, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals, reversing a decree of the District Court, which denied an

injunction, in a dependent suit brought by the present respondent to restrain the petitioners from prosecuting a suit in a state court.

Mr. William H. Arnold and *Mr. Frank S. Quinn,* with whom *Mr. William H. Arnold, Jr.,* and *Mr. David C. Arnold* were on the brief, for petitioners.

Mr. James B. McDonough for respondent.

Mr. Justice Sutherland delivered the opinion of the Court.

The Burke Construction Company, a corporation organized under the laws of the State of Missouri, brought an action at law against petitioners in the United States District Court for the Western District of Arkansas on February 16, 1920. The jurisdiction of that court was invoked upon the ground of diversity of citizenship, the petitioners being citizens of the State of Arkansas. The action was for breach of a contract between the parties, whereby the Construction Company had engaged to pave certain streets in the town of Texarkana. A trial was had before the court and a jury which resulted in a disagreement.

Subsequent to the commencement of the action by the Construction Company, viz., on March 19, 1920, petitioners instituted a suit in equity against that Company in a state chancery court of the State of Arkansas, upon the same contract, joining as defendants the sureties on the bond which had been given for the faithful performance of the contract. The bill in the latter suit alleged that the Construction Company had abandoned its contract and judgment was sought against the sureties as well as against the company. The bill asked an accounting with reference to the work which had been done and which remained to be done under the contract, and prayed judgment in the sum of $88,000.

In the action brought by the Construction Company the petitioners filed an answer and cross complaint, setting up, in substance, the same matters which were set forth in their bill in the state court. In the equity suit the Construction Company filed an answer and cross complaint, setting up the matters charged in its complaint in the action at law. Thus the two cases presented substantially the same issues, the only differences being those resulting from the addition of the sureties as parties defendant in the equity suit. Both actions were *in personam,* the ultimate relief sought in each case being for a money judgment only.

The equity suit was removed to the United States District Court upon the petition of the Construction Company upon the ground that the Company and the petitioners were citizens of different States and that the controversy between them was a separable controversy, and upon the further ground that a federal question was involved. Petitioners moved to remand. The District Court sustained the motion and the equity suit was thereupon remanded to the State Chancery Court, where it is still pending.

After the mistrial of the action at law in the United States District Court, the Construction Company filed a bill of complaint as a dependent bill to its action at law, by which it sought to enjoin the petitioners from further prosecuting the suit in equity in the State Chancery Court. The United States District Court denied the injunction and an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit. That court reversed the decision of the District Court and remanded the case with instructions to issue an injunction against the prosecution of the suit in equity in the State Chancery Court. From that decree the case comes here upon writ of certiorari.

Section 265 of the Judicial Code provides: "The writ of injunction shall not be granted by any court of the

United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." But this section is to be construed in connection with § 262, which authorizes the United States courts " to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." See *Julian* v. *Central Trust Co.,* 193 U. S. 93, 112; *Lanning* v. *Osborne,* 79 Fed. 657, 662. It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is *in rem* the effect is to draw to the federal court the possession or control, actual or potential, of the *res,* and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction.

This Court in *Covell* v. *Heyman,* 111 U. S. 176, 182, said:

" The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State Courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same sys-

tem, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

And the same rule applies where a person is in custody under the authority of the court of another jurisdiction. *Ponzi* v. *Fessenden,* 258 U. S. 254.

But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded. *Stanton* v. *Embrey,* 93 U. S. 548; *Gordon* v. *Gilfoil,* 99 U. S. 168, 178; *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322, 339; *Insurance Company* v.

Brune's Assignee, 96 U. S. 588, 592; *Merritt* v. *American Steel-Barge Co.,* 79 Fed. 228; *Ball* v. *Tompkins,* 41 Fed. 486; *Holmes County* v. *Burton Construction Co.,* 272 Fed. 565, 567; *Standley* v. *Roberts,* 59 Fed. 836, 844–5; *Green* v. *Underwood,* 86 Fed. 427, 429; *Ogden City* v. *Weaver,* 108 Fed. 564, 568; *Zimmerman* v. *So Relle,* 80 Fed. 417, 419–420; *Baltimore & Ohio R. R. Co.* v. *Wabash R. R. Co.,* 119 Fed. 678, 680; *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.,* 146 Fed. 337, 340; *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.,* 171 Fed. 43; *Woren* v. *Witherbee, Sherman & Co.,* 240 Fed. 1013; *Stewart Land Co.* v. *Arthur,* 267 Fed. 184.

In *Baltimore & Ohio R. R. Co.* v. *Wabash R. R. Co., supra,* the Circuit Court of Appeals for the Seventh Circuit said:

"It is settled that, when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted. . . . The rule is not only one of comity, to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons, but between state courts and those of the United States it is something more. 'It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.' *Covell* v. *Heyman,* 111 U. S. 176. The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature. *Farmers' Loan & Trust Co.* v. *Lake Street El. R. Co.,* 177 U. S. 51; *Merritt* v. *Steel Barge Co.,* 24 C. C. A. 530, 79 Fed. 228, 49 U. S. App. 85. The rule is limited to

actions which deal either actually or potentially with specific property or objects. Where a suit is strictly in personam, in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because it neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law. *Stanton* v. *Embrey,* 93 U. S. 548."

In *Stewart Land Co.* v. *Arthur, supra,* where the plaintiff sued the defendant upon two checks and a promissory note in the United States District Court, and subsequently brought an action against him upon the same instruments in a state court and an injunction was sought against the latter action, the Circuit Court of Appeals for the Eighth Circuit disposed of the matter as follows:

"In the Iowa case there was no custody of property which might lawfully be protected by the injunctive process. It was purely in personam. The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the others. Each may take its normal course."

Prior to the decision in the instant case, as an examination of the foregoing authorities, and others which might be added, will show, the rule was firmly established that the pendency in a federal court of an action *in personam* was neither ground for abating a subsequent action in a state court nor for the issuance of an injunction against its prosecution. In the case now under consideration, however, the court below held otherwise, upon the ground

that: "By the Constitution of the United States (article 3, § 2, and the acts of Congress, U. S. Comp. Stat. 991) the constitutional right was granted to the Burke Company to ask and to have a trial and adjudication . . . by the federal court."

It is said further that if the second suit may be prosecuted so as to secure an adjudication in a state court before the action of the federal court can be adjudicated, then the federal court's adjudication would be made futile because before it is rendered the controversy will have become *res adjudicata* by the adjudication of the state court. Such a result, it is urged, cannot be allowed because the Construction Company brought its action in the federal court in pursuance "of a grant of this right in the Constitution and the acts of Congress" and it may not be deprived of that constitutional right by a subsequent suit in a state court.

The force of the cases above cited is sought to be broken by the suggestion that in none of them was this question of constitutional right presented or considered.

The right of a litigant to maintain an action in a federal court on the ground that there is a controversy between citizens of different States is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right *granted* by the Constitution. The applicable provisions, so far as necessary to be quoted here, are contained in Article III. Section 1 of that Article provides, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." By § 2 of the same Article it is provided that the judicial power shall extend to certain designated cases and controversies and, among them, "to controversies . . . between citizens of different States. . . ." The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated

cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner* v. *Bank of North America,* 4 Dall. 8, 10; *United States* v. *Hudson & Goodwin,* 7 Cranch, 32; *Sheldon* v. *Sill,* 8 How. 441, 448; *Stevenson* v. *Fain,* 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *The Mayor* v. *Cooper,* 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors* v. *Osbornes,* 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right. The Construction Company, however, had the undoubted right under the statute to invoke the jurisdiction of the federal court and that court was bound to take the case and proceed to judgment. It could not abdicate its authority or duty in favor of the state jurisdiction. *Chicot County* v. *Sherwood,* 148 U. S. 529, 533; *McClellan* v. *Carland,* 217 U. S. 268, 282. But, while this is true, it is likewise true that the state court had jurisdiction of the suit instituted by petitioners. Indeed, since the case presented by that suit was such as to preclude its removal to the federal jurisdiction, the state jurisdiction in that particular suit was exclusive. It was, therefore, equally

the duty of the state court to take the case and proceed to judgment. There can be no question of judicial supremacy, or of superiority of individual right. The well established rule, to which we have referred, that where the action is one *in rem* that court—whether state or federal—which first acquires jurisdiction draws to itself the exclusive authority to control and dispose of the *res,* involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective courts are of equal rank. See *Heidritter* v. *Elizabeth Oil-Cloth Co.,* 112 U. S. 294, 305. The rank and authority of the courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam,* involving a question of personal liability only, the rule applies in the former but does not apply in the latter.

The decree of the Circuit Court of Appeals is therefore reversed and the case remanded to the District Court for further proceedings in conformity with this opinion.

LIBERTY OIL COMPANY *v.* CONDON NATIONAL BANK ET AL.

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

No. 98. Argued November 15, 16, 1922.—Decided November 27, 1922.

1. Where a defendant, sued at law in the District Court for money had and received, avers by answer and cross-petition that it is a stakeholder of the money in question, offers to pay it into court,

and prays that the other claimants be made parties, that the issue be litigated between them and the plaintiff, and that the defendant be discharged from liability, the proceeding becomes an equitable one, an interpleader, under Jud. Code, § 274b, as amended by Act of March 3, 1915, c. 90, 38 Stat. 956. P. 240.

2. While it is not so expressly required, either by Equity Rule 22 or by statute, there is authority, by implication from Jud. Code, § 274b, *supra,* and § 274a, to transfer a case thus begun at law and converted to equity, to the equity side of the court; and such, it seems, is the better practice. P. 241.
3. But failure to order such transfer does not deprive the suit of its equitable character. P. 242.
4. Where an equitable defense is interposed in an action at law, the equitable issue should first be disposed of; and, if an issue at law remains, it is triable to a jury. P. 242.
5. This preserves the right of jury trial guaranteed by the Seventh Amendment, being in conformity with the practice of the courts of law and chancery in England at the time of the adoption of the Constitution in the light of which the Amendment should be construed. P. 243.
6. Sections 274b and 274a of the Judicial Code, although not creating one form of civil action, are calculated to permit changes from law to equity and *vice versa,* with the least possible delay or formality. P. 243.
7. Where an action at law is thus converted into an interpleader, it is to be treated thenceforth, by trial and appellate courts, as a proceeding in equity; the issue between the claimants need not, under the Seventh Amendment, be submitted to a jury, but may be tried by the court; and the judgment is reviewable as in equity and not as at law. P. 244.
8. Under Jud. Code, § 269, as amended February 26, 1919, c. 48, 40 Stat. 1181, appellate courts are to give judgment after examination of the record without regard to technical errors, defects, or exceptions, not affecting substantial rights. P. 245.
9. Under Jud. Code, § 274b, *supra,* whether review is sought by writ of error or appeal, the appellate court has full power to render such judgment upon the record as law and justice require. P. 245.
10. Where certiorari was issued to the Circuit Court of Appeals to settle an important question of practice, *held,* that this Court though it had the power, would not also decide the merits but would remand the case for that purpose to the court below. P. 245.

271 Fed. 928, reversed.

This suit was begun as an action at law in the District Court of Kansas by the Liberty Oil Company, a corporation organized under the laws of Virginia, and a citizen of that State, against the Condon National Bank, a corporation organized under the banking laws of the United States and resident and doing business in Kansas. Plaintiff by its petition averred that it had made a contract with the Atlas Petroleum Company of Oklahoma, C. M. Ball, Isadore Litman, P. G. Keith and J. H. Keith, residents of Kansas, by which it agreed to purchase and they agreed to sell 160 acres more or less of oil lands in Butler County, Kansas, for $1,150,000. By the contract, the purchaser was required to deposit $100,000 with the Liberty National Bank simultaneously with a deposit of the contract, and this sum, together with the assignments, transfers and conveyances under the contract, was to be held by the bank and by it to be delivered in accordance with the conditions of the contract. The main conditions, and the only ones here material, were that the vendors should furnish an abstract of the title to the property contracted to be sold showing a good and marketable title in them, that the vendee should have seven days in which to examine the abstract, and that if its examination should show a good and marketable title, the vendee should pay the bank $1,050,000, the remainder of the purchase money, and the bank should deliver the deeds of assignments and transfers to the vendee and the vendor should deliver possession of the land. If the examination showed a good and marketable title and the vendee should refuse to pay the money then due from it, the $100,000 was to be delivered to the vendors as liquidated damages and the contract was to become null and void. In the event that the examination should disclose that the title was not good and marketable, the vendee was to notify the vendors and they were to have thirty days in which to perfect the title and should they neglect in that time to do so, the $100,000 on

deposit was to be returned to the vendee and the contract was to become null and void.

The petition averred that the money and the contract were deposited in the defendant bank, that the abstract of title was submitted, that an examination of the abstract submitted showed that the title of the vendors was not good and marketable, in that in the chain of title the vendors claimed under the deed of an assignee for the benefit of creditors filed in a Colorado court and taking effect by the laws of that State but never authorized or confirmed by a court of competent jurisdiction under the laws of Kansas as required by the law of the latter State, that this defect was not remedied by the vendors within the time required by the contract, and on July 11, 1918, the plaintiff duly notified the defendant bank of this and demanded payment of the money deposited, that the defendant refused and appropriated the sum to its own use to the damage of the plaintiff in the sum of $100,000 and interest at six per cent. from the date of the demand and refusal.

The defendant bank answered admitting all the facts averred in the petition except those as to the character of the title shown by the abstract, and alleged that the vendors in the contract of sale had also demanded that the deposit of $100,000 be paid to them on the ground that the vendee had refused without right to accept a good and marketable title to the land sold, that the defendant bank had no interest in the deposit and offered to pay the sum into court or to such person as the court should order. The defendant asked that the vendors be made parties and required to set up their claim to the deposit, that the court make proper order as to the disposition of the money, and that the defendant upon compliance with the order be discharged from all liability in connection therewith. The court granted the prayer of the answer and "ordered, adjudged and decreed" that vendors be made

parties, and set up their claim within twenty days. The vendors waived summons and filed an answer and cross petition in which they averred that the petition of the plaintiff did not state a cause of action; and denied as much of the petition as averred that there were defects in the abstract of title which prevented it from being good and marketable. By the cross petition they asked for the payment of the $100,000 deposit and also a judgment for $1,050,000 as the purchase price for the land, title to which they had tendered, and for general relief. This cross petition the plaintiff answered making the same issue as that in the petition and answer. A jury was waived in writing. A bill of exceptions was taken embodying all the evidence, which was signed by the judge, and the same evidence was included in a transcript also certified to by the judge.

The District Court on the evidence found generally for the vendors, and from its opinion it appeared that it found the title good and marketable, and that upon plaintiff's refusal to accept the same the vendors became entitled to the $100,000 as liquidated damages. Accordingly it was " considered, ordered and adjudged " that the vendors, interveners, recover $10,750.00 as interest on the $100,000 from June 30, 1918, that the Condon Bank, defendant, be discharged from further liability, and that the interveners have judgment for the $100,000 then in the registry of the court. There is nothing in the record to show that the defendant bank was dismissed until this final judgment, although, under some authority not made a matter of record, it had turned the money into the registry of the court.

An appeal was taken to the Circuit Court of Appeals and a supersedeas bond given. The Circuit Court of Appeals held that the action was a suit at law, that under § 4 of the Act of September 6, 1916, c. 448, 39 Stat. 727, to amend the Judicial Code, it had the power and it was

its duty to consider the appeal taken as a writ of error, and that as the bill of exceptions showed no special findings of fact in a cause in which a jury had been waived but only a general finding for the interveners, it was not within the power of the court in a law case to consider the sufficiency of the evidence to sustain the finding. It therefore affirmed the judgment of the District Court. A certiorari brings the case here for consideration.

Mr. F. W. Lehmann, with whom *Mr. Harry E. Karr* and *Mr. Charles G. Yankey* were on the brief, for petitioner.

Mr. John J. Jones, with whom *Mr. J. H. Keith* and *Mr. Hugo T. Wedell* were on the brief, for respondents.

Mr. Chief Justice Taft, after stating the case, delivered the opinion of the Court.

We differ with the Circuit Court of Appeals in its holding that, as brought in review before it, this cause was an action at law. We think the cause was then equitable and the proper review was by appeal. The case began as an action at law for money had and received. When the defendant bank claimed to be only a stakeholder of the deposit, disclaimed interest therein and offered to pay it into court, and asked that the other claimants of the fund be made parties, its answer and cross petition became an equitable defense and a prayer for affirmative equitable relief in the nature of a bill for interpleader. Section 274b of the Judicial Code as amended by Act of March 3, 1915, c. 90, 38 Stat. 956, provides:

" That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable

relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

This section applies to the case before us. The proceeding was changed by defendant's answer and cross petition from one at law to one in equity, with all the consequences flowing therefrom. The better practice would perhaps have been, on the defendant's filing its answer and cross petition, to order the cause transferred to the equity side of the court. Under Equity Rule No. 22, a suit in equity which should have been brought at law must be transferred to the law side of the court. There is no corresponding provision in rule or statute which expressly directs this to be done when the action begun at law should have been by a bill on the equity side, but we think the power of the trial court to order a transfer in a case like this is implied from the broad language of § 274b, above quoted, by which the defendant who files an equitable defense is to be given the same rights as if he had set them up in a bill in equity, and from § 274a of the Judicial Code, quoted below, in which the court is directed, when a suit at law should have been brought in equity, to order amendments to the pleadings necessary to conform them to the proper practice. *Webb* v. *Southern Ry. Co.,* 235 Fed. 578, 593, 594. We are aware that a different conclusion has been reached by the Circuit Court of Appeals of the Fourth Circuit in *Waldo* v. *Wilson,* 231 Fed. 654, but for the reasons stated and after a full examination of that case, we think the conclusion of that court upon this point was too narrow.

Nor, by the failure to order the transfer in this case, did the suit lose the equitable character it had taken on by the answer and cross petition of the defendant. The situation thus produced was quite like that under state civil codes of procedure in which there is but one form of civil action, the formal distinction between proceedings in law and equity is abolished and remedies at law and in equity are available to the parties in the same court and the same cause. Neither legal nor equitable remedies are abolished under such codes. "What was an action at law before the code, is still an action founded on legal principles; and what was a bill in equity before the code, is still a civil action founded on principles of equity." Sutherland on Code Pleading, Practice and Forms, § 87—*DeWitt* v. *Hays,* 2 Cal. 463; *Smith* v. *Rowe,* 4 Cal. 6; *Howard* v. *Tiffany,* 3 Sandf. 695.

Section 274b is an important step toward a consolidation of the federal courts of law and equity and the questions presented in this union are to be solved much as they have been under the state codes. *United States* v. *Richardson,* 223 Fed. 1010, 1013. The most important limitation upon a federal union of the two kinds of remedies in one form of action is the requirement of the Constitution in the Seventh Amendment that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then if an issue at law remains, it is triable to a jury. *Massie* v. *Stradford,* 17 Oh. St. 596; *Dodsworth* v. *Hopple,* 33 Oh. St. 16, 18; *Taylor* v. *Standard Brick Co.,* 66 Oh. St. 360, 366; Sutherland, Code Pl. and Pr. § 1157. The equitable defense makes the issue

equitable and it is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was at common law. The same order is preserved as under the system of separate courts. If a defendant at law had an equitable defense, he resorted to a bill in equity to enjoin the suit at law until he could make his equitable defense effective by a hearing before the chancellor. The hearing on that bill was before the chancellor and not before a jury, and if the prayer of the bill was granted, the injunction against the suit at law was made perpetual and no jury trial ensued. If the injunction was denied, the suit at law proceeded to verdict and judgment. This was the practice in the Courts of Law and Chancery in England when our Constitution and the Seventh Amendment were adopted, and it is in the light of such practice that the Seventh Amendment is to be construed.

Congress, we think, was looking toward such a union of law and equity actions in the enactment of § 274b, quoted above, and of § 274a, which, referring to courts of the United States, provides:

"That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

To be sure, these sections do not create one form of civil action as do the codes of procedure in the States, but they

manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible, and are long steps toward code practice.

Coming now to apply those two sections thus construed to the case before us, we find that by defendant's answer and the court's order it became a bill of interpleader in equity. Thereafter the proceedings should have been so treated, both in the trial and appellate courts. The chancellor having sustained a bill of interpleader, disposed of the controversy between the claimants by directing any method of trial which would best and expeditiously accomplish justice in the particular case. *State Insurance Co.* v. *Gennett,* 2 Tenn. Ch. 100, 101; *Rowe* v. *Hoagland's Administrators,* 7 N. J. Eq. 131; *Condict's Executors* v. *King,* 13 N. J. Eq. 375, 383; *City Bank* v. *Bangs,* 2 Paige, Ch. R. 570, 573; *Gibson* v. *Goldthwaite,* 7 Ala. 281, 290; *Angell* v. *Hadden,* 16 Vesey, 202; *Kirtland* v. *Moore,* 40 N. J. Eq. 106, 108; 2 Daniel's Ch. Practice, (6th Amer. ed.) 1568, 1569. This well established rule takes the issue here to be tried out of that class of issues in which there must have been a jury trial under the Seventh Amendment. Where it was one which the chancellor could readily dispose of in one proceeding, it was in the interest of economy, expedition and justice that he should do so. This is in accord with the general rule in equity embodied in Equity Rule 23 that jurisdiction once assumed should be maintained to end the litigation. *Greene* v. *Louisville & Interurban R. R. Co.,* 244 U. S. 499, 520; *McGowan* v. *Parish,* 237 U. S. 285, 296; *Camp* v. *Boyd,* 229 U. S. 530, 551, 552.

It was, therefore, error by the Circuit Court of Appeals to proceed as if it were reviewing a judgment in a suit at law upon a bill of exceptions. It is true that the record contained a bill of exceptions, but there was also a transcript of the same evidence certified as required

in appeals in equity. The plaintiff below was evidently not certain of the proper practice and prepared for either writ of error or appeal. Under § 269 of the Judicial Code, as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181, appellate courts are enjoined to give judgment after an examination of the record without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties; and under § 274b, whether the review is sought by writ of error or appeal, the appellate court is given full power to render such judgment upon the record as law and justice shall require. It follows that the court should have considered the issue of law and fact upon which the decree of the District Court depended, that is, whether there was a good and marketable title.

On this review by certiorari, we could consider and decide the issue which the Circuit Court of Appeals erroneously refused to consider. On such an issue alone, however, we would not have granted the writ, because except for the important question of practice the case was not of sufficient public interest to justify it. We think it better, therefore, to reverse the judgment of the Circuit Court of Appeals and to remand the case to that court for consideration and decision of the issues of fact and law in this case as on an appeal in equity.

Reversed.

HEISLER *v.* THOMAS COLLIERY COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 541. Argued November 14, 15, 1922.—Decided November 27, 1922.

1. In view of the differences between anthracite and bituminous coals in properties and uses, a Pennsylvania tax is not unreasonable

and arbitrary because levied on the one but not on the other, and is therefore unobjectionable under the equal protection clause of the Fourteenth Amendment. P. 254.

2. The commercial competition between these two products is not a sufficient reason against classifying them separately for taxation purposes. P. 257.
3. The fact that useful products are obtained from bituminous coal which are not produced from anthracite serves to justify the state policy of favoring the former in taxation. P. 257.
4. Whether a statute or action of a State impinges on interstate commerce, depends upon the statute or action, and not upon what was said about it or the motive that impelled it. P. 258.

   So *held*, where it was argued that anthracite being virtually confined in production to Pennsylvania but largely consumed by the necessities of other States, the tax law in question was advocated by the Pennsylvania governor as a means of levying tribute on the other-state consumption.
5. A state act regulating interstate commerce is invalid, whatever the degree of interference. P. 259.
6. The Pennsylvania tax on anthracite when prepared and "ready for shipment or market," as applied to coal destined to have a market in other States but not as yet moved from the place of production or preparation, is not an interference with interstate commerce. P. 259. *Coe* v. *Errol*, 116 U. S. 517.
7. The fact that the statute imposes the tax when the coal "is ready for shipment or market" does not prove it an intentional fraud on the commerce clause. P. 261.

274 Pa. St. 448, affirmed.

ERROR to a decree of the Supreme Court of Pennsylvania, affirming a decree of a lower court, which dismissed a bill brought by Heisler, as a stockholder, to enjoin the Colliery Company and its trustees from paying a state tax and defendant state officials from enforcing it.

Mr. Louis Marshall for plaintiff in error.

The producers of anthracite coal in Pennsylvania are denied the equal protection of the laws because the *ad valorem* tax imposed by the Act of 1921 is not made applicable to bituminous or other kinds or grades of coal produced in the State. Citing numerous cases and dis-

cussing: *Commonwealth* v. *Alden Coal Co.,* 251 Pa. St. 124; *District of Columbia* v. *Brooke,* 214 U. S. 138; *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232; *Barbier* v. *Connolly,* 113 U. S. 27; *Southern Ry. Co.* v. *Greene,* 216 U. S. 400; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; *People ex rel. Farrington* v. *Mensching,* 187 N. Y. 8; *Hauser* v. *North British & Mercantile Ins. Co.,* 206 N. Y. 455; *State* v. *Julow,* 129 Mo. 163.

Mr. George E. Alter, Attorney General of the State of Pennsylvania, with whom *Mr. Emerson Collins* and *Mr. George Ross Hull* were on the brief, for defendants in error.

Mr. J. Weston Allen, Attorney General of the State of Massachusetts, as *amicus curiae,* by special leave of court. *Mr. Edwin H. Abbot, Jr.,* Assistant Attorney General of that State, and *Mr. Charles D. Newton, Mr. Thomas F. McCran, Mr. Ransford W. Shaw, Mr. Oscar L. Young, Mr. Frank C. Archibald, Mr. Herbert Ambrose Rice, Mr. Frank E. Healy* and *Mr. Sylvester D. Townsend, Jr.,* Attorneys General respectively of the States of New York, New Jersey, Maine, New Hampshire, Vermont, Rhode Island, Connecticut and Delaware, were on the briefs.

The question whether a state law is permissible regulation of local affairs or a forbidden regulation of interstate commerce does not depend upon whether that law purports to regulate interstate commerce *eo nomine* or by express words. On the contrary, it depends upon the actual operation of the law upon interstate commerce under the particular circumstances.

The question whether the exercise of state powers upon matters within their apparent scope is in fact a direct burden upon or regulation of interstate commerce, and is therefore forbidden, or merely remotely and incidentally affects such commerce, and is therefore permitted, is frequently one of degree. The dividing line "is to be

pricked out by the gradual contact of opposing decisions." *Noble State Bank* v. *Haskell,* 219 U. S. 104.

The power of a State to impose ordinary and general property taxes without discrimination upon the mass of property within its borders extends to the whole mass even though some portion of that mass has come from other States or is about to be shipped into other States; and the test as to whether this class of taxes burdens interstate commerce is whether the goods are at rest within the State. If they have not begun to move in interstate commerce, or if the interstate movement is complete, such property taxes may be levied. It may be observed that a different rule would exempt from the general taxes ordinarily levied upon personal property a large mass of property either because it had once moved in interstate commerce or might so move in the future.

But the very cases which uphold ordinary property taxes upon property at rest within the State recognize that no special or discriminatory tax may be imposed either because the goods have been shipped into the State or are about to be shipped out of it. *Brown* v. *Houston,* 114 U. S. 622; *Coe* v. *Errol,* 116 U. S. 517; *Pittsburg & Southern Coal Co.* v. *Bates,* 156 U. S. 577; *Diamond Match Co.* v. *Ontonagon,* 188 U. S. 82; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500; *Bacon* v. *Illinois,* 227 U. S. 504.

There is ample authority to sustain the distinction between the general ordinary and non-discriminatory property tax and the special tax intended to discriminate against goods because of their relation to interstate commerce. Thus, a general and non-discriminatory tax upon selling goods which have become part of the general mass of property within the State is valid. *Emert* v. *Missouri,* 156 U. S. 296; *Woodruff* v. *Parham,* 8 Wall. 123. But a special tax upon "goods, wares and merchandise which are not the growth, produce or manufacture of this state"

is void, as a discrimination against interstate commerce, even though the goods have become a part of the general mass of property within the State. *Welton* v. *Missouri,* 91 U. S. 275; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Guy* v. *Baltimore,* 100 U. S. 434; *Webber* v. *Virginia,* 103 U. S. 344; *Walling* v. *Michigan,* 116 U. S. 446; *Minnesota v. Barber,* 136 U. S. 313; *Darnell & Son Co.* v. *Memphis,* 208 U. S. 113; *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 348, *semble; Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421. Cf. *Philadelphia S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292.

In principle the cases just considered govern the case at bar. It is true that many of them condemn what is in effect a special discriminatory tax on goods shipped into the State, levied after those goods have become a part of the general mass of property within the State by reason of such interstate shipment, while the case at bar concerns a tax which, we contend, is imposed upon goods about to be shipped out of the State by reason of such interstate or foreign shipment. But that distinction cannot avail even if it be pressed. What is condemned is a discrimination because of interstate shipment whether the movement be into the State or out of the State. Outward movement is as much within the protection of the commerce clause as inward movement. *Coe* v. *Errol,* 116 U. S. 517; *Diamond Match Co.* v. *Ontonagon,* 188 U. S. 82; *Almy* v. *California,* 24 How. 169; *Fairbank* v. *United States,* 181 U. S. 283; *United States* v. *Hvoslef,* 237 U. S. 1; *Thames & Mersey Marine Ins. Co.* v. *United States,* 237 U. S. 19; *New York & Cuba Mail S. S. Co.* v. *United States,* 125 Fed. 320.

Even if it be assumed, without conceding, that this tax is imposed upon this coal while it is still a part of the general mass of property in Pennsylvania, and before it

has actually begun to move in interstate commerce to other States or foreign countries, the tax is none the less void if in fact it operates as a discrimination against such outward moving commerce. As the tax is imposed directly upon the coal at the moment before shipment, it is unnecessary to argue at length the proposition that the tax is not upon the coal, but upon some person or thing which the State could lawfully tax. It is enough to point out that such devices have been uniformly condemned by this Court, if in fact the tax ultimately must be borne by the goods. Thus, a tax upon the person who sells the goods is a tax upon the goods. *Brown* v. *Maryland,* 12 Wheat. 419; *Welton* v. *Missouri,* 91 U. S. 275; *Davis* v. *Virginia,* 236 U. S. 697. So also a discriminatory charge made for the use of a wharf ultimately falls upon the goods and is equally condemned. *Guy* v. *Baltimore,* 100 U. S. 434. So also a special and burdensome license tax imposed upon maintaining an office for the transaction of interstate commerce cannot be upheld. *Rosenberger* v. *Pacific Express Co.,* 241 U. S. 48. And special burdens imposed upon foreign corporations engaged in interstate commerce as a condition to suit upon interstate accounts cannot be sustained. *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197. Similarly, a stamp tax imposed upon all bills of lading, manifests, charter parties or policies of marine insurance is void as to such documents used in interstate or foreign commerce, *United States* v. *Hvoslef,* 237 U. S. 1; *Thames & Mersey Marine Ins. Co.* v. *United States,* 237 U. S. 19; *New York & Cuba Mail S. S. Co.* v. *United States,* 125 Fed. 320; and is doubly bad if it is specifically directed at the documents used in such commerce. *Almy* v. *California,* 24 How. 169; *Fairbank* v. *United States,* 181 U. S. 283.

In connection with the stamp tax cases it may be observed that the goods had not started upon their foreign journey, but the tax was overthrown notwithstanding

because it inevitably imposed a burden upon interstate or foreign commerce whether the goods had already started or not.

That the essential test is whether the tax in fact burdens interstate commerce, even though in terms laid upon some privilege or thing which the State has unquestioned jurisdiction to tax, is well illustrated by those cases which hold that where a foreign corporation is doing both local and interstate business, the State cannot impose a license fee for doing local business in such a manner or in such amount that it burdens the interstate business. *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135.

If these cases are considered in connection with the cases to the effect that a State cannot exert its undoubted power to regulate local rates in such a manner as to interfere with national regulation of interstate rates (*New York* v. *United States,* 257 U. S. 591), it is plain that if this tax does in fact burden interstate commerce the exaction of it before the goods have begun to move (if that be the fact) cannot save it. This is perhaps simply another way of saying that a State cannot discriminate against interstate commerce even by exerting its undoubted powers upon matters clearly within its jurisdiction.

Apply these principles to the present case. Pennsylvania has a natural monopoly of anthracite coal in this country. That coal is a prime necessity of life, especially in the northeastern States. Eighty per cent of such coal is shipped out of Pennsylvania. The Thomas Colliery so ships 67 per cent of its anthracite. It is therefore a proper party to present this question here.

The declared intention at the time this act was passed was so to use the natural monopoly which Pennsylvania possesses as to compel the inhabitants of other States to

pay a tax to Pennsylvania by collecting a special tax from the colliery which would inevitably pass such tax on to the consumer.

In order to avoid constitutional difficulties so far as might be, the act provides that the tax shall be imposed when the coal "is ready for shipment or market." As a practical matter, the tax would have exactly the same operation and effect, so far as coal shipped out of the State is concerned, if it had been exacted at the boundary line of the State as an express export duty. The selection of the moment before the coal moves (if that moment has been effectively selected) is a plain and intentional fraud upon the commerce clause. Cf. *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44.

As this coal has already borne its full share of ordinary, non-discriminatory property taxes (which are the kind of taxes permitted by *Coe* v. *Errol,* 116 U. S. 517), to sustain this additional and discriminatory tax imposed upon anthracite coal alone would permit the holder of a natural monopoly to use the channels of interstate commerce to tax persons in other States to the extent of about $6,000,000 a year, of which about $3,600,000 will be paid by the States which here protest as *amici curiae.*

The question at issue extends far beyond the validity or invalidity of the particular tax in question. It will establish a far reaching principle for good or ill. If the tax be upheld, it is inevitable that every State which possesses natural resources essential to other States will impose similar taxes in order to make those whom it cannot directly and constitutionally tax contribute to its exchequer through the channels of commerce. Indeed, several States may combine so as to create absolute monopolies by the enactment of uniform laws exacting taxes similar to this. Such a situation would bring back the commercial conflicts between the States which the com-

merce clause was enacted to prevent. A result so absolutely repugnant to both the letter and the purpose of the commerce clause ought not to be permitted.

Mr. Justice McKenna delivered the opinion of the Court.

In 1913 the Commonwealth of Pennsylvania, by an act of its General Assembly [P. L. 1913, p. 639], imposed a tax of 2½% upon anthracite coal, and provided for the distribution of the tax.

The act was adjudged a violation of the constitution of the Commonwealth which required uniformity of taxation. *Commonwealth* v. *Alden Coal Co.*, 251 Pa. St. 134, and *Commonwealth* v. *St. Clair Coal Co.*, 251 Pa. St. 159.

In 1921 the Commonweath passed the act here involved. [P. L. 1921, p. 479.] It provided that from and after its passage each ton of anthracite coal mined, "washed, screened, or otherwise prepared for market," in the Commonwealth should be "subject to a tax of one and one-half per centum (1½) of the value thereof when prepared for market." It was provided that the tax should be assessed at the time when the coal has been subjected to the indicated preparation "and is ready for shipment or market."

Plaintiff in error, alleging himself to be a stockholder of the Thomas Colliery Company, brought this suit to have the act adjudged and decreed to be unconstitutional and void, and to enjoin that company and its directors from complying with the act, and to enjoin defendant in error, Samuel S. Lewis, Auditor General of the Commonwealth, and the defendant in error, Charles A. Snyder, Treasurer of the Commonwealth, from enforcing the act.

The trial court, Court of Common Pleas, decided against the relief prayed, distinguishing the case from those in which the Act of 1913 was declared void, and adjudged and decreed that the suit be dismissed. The ruling was affirmed

by the Supreme Court of the State. The case is here on writ of error to that action.

The bill in the case, as far as we are concerned with it, assails the Act of 1921 as offensive to the Fourteenth Amendment of the Constitution of the United States, in that it denies to the Thomas Colliery Company, and other owners and operators of anthracite mines, the equal protection of the laws, because it taxes such owners and anthracite coal, and does not tax the owners of bituminous mines and bituminous coal. The ultimate foundation of the contention is that anthracite coal and bituminous coal are fuels and necessarily, therefore, must be associated in the same class for taxation, in disregard or in diminution of whatever other differences may exist between them in composition, qualities or uses, and that not to so associate them is arbitrary and unreasonable, having the consequences of inequality and illegality, and, therefore, within the ban of the Constitution of the United States.

The contention, therefore, concentrates attention upon the consideration of what resemblances or differences in objects justify their inclusion in, or their exclusion from, a particular class.

It would be commonplace and wearisome to enlarge much upon the principle that presides in and determines the classification of objects. It is too necessary and too familiar in the affairs of life. We cannot go far in thought or practice without its exercise. It is the process of considering objects together or in separation as determined by their properties or some of them, and the purpose we have in hand. If the properties and purpose have relation, the process is logically justified.

Illustrations readily occur. A farmer will classify plants differently from a botanist, but the classifications of both may, notwithstanding the difference, be logically proper.

And so classification has uses in government—indeed, we may say, necessities in government, for government as well as persons has purposes, varied and, at times, exigent, and its legislation must be accommodated to them, either in convenience or necessity. That government has the power to do so, we have often pronounced; not, however, omitting to recognize the restraints upon the power while expressing its range and adaptation. In its exercise in taxation, we have said, it is competent for a State to exempt certain kinds of property and tax others, the restraints upon it only being against " clear and hostile discriminations against particular persons and classes." Discriminations merely are not inhibited, for, it was recognized, that there are " discriminations which the best interests of society require." *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237.

The principle of that case, and its concession to the power of a State, has received expression and illustration in cases which concerned the exercise of the power in the classification of objects for taxing purposes. In *Watson* v. *State Comptroller,* 254 U. S. 122, 124, it is said, "Any classification is permissible which has a reasonable relation to some permitted end of governmental action. . . . It is enough, for instance, if the classification is reasonably founded in ' the purposes and policy of taxation.' " In other cases it is said that facts which can be reasonably conceived of as having existed when the law was enacted will be assumed to justify it. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129, 137. And " it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357, and cases there cited. And further, the purpose of the legislation may not be the correction of some

definite evil but may be only to remove "obstacles to a greater public welfare." See also, as to classification by legislation and its consonance to the requirements of the Fourteenth Amendment, *District of Columbia* v. *Brooke*, 214 U. S. 138, 150.

Is there a guide in these cases to decision, or is it to be found in the cases cited by the plaintiff in error, which express the admonition and restraint that a classification to be justified must not be unreasonable or arbitrary? To answer, a comparison of the coals becomes necessary. In making it, the first fact we encounter is a difference in their names, and as names of things are considered significant of their attributes, the names, it may be assumed, announce a difference in attributes, and as dependent upon it, a difference in uses. Resemblances, however, are alleged in the bill and not denied in the answer, which, it is alleged, essentially assimilate the coals and make arbitrary the selection of one for taxation and not the other.

The detail is interesting. It includes the description of the processes of nature in the formation of the coals, their particular properties, composition and appearances, and the localities of their production. Anthracite coal, it is said, is found only in nine counties out of sixty-seven in the State of Pennsylvania; bituminous coal in twenty-four counties. Both are sold, is the allegation, to places outside of the State and in competition for fuel purposes, and that the anthracite in certain sizes, termed steam sizes, competes with bituminous coal, and certain subgrades (intermediate grades) of the latter with certain subgrades of anthracite.

But we need not dwell further on these considerations. The fact of competition may be accepted. Both coals, being compositions of carbon, are of course capable of combustion and may be used as fuels, but under different conditions and manifestations; and the difference deter-

mines a choice between them even as fuels. By disregarding that difference and the greater ones which exist, and by dwelling on competition alone, it is easy to erect an argument of strength against the taxation of one and not of the other. But this may not be done. The differences between them are a just basis for their different classification; and the differences are great and important. They differ even as fuels; they differ fundamentally in other particulars. Anthracite coal has no substantial use beyond a fuel; bituminous coal has other uses. Products of utility are obtained from it. The fact is not denied and the products are enumerated, and the extent of their use.[1] They are, therefore, incentives to industries that the State in natural policy might well hesitate to obstruct or burden; and to yield to the policy or consider it, is well within the concession of the power of the State expressed in the cases we have cited. The distinction in the treatment of the respective coals being within the power conceded by the cases to the State, it has logical and legal justification and is, necessarily, not unreasonable or arbitrary. We concur, therefore, in the decision of the Supreme Court of the State sustaining the Act of 1921.

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[1] The differences of the coals and their respective uses were found by the Court of Common Pleas and the Supreme Court. One of the findings is as follows: "We find that anthracite coal differs from bituminous coal in its physical properties, namely, the amount of fixed carbon, the amount of volatile matter, color, lustre, and structural character. The percentage of fixed carbon in anthracite is much higher and the percentage of volatile matter much lower, than in bituminous coal. Anthracite coal is hard, compact, and comparatively clean and free from dust, while bituminous coal is softer, dusty and dirty." The court also observed that it was persuasive of the difference between the coals that the Congress of the United States and the Canadian Parliament, in levying import taxes, put the coals in different classes, and that the railroads of Pennsylvania so separated them, and that, therefore, quoting another, the classification was "one which actually exists in the business world."

Anthracite coal, as we have observed, is asserted to be found in only nine counties in the State, and practically nowhere else in the United States. The fact, it is further said, gives the State a monopoly of it, and that a tax upon it is levying a tribute upon the consumption of other States, and nine of them have appeared by their attorneys general to assail it as illegal and denounce it as an attempt to regulate interstate commerce. In emphasis of the contention, the Governor of the State is quoted as urging the tax because of that effect. The fact, tribute upon the consumers of the coal in other States, is pronounced inevitable, as, it is the assertion, 80% of the total production is shipped to other States, and that this constitutes its "major 'market.'" And the dependency upon Pennsylvania is represented as impossible of evasion or relief. Anthracite coal, is the assertion, has become a prime necessity of those States, "particularly for domestic purposes" and even "municipal laws and ordinances have been passed forbidding the use of other coal for heating purposes."

The representation is graphic, but the first impression it makes is that it is in contradiction of the contention of the plaintiff in error that the tax discriminates against anthracite coal; for certainly there cannot be that complete competition and identity of use as a fuel between that coal and bituminous coal when there is such a difference between them as fuels that the use of one is enjoined by law and the other, in effect, prohibited.

This, however, only in passing. We will consider the contentions of the attorneys general, independently of the contentions of plaintiff in error, and assume that the antagonism, if existing, between the contentions, may in some way, not now appearing, have reconciliation.

The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the Governor of the State of its effect upon con-

sumers in other States. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a State impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it, and a tax upon articles in one State that are destined for use in another State cannot be called a regulation of interstate commerce, whether imposed in the certainty of a return from a monopoly existing, or in the doubt and chances because of competition. The action of the State as a regulation of interstate commerce does not depend upon the degree of interference; it is illegal in any degree.

We may, therefore, disregard the adventitious considerations referred to and their confusion, and by doing so we can estimate the contention made. It is that the products of a State that have, or are destined to have, a market in other States, are subjects of interstate commerce, though they have not moved from the place of their production or preparation.

The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or

growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet "on the hoof," wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production.

However, we need not proceed further in speculation and argument. Ingenuity and imagination have been exercised heretofore upon a like contention. There is temptation to it in the relation of the States to the Federal Government, being yet superior to the States in instances, or rather, having spheres of action exclusive of them. The instances cannot in all cases be precisely defined. And the uncertainty attracts disputes, and is availed of to assert or suppose collisions which, in fact, do not exist. There is illustration in the cases. In *Coe* v. *Errol,* 116 U. S. 517, the precise contention here made was passed upon and rejected. It involved the taxing power of a State, and the property subject to it (timber cut in its forests) was intended for exportation and had progressed nearer to exportation than the coal in the present case.

The question in the case was said to be "whether the products of a State (in this case timber cut in its forests) are liable to be taxed like other property within the State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place of shipment, such products being owned by persons residing in another State." And again, "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?" In answer to the questions, the point of time when goods cease to be under the power of the State and come under the protection of the Constitution was considered. To express it, as the Court did, "there must be a point of time when they [goods] cease to be governed exclusively by the domestic law and

begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination."

And again, " nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State." Until then, it was said, that they were a part of the general mass of property of the State, and subject to its jurisdiction.

Other cases have decided the same and afford illustrations of it. *Cornell* v. *Coyne,* 192 U. S. 418; *Susquehanna Coal Co.* v. *South Amboy,* 228 U. S. 665; *Bacon* v. *Illinois,* 227 U. S. 504; *General Oil Co.* v. *Crain,* 209 U. S. 211; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344.

The effect of these cases is attempted to be evaded by the assertion that the statute, in imposing the tax when the coal " ' is ready for shipment or market,' is a plain and intentional fraud upon the commerce clause." We cannot accept the accusation as justified, or that the situation of the coal can be changed by it and as moving in interstate commerce when it is plainly not so moving. The coal, therefore, is too definitely situated to be misunderstood, and the cases cited to establish a different character and subjection need not be reviewed.

Decree affirmed.

GENERAL INVESTMENT COMPANY *v.* LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY ET AL.

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

No. 34. Argued October 6, 1922.—Decided November 27, 1922.

1. A motion by a defendant to quash service of process may be made in and entertained by the District Court after removal of the cause,

though previously made and overruled in the state court before removal. P. 267.

2. Service on a foreign railway corporation in a State where it had no railroad or office, upon a person not its agent, *held* void. P. 268.
3. A petition of removal filed in a state court, with or without reservations as to jurisdiction, is a special appearance, and leaves the validity of attempted service of process open to question in the District Court. P. 268.
4. An objection to the validity of service of process made by special appearance in the state court and renewed in like manner in the District Court after removal, *held* not waived by a stipulation that evidence directly relating to it and used on the first hearing, might be used on the second. P. 269.
5. The filing of a brief, subscribed by solicitors as "solicitors for the defendants," *held* to have been on behalf of the one defendant duly served, and not to have been intended, or to have operated, as a general appearance for another defendant not duly served. P. 270.
6. The restriction (Jud. Code, § 51) that no suit shall be brought in the District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, does not affect the general jurisdiction of the court over the particular cause as defined by § 24, but merely establishes a personal privilege of the defendant which he may waive, and does waive by entering an appearance without claiming it. P. 272.
7. Under Jud. Code, §§ 28, 29, permitting removal of causes to the District Court "for the proper district," the proper district is that one which includes the county or place where the suit in the state court is pending at the time of the removal. P. 274.
8. In providing for removal of suits, arising under the Federal Constitution or laws, "of which the district courts . . . are given original jurisdiction by this title," § 28 of the Judicial Code (like § 2 of the Judiciary Act of 1888,) refers to the general jurisdiction conferred by § 24, and not to the venue provision of § 51, (see *supra*, par. 6). P. 276.
9. A suit arising under the Federal Constitution or laws may therefore be removed to the "proper district" (embracing the seat of the state court) by a defendant who is not an inhabitant of that district, and who consequently could have objected to the venue under Jud. Code, § 51. P. 279.
10. No change in the meaning of the Judiciary Act of August 13, 1888, was intended or wrought by the rearrangement of its parts in the Judicial Code. P. 278.

11. Like § 51, Jud. Code, the special provision as to venue made by § 12 of the Clayton Act, respecting suits under anti-trust laws, does not affect the general jurisdiction of the District Courts, but allows the defendant a personal privilege which he may waive. P. 279.
12. A suit against two railroad companies—one having lines within and without, and the other lines without, the State of suit,—to enjoin them from entering into consolidation, and to dissolve the consolidation if consummated *pendente lite*, is a suit *in personam* to which the provisions of Jud. Code, § 57, for special service of process in local suits directly relating to specific property, do not apply. P. 279.
13. The office of a supplemental bill is to introduce matters occurring after the filing of the original bill, or not then known to the plaintiff (Equity Rule 34); but not to shift the right in which the plaintiff sues or change the character and object of the suit. P. 281.
14. Application to file a supplemental bill is addressed to the sound discretion of the court. P. 281.
15. Where a decree of the District Court dismissing a bill was affirmed by the Circuit Court of Appeals as to part of the bill but as to the remainder was reversed upon the ground that, as to that part, the dismissal was erroneously based on a supposed defect of parties, *held*, that upon the return of the case, other objections to the remaining part which might have been, but were not, urged or considered on the appeal, could be considered by the District Court, and by the Circuit Court of Appeals on a second appeal. P. 284.
16. In a suit by a shareholder to prevent two corporations from carrying out an agreement for a consolidation alleged to be unlawful, which was subject to ratification by their shareholders, *held*, that one of the corporations, which held shares of the other, was an indispensable party as to so much of the bill as sought to enjoin it from voting them and to enjoin the other from permitting it so to do, but not as to so much as sought to enjoin the other from entering into or consummating the proposed consolidation. P. 285.
17. Under § 16 of the Clayton Act, c. 323, 38 Stat. 730, a private suit to enjoin a violation of that act or of the Sherman Anti-Trust Act, can only be brought in a federal court. Such a suit cannot be brought in a state court. P. 286.
18. Want of jurisdiction in a state court is not cured by removal of the cause to the federal court. P. 288.

19. A decree dismissing a bill for want of jurisdiction should be without prejudice. P. 288.
20. When a private individual, in virtue of a minute interest in the stock of a railroad corporation acquired after it entered into an agreement looking to consolidation with other companies, seeks to enjoin it from entering the consolidation as contrary to the policy of the State respecting control of parallel, competing lines, but shows by his allegations that the control complained of has long existed, practically, through stock ownership, and exhibits no objection on the part of the State or the other shareholders, he must show in his bill, with precision and certainty, in what respects the law is about to be violated and, clearly and positively, that substantial and irreparable injury will result to his private rights. P. 288.

269 Fed. 235, modified and affirmed.

This suit in equity was begun in the Court of Common Pleas of Cuyahoga County, Ohio, to enjoin a proposed consolidation of the New York Central and Hudson River Railroad Company, the Lake Shore and Michigan Southern Railway Company, and nine other companies, not identified in the bill, and to secure other relief of an incidental nature. The suit was brought by the General Investment Company, a Maine corporation; and the New York Central and Hudson River Railroad Company, the Lake Shore and Michigan Southern Railway Company, the Central Trust Company, and three individuals, called the Read Committee, were named as defendants.

The principal ground on which the proposed consolidation was assailed was that it would contravene the Sherman Anti-Trust Act and the Clayton Act,—both laws of the United States. There were also charges that it would be contrary to the constitution and laws of Ohio and other States, but the general tenor of the bill made it evident that these charges were to be taken as of secondary importance. The plaintiff's right to sue was based on allegations that it was a stockholder in the New York Central Company and the Lake Shore Company and, as such,

would be subjected to irreparable loss and damage should the consolidation be effected.

Process was duly served on the Lake Shore Company and there was a purported service on the New York Central Company; but there was neither service on nor appearance by the other defendants. The New York Central Company, appearing specially for the purpose, promptly challenged the validity of the service on it by moving to set the same aside; but the state court overruled the motion.

In due time the two railroad companies caused the suit to be removed into the District Court of the United States for the Northern District of Ohio. The plaintiff objected to this and reserved an exception to the order allowing it. The removal was sought and allowed on the ground that the suit, according to the claim made in the bill, was one arising under the laws of the United States, and of which the District Courts of the United States are given original jurisdiction. Diversity of citizenship was shown but not specified as a ground for removal.

Shortly after the removal the New York Central Company, again appearing specially for the purpose, sought and obtained in the District Court another hearing on its objection to the purported service on it, and on that hearing the objection was sustained and the service set aside. 226 Fed. 976. Afterwards motions by the plaintiff to remand the suit to the state court, to direct special service on the New York Central Company and other defendants in the mode provided in § 57 of the Judicial Code, and for leave to file a supplemental bill and make new parties defendant were severally overruled. And lastly a motion by the Lake Shore Company, the only defendant then before the court, to dismiss the suit was sustained on the ground that the New York Central Company was an indispensable party, had not voluntarily ap-

peared and was not within the reach of the court's process.

From the decree of dismissal the plaintiff appealed to the Circuit Court of Appeals. That court upheld the rulings setting aside the service on the New York Central Company, denying the motion to remand to the state court, declining to direct special service on the New York Central Company and other defendants, and refusing leave to file a supplemental bill and make new parties. It also sustained the decree of dismissal as to much of the bill, with the qualification that it be without prejudice, and reversed it as to other parts of the bill to which that court thought the Lake Shore Company was the only necessary defendant. 250 Fed. 160.

When the cause was returned to the District Court the plaintiff, complying with a direction that the bill be made certain in a particular in which the Circuit Court of Appeals deemed it uncertain, so amended it as to show the date on which the directors of the Lake Shore and other companies adopted the agreement for the proposed consolidation. The Lake Shore Company then moved that the bill, as left by the decision of the Circuit Court of Appeals, be dismissed on the grounds (a) that in so far as it was directed to securing an injunction against alleged or threatened violations of the Sherman Anti-Trust Act or the Clayton Act the plaintiff had no right or standing to maintain it, or, if having such a right or standing, could not bring it in a state court, as was done, and (b) that, in so far as it was directed against alleged or threatened violations of state constitutions or laws, it did not show a right in equity to the relief sought or any part thereof. This motion was sustained and a decree of dismissal entered. The plaintiff again appealed to the Circuit Court of Appeals and that court affirmed the decree, but without prejudice to the institution in a proper court of a new suit based only on infractions of state

constitutions or laws. 269 Fed. 235. A further appeal brings the case here.

Mr. Frederick A. Henry, with whom *Mr. Elijah N. Zoline* was on the brief, for appellant.

Mr. Walter C. Noyes, with whom *Mr. Robert J. Cary* and *Mr. S. H. West* were on the brief, for appellees.

Mr. Justice Van Devanter, after stating the case as above, delivered the opinion of the Court.

Complaint is made of each of the rulings alluded to in the foregoing statement together with some others. We take them up in their order.

The setting aside of the purported service on the New York Central Company.

While the state court considered the objection to the service and overruled it before the removal, this was not an obstacle to an examination of the question by the District Court after the removal. The state court's ruling was purely interlocutory, and its status in this regard was not affected by the removal. Being interlocutory, it was subject to reconsideration and would continue to be so up to the passing of a final decree. Had the cause remained in the state court the power to reconsider would have been in that court, but when the removal was made the power passed with the cause to the District Court. Of course in the latter the ruling was to be treated with respect, but not as final or conclusive. *Garden City Manufacturing Co.* v. *Smith,* 9 Fed. Cas. p. 1153; *Bryant* v. *Thompson,* 27 Fed. 881. And see *Goldey* v. *Morning News,* 156 U. S. 518, 522.

The sheriff returned that he had served the summons on the New York Central Company in Cuyahoga County by delivering a copy to " W. A. Barr, regular ticket agent, in charge of the business of said company." As grounds

for assailing this service the company alleged that it was a New York corporation, had no railroad in Ohio, was not doing business there, did not maintain a place of business or office in that State, and had not made Barr its agent or employee. From the evidence adduced on that issue the District Court, as also the Circuit Court of Appeals, found that the grounds of the company's objection were all true in point of fact. We have examined the evidence and discover no occasion for disturbing the finding. Indeed, we think a different one would have been quite inadmissible. The substance of the evidence is accurately set forth in the opinion of the Circuit Court of Appeals (250 Fed. 165) and need not be repeated here.

It follows that the purported service on this company was invalid and rightly set aside. *Philadelphia & Reading Ry. Co.* v. *McKibbin,* 243 U. S. 264, and cases cited.

Alleged submission by New York Central Company to court's jurisdiction.

The plaintiff contends that, even if the service was not good, the company waived the fault and submitted to the court's jurisdiction. Three things are relied on as constituting or showing such a waiver and submission. They are, the petition for removal, a stipulation bringing before the District Court evidence presented in the state court, and a brief filed in opposition to the motion to remand. We think the contention has no support in any of them.

In fact the petition for removal contained an express declaration that the company was " not intending to waive any question of the sufficiency of service or the want of service," but was " reserving all questions of service, jurisdiction and want of service." Besides, it is well settled that a petition for removal, even if not containing such a reservation, does not amount to a general appearance, but only a special appearance, and that after the removal the party securing it has the same right to invoke the decision

of the United States court on the validity of the prior service that he has to ask its judgment on the merits. *Wabash Western Ry.* v. *Brow,* 164 U. S. 271, 279; *Mechanical Appliance Co.* v. *Castleman,* 215 U. S. 437, 441; *Cain* v. *Commercial Publishing Co.,* 232 U. S. 124, 131. The plaintiff insists that, even if that be the usual rule, it is not applicable here, because by this petition the company sought and secured a removal into a District Court other than the one designated by law. But, as will be shown presently, the court to which removal was asked and effected was the proper one. So, whether the petition be judged by what it says or by its legal effect, it did not amount to a general appearance or a waiver of any invalidity in the service.

The stipulation relied on was made between the plaintiff and the New York Central Company and related to the use of specific evidence bearing directly on the validity of the service on the latter. The evidence had been presented at the hearing in the state court on that question, and the purpose of the stipulation was merely to make it, or a report of it, available at a new hearing in the District Court on the same question. The stipulation did not in terms restrict the use to that hearing, but such a restriction inhered in the nature of the evidence specified, and was implied. In the application whereon the new hearing was granted the company had declared that it was appearing specially for the purpose only of questioning the validity of the service. That declaration, made at the outset, applied to and qualified every step taken by the company in bringing the question to a hearing and decision. Joining in the stipulation was merely such a step.

After the service on the New York Central Company was held invalid and set aside, the plaintiff moved that the cause be remanded to the state court. At that time the Lake Shore Company was the only defendant before

the court. A brief by solicitors subscribing themselves as "Solicitors for Defendants" was filed in opposition to the motion. The plaintiff insists this was a general appearance by the New York Central Company. In the body of the brief its authors referred to the absence of any process against or appearance by the Central Trust Company and the members of the Read Committee, recited the proceedings and order whereby the service on the New York Central Company was set aside, said of that company that it "is not now a defendant," spoke of the Lake Shore Company as "now the only real and actual defendant," and otherwise indicated that in filing the brief they were acting for the Lake Shore Company, and for it alone. The plaintiff attaches much weight to the plural term "defendants" in the subscription and gives little consideration to the prior proceedings and the plain purport of the body of the brief. We think all should be considered and that when this is done, it is apparent, as was said by the Circuit Court of Appeals, that the use of the plural term was an inadvertence, the singular being intended. Certainly the plural had no particular reference to the New York Central Company, and yet the plaintiff treats it as including that company but not the Central Trust Company or the members of the Read Committee. This serves to show the fallacy of the claim. If the term included any defendant not then before the court, it included all—one as much as another. But if it be reconciled, as we think it should be, with the prior situation and the general purport of the brief, it becomes evident that it referred, and was intended to refer, to the Lake Shore Company, the only defendant then in the suit, and to it alone.

Refusal to remand to state court.

A restatement of the facts bearing on the propriety of this ruling will be helpful. The suit, according to the plaintiff's statement of its case as made in the bill, was one

arising under the laws of the United States, and this was so although the claim to the relief sought was based in part on local constitutions and laws. It also appeared that the matter in controversy exceeded, exclusive of interest and costs, the sum or value of three thousand dollars. Because the suit possessed these elements it was removed from the Common Pleas Court of Cuyahoga County, Ohio, where it had been brought and was pending, into the District Court of the United States for the Northern District of Ohio, which included Cuyahoga County. The removal, which was over the plaintiff's objection and exception, was had on the petition of two defendants, the only ones attempted to be brought before the state court. One of these, the New York Central Company, was a corporate citizen of New York, and therefore not an inhabitant of the Northern District of Ohio,[1] while the other, the Lake Shore Company, was a corporate citizen of Ohio and an inhabitant of the Northern District of that State.

The ground on which the plaintiff moved that the cause be remanded to the state court was that, as the New York Central Company, one of the defendants, was not an inhabitant of the Northern District of Ohio, the suit could not have been originally brought in the District Court for that district, and therefore could not be removed into it from the state court. The motion was denied.

As we shall show, the argument advanced against that ruling confuses venue with general jurisdiction and also confuses the venue prescribed for cases begun in the District Courts with that prescribed for cases removed into them from state courts.

Section 24 of the Judicial Code declares that—

"The district courts shall have original jurisdiction . . . of all suits of a civil nature, at common law or in

[1] See *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444.

equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, . . ."

This provision covers two distinct classes of suits. In one the distinctive feature consists in the fact that the suit arises under the Constitution, or a law or treaty, of the United States, the citizenship of the parties not being an element; while in the other the distinctive feature consists in the fact that the parties are citizens of different States, the particular basis or ground of the suit not being an element. This suit was within the first class, and, the requisite amount being involved, it came within the general jurisdiction of the District Courts as defined by § 24.

Section 51 deals with the venue of suits begun in those courts and provides, subject to exceptions not material here, that—

". . . no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This restriction, as repeatedly has been held, does not affect the general jurisdiction of a District Court over a particular cause, but merely establishes a personal privilege of the defendant, which he may insist on, or may waive, at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming his privilege. *Central Trust Co.* v. *McGeorge,* 151 U. S. 129; *Interior Construction Co.* v. *Gibney,* 160 U. S. 217; *In re Moore,*

209 U. S. 490, 501; *United States* v. *Hvoslef,* 237 U. S. 1, 12; *Camp* v. *Gress,* 250 U. S. 308, 311.

It therefore cannot be affirmed broadly that this suit could not have been brought against the New York Central Company in the District Court for the Northern District of Ohio, but only that it could not have been brought and maintained in that court over a seasonable objection by the company to being sued there. And the inability of the court to proceed with the cause in the presence of such an objection would not have resulted from any want of power to entertain and determine such a suit between such parties, if they were before it, but only because the company declined to yield the necessary jurisdiction of its person. *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.,* 215 U. S. 501, 503, 508.

Respecting the jurisdiction of the district courts on removal from state courts, § 28 of the Judicial Code declares:

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. . . ."

The next section (29) provides that the removal shall be " into the district court to be held in the district where

such suit is pending"; and § 53 provides that where the district is separated into distinct divisions the removal shall be into the District Court "in the division in which the county is situated from which the removal is made."

Shortly after the original enactment of the removal provisions now embodied in §§ 28 and 29, the meaning of the words "the proper district," found in § 28, was drawn in question; and the courts, on examining the entire statute, very generally reached the conclusion that the words mean the district which includes the county or place where the suit is pending at the time of the removal. Subject to exceptional departures soon disapproved, that view has prevailed ever since,[1] and we regard it as obviously right.

From what has been said it seems plainly to follow that this suit was removable and that the removal was to the District Court for the proper district. But the plaintiff insists that this view does not give due effect to the clause in § 28 "of which the district courts of the United States are given original jurisdiction", and the provision in § 51 respecting the place of suit or venue. These, it is argued, show that removability is not to be determined by inquiring merely whether the particular suit is one of which § 24 says the District Courts "shall have original jurisdiction," but by inquiring also whether it is one which under § 51 could be brought, over the defendant's objection, in the District Court for the particular district within which

[1] See *Ex parte State Insurance Co.*, 18 Wall. 417; *Hess* v. *Reynolds*, 113 U. S. 73; *Knowlton* v. *Congress & Empire Spring Co.*, 14 Fed. Cas. p. 796; *Hyde* v. *Victoria Land Co.*, 125 Fed. 970; *Rubber & Celluloid Harness Trimming Co.* v. *Whiting-Adams Co.*, 210 Fed. 393, 395; *St. John* v. *Taintor*, 220 Fed. 457; *Pavick* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 225 Fed. 395; *Eddy* v. *Chicago & Northwestern Ry. Co.*, 226 Fed. 120; *New York Coal Co.* v. *Sunday Creek Co.*, 230 Fed. 295; *Ostrom* v. *Edison*, 244 Fed. 228; *Matarazzo* v. *Hustis*, 256 Fed. 882, 885, 892.

it is pending in a state court. The argument means, and counsel for plaintiff so claim, that a suit arising under the Constitution, or a law or treaty, of the United States and brought in a state court within a particular federal district is removable if the defendant be an inhabitant of that district, but not if he be an inhabitant of some district in another State—in other words, that in respect of the right to remove such a suit the statute discriminates against defendants who are inhabitants of other States and in favor of those who are inhabitants of the State and district where the suit is pending. We think the contention runs counter to both the letter and spirit of the statute.

Section 24 contains a typical grant of original jurisdiction to the District Courts in general of "all suits" in the classes falling within its descriptive terms, save certain suits by assignees of particular choses in action. Section 51 does not withdraw any suit from that grant, but merely regulates the place of suit, its purpose being to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found. Like similar state statutes, it accords to defendants a privilege which they may, and not infrequently do, waive.

Coming to the removal section (28), it is apparent that the clause, "of which the district courts of the United States are given original jurisdiction," refers to the jurisdiction conferred on the District Courts in general, for it speaks of them in the plural. That it does not refer to the venue provision in § 51 is apparent, first, because that provision does not except or take any suit from the general jurisdiction conferred by § 24; next, because there could be no purpose in extending to removals the personal privilege accorded to defendants by § 51, since removals are had only at the instance of defendants, and, lastly,

because the venue on removal is specially dealt with and fixed by § 29.

There are still other reasons for thinking the venue provision of § 51 has no bearing on removals. First, its own words confine it to suits begun in the District Courts; and next, it cannot be regarded as limiting the right of removal without disregarding the plain import of § 28. That section provides for the removal of suits falling within any one of several classes and declares who shall have the right to remove them. As to the first class, which comprises suits arising under the Constitution, or a law or treaty, of the United States, the right is given to the defendant or defendants without any qualification, while as to the other classes the right is given to the defendant or defendants if he or they be non-residents of the State. Evidently the question of what, if any, limitation in that regard should be attached to the right was considered when the section was in process of enactment and was dealt with therein to the extent that Congress deemed a limitation advisable. Of course, the omission of such a limitation as to suits of the first class, when contrasted with the express imposition of one as to suits of the other classes, means that Congress intended there should be none as to the former.

Prior to the adoption of the Judicial Code with its present arrangement of sections the jurisdictional provisions of § 24 and the venue provision of § 51 constituted the first section of the Act of August 13, 1888, c. 866, 25 Stat. 433, the jurisdictional provisions preceding the other. The removal provision of § 28, with the clause, " of which the circuit courts [1] of the United States are given original jurisdiction," constituted the second section of the same

[1] At that period the jurisdiction here discussed was lodged in the Circuit Courts. Afterwards they were abolished by the Judicial Code and the same jurisdiction was lodged in the District Courts.

act. Speaking of that act, and particularly of the meaning of the clause just quoted, this Court on different occasions said the clause referred "to the first part of section one by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought," and that "the clause vesting jurisdiction should not be confounded with the clause determining the particular courts in which the jurisdiction must be exercised." *Mexican National R. R. Co.* v. *Davidson,* 157 U. S. 201, 208; *Sweeney* v. *Carter Oil Co.,* 199 U. S. 252, 259. There were also many decisions to the same effect in the circuit courts.[1]

True, that view was departed from in the case of *Ex parte Wisner,* 203 U. S. 449, where the provision relating to the district in which suit may be brought was treated as strictly jurisdictional, not avoidable even by the consent of both parties, and applicable to removals. But much that was said in that case was afterwards disapproved in the case of *In re Moore,* 209 U. S. 490, where the Court returned to its former view, saying (p. 501):

"The contention is that as this action could not have been originally brought in the Circuit Court for the Eastern District of Missouri by reason of the last provision quoted from § 1, it cannot under § 2 be removed to that court, as the authorized removal is only of those cases of which by the prior section original jurisdiction is given to the United States Circuit Courts. But this ignores the distinction between the general description of the jurisdiction of the United States courts and the clause naming

[1] *Fales* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 32 Fed. 673; *Vinal* v. *Continental Construction Co.,* 34 Fed. 228; *Wilson* v. *Western Union Telegraph Co.,* 34 Fed. 561, 564; *Cooley* v. *McArthur,* 35 Fed. 372; *Kansas City & Topeka Ry. Co.* v. *Interstate Lumber Co.,* 37 Fed. 3; *Baltimore & Ohio R. R. Co.* v. *Meyers,* 62 Fed. 367, 372; *Duncan* v. *Associated Press,* 81 Fed. 417; *Rome Petroleum & Iron Co.* v. *Hughes Specialty Co.,* 130 Fed. 585.

the particular district in which an action must be brought."

That no change in the meaning of the Act of 1888 was intended or wrought by the mere rearrangement of its sections or parts as incorporated into the Judicial Code is shown by §§ 294 and 295 of the Code. See *Brown* v. *Fletcher,* 235 U. S. 589, 597; *United States* v. *Cress,* 243 U. S. 316, 331; *J. Homer Fritch, Inc.* v. *United States,* 248 U. S. 458, 463.

The plaintiff cites the cases of *Tennessee* v. *Bank of Commerce,* 152 U. S. 454; *Cochran* v. *Montgomery County,* 199 U. S. 260, and *In re Winn,* 213 U. S. 458, as holding that to be removable into a particular federal court a suit must be one which as of right could have been brought originally in that court. But those cases are not fairly susceptible of that interpretation. In each a right of removal was claimed and was denied. In the first and third the right was claimed on the ground that the suit was one arising under the laws of the United States; and the denial was put on the ground that the plaintiff's statement of his cause of action, apart from any anticipation of defenses, did not show that it arose under those laws. Because of this, it was said in both cases that the suit could not have been brought originally in the Circuit Court, and therefore could not be removed into it. In the second case the right was claimed on the ground of diversity of citizenship coupled with prejudice and local influence, and the denial was put on the ground that the requisite diversity of citizenship did not exist, the plaintiff and one of the defendants being citizens of the same State. Thus the turning point in each case was that the suit was not one of which the Circuit Courts were given original jurisdiction—in other words, that it could not have been brought in any of them, and not that there was any special obstacle to the exercise of jurisdiction by the particular one to which removal was sought. The opin-

ions in the cases show that the real holding was that the suit was not removable because not within the original jurisdiction conferred on the Circuit Courts in general. Indeed, in the second case it was said to be the established rule that " those suits only can be removed of which the Circuit Courts are given original jurisdiction," and the first case was cited as so holding. 199 U. S. 269.

We conclude that, as the present suit was one arising under the laws of the United States, of which the District Courts are given original jurisdiction by § 24, the defendants were entitled under §§ 28 and 29 to remove it from the state court where it was begun into the District Court for that district, regardless of their citizenship or places of inhabitance, and therefore that the motion to remand was rightly denied.

In presenting this question counsel have treated § 51 of the Judicial Code as regulating the district in which suits under the anti-trust laws may be brought; and our discussion of the question has proceeded on that line. To avoid any misapprehension it should be observed that § 12 of the Clayton Act (38 Stat. 736) alters that venue provision in respect of such suits, but not in a way which is material here. Like § 51, the special provision in § 12 does not affect the general jurisdiction of the District Courts, but merely establishes a personal privilege which a defendant is free to waive.

Refusal to direct special service under § 57 of the Judicial Code on New York Central Company and other defendants.

This section is in terms restricted to suits " to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property " located within the district of suit or partly within that district and partly within another district " within the same State." As to such a suit it provides that where a defendant is not an inhabitant of

the district, nor found within the same, and does not voluntarily appear, the court may make an order directing such defendant to appear and plead by a day certain, to be fixed in the order; that personal service of the order, if practicable, shall be made on such defendant wherever found, and, if that mode of service be not practicable, service may be had by publication; that the order shall also be served on the person in possession or charge of the property, if any there be, and that after the order has been properly served the court may proceed with the cause, but with the qualification that as against any such defendant not appearing the adjudication shall affect only the property which shall have been the subject of the suit and so located as to be under the court's jurisdiction therein.

It has been doubted that this section applies to suits begun in state courts and removed into federal courts; [1] but this question was not noticed in argument and we find its decision is not essential here.

Obviously the section is confined to suits which are local in the sense of relating directly to specific property, real or personal, within the district of suit or partly therein and partly in another district of the same State. This suit was not within that category. It was not brought to enforce a claim to or lien upon specific property so located, nor to cancel an incumbrance or lien thereon nor to remove a cloud upon the title. On the contrary, as the original bill plainly disclosed, it was brought to enjoin two railroad companies—one having lines both within and without the State in which the suit was begun, and the other having lines without that State—from consolidating, along with nine other companies, into a single corporation. Such a suit is essentially *in personam* and strictly transitory, and is not made

[1] See *Adams* v. *Heckscher*, 80 Fed. 742, 744.

any the less so by including in the bill, as was done here, an incidental prayer that the consolidation be annulled if consummated pending the suit. So, tested by the original bill, this suit was not one wherein special service could be had under § 57.

Denial of leave to file supplemental bill and make new parties.

The original bill showed that the plaintiff was suing in its own right as a stockholder in the New York Central and the Lake Shore companies to prevent loss and damage which it apprehended would come to it as such stockholder if the consolidation were effected. By the supplemental bill, proffered for filing eight months after the suit was begun, the plaintiff sought, first, to show that in the meantime the consolidation had been effected, that the properties of the consolidating companies had been turned over to the consolidated company and that two mortgages had been executed and delivered by the latter covering all the property received from the Lake Shore Company; secondly, to change the character and object of the suit in such way that the plaintiff would be suing in the right and on behalf of the Lake Shore Company, of which it was a stockholder, with the purpose (a) of having so much of that company's property as was within that district freed from the claim of the consolidated company, (b) of enforcing a restoration of that part of the property to the Lake Shore Company, and (c) of having the two mortgages executed by the consolidated company pronounced void and of no effect as to that part of the property; and, thirdly, to bring in various new parties as defendants.

An application for leave to file a supplemental bill is addressed to the discretion of the court, and the ruling thereon will not be disturbed on appeal unless the discretion has been abused. Under Equity Rule 34 the office of a supplemental bill is to introduce matters oc-

curring after the filing of the original bill, or not then known to the plaintiff. Much more was attempted by the supplemental bill tendered in this instance. By it, as we have shown, the plaintiff sought to shift the right in which it was suing and to change the character and object of the suit. Other matters also had a bearing on the propriety of granting leave to file it. The railroad of the Lake Shore Company extended from Buffalo, New York, to Chicago, Illinois. Its maintenance and operation as a through line was a matter of general concern. To dismember it might work a serious disturbance of both public and private interests. If its inclusion in the consolidation was unlawful, it was so in respect of the entire line. The supplemental bill sought to deal with only a minor part and if sustained would result in restoring that part to the Lake Shore Company while leaving the major part with the consolidated company. At a meeting of the stockholders of the Lake Shore Company at which 459,461 shares were represented the holders of 459,379 shares had voted to ratify the consolidation. The plaintiff held but five shares and had purchased these knowing that the directors had signed the agreement for the consolidation two months before. The ownership of these shares was put forward as entitling the plaintiff to proceed in the right of the Lake Shore Company. No other shareholder was seeking to join in the proceeding. Under the terms of the consolidation the plaintiff could surrender its shares and take five times their par value in stock of the consolidated company; or under a supplemental arrangement it could surrender its shares and receive five times their par value in cash—a sum not alleged to be less than the actual or market value. The shareholders represented by the Read Committee availed themselves of the latter alternative. The Circuit Court of Appeals, considering all these matters, concluded that the action of the District Court in refusing leave to file the supplemental bill was

within the limits of a reasonable discretion and should not be disturbed. We concur in that conclusion.

Dismissal of original bill on motions of Lake Shore Company.

In so far as the allegations of fact in the bill need be noticed here they may be summarized as follows: The railroad of the New York Central Company extended from New York City to Buffalo and there connected with the Lake Shore Company's line from Buffalo to Chicago. Continuously since 1898 the New York Central Company had owned more than a majority of the stock of the Lake Shore Company and the Michigan Central Company. For several years the Lake Shore Company had been and it still was the owner of more than a majority of the stock of the Nickel Plate, the Big Four, the Lake Erie, and the Ohio Central companies. The railroad of the Michigan Central Company and those of the several companies a majority of whose stock was owned by the Lake Shore Company were all parallel to and potential competitors of some part or all of the Lake Shore Company's line. All of the lines named were engaged in both intrastate and interstate commerce. The New York Central Company's interest in and control over the Lake Shore and the Michigan Central companies had been acquired and was held with a view to suppressing competition in intrastate and interstate transportation and to restraining such commerce. In furtherance of that purpose the directors of the New York Central, the Lake Shore and nine other companies (the nine were not named in the bill) recently had formulated and signed an agreement for the consolidation of the eleven companies into a single corporation. The agreement called for ratification by stockholders' meetings. It was ratified over the plaintiff's protest at a meeting of the stockholders of the New York Central Company. The stockholders of the Lake Shore Company were intending to act on it at a meeting called

for an early day, and would ratify it over the plaintiff's opposition unless prevented from doing so by an injunction. Out of 2,555,810 outstanding shares in the New York Central Company the plaintiff was the owner of three hundred, which it had purchased two months before the agreement for the consolidation was signed by the directors; and out of 499,961 outstanding shares in the Lake Shore Company the plaintiff was the owner of five, which it had purchased two months after the directors signed the agreement.

The bill prayed that the New York Central Company be enjoined from voting its shares in the Lake Shore Company in favor of the consolidation agreement, or in any other way, or for any other purpose, that the Lake Shore Company be enjoined from permitting the New York Central Company to vote its shares in the former at any meeting of the stockholders, and that the Lake Shore Company be also enjoined from in any way entering into or consummating the proposed consolidation. Other incidental relief was prayed, but it need not be noticed here.

Two motions to dismiss were interposed by the Lake Shore Company and sustained by the District Court—one before and the other after the first appeal to the Circuit Court of Appeals. On that appeal the Circuit Court of Appeals upheld the ruling on the first motion as to part of the bill and reversed it as to the remainder. The second motion was directed against all that remained of the bill and advanced objections thereto which might have been, but were not, urged or considered on the first appeal. The District Court, regarding these as well taken, sustained the second motion, and on the next appeal the Circuit Court of Appeals approved that ruling. These motions gave rise to several distinct questions which we shall take up separately.

Effect of decision on first appeal.

The plaintiff takes the position that the partial reversal on the first appeal amounted to an adjudication of the

sufficiency of so much of the bill as fell within the reversal and that the District Court could not thereafter treat its sufficiency as an open question. This position is not tenable. The reversal was put on the ground that the District Court had erred in holding in respect of that part of the bill that the New York Central Company was an indispensable party. Whether that part was rightly subject to other objections, such as afterwards were advanced in the second motion to dimiss, was neither discussed nor decided on that appeal. The opinions delivered on the two appeals make this plain. In that situation it was quite admissible for the District Court, after the case was returned to it, to examine and pass on the objections presented in the second motion, and was likewise admissible for the Circuit Court of Appeals to consider them on the second appeal. *Mutual Life Insurance Co.* v. *Hill,* 193 U. S. 551, 553. And see *Messenger* v. *Anderson,* 225 U. S. 436, 444.

Was the New York Central Company an indispensable party?

As to so much of the bill as sought to enjoin the New York Central Company from voting its shares in the Lake Shore Company and to enjoin the latter from permitting it to vote them, we think it is obvious that the New York Central Company was an indispensable party, and that with it neither appearing nor reached by any effective process no other course was open than to dismiss that part of the bill. *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 235, 246; *Taylor & Co.* v. *Southern Pacific Co.,* 122 Fed. 147, 152, 154.

As to so much of the bill as sought to enjoin the Lake Shore Company from entering or consummating the proposed consolidation, the New York Central Company plainly was not an indispensable party. Its stockholding interest in the Lake Shore Company did not make its presence essential, its status in this regard being merely

that of the stockholders in general. Nor did its participation in the agreement for the consolidation give it any right which required that it be brought in. At best the agreement was not to be effective unless and until ratified by the stockholders of the several companies. It had not been ratified by the stockholders of the Lake Shore Company and they were under no obligation to ratify it.

Was plaintiff entitled to sue under the Sherman Anti-Trust Act and the Clayton Act, and, if so, could that right be exercised through a suit brought in a state court?

In the part of the bill assailed in the second motion to dismiss, as in the bill as a whole, the plaintiff based its right to relief by injunction primarily on the ground that the proposed consolidation would contravene the Sherman Anti-Trust Act, c. 647, 26 Stat. 209, and the Clayton Act, c. 323, 38 Stat. 730, and secondarily on the ground that it would be contrary to the constitution and laws of Ohio and other States.

As respects the Sherman Anti-Trust Act as it stood before it was supplemented by the Clayton Act, this Court has heretofore determined that the civil remedies specially provided in the act for actual and threatened violations of its provisions were intended to be exclusive and that those remedies consisted only of (a) suits for injunctions brought by the United States in the public interest under § 4 and (b) private actions to recover damages brought under § 7. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 71; *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471; *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 593. The present suit for an injunction, brought by a private corporation in its own interest, was not within those remedies, and so could not be maintained under that act standing alone.

That act was supplemented by the Clayton Act, particularly by its sixteenth section reading as follows:

"That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

This section undoubtedly enlarges the remedies provided in the Sherman Anti-Trust Act to the extent of enabling persons and corporations threatened with loss or damage through violations of that act to maintain suits to enjoin such violations, save in the instances specified in the proviso. This right to sue, however, is granted in terms which show that it is to be exercised only in a "court of the United States." This suit was brought in a state court, and in so far as its purpose was to enjoin a violation of the Sherman Anti-Trust Act that court could not entertain it. The situation was the same in respect of the purpose to enjoin a violation of the Clayton Act.

When a cause is removed from a state court into a federal court the latter takes it as it stood in the former. A want of jurisdiction in the state court is not cured by the removal, but may be asserted after it is consummated. *Cain* v. *Commercial Publishing Co.,* 232 U. S. 124, 131, *et seq.; Cowley* v. *Northern Pacific R. R. Co.,* 159 U. S. 569, 583; *De Lima* v. *Bidwell,* 182 U. S. 1, 174; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.,* 258 U. S. 377.

It follows that so much of the bill as based the right to relief on asserted violations of the Sherman Anti-Trust Act and the Clayton Act was rightly dismissed; but the dismissal, being for want of jurisdiction, should have been without prejudice.

Did the bill show a right to relief in equity because of infractions of state constitutions and laws?

This branch of the suit was loosely set forth and, as was observed by both courts below, there is some ground for thinking the references to state constitutions and laws were merely makeweights. With other matters eliminated, this branch at best was left in a state of relative uncertainty. After commenting on this, the Circuit Court of Appeals said, with ample warrant (269 Fed. 239):

"We next observe that the consolidation sought to be enjoined was only a new formulation of the situation which had been existing for many years. It is expressly averred that the obnoxious control of parallel and competing lines had been accomplished, and for many years maintained, by stock ownership and control. It does not seem to be claimed that the proposed consolidation would create any restraints on competition that did not already exist. We find no definite statement that what was proposed would be obnoxious to any statute or constitutional provision which did not relate to competition between parallel lines, excepting the claim that the proposed consolidation would increase the capital stock and debts above

the permitted limit. It is probable, also, from the silence of the bill, that during all these years the public authorities of the various states have rested content and have not indicated any belief that public policy was being violated, and it may likewise seemingly be inferred that no public authorities are now objecting to the proposed consolidation, but that, on the contrary, they are all content.

"Further, we notice that plaintiff owns only one one-thousandth of 1 per cent. of the capital stock, that no other shareholder has accepted its invitation to join in preventing the imminent irreparable injury, and that this interest plaintiff bought after the consolidation contract was made. He seems to be a volunteer, rather than a conscript. We have, then, a case where a private suitor, with a minimum of ponderable interest, and with no disposition to beware of entrance to a quarrel, is seeking relief upon the sole ground that the public policy of the state is being violated, and where the state authorities have long acquiesced and do acquiesce in any violation there may be. Under such circumstances, the court of equity will be strict in requiring the plaintiff to point out with precision and certainty in what respects the law is about to be violated and to show, clearly and positively, substantial and irreparable injury to its private rights. A measure of imperfection in pleading that might well be overlooked in the ordinary controversy should not be disregarded in such a case as this."

We think this branch of the suit should be tested by the rule of pleading there suggested and that when this is done it is apparent that a right to equitable relief was not shown.

Our conclusion is that the motions to dismiss were rightly sustained. The Circuit Court of Appeals qualified the dismissal by making it without prejudice as to all parts of the bill save one. We have indicated that the qualification should have included that part.

The decree is accordingly modified by making the dismissal without prejudice as to all parts of the bill, and as thus modified it is

Affirmed.

UNITED STATES *v.* OREGON LUMBER COMPANY ET AL.

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

No. 40. Argued October 9, 1922.—Decided November 27, 1922.

Where the Government sued to annul land patents upon the ground of fraud, and persisted in the suit after the defendant had pleaded in bar the statute of limitations applicable to such cases, and the plea was sustained and the bill dismissed, *held*, that the Government had elected its remedy, and therefore could not afterwards maintain an action at law to recover damages for the fraud. P. 294.

QUESTIONS certified by the Circuit Court of Appeals, arising upon review of a judgment of the District Court which dismissed the complaint in an action brought by the United States to recover damages for fraud in procuring patents to public land.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. H. L. Underwood* were on the brief, for the United States.

It is settled that the doctrine of election of remedies is applicable only where a suitor has inconsistent remedies available. When he pursues one of them, he is bound by his election even if that remedy be not efficacious. *Robb* v. *Vos,* 155 U. S. 13, 41, *et seq.*

It is equally well settled that there can not be an election unless inconsistent remedies are available; that the pursuit of a remedy which a party may think himself entitled to, but to which it develops he is not, does not bar the bringing of a suit on the remedy which does

exist. *Northern Assurance Co.* v. *Grand View Building Association,* 203 U. S. 106; *Bierce* v. *Hutchins,* 205 U. S. 341; *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483; *Bistline* v. *United States,* 229 Fed. 546.

We contend the case comes within the last stated rule. When the United States filed its bill in equity to secure the cancellation of the patents, it was met with a plea by the defendants that the suit was barred because not brought within six years from the date the patents were issued. Act of March 3, 1891, c. 561, § 8, 26 Stat. 1095, 1099. The Government asserted that the suit was not barred because it was brought within six years after it had received notice of the fraud. Cf. *Exploration Co.* v. *United States,* 247 U. S. 435. The case went to trial and the court held the suit barred because the United States had notice of the fraud more than six years before suit was filed. It therefore dismissed the bill on that ground.

It is very clear, therefore, that when the suit in equity was filed the United States did not have a right to the remedy therein sought, namely, the cancellation of the patents. Hence its course in pursuing that supposed remedy does not bar the prosecution of the present suit at law to recover the value of the land.

It is no answer to that proposition to say that when the suit was brought the facts respecting notice were known, or, to be more exact, that knowledge was chargeable to the United States. Granting that they were known, whether those facts constituted such notice as would operate to set the statute of limitations in motion was a question of law, and because the United States thought the statute not applicable, would not militate against the prosecution of the present suit, its mistake being due to an erroneous view of the law.

The law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect

them by inappropriate action, upon which recovery could not be had. *McLaughlin* v. *Austin,* 104 Mich. 489, 491. If the rule were otherwise, a mere mistake of judgment would result in depriving one of valuable rights. *Agar* v. *Winslow,* 123 Cal. 587. The instant case closely resembles *Bistline* v. *United States,* 229 Fed. 546. See *Tullos* v. *Mayfield,* 198 S. W. 1073; *Stone* v. *Robinson,* 218 S. W. 5.

The statute of limitations invoked in the equity suit merely barred the remedy but did not extinguish the right of the Government to recover the value of the lands. *United States* v. *Whited & Wheless,* 246 U. S. 552.

Again, the fact that the Government pursued the equity suit to judgment when met with the plea in bar, does not make that judgment *res judicata* in the instant suit, for the sole question decided there was the applicability of the statute of limitations. That was no adjudication of the rights of the Government but only of the availability of the remedy. Statutes of limitation affect the remedy, not the merits. *Townsend* v. *Jemison,* 9 How. 406; *McElmoyle* v. *Cohen,* 13 Pet. 312. A judgment not on the merits is not *res judicata. Cromwell* v. *County of Sac,* 94 U. S. 351.

Furthermore, we suggest that there is not such inconsistency between a suit to recover the lands patented because of fraud and a suit to recover damages for the fraud, as to bar prosecution of the latter. *Friederichsen* v. *Renard,* 247 U. S. 207. In that case it was distinctly pointed out that in a bill in equity to recover lands fraudulently procured, an alternative prayer might be made for the value of the lands.

Mr. W. Lair Thompson, with whom *Mr. Wallace McCamant* was on the brief, for Oregon Lumber Company et al.

Mr. Justice Sutherland delivered the opinion of the Court.

This case is here upon a certificate from the Circuit Court of Appeals for the Ninth Circuit, under § 239 of the Judicial Code.

The plaintiff in error brought an action at law against the defendants in error in the United States District Court for the District of Oregon to recover damages for the fraudulent acquisition of certain lands. The complaint was filed in February, 1918, and alleged that the Oregon Lumber Company, a corporation, and certain of its officers, named as co-defendants, unlawfully conspired to acquire certain tracts of land in Oregon, under the Timber and Stone Act of June 3, 1878, c. 151, 20 Stat. 89. The lands were patented in 1900, subsequently conveyed by the patentees to an officer of the defendant corporation, and thereafter (with the exception of a small tract) transferred by such officer to the corporation. The value of the lands was alleged to be $65,000 and judgment was asked for this amount.

The answer denied the material allegations of the complaint and pleaded, among other things, as separate defenses: "(1) that *pro tanto* to the measure of damages the United States received from the several entrymen named in the complaint the aggregate sum of $16,400, which was the price fixed by law and the practices in the land office for the lands described in the complaint; (2) that in October, 1912, the United States brought suit in equity to set aside the patents for the lands and alleged that it owned the property described in the complaint herein and that the patents for the lands which are the same as are involved in this action were secured through fraud of the defendants named in the present action and others, and prayed for the cancellation of the patents; that in the equity suit substantially the same facts were pleaded as are pleaded by the United States in this action; that issue was joined in the equity suit; that in 1916, after trial upon the merits, the District Court dismissed the equity

suit for the reason that the United States had had full knowledge of the matters complained of in its complaint for more than six years before the equity suit was instituted, and that no appeal was ever taken from the decree dismissing the complaint of the United States."

The plaintiff in error demurred to these separate defenses, and, the District Court having overruled the demurrer and the plaintiff in error having declined to plead further, the court dismissed the complaint and judgment was entered.

The District Court, in rendering its judgment, decided that, inasmuch as the suit in equity was brought by the United States with knowledge of all the facts, it constituted an election final and conclusive.

Upon these facts the following questions are propounded by the Circuit Court of Appeals:

"1. Is an action by the United States for the value of lands as damages, against the patentees for the lands for fraudulent acquisition of the lands patented under the timber and stone act, barred where more than six years have elapsed after the United States, with knowledge of the fraud, brought a suit in equity to cancel the patents for the same lands, in which equity suit decree of dismissal was made against the United States on the ground that the suit was barred by the statute of limitations?

"2. If the foregoing question be answered in the negative, should any damages recoverable be reduced by such amounts as the United States may have received from the entrymen, as the price fixed by law for the lands described in the patents?"

Upon the facts stated the sale was voidable (*Moran* v. *Horsky,* 178 U. S. 205, 212), and the plaintiff in error was entitled either to disaffirm the same and recover the lands or affirm it and recover damages for the fraud. It could not do both. Both remedies were appropriate to the facts, but they were inconsistent since the first was founded

upon a disaffirmance and the second upon an affirmance of a voidable transaction. *Robb* v. *Vos,* 155 U. S. 13, 43; *Connihan* v. *Thompson,* 111 Mass. 270, 272. 2 Black on Rescission and Cancellation, § 562, and cases cited. The rule is applicable to the Government in cases where patents have been procured by fraud. *United States* v. *Koleno,* 226 Fed. 180, 183. Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions. *Robb* v. *Vos, supra.*

It is suggested in the brief for the plaintiff in error that there is not such inconsistency between a suit to recover lands patented because of fraud and an action to recover damages for the fraud as to bar the latter, citing *Friederichsen* v. *Renard,* 247 U. S. 207. That case, however, lends no support to the suggestion. The petitioner, Friederichsen, brought suit to cancel a contract for the exchange of lands, on the ground of fraud practiced upon him. Upon the coming in of the report of the master it appeared that petitioner, pending suit, had cut a considerable amount of timber growing upon the lands which he had taken in exchange. Thereupon the court found that he was not entitled to equitable relief because, by cutting the timber, he had ratified the contract and had rendered it impossible to put the defendant in *statu quo,* but his remedy was at law for damages. The court ordered that the master's report be vacated and the case transferred to the law side of the court, pursuant to Equity Rule 22, and that the parties " file amended pleadings to conform with an action at law." The question was there presented for decision whether this was the commencement of a new action, so as to bring it within the bar of the statute of limitations, and it was determined in the negative. Holding further

that under the circumstances the doctrine of election of remedies did not apply, this Court said:

"Thus, we are brought to the conclusion that since the two remedies asserted by the petitioner were alternative remedies, and since the order made, requiring the conversion of the suit in equity into one at law, was entered by the court sitting in chancery, for us to affirm the judgment of the Circuit Court of Appeals that the petitioner, in obeying the order of the trial court, made a fatal choice of an inconsistent remedy, would be to subordinate substance to form of procedure, with the result of defeating a claim which the respondents stipulated had been sufficiently established to justify a verdict against them. This we cannot consent to do."

But here in the equity suit, the plaintiff in error upon the coming in of the defendant's plea of the statute of limitations made no offer to amend or request to transfer the case to the law docket, but proceeded to trial and judgment upon the original bill, with knowledge of all the facts for more than six years prior to the filing of its bill. Defeated in its equity suit, it brought its action at law upon the same allegations of fact. We think it is not admissible to thus speculate upon the action of the court, and, having met with an adverse decision, to again vex the defendant with another and inconsistent action upon the same facts.

The justice of enforcing the doctrine of election of remedies in this case is emphasized by a consideration of the facts: The lands in question were conveyed by the United States in the year 1900. It was not until 1912 that the first suit was brought. The judgment, dismissing the bill in that suit, was rendered in 1916, and the present action was brought two years later. Thus a period of eighteen years had elapsed since the transfer of the lands before the present action was begun, during more than two-thirds of which time the United States had possessed

knowledge of all the facts upon which the plea of the statute of limitations was founded and sustained.

The mere filing of the bill in the first suit, according to many authorities, did not constitute an irrevocable election. But upon ascertaining from their plea that the defendants intended to rely upon the statute of limitations, and having knowledge of the facts upon which that plea was founded, and thereafter sustained, the plaintiff in error had fairly presented to it the alternative: (a) of abandoning that suit and beginning an action at law or transferring it to the law side of the court and making the necessary amendments to convert it into an action for damages, as a " mere incident in the progress of the original case," (247 U. S. 210); or (b) of proceeding with the original case upon the issues as they stood. The plaintiff in error deliberately chose the latter alternative. If the election was not final before, it became final and irrevocable then. *Rehfield* v. *Winters,* 62 Ore. 299, 305–306; *Bowker Fertilizer Co.* v. *Cox,* 106 N. Y. 555, 558–559; *Moss* v. *Marks,* 70 Neb. 701, 703.

The case of *Bistline* v. *United States,* 229 Fed. 546, relied upon by the plaintiff in error, is not in conflict with this conclusion. That was an action by the Government to recover damages for the fraudulent acquisition of certain public lands. A prior suit had been brought in equity to cancel the patent, but the defendant's answer showed that the land had been conveyed to persons not made parties to the suit. The Government thereupon promptly dismissed its suit in equity and, on the same day, commenced the action at law for damages. If, in the instant case, a like course had been followed upon the coming in of the defendant's answer pleading the statute of limitations, the case just referred to would have been in point.

Northern Assurance Co. v. *Grand View Building Association,* 203 U. S. 106; *William W. Bierce, Limited,* v. *Hutchins,* 205 U. S. 340; and *Southern Pacific Co.* v. *Bo-*

gert, 250 U. S. 483, cited by plaintiff in error in support of its contention, are all distinguishable from the case now under consideration. In *Northern Assurance Co.* v. *Grand View Building Association, supra,* an action at law had been brought to enforce an insurance policy, but it was held that no recovery could be had on the policy as it stood. Thereupon a suit was brought to reform the policy and enforce it as reformed. It was held that there was no inconsistency between these two remedies; and clearly there was not, since both cases proceeded in affirmance of the contract. In *William W. Bierce, Limited,* v. *Hutchins, supra,* there had been a conditional sale. Plaintiff first undertook to enforce a lien upon the property and later brought an action in replevin. It was held there was no election because plaintiff could not enforce a lien upon property to which it had title. This Court said: "It [appellant] could not obliterate the condition and leave the contract in force. It may be that it had an election to avoid the contract altogether, but, if so, it did not attempt to do it. It insisted on the contract as the ground of its claim to a lien for the price of the goods. The election supposed and relied upon is an election to keep the contract in force, but to leave out the reservation of title. . . . But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one because the party has no right to choose. The claim in the lien suit, as was said in a recent case, was not an election but an hypothesis." In *Southern Pacific Co.* v. *Bogert, supra,* there had been much prior litigation over the same subject-matter. It was contended that the plaintiffs were bound as privies to this litigation. As appears by the decision of the lower court (*Bogert* v. *Southern Pacific Co.,* 244 Fed. 61) the grievance alleged in the prior suits was a corporate grievance. Each of the suits was dismissed on the ground that the decree of fore-

closure involved could not be attacked collaterally. The Bogert suit, however, was a suit on behalf of the minority stockholders, asserting no corporate right of the railway company, but only the right of minority stockholders. The right asserted in the prior suits and that asserted in the Bogert suit were, therefore, the rights of different parties.

It is further urged that the judgment of the District Court was not upon the merits but upon the plea in bar and that, therefore, when the equity suit was begun, plaintiff in error had no choice of remedies, since the judgment rendered established that in fact there was no remedy in equity at all. The contention, we think, is unsound.

The defense of the statute of limitations is not a technical defense but substantial and meritorious. The great weight of modern authority is to this effect. *Lilly-Brackett Co.* v. *Sonnemann,* 157 Cal. 192; *Wheeler* v. *Castor,* 11 N. Dak. 347, 353, *et seq.,* where the authorities are reviewed.

Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time by raising a presumption which renders proof unnecessary. *Bell* v. *Morrison,* 1 Pet. 351, 360; *Hanger* v. *Abbott,* 6 Wall. 532, 538; *Wood* v. *Carpenter,* 101 U. S. 135, 139; *Riddlesbarger* v. *Hartford Insurance Co.,* 7 Wall. 386, 390. And see *United States* v. *Chandler-Dunbar Water Power Co.,* 209 U. S. 447, 450.

In *Wood* v. *Carpenter,* this Court said:

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence

of rights, *they supply its place by a presumption which renders proof unnecessary.* Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

In *Riddlesbarger* v. *Hartford Insurance Co.:*

"They are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth."

In *Parkes* v. *Clift,* 9 Lea (Tenn.) 524, it was held that a decree dismissing a bill on the ground of lapse of time was a judgment upon the merits. The court said (pp. 531, 532):

"In order that a judgment or decree should be on the merits, it is not necessary that the litigation should be determined 'on the merits,' in the moral or abstract sense of these words. It is sufficient that the status of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases . . . A finding against a party, either upon final hearing or demurrer, that his cause of action as shown by him, is barred by the statute of limitations or by laches is a decision upon the merits, concluding the right of action." See also *People ex rel. Best* v. *Preston,* 62 Hun, 185, 188–189; *Black* v. *Miller,* 75 Mich. 323, 329.

Whether based on a plea of the statute of limitations or on a failure to prove substantive allegations of fact, there-

fore, the result of the judgment is the same, viz: that plaintiff has no case; and to hold that plaintiff may then invoke another and inconsistent remedy is not to recognize an exception to the general operation of the doctrine of election of remedies but to deny the doctrine altogether. Here, upon the facts as stated in the bill in equity and later in the action at law, both remedies were available to the plaintiff in error. In electing to sue in equity plaintiff in error proceeded with full knowledge of the facts, but it underestimated the strength of its cause, and if that were sufficient to warrant the bringing of a second and inconsistent action the result would be to confine the defense of election of remedies to cases where the first suit had been won by plaintiff and to deny it in all cases where plaintiff had lost. But the election was determined by the bringing and maintenance of the suit, not by the final disposition of the case by the court. See for example *Bolton Mines Co.* v. *Stokes,* 82 Md. 50, 59.

The distinguishing feature of the instant case is that after the coming in of the answer, pleading the statute of limitations, and the plain warning thus conveyed of the danger of continuing the equity suit further, the plaintiff in error persisted in pursuing it to final judgment, instead of promptly reforming the cause or dismissing the bill and seeking the alternative remedy not subject to the same defense. The doctrine of election of remedies and that of *res adjudicata* are not the same, but they have this in common, that each has for its underlying basis the maxim which forbids that one shall be twice vexed for one and the same cause. The policy embodied in this maxim we think requires us to hold that the plaintiff in error, in bringing the original suit, and in continuing after the plea in bar to follow it to a final determination, made an irrevocable election, and that it is now estopped from maintaining the present inconsistent action.

Question No. 1 is somewhat ambiguous but taken in connection with the facts, it is clear that what the Circuit

Court of Appeals desires to know is whether the action at law by the United States to recover the value of lands, the title to which was fraudulently obtained, is barred for the reason that the United States, with knowledge of the fraud, had previously prosecuted, upon the same facts, a suit in equity to final judgment of dismissal rendered on the ground that the suit was barred by the statute of limitations? This question we answer in the affirmative, and, as this disposes of the case, no answer to question No. 2 is required.

It will be so certified.

MR. JUSTICE BRANDEIS dissenting, with whom THE CHIEF JUSTICE and MR. JUSTICE HOLMES concur.

The general rule that statutes of limitation do not run against the United States often works hardship. The rule proved so oppressive when applied to proceedings to annul patents to land, that Congress erected for such suits the six-year bar. Act of March 3, 1891, c. 561, § 8, 26 Stat. 1095, 1099. In *Exploration Co., Limited,* v. *United States,* 247 U. S. 435, the act was construed to mean that the six years do not begin to run until the cause of action is discovered. This statute did not in terms extend the bar to the Government's remedy at law. *United States* v. *Whited & Wheless,* 246 U. S. 552, held that the law gave two remedies to protect the single right, and that the Act of 1891 left intact the remedy at law for deceit practiced in securing the patent. The Court, therefore, permitted recovery at law, although the remedy in equity had been barred.

The fraud here involved was practiced in connection with the acquisition of land patented in 1900. To obtain redress the Government brought in 1912 a bill in equity to annul the patent. Defendants pleaded the statutory bar. The Government might then have dismissed its bill; and if it had done so, it could then unquestionably have com-

menced an action at law for deceit.[1] Or, the Government might, under the Act of March 3, 1915, c. 90, 38 Stat. 956, and Equity Rule 22, have then had the case transferred to the law side of the court, and have thus freed itself from the possibility of a statutory bar. It did not do either. Instead, it proceeded to a hearing in the equity suit; presumably, because it considered the legal remedy inadequate and believed that it could establish its right to pursue the equitable remedy by showing that the fraud had been discovered within the six years. In this the Government proved to be mistaken. The court found that the United States had full knowledge of the matters complained of more than six years before the suit was begun, and for that reason could not have the relief sought in equity. Even then—after the adverse decision but before entry of a decree—it was not too late to transfer the pending suit to the law side of the court, and to proceed there with the action for deceit. Such a transfer, after full hearing on the merits and a decision that relief in equity could not be had, was made without loss of any right in *Friederichsen* v. *Renard,* 247 U. S. 207. But the Government made no such application; the court entered a decree dismissing the bill; and no appeal was taken. Then, in 1918, the Government brought the present action at law. The question now presented for decision is whether it had lost the right to do so.

The thing adjudged in the equity case was solely that the fraud had been discovered by the Government more than six years before the commencement of the suit; and that, for this reason, the patent could not be annulled. There was no adjudication of the Government's substantive right. And since it had two remedies to protect that right, and the fact found is not a bar to an action at law, no suggestion is made that the decree of dismissal bars this action as *res judicata.* There is likewise no sugges-

[1] See *Bistline* v. *United States,* 229 Fed. 546.

tion of an estoppel *in pais*. Nor is there a suggestion that by proceeding to a hearing in the equity suit, or by failing to ask that the case be transferred to the law side of the court, the Government subjected defendants to any annoyance or expense, other than that necessarily incident to unproductive litigation. The remedy at law is denied solely on the ground that the so-called doctrine of election of remedies applies; that the Government had two remedies; that the two remedies were inconsistent; that when the statutory bar was pleaded in equity, the plaintiff was obliged, at its peril, to make a final choice between the two remedies; and that since it selected the one which proved not to be available, it shall have no remedy whatsoever.

The doctrine of election of remedies is not a rule of substantive law. It is a rule of procedure or judicial administration. It is technical; and, as applied in some jurisdictions, has often sacrificed substantial right to supposed legal consistency.[1] The doctrine has often been invoked in this Court, but never before successfully. Its existence has been recognized; but in every case in which the question presented was actually one of election of remedies, this Court held that the doctrine did not apply; giving as a reason that one or the other of its essential elements was absent. These essentials are that the party must have actually had two remedies and that the remedy in question must be inconsistent with the other previously invoked. Here neither of these essential elements was present.

The Government did not have a remedy in equity when the suit to annul the patent was begun or at any time thereafter. That this is true was established by the de-

[1] See Election of Remedies, A Criticism, by Charles P. Hine, 26 Harv. Law Rev. 707; Election between Alternative Remedies by Walter Hussey Griffith, 16 Law Quar. Rev. 160; *ibid.* by J. F. W. Galbraith, 16 Law Quar. Rev. 269.

cree in the equity suit. The Government's alleged choice of the equitable remedy was, therefore, " not an election but an hypothesis." *Northern Assurance Co.* v. *Grand View Building Association,* 203 U. S. 106, 108; *William W. Bierce, Limited,* v. *Hutchins,* 205 U. S. 340, 347. For " it is impossible to conceive of a right of election in a case where no such right existed." *Friend* v. *Talcott,* 228 U. S. 27, 37, 38. Thus, the mere fact that the remedy first invoked was at the time unavailable precludes application of the doctrine. The reason why it was unavailable is immaterial. A party is equally free to try another remedy, whether the earlier proceeding was futile because of inability to establish assumed facts essential to the existence of the remedy then pursued or because the assumed facts did not as matter of law entitle him to the relief sought.[1] In the *Northern Assurance Case, supra,* the earlier action at law was held not to be an election, because the facts there relied on could not be proved. In the *Bierce Case, supra,* filing an earlier lien suit was held not to be an election, because one cannot have a lien on one's own property. In *Friederichsen* v. *Renard, supra,* suing to set aside the conveyance was not an election, because the right to rescind had been lost. In *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 490, 491, the earlier unsuccessful suits were not an election because facts there essential could not be established. So, in the case at bar, because the equitable remedy theretofore invoked was not in fact available to the Government, its right to pro-

[1] *Barnsdall* v. *Waltemeyer,* 142 Fed. 415, 420; *Water, Light & Gas Co.* v. *Hutchinson,* 160 Fed. 41, 43; *Harrill* v. *Davis,* 168 Fed. 187, 195; *Brown* v. *Fletcher,* 182 Fed. 963, 971–974; *Rankin* v. *Tygard,* 198 Fed. 795, 806; *Union Central Life Ins. Co.* v. *Drake,* 214 Fed. 536, 548; *Agar* v. *Winslow,* 123 Cal. 587, 590; *Capital City Bank* v. *Hilson,* 64 Fla. 206; *Asher* v. *Pegg,* 146 Iowa, 541, 543; *Hillerich* v. *Franklin Ins. Co.,* 111 Ky. 255; *Clark* v. *Heath,* 101 Me. 530; *Wilson* v. *Knapp,* 143 Mich. 64; *Kelsey* v. *Agricultural Ins. Co.,* 78 N. J. Eq. 378, 383.

ceed at law was not lost, under the doctrine of election of remedies.[1]

Moreover, an action at law for deceit is not inconsistent with a prior unsuccessful suit to annul the patent. This case must not be confused with those in which it has been held that a prior action at law on a contract, or other proceeding arising out of it, bars a later suit to rescind; as where an action on a purchase money note has been held to bar a later suit by the vendor to set aside the conveyance for fraud. There, the reason why the conveyance cannot be set aside is that by suing at law the vendor exercises his option to affirm the voidable transaction, and cannot thereafter disaffirm it. In so doing he makes a choice of substantive rights. But where the vendor's first attempt to obtain redress was by way of rescission, and there was in fact then no right to rescind, his substantive rights have not been changed.[2] This is the situation presented in the case at bar. The Government said, in effect: "We wish to rescind and get back the land; but if the facts, or the law are such that we cannot rescind, then we wish to recover damages for the deceit." Certainly that is not taking inconsistent positions. See *United States* v. *Whited & Wheless, supra,* pp. 562, 564. Indeed, an action for damages might be permissible as a supplemental remedy even if the equitable relief had been granted.[3] For annulling the patent may fail to give the Government

[1] In *Strong* v. *Strong,* 102 N. Y. 69, 73, an earlier proceeding to rescind was held not to be an election, because by reason of laches and lack of tender there was then no right to rescind.

[2] *Zimmerman* v. *Robinson & Co.,* 128 Iowa, 72; *Marshall* v. *Gilman,* 52 Minn. 88, 97; *Tullos* v. *Mayfield,* 198 S. W. 1073 (Tex. Civ. App.); *Griffin* v. *Williams,* 142 S. W. 981 (Tex. Civ. App.) Compare *McGibbon* v. *Schmidt,* 172 Cal. 70; *Glover* v. *Radford,* 120 Mich. 542, 544; *Freeman* v. *Fehr,* 132 Minn. 384, 388. See *Cohoon* v. *Fisher,* 146 Ind. 583; *Conrow* v. *Little,* 115 N. Y. 387.

[3] See *Crockett* v. *Miller,* 112 Fed. 729, 736; *Lenox* v. *Fuller,* 39 Mich. 268, 273.

full relief. The land may have been stripped, meanwhile, of its trees or its mineral; or the deceit may have involved the Government in expenses which are recoverable. It is true that under such circumstances equity, if it annulled the patent, would probably retain the cause to award recovery for all damages as suffered. But it might leave the vendor to his remedy at law; and conversely the vendor might, if he chose, limit his suit in equity to the recovery of the property. In either event he could recover his damages at law. Compare *Brady* v. *Daly,* 175 U. S. 148, 161; *Thomas* v. *Sugarman,* 218 U. S. 129; *Zimmerman* v. *Harding,* 227 U. S. 489, 493. There is, therefore, lacking here inconsistency of remedies; and for that reason, also, the doctrine of election of remedies does not apply.

There are some cases in this Court, earlier than those discussed above, in which the doctrine of election of remedies was referred to when denying the relief sought. But in those cases, of which *Robb* v. *Vos,* 155 U. S. 13, is an example, relief was not denied because of a previous election of an inconsistent remedy. The party failed because he had theretofore made a choice of an alternative substantive right; as where one by his conduct ratifies and makes valid an unauthorized transaction otherwise void. In such cases the mere fact that the conduct relied upon consisted, in whole, or in part, of legal proceedings, is of no legal significance in this connection.[1]

[1] Thus in *Robb* v. *Vos,* 155 U. S. 13, 34, 39, the question was whether Robb and Strong, trustees, by filing an answer and cross petition in another suit had ratified Kebler's want of authority, and therefore made the title of Vos and Stix to the land in question good. In *Van Winkle* v. *Crowell,* 146 U. S. 42, 51, the commencement of a suit to enforce a mechanics' lien was an election to treat the title to property sold under conditional sale as having passed to the purchaser. In *Stuart* v. *Hayden,* 169 U. S. 1, commencement of an action which was deemed in effect an action for the purchase price, was

Because the Government had, as now appears, no remedy except the action at law for deceit, and also because this remedy is not inconsistent with an earlier vain attempt to rescind, a denial of the right to prosecute the present action cannot, consistently with the earlier decisions of this Court, rest upon the doctrine of election of remedies. Support for the denial is sought in the fact that the Government did not abandon its futile attempt to annul the patent, when it was advised by the defendants' answer that they proposed to rely upon the statutory bar. But it is well settled that a party may disregard such a warning. If he deems it doubtful which one of several possible courses will lead to relief he may (even where the courses are inconsistent) follow one to defeat; and still pursue thereafter another remedy until he ultimately finds the one which will afford him redress; provided always that the facts do not create an equitable estoppel.[1] There is, of course, no suggestion here, that the

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held to have ratified a sale of real estate, which the plaintiff later attempted to rescind. In *Peters* v. *Bain,* 133 U. S. 670, 683, 695, it was held that there was no election of remedies. *Green* v. *Bogue,* 158 U. S. 478, was a case of *res judicata.* In *Dickson* v. *Patterson,* 160 U. S. 584, 588, 592, there was only one remedy involved. The question was whether plaintiff had elected to ratify the transaction after knowledge of the fraud. In *Dahn* v. *Davis,* 258 U. S. 421, the question was one of statutory construction; namely, whether an employee injured during federal control of the railroad had a right to compensation under both the Employers' Liability Act and the Compensation Act, or only under one.

[1] *Strong* v. *Strong,* 102 N. Y. 69, 73; *Henry* v. *Herrington,* 193 N. Y. 218; *Snow* v. *Alley,* 156 Mass. 193, 195; *Clark* v. *Heath,* 101 Me. 530; *Wilson* v. *Knapp,* 143 Mich. 64; *Glover* v. *Radford,* 120 Mich. 542, 544; *Sullivan* v. *Ross' Estate,* 113 Mich. 311, 319; *Lenox* v. *Fuller,* 39 Mich. 268; *Marshall* v. *Gilman,* 52 Minn. 88, 97; *Garrett* v. *Farwell Co.,* 199 Ill. 436; *Zimmerman* v. *Robinson & Co.,* 128 Iowa, 72; *American Pure Food Co.* v. *Elliott & Co.,* 151 N. Car. 393; *Tullos* v. *Mayfield,* 198 S. W. 1073 (Tex. Civ. App.); *Griffin* v. *Williams,* 142 S. W. 981 (Tex. Civ. App.); *Rankin* v. *Tygard,* 198 Fed. 795.

Government acted in bad faith in refusing to abandon the equitable remedy until the trial court had decided the issue of knowledge against it. The Government gained nothing, the defendants lost nothing, by the bringing of the futile suit in equity to annul the patent. However stupid or stubborn a party may have been, he is not deprived of the right to try another remedy; for whatever the cause of his earlier futile attempt, his failure proves him to have been mistaken. To hold that this action for deceit is barred, because the Government did not dismiss the earlier equity suit when it was advised by the answer that the statutory bar would be relied on, lays down a rule new in this Court,—a rule inconsistent with the principles heretofore established and opposed to a long line of well considered decisions in state courts. To do this seems to me regrettable.

CITY OF BOSTON v. JACKSON, TREASURER AND RECEIVER GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.

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

No. 141. Motion to dismiss or affirm submitted November 13, 1922.—Decided December 4, 1922.

1. Upon review here of a state judgment, an order of the state Supreme Court substituting the successor of a state official as a party is accepted as a conclusive determination that the state law authorized the substitution. P. 313.
2. Where the state court justifiably construed the bill as standing for further relief after a particular tax, sought to be enjoined, had been collected and paid over, this Court will accept its view that the payment did not render the litigation moot. P. 313.
3. Under paragraph 5 of Rule 6 of this Court, a judgment will be affirmed on motion when, in view of previous decisions, the questions presented by the plaintiff in error are so wanting in substance as not to need further argument. P. 314.

4. Subways and tunnels, constructed by the City of Boston under authority of a statute which declared them, with their rents and profits, to be held by the City in its private or proprietary capacity, for its own property, never to be taken by the State without just compensation, were leased by the City, for a long term at a fixed rental, to a railroad corporation serving that and other cities and towns. The company falling into financial difficulty, the legislature enacted a law under which, with the consent of the stockholders, the railroad, including the leased premises, was taken over by trustees, who, under the law, repaired and operated the road, determining the needed expenditures, and fixed the fares to meet the cost of service, including taxes, rentals, interest on the company's indebtedness and dividends to its stockholders as fixed by the act. Payments necessary to meet deficits or diminution of reserve were to be made by the State and the amounts assessed upon the several cities and towns, as an addition to the state tax, in proportion to the number of persons in each using the service, as determined by the trustees, *Held*:—

(*a*) That the statute did not impair the obligation of the City's contract of lease, since the lease was assignable and the statute provided for repairs, and payment of the rent, while the taxes authorized were not a diminution of the rent imposed on the City as a proprietor but were state taxes, for a state purpose, as to which the City was but a collection agency. P. 314.

(*b*) That, operation of the railroad by the State being authorized by the state constitution and laws, the delegation to the trustees of the power to determine expenditures and the imposition of taxes to pay deficits did not deprive the City of property without due process, in violation of the Fourteenth Amendment. P. 316.

5. *Quaere:* Whether a State may confer upon a subdivision, like a city, capacity to acquire property or contract rights protected under the Federal Constitution against subsequent impairment by the State? P. 316.

237 Mass. 403, affirmed.

Error to a decree of the Supreme Judicial Court of Massachusetts sustaining a demurrer to a bill, brought by the City of Boston to enjoin a tax and for other relief, and dismissing it for want of equity.

Mr. Nathan Matthews, Mr. Joseph Lyons and *Mr. E. Mark Sullivan* for plaintiff in error.

Mr. J. Weston Allen, Attorney General of the State of Massachusetts, *Mr. Edwin H. Abbot Jr., Mr. Alexander Lincoln, Mr. H. Ware Barnum, Mr. Charles W. Mulcahy, Mr. Alexander Britton* and *Mr. Thomas Hunt* for defendants in error.

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

This is a writ of error to a decree of the Supreme Judicial Court of Massachusetts sustaining a demurrer to a bill in equity against the Treasurer and Receiver General of the Commonwealth of Massachusetts, the Boston Elevated Railway Company, and the trustees who are operating the railway of that Company under a special statute of the Commonwealth (Mass. Spec. Stat. 1918, c. 159), and dismissing the bill for want of equity, the plaintiff not wishing to plead further. It now comes before us on a motion by the Attorney General of Massachusetts to dismiss or affirm.

The case as made by the bill is an impeachment of the validity of the Special Act of 1918. By Acts of 1902 and 1911 (Stat. 1902, c. 534, and Stat. 1911, c. 741), the City of Boston was given power to construct and did construct subways and tunnels at a cost of $31,000,000, and by the same authority leased these and also others built by it under earlier statutes to the Boston Elevated Railway Company for a fixed rental until July 1, 1936, and the whole property and its rents and profits are by the express terms of the statute held by the city "in its private or proprietary capacity, for its own property" never to be taken by the Commonwealth except upon payment of just compensation. The railway company got into financial difficulty. It served the residents of Boston and other towns of the Commonwealth. The General Court in the public interest passed the Special Act of 1918 to relieve the situation. In general the act provided for the appoint-

ment of trustees who were to take the railway out of the hands of the company and operate it under the leases to the company by the City of Boston, on condition that the stockholders of the railway company accepted the provisions of the act. It is not necessary to set out what these provisions in detail are, except to say that they provide for the payment of dividends on the stock of the company, the repair and maintenance of the railway, the raising of $3,000,000 by the company for the improvement of the property and a reserve fund, and the payment of any deficit in operation out of the treasury of the Commonwealth. If the Commonwealth is called upon to make payments, to meet deficits or diminution of the reserve fund, such amounts are to be assessed upon the several cities and towns in which the railway operates, as an addition to the regular state tax, in proportion to the number of persons in said cities and towns using the service of the company at the time of the payments as determined by the trustees. The trustees are to fix the fares to meet the cost of service, including taxes, rentals and interest on the indebtedness of the company, fixed dividends on the preferred stock, and five per cent. on the common stock for two years, five and one-half per cent. for the next two years and six per cent. for the remainder of public operation, which is for a period of ten years and thereafter as the Commonwealth shall determine.

The company's stockholders having accepted the act, the trustees took over the possession and operation of the railway. They found the railway in bad repair and charged $2,000,000 for depreciation and $2,300,000 for maintenance and repair in the year 1919. This led to a deficit for that year of $4,000,000, although in previous years the company had not expended more than $100,000 a year on such account. The Treasurer and Receiver General under the Act of 1918 paid the deficit out of the Treasury of the Commonwealth, and was about to include

the same in the state taxes to be collected by the City of Boston and the other towns through which the railway runs in the proportion fixed by the act. The object of the bill was to prevent this levy and collection and further proceedings under the act.

The motion to dismiss is urged first upon the ground that Charles L. Burrill as Treasurer and Receiver General was the defendant in the original bill and that the present defendant Jackson, his successor in office, has been substituted without legal sanction. The substitution took place in the Supreme Judicial Court of Massachusetts before that court considered the case on its merits and in the court's opinion the objection to the substitution was noted and overruled. This settles conclusively so far as we are concerned, that the state law authorized the substitution. The case of *Irwin* v. *Wright,* 258 U. S. 219, has no application. That was an appeal from a Federal District Court in which this Court had to consider the substitution in this Court of county officers newly elected for those in office when the suit was brought and the decree entered in the District Court. It was not authorized by the federal statute and we could find no state law which permitted it to be done.

The second ground urged for dismissal is that the tax for 1919, sought to be enjoined, has been collected from the taxpayers of the city by the city and paid over to the Treasurer of the Commonwealth so that the case here becomes a moot one. But the tax had been paid before the Supreme Judicial Court took up, considered and decided the case. It must, therefore, have found, as it was entirely justified in doing, that the bill in its averments, prayer and real object was directed not only against the collection of the tax then pending but against future payments out of the Treasury of the Commonwealth and against the continued operation by the trustees under the statute of 1918 with the possible in-

curring of future deficits to be assessed against the city for collection. The action of the state court upon such a matter relieves us from its consideration. *Bi-Metallic Investment Co.* v. *State Board of Equalization of Colorado,* 239 U. S. 441, 444.

Having disposed thus of the grounds presented for dismissing the writ of error, we come to the alternative prayer for affirmance. Under paragraph 5 of Rule 6 of this Court, when the questions presented on such a motion are found by the Court, in view of our previous decisions, to be so wanting in substance as not to need further argument, we dispose of the case. *Chicago, Rock Island & Pacific Ry. Co.* v. *Devine,* 239 U. S. 52, 54; *Missouri Pacific Ry. Co.* v. *Castle,* 224 U. S. 541, 544.

The plaintiff in error comes to this Court because, as it says, the statute of 1918 of the Commonwealth, by which the trustees took over and are now operating the railway, impairs the obligation of the contract of lease of its property in the tunnels and subways to the railway company, and so violates the contract clause of the Federal Constitution. It further contends that the imposition of a tax merely to aid a private corporation, as in the Act of 1918 complained of, is not for a public purpose, and taxes collected therefor from it is taking its property without due process of law. Thirdly, it avers that vesting power in the trustees to fix the deficit in operation of the railway and to assess the city for a large part thereof is also taking its property without due process of law.

We are relieved from full or detailed consideration of these grounds urged for reversal by the satisfactory opinion of the Supreme Judicial Court in this case. *Boston* v. *Treasurer and Receiver General,* 237 Mass. 403.

What the Commonwealth did was to help the people of the towns which the railway served when the railway's finances threatened its collapse, by taking over the lease of the railway company for a valuable consideration.

There was no restriction upon the power of the railway company to assign the lease if the company had the corporate power and that, if it did not exist before, was supplied by the act itself. The law provided for keeping the property in good repair and the payment of the rentals due the city. There was nothing in the contract of assignment which in the slightest degree impaired the obligation of the company to the city under the lease. Indeed, it secured the performance of those obligations.

But it is said the contract was impaired because the act provided that any deficit incurred in the operation of the road under the assignment was to be paid out of the Treasury of the Commonwealth and finally was to be collected in large part from the City of Boston, and thus that though Boston was to receive its rental, it was required to pay a deficit in operation into which the rental must enter as an important factor. The effect, therefore, was to take away or impair its beneficial interest in the profits of the contract of lease and its property. To this the Supreme Court answered that this tax was not imposed on Boston in its proprietary capacity in which it built the subways and leased them. The taxes collected were state taxes to achieve a state purpose and Boston in its public and political character was a mere state tax agency for the collection. The taxpayers were to be called upon to bear the burden of the public purpose of the State in furnishing this important service of transportation in and between the communities in which they lived. If this was in accord with the state constitution and statutes, as we must and do find it to be from the well-reasoned opinion of the Supreme Judicial Court, we can not see that in any respect the levy of the tax for deficits impairs Boston's contract with the railway company.

In disposing of this objection we have in effect disposed of those objections to the Act of 1918 based on the Four-

teenth Amendment. If the constitution and laws of Massachusetts authorize the Commonwealth to operate a railway company for the public benefit, there is nothing in the Fourteenth Amendment to prevent. Nor is there anything in it preventing the State from using the trustees as agents to operate the railway and in such operation to determine the needed expenditures to comply with the obligations of the lease or the requirements of adequate public service. This is delegating to proper agents the decision of a proper administrative policy in the management of a state enterprise and the ascertainment of facts peculiarly within their field of authorized action.

In this conclusion, we assume, as did the Supreme Judicial Court, that the State may confer on one of its subdivisions like a city or town the private proprietary capacity by which it may acquire contract or property rights protected by the Federal Constitution against subsequent impairment by its creator the State. *Mt. Hope Cemetery* v. *Boston,* 158 Mass. 509. We do not wish to be understood as accepting such assumption as an established rule. *Pawhuska* v. *Pawhuska Oil & Gas Co.,* 250 U. S. 394. All we now decide is that even if the City of Boston may invoke the contract clause of the Federal Constitution to protect its rights under the lease as against infringing legislation by the Commonwealth, the Act of 1918 does not infringe.

Decree affirmed.

SOUTHERN RAILWAY COMPANY *v.* CLIFT.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 107. Argued November 21, 1922.—Decided December 4, 1922.

1. A law declaring that "either party" may file a petition for rehearing within a stated time after judgment is not to be construed as referring to a successful party and does not defer the finality of the judgment for purposes of review by his adversary. P. 318.

2. A decision of a state court disposing of a federal question by following its decision on a former appeal as the law of the case, cannot be regarded as resting on the independent, non-federal ground of *res judicata*. P. 319.
3. A state law requiring railroads to pay or reject claims for loss or damage to freight within ninety days of their presentation, under penalty that, otherwise, the claims shall stand as liabilities due and payable in their full amounts and recoverable in any court of competent jurisdiction, does not violate the due process clause of the Fourteenth Amendment. P. 320.

131 N. E. 4, affirmed.

ERROR to a judgment of the Supreme Court of Indiana, affirming a judgment for damages in an action by Clift against the Railway Company.

Mr. John D. Welman, with whom *Mr. L. E. Jeffries*, *Mr. Alexander Pope Humphrey*, *Mr. Edward P. Humphrey* and *Mr. Lucius C. Embree* were on the brief, for plaintiff in error.

While it may be competent for a State, in the exercise of police power, to require a carrier to pay a shipper who has established in a court of justice his claim as demanded, a sum additional to such claim by way of double damages or attorney's fees, *Atchison, Topeka & Santa Fe Ry. Co.* v. *Memphis*, 174 U. S. 96; *St. Louis, I. M. & S. Ry. Co.* v. *Wynne*, 224 U. S. 354; or, in order to enforce the prompt settlement of small claims, to require the carrier unsuccessfully resisting such claims, to pay a penalty in the nature of a fixed amount or an attorney's fee, *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217; *Kansas City Southern Ry. Co.* v. *Anderson*, 233 U. S. 326; *Missouri, K. & T. Ry. Co.* v. *Cade*, 233 U. S. 642; *Missouri, K. & T. Ry. Co.* v. *Harris*, 234 U. S. 412; yet, in all such cases the carrier must have had an opportunity to contest in a court of justice, (1) the validity of the claim; and (2) the amount demanded; and only in the event that the claimant suc-

ceeds in establishing (1) the justice of his claim; and (2) the amount as demanded by him prior to bringing suit, can the carrier be made liable for more than the court adjudges due on the claim. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150; *St. Louis, I. M. & S. Ry. Co.* v. *Wynne,* 224 U. S. 354; *Chicago, M. & St. P. Ry. Co.* v. *Polt,* 232 U. S. 165; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg,* 238 U. S. 56.

It is difficult to see how a litigant can receive the equal protection of the law when he is prohibited, simply on account of a failure to write a letter, from contesting the justice of a claim which has been presented to him, and from showing, even though the claim is just to a certain amount, it is not just to the extent claimed.

The statute of Indiana here involved makes the mere failure of a carrier to respond to a demand, conclusive as against the carrier, both as to the validity of the claim, and as to the amount demanded.

Mr. Thomas Morton McDonald for defendant in error.

Mr. Justice McKenna delivered the opinion of the Court.

The case is concerned with a statute of Indiana under which judgment was obtained against the Railway Company upon a claim for damage to property which it received for transportation within the State.

A motion is made by defendant in error to dismiss the writ of error, this Court, it is contended, being without jurisdiction. The grounds of the motion are specified as follows: (1) The judgment at the time the transcript was filed had not become final. (2) It did not decide any federal question.

To sustain the first ground, it is said, that under the law of the State, within sixty days after the termination of the case by the Supreme Court " either party may file a

petition for a rehearing." [Burns' Revision, 1914, § 704.] From this it is deduced and contended that the successful as well as the unsuccessful party in the action may file a petition for rehearing and that until the expiration of the time for the exercise of the right the judgment does not become final. The contention is curious. Legal procedure is a facility of rights and, rights achieved, its purpose is done. A successful litigant does not need the delay and provision of a rehearing. He has more efficient and enduring relief. His affliction may be solaced by not enforcing the victory which is the cause of it. The contention of defendant in error is so obviously untenable that further comment upon it would be the veriest supererogation.

In support of the second ground it is pointed out that the judgment to which the writ of error is directed was rendered on a second appeal and that the court decided that the decision "on the first appeal is the law of the case." It is hence asserted that it was *res judicata* and precluded dispute, and that, therefore, the decision rested upon an independent ground not involving a federal question and broad enough to maintain the judgment. For this *Northern Pacific R. R. Co.* v. *Ellis,* 144 U. S. 458, 464, is cited. That case does not determine this one. That case was constrained by the law of the State; such constraint does not exist in the present case. The constitutional question involved was considered and decided. The prior ruling may have been followed as the law of the case but there is a difference between such adherence and *res judicata;* one directs discretion, the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission. *Remington* v. *Central Pacific R. R. Co.,* 198 U. S. 95, 99; *Messenger* v. *Anderson,* 225 U. S. 436, 444. The court in the present case, as we have said, considered the constitutional question presented and decided against it, and to

review its decision is the purpose of this writ of error. The motion to dismiss is denied.

The merits of the case are concerned with the validity of a statute of the State of Indiana passed in 1911 [Acts 1911, c. 183] providing for the presentation of claims for loss or damage to freight transported wholly within the State.

A section of the act requires the claimant to present his claim within four months, and another section (3) prescribes the action and the time of action of the railroad company. It is as follows: "That every claim for loss of or damage to freight transported wholly between points within the State of Indiana may be presented to the agent of the carrier who issued the receipt or bill of lading therefor or to the freight agent or representative of such carrier at the point of destination, or to any freight agent of any carrier in whose possession such freight was when lost or damaged, and when so presented shall be paid or rejected by such carrier within ninety days therefrom, and if neither paid nor rejected in whole or in part within such time, such claim shall stand admitted as a liability due and payable to the full amount thereof against any such carrier, and may be recovered in any court having competent jurisdiction. . . ."

The assignments of error assail the quoted section as offensive to the Fourteenth Amendment of the Constitution of the United States, and in specification it is contended that the judgment of the court in sustaining the statute and in rendering judgment against the Company for the full amount of the claim presented, together with interest, upon the pleadings in the case, denied to the Company the right to defend the case on the merits as to the amount defendant in error was damaged and whether he was damaged at all.

The invocation of the Company is of the due process clause of the Fourteenth Amendment. It is admitted the

effect of the decisions of this Court is that the relation of carriers and shippers is " a relation so peculiar as to render valid a classification based upon it." If there may be class assignment, there may be class legislation. In other words, under the concession and the decisions that compel it, railroads have special characteristics and duties, and the legislation that is considerate of and appropriate to those characteristics and duties is due process of law. And this obviously. The service of a railroad is in the public interest; it is compulsory, and its purpose and duty are the transportation of persons and things promptly and safely, and the purpose and duty are fortified by responsibility for neglect of them or violation of them. And legislation may make an element of responsibility an early payment of loss or notification of controversy that responsibility may be enforced if it exist. In the legislation under review there is no impediment to investigation. Considering the facilities of the railroad company there is time for investigation and what can be discovered by it, and if controversy is resolved upon, the procedure of the law and the principles which direct the decisions of the law are available against the claim in whole or in part. Counsel is, therefore, in error, in the statement that the statute prohibits the railroad " from contesting the justice of a claim which has been presented to it, and from showing, even though the claim is justified to a certain amount, it is not just to the extent claimed."

The Company cites cases to sustain its contention that the statute of the State is unconstitutional. We do not review them because we consider that they are not analogous or pertinent. They were not concerned with the time of the presentation of claims simply and suit upon them as in the Indiana statute. They were concerned with elements or conditions of liability in addition to the claims. Other cases which, in candor, the Company has cited oppose its contention. In *Seaboard Air Line Ry.* v.

Seegers, 207 U. S. 73, a statute of South Carolina was held valid imposing a penalty of fifty dollars on all common carriers for failure to adjust damage claims within forty days from the time of demand. The statute was considered as not one of the mere refusal to pay a claim nor was it decided to have that objection because a penalty of fifty dollars could be imposed in case of recovery in court. The penalty was considered a legal deterrent upon the carrier in refusing the settlement of just claims and as compensation for the trouble and expense of suit. In *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co.,* 226 U. S. 217, the penalty prescribed was decided to be a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special legislative treatment. To the same effect are *Kansas City Southern Ry. Co.* v. *Anderson,* 233 U. S. 325; *Missouri, Kansas & Texas Ry. Co.* v. *Cade,* 233 U. S. 642, and *Chicago & Northwestern Ry. Co.* v. *Nye Schneider Fowler Co., ante,* 35.

In attempting to minimize these cases or exclude them from authority it seems to be contended, certainly implied, that by the statute, in case of suit by a claimant, he is excused from establishing his claim. The contention is untenable. The statute is clear and direct in its requirements. If the claim is just, there is no injustice in requiring its payment, if the claim is deemed by the company to be unjust, the statute requires a declaration of the fact by its rejection. Upon rejection, suit, of course, must be brought for it and it must be established. No penalty is imposed for its rejection nor increase of its amount in consequence of rejection.

Judgment affirmed.

UNITED STATES *v.* MASON & HANGER COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 121. Argued November 24, 1922.—Decided December 4, 1922.

A building contract, made through the War Department, provided that the contractor should be reimbursed for such actual net expenditures in the performance of the work as might be approved or ratified by the contracting officer, including "such bonds, fire, liability, and other insurance as the contracting officer may approve or require;" that monthly statements of costs should be made, upon which, in case of disagreement, the decision of the contracting officer should govern; and that statements so made and all payments made thereon should be final and binding on both parties. *Held,* that where a payment made by the contractor as a premium on its bond to secure the performance of the contract was thus approved and repaid as part of the cost of the work, the decision and action of the officer were conclusive, and that the Comptroller of the Treasury was without power to deduct the amount from other moneys due the contractor, upon the ground that the expense was not among those for which the contract promised reimbursement. P. 325.

56 Ct. Clms. 238, affirmed.

APPEAL by the United States from a judgment of the Court of Claims. A rehearing was granted in this case; but, after reargument, the judgment below was again affirmed, April 9, 1923, by a per curiam decision, which will be reported in volume 261.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

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

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Appeal from a judgment of the Court of Claims which awards the appellee, plaintiff in the Court of Claims, the sum of $12,064.52, composed of three sums which are respectively of the amounts of $2,500, $450 and $9,114.52. The last two sums the United States does not contest. The sum of $2,500 is only, therefore, in question. The amount is charged to be due (as the other sums were) upon what are called " cost plus contracts " for the construction of certain buildings at Camp Zachary Taylor, near Louisville, Kentucky.

It is provided in Article II of the contract that " the contractor shall be reimbursed . . . for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer . . . (h) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. . . ."

The United States contends that within the meaning of Article II the premium paid on a bond of $250,000, that being the amount fixed by the War Department, was not an expenditure in the performance of the work. The Court of Claims decided the contrary and supported its decision by the action and approval of the War Department. And there was no hesitation on the part of the Department. It recognized the obligation of the Government under the contract to pay to the contractor the

amount of premium, and negotiated with the surety companies for a reduction of it in the interest of the Government. The premium was approved by the contracting officer as required by Article II and paid as part of the cost of the work and was not questioned for over two years. Its amount was later deducted from other sums due the contractor.

What is the import of this practical interpretation? The Government does not contend that the words of the contract were dictated by statute. They are, therefore, the words of the contracting officer to express and provide for the purpose of the Government in exercise of the duty with which he was charged, and used as a declaration and measure of the rights and obligations of the parties to the contract. His subsequent conduct is necessarily to be considered a definition of them. The officer in a sense is a party to the contract, not only representing but speaking for the impersonality of the Government. Competent, therefore, it would seem, to declare the meaning of the contract.

We are, however, not called upon to pass upon the conflicting contentions. The contract contains other provisions that determine the liability of the Government.

Article IV of the contract provides for a monthly statement of the elements of costs upon which, if there be disagreement, the decision of the contracting officer "shall govern." It is further provided that "the statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof." Article XIV requires the contract to be interpreted as a whole, not by any special clause, and takes care to reserve the determining decision to the officers concerned with the work, the final decision being that of the Secretary of War. Article IV, indeed, is the complement and elaboration of the provision of Article II (quoted above) which provides that the contractor is to

be reimbursed for such of its expenditures "as may be approved or ratified by the contracting officer."

We have decided that the parties to the contract can so provide and that the decision of the officer is conclusive upon the parties. *Kihlberg* v. *United States,* 97 U. S. 398; *Martinsburg & Potomac R. R. Co.* v. *March,* 114 U. S. 549; *United States* v. *Gleason,* 175 U. S. 588; *Ripley* v. *United States,* 223 U. S. 695. This is extending the rule between private parties to the Government.

There were such decisions, and settlement, and payments, in consequence of them, as we have seen. Over the effect of these the Comptroller of the Treasury has no power. They were the acts and duty of the officer in charge, in the expression of which there was no ambiguity, and were, therefore, conclusive in effect.

Judgment affirmed.

UNITED STATES *v.* NORTHEASTERN CONSTRUCTION COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 122. Argued November 24, 1922.—Decided December 4, 1922.

Decided on the authority of *United States* v. *Mason & Hanger Co., ante,* 323.

56 Ct. Clms. 492, affirmed.

APPEAL by the United States from a judgment of the Court of Claims. See the per curiam decision of April 9, 1923, to be reported in volume 261, reaffirming the judgment after rehearing.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

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

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Judgment in this case was rendered at the same time as that in *Mason & Hanger Co.* v. *United States,* just decided, *ante,* 323.

The amounts only are different. In that case it was $2,500—in this case it is $150. In both, the amounts represented premiums on bonds and depend upon the same considerations. On the authority of the *Mason & Hanger Co. Case* the judgment of the Court of Claims in this case is

Affirmed.

PORTSMOUTH HARBOR LAND & HOTEL COMPANY ET AL. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 97. Argued November 15, 1922.—Decided December 4, 1922.

1. The petition alleged that the United States, after having several times in the past discharged its battery over petitioner's land, reinstalled its guns with the intention of so firing them and without intention or ability to fire them otherwise, established a fire control and service upon that land, and again discharged all of the guns over and across it. A taking by the United States was alleged as a conclusion of fact from these specific acts, and damages were claimed. *Held,* that the taking of a servitude, and an implied contract to pay, might be inferred; and that a demurrer to the petition should not have been sustained. P. 328.
2. Where acts amount to a taking of property by the United States, without assertion of an adverse right, a contract to pay may be implied whether it was thought of or not. P. 330.

56 Ct. Clms. 494, reversed.

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

Mr. Chauncey Hackett, with whom *Mr. John Lowell* was on the briefs, for appellants.

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

Mr. Justice Holmes delivered the opinion of the Court.

This is a claim in respect of land which, or an interest in which, is alleged to have been taken by the United States Government. Similar claims in respect of the same land based upon earlier acts of the Government have been made before and have been denied. *Peabody* v. *United States,* 231 U. S. 530. *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 250 U. S. 1. But it is urged that the cumulative effect of later acts added to those that have been held not enough to establish a taking leads to a different result.—The land is on Gerrish Island, lying east of the entrance to Portsmouth Harbor, and borders on the ocean. Its main value is for use as a summer resort. Adjoining it to the north and west lies land of the United States upon which the Government has erected a fort, the guns of which have a range over the whole sea front of the claimants' property. In the first case it was decided that the mere erection of the fort and the fact that guns were fired over the claimants' land upon two occasions about two years and a half before the suit was brought, coupled with the apprehension that the firing would be repeated, but with no proof of intent to repeat it other than the facts stated, did not require the finding of an appropriation and a promise to pay by the United States. The second case was like the first except for " some occasional subsequent acts of gun fire," 250 U. S. 2, and the finding of the Court of Claims for the United States again was sustained.

The present case was decided upon demurrer. The question therefore is not what inferences should be drawn from the facts that may be proved but whether the allega-

tions if proved would require or at least warrant a different finding from those previously reached. There is no doubt that a serious loss has been inflicted upon the claimant, as the public has been frightened off the premises by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that "if the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made." 231 U. S. 538. That proposition we regard as clearly sound. The question is whether the petition before us presents the case supposed.

It is alleged that after dismounting the old guns for the purpose of sending them to France during the late war, the United States has set up heavy coast defense guns with the intention of firing them over the claimants' land and without the intent or ability to fire them except over that land. It also, according to the petition, has established upon that land a fire control station and service, and in December, 1920, it again discharged all of the guns over and across the same land. The last fact, although occurring after this petition was filed, may be considered as bearing on the intent in establishing the fire control. If the United States, with the admitted intent to fire across the claimants' land at will should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient

time may prove it. Every successive trespass adds to the force of the evidence. The establishment of a fire control is an indication of an abiding purpose. The fact that the evidence was not sufficient in 1905 does not show that it may not be sufficient in 1922. As we have said the intent and the overt acts are alleged as is also the conclusion that the United States has taken the land. That we take to be stated as a conclusion of fact and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific facts set forth would warrant a finding that a servitude has been imposed.

It very well may be that the claimants will be unable to establish authority on the part of those who did the acts to bind the Government by taking the land, *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330. But as the allegation is that the United States did the acts in question, we are not prepared to pronounce it impossible upon demurrer. As the United States built the fort and put in the guns and the men, there is a little natural unwillingness to find lack of authority to do the acts even if the possible legal consequences were unforeseen. If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought of or not. The repetition of those acts through many years and the establishment of the fire control may be found to show an abiding purpose to fire when the United States sees fit, even if not frequently, or they may be explained as still only occasional torts. That is for the Court of Claims when the evidence is heard.

Judgment reversed.

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE SUTHERLAND concurs.

I agree that, in time of peace, the United States has not the unlimited right to shoot from a battery over adjoining

private property, even if no physical damage is done to it thereby; that a single shot so fired may, in connection with other conceivable facts, justify a court in finding that the Government took, by eminent domain, the land or an easement therein; and that such taking, if made under circumstances which give rise to a contract implied in fact to pay compensation, will entitle the owner to sue in the Court of Claims. But the question here is not whether the facts set forth in the petition would alone, or in connection with other evidence, justify the court in finding such a taking and the implied contract. The case was heard on demurrer to the petition; the facts therein set forth must, therefore, be taken as the ultimate facts; and they must be treated as are the findings of fact made by the Court of Claims. These are treated like a special verdict and not as evidence from which inferences may be drawn. Rule I of this Court relating to appeals from the Court of Claims; *Crocker* v. *United States,* 240 U. S. 74, 78; *Brothers* v. *United States,* 250 U. S. 88, 93. Unless, therefore, the petition sets forth facts well pleaded, which if found by the lower court would as matter of law entitle the claimants to a judgment, the lower court was, in my opinion, right in dismissing the petition.

Appropriation by the United States of private property for public use, without instituting condemnation proceedings, does not entitle the owner to sue under the Tucker Act (Judicial Code, § 24, par. 20), unless the taking was made under such circumstances as to give rise to a contract express or implied in fact to pay compensation. *Hill v. United States,* 149 U. S. 593; *Schillinger* v. *United States,* 155 U. S. 163, 168–171; *Belknap* v. *Schild,* 161 U. S. 10, 17; *John Horstmann Co.* v. *United States,* 257 U. S. 138, 146. Hence this action must rest on a contract, express or implied in fact. *Harley* v. *United States,* 198 U. S. 229; *United States* v. *Buffalo Pitts Co.,* 234 U. S. 228, 232; *William Cramp & Sons Co.* v. *Curtis Turbine*

Co., 246 U. S. 28, 40, 41. There is no suggestion of an express promise; and there is not to be found in the petition, or in the exhibits incorporated by reference, a single allegation, however general, of an implied contract. This omission would not be fatal, if the petition set forth the facts essential to the existence of the cause of action. But it does not. An appropriation of private property will not entitle the owner to recover if made by mistake or if made under a claim of right, although the claim is later shown to be unfounded. *Tempel* v. *United States,* 248 U. S. 121, 130, 131. And, if the appropriation was made by an officer without authority, the claimant is likewise without this remedy against the Government. *United States* v. *North American Transportation & Trading Co.,* 253 U. S. 330, 333. The essentials of a recovery are a taking on behalf of the United States, made by officials duly authorized, and under such conditions that a contract will be implied in fact. The petition fails to set out such facts. Indeed, the facts which are set out make it clear that what was done did not constitute a taking; that the officers of the Government in doing what they did, had no intention of subjecting it to any liability; that they were not authorized to take the land or an easement therein; and that they consistently denied that claimants were entitled to compensation. Implied contracts in fact do not arise from denials and contentions of parties, but from their common understanding whereby mutual intent to contract without formal words therefor is shown. *Farnham* v. *United States,* 240 U. S. 537; *E. W. Bliss Co.* v. *United States,* 253 U. S. 187, 190, 191; *Knapp* v. *United States,* 46 Ct. Clms. 601, 643.

The petition sets forth the proceedings in the two earlier cases, *Peabody* v. *United States,* 231 U. S. 530; *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 250 U. S. 1. Those judgments make *res judicata,* not only the fact that there was no appropriation prior to 1918, but

also the facts specifically found in the second suit concerning the erection and maintenance of the battery, the policy and practice of the military authorities, and their intentions when the guns were discharged prior to that date. Among other things, as the petition states, the court found that the shots were fired for the purpose of testing certain modifications of the gun carriages made shortly prior thereto; that in so firing the guns the officers and agents of the United States especially desired, intended, and took precautions so to fire them and believed they were so firing them, as to avoid firing any of them over any part of claimants' land; that such firing as was done over said land was due to a misunderstanding on the part of said officers and agents as to the boundaries of said land; that the fort was not constructed for the purpose of firing any of its guns over and across any of claimants' lands in time of peace, or of so firing them at all, except over the Government's own premises occasionally for testing purposes; that the fort was never garrisoned; that no target or practice firing was ever done there; that until 1917, when its guns were dismounted for removal and use elsewhere, its batteries had been continuously kept in serviceable condition for defensive use by a small detail from Fort Constitution, across the harbor; and that it was the policy and practice of the military authorities not to maintain garrisons and train gun crews at all of its coast fortifications, but to maintain garrisons and do such training at fortifications where the facilities for training are best and where there was, or naturally would be, less objection and complaint by nearby residents on account of the noise and concussion.[1] The only later occurrences,

[1] The facts concerning the establishment and earlier use of the battery found in the first suit, were:

By Act of February 21, 1873, c. 175, 17 Stat. 468, 469, Congress appropriated $50,000 for batteries in Portsmouth Harbor, on Gerrish Island and Jerry Point, and by Act of February 10, 1875, c. 39, 18

material to the issue, which are set forth in this suit, in the petition as amended, are the re-installation of the guns at the battery after the Armistice, the erection of a fire control station on claimants' land in connection therewith, and firing the guns on December 8, 1920.

This suit was begun in February, 1920. The original petition set forth the facts found in the earlier cases; and

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Stat. 313, added to the appropriation for the Gerrish Island battery, $20,000. Under the authority thus conferred a tract of 70 acres abutting claimants' land was purchased in 1873, and construction was begun. After $50,000 had been expended in substantially completing the breast-high walls of the fortification, the work was suspended for lack of appropriations in 1876; and it was not resumed until funds were allotted out of the general appropriation made by the Act of May 7, 1898, c. 248, 30 Stat. 400, for fortifications and like purposes. Then, on the site of the old, uncompleted battery, there was constructed the battery now known as Fort Foster; and in December, 1901, it was transferred to the Artillery. In June, 1902, the Government fired two of the guns, and in September, 1902, another, for the purpose of testing guns and carriages, off the coast; and in so doing it fired across complainants' land. Between that time and 1911 no gun was fired from the fort. This battery is located within 200 feet of a corner of claimants' land; no part of the fort encroaches upon it; but the guns there installed had a range of fire over all its sea front; and whether the guns then installed could have been fired for practice or other necessary purpose in time of peace without shooting over claimants' land depends upon a question of law concerning ownership of a narrow strip of land over which the guns had a range of fire—a question as to which the parties were and so far as appears are still in dispute. It was not, so far as then appeared, the intention of the Government to fire in time of peace any gun already installed or which might thereafter be installed, over and across the claimants' land, so as to deprive them of the use of the same or to injure them, except as such intention can be drawn from the fact that the guns then installed were so fixed as to make it possible so to do and the fact that they had been fired as stated. On these facts found by the Court of Claims, 46 Ct. Clms. 39, that court and this held, that there was no basis for the claim that the Government had appropriated the land and impliedly agreed to pay for it. *Peabody* v. *United States,* 231 U. S. 530.

substantially nothing more except the intention to reinstall the guns. It was devoted largely to pointing out errors in the earlier findings for which it sought relief through the equity powers of the court. The only new fact then alleged, which may be deemed material, was "establishing [on claimants' land] a fire control station and service for use of the fort." The reinstallation of guns, and the firing in December, 1920, were first set up by an amendment filed in 1921. And it is by this reinstallation after the commencement of this suit, that the United States is alleged to have established the fort as a part of the permanent coast defense.[1] If there was no taking until the guns were installed and the shots fired in December, 1920, then there was no cause of action when this suit was brought; and the demurrer was properly sustained on that ground. See *Court of Marion County* v. *United States,* 53 Ct. Clms. 120, 150. And there is this further obstacle to the maintenance of the suit. We take judicial notice of the fact that on December 8, 1920, the United States was still at war with Germany and Austria-Hungary. Joint Resolution of March 3, 1921, c. 136, 41 Stat. 1359. That the Government has in time of war the right to shoot over private land was assumed in *Peabody*

[1] The amendment alleges:

"And in so doing the United States have established the said fort and battery with the said guns as a part of the permanent establishment of the coast defense fortifications maintained by [it] . . . without intending to fire, or being able to fire, the said guns to sea except over and across the said land. And the United States have used the said land of the said claimants for the establishment of a fire control station and service for the use of said fort. The United States have since setting up the said guns, as aforesaid, at frequent intervals in the use of the said fort, raised the said guns and pointed them as aforesaid, over and across the said land, and have, further, in the use of the said fort, discharged all of the said guns as aforesaid, on or about the eighth day of December, 1920, over and across the said land."

v. *United States, supra,* and is not disputed. See also, *Peabody* v. *United States,* 43 Ct. Clms. 5, 18. The Armistice signed November 11, 1918, left the United States possessed in December, 1920, of the same power to fire over claimants' land as if war had then been flagrant. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146, 158–160. Reinstallation of the guns and testing them by firing was an appropriate precautionary measure in view of a possible renewal of the conflict. Thus, the only overt acts upon claimants' land which are alleged to have occurred after the date of the findings in the earlier cases, and which are relied upon as establishing a taking after entry of the judgment in 250 U. S. 1, appear to have been acts done in the exercise of a right already possessed without a taking.

It is said that the petition alleges, in general terms, a taking and intention to take by the United States; that this allegation alone, although general, is an allegation of all the facts necessary to give a cause of action; and that the specification in detail of the facts relied upon may be treated as surplusage. To this contention there are several answers. The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts. It requires a plain concise statement of the facts relied upon. See Rule 15, Court of Claims. The petition may not be so general as to leave the defendant in doubt as to what must be met. *Schierling* v. *United States,* 23 Ct. Clms. 361; *Atlantic Works* v. *United States,* 46 Ct. Clms. 57, 61; *New Jersey Foundry & Machine Co.* v. *United States,* 49 Ct. Clms. 235; *United States* v. *Stratton,* 88 Fed. 54, 59. If the suit had rested upon a statute which provides that the owner of property appropriated shall receive compensation, a fairly general statement that the property had been taken might be sufficient; for, in such a case, the obligation to pay would follow as a conclusion of law. But here, there

is no such statute; the mere fact of appropriation would not raise a promise implied in law; hence, claimants were obliged to set forth additional facts to show that the Government intended to pay the claimants compensation. Moreover, the general allegation of taking was not left to stand alone. Claimants set forth, in great detail, the facts upon which they rely as constituting a legal taking; they have done it in such a way that the allegation of taking reads now, not as an allegation of fact, but as a statement by the pleader of a conclusion of law; and consequently is not admitted by the demurrer. *Pierce Oil Corporation* v. *City of Hope*, 248 U. S. 498, 500. And for a further reason, the facts set forth in detail may not be disregarded as surplusage. They negative the existence of a cause of action. *Randall* v. *Howard,* 2 Black, 585; *McClure* v. *Township of Oxford,* 94 U. S. 429; *Speidel* v. *Henrici,* 120 U. S. 377. The facts stated show, as indicated above, not only an absence of taking and of intention to take the claimants' property, but also an absence of authority to do so in those who did the acts relied upon.

The petition alleges in terms authority in the Secretary of War to take the land. But in setting forth the facts relied upon, the pleader has disclosed the absence of authority from the Secretary of War to the officers by whom the taking, if any, must have been made. Claimants seek in their suit to recover $820,000. They assert that the land is worth $700,000. For the fifteen years preceding the commencement of this suit, there had been active litigation in which claimants had strenuously asserted that there was a taking and the United States had throughout denied that it had taken, or intended to take, any property of claimants. Unless the Secretary of War conferred upon his subordinates who made this alleged taking authority to take this land or an easement therein, the Government can, in no event, be made liable. *United States* v. *North American Transportation & Trading Co.,*

253 U. S. 330, 333, 334. See *Ball Engineering Co.* v. *J. G. White & Co.*, 250 U. S. 46, 54–57. If the present case had proceeded to a trial on the facts, claimants could not have proved authority in the subordinate officers to acquire this land or an interest therein, by showing merely that they were authorized to reinstall the guns and to test them after installation. That is exactly what they had done before and which the courts found did not constitute a taking. An authority to take land by purchase or by eminent domain is not conferred by the Secretary of War merely because he has authorized, directly or indirectly, certain discharges of guns for testing or other purposes. We must take judicial notice, that to acquire land for fortifications is not, and was not, within the powers ordinarily conferred upon the Ordnance or upon the Artillery. We know that by Act of July 2, 1917, c. 35, 40 Stat. 241, provision was made for speedy acquisition by the Secretary of War, by means of condemnation or purchase, of any land, temporary use thereof or interest therein, needed for the site, location, construction or prosecution of works for fortification or coast defenses; that upon filing a petition for condemnation, the immediate possession thereof to the extent of the interest to be acquired could be obtained; and that by passage of this act the occasions for taking interests in land without first instituting condemnation proceedings had been largely removed. We know that by Act of June 30, 1906, c. 3914, 34 Stat. 764, a contract involving payment of money may not be made in excess of appropriations. 30 Ops. Atty. Gen. 147, 149. We know that Act of March 3, 1919, c. 99, § 6, 40 Stat. 1305, 1309, required that estimates of appropriation for fortifications and other defense works for the year beginning July 1, 1920, be submitted to Congress in the Book of Estimates. And we may take judicial notice of the fact that in submitting estimates of the amount needed for the year beginning

July 1, 1920, "For procurement or reclamation of land, or rights pertaining thereto, needed for site, location, construction, or prosecution of work for fortifications and coast defenses," the Secretary of War asked for only $15,000 for the whole country for all these purposes; and that no part of that amount was allocated in the estimates to the "Purchase of land and interest in land." Estimates of Appropriation, 66th Cong., 2d sess., Doc. 411, pp. 531, 532. The facts alleged and of which we take judicial notice show not only an absence of intention to take, but the absence of power and authority to take.

The principle on which, under certain conditions, compensation may be recovered in the Court of Claims for private property appropriated for public purposes without condemnation proceedings, leaves unimpaired the long established rules that the United States is not liable for its torts, nor for unauthorized acts of its officers and agents, although performed in the ordinary course of their business and for the benefit of the United States. The Tucker Act merely gives a remedy where the essential elements of contractual liability exist. It does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law, as in case of unjust enrichment, *Sutton* v. *United States,* 256 U. S. 575, 581, or when a plaintiff waives a tort and sues in contract. *Hijo* v. *United States,* 194 U. S. 315, 323; *Hooe* v. *United States,* 218 U. S. 322. The fact alleged in the petition that at some time in 1919 the War Department offered to purchase part of this land for the fire control station—perhaps only a few square feet, or a rood, out of a 200-acre tract—when considered in connection with the other facts stated, serves not to prove, but to negative authorization to make the taking asserted in this suit. That the offer was not accepted

and that the Government did not institute condemnation proceedings may tend to show that officers of the United States committed a tort on its behalf; but, if a tort was committed, the remedy lies with Congress, not with the courts.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *v.* KINNEY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 110. Argued November 21, 1922.—Decided December 4, 1922.

Where a complaint in an action for personal injuries alleges facts which may constitute the wrong either under the state law or the Federal Employers' Liability Act, according to the nature of the employment, an amendment alleging that the parties at the time of injury were engaged in interstate commerce does not introduce a new cause of action, and may be allowed after the two-year limitation prescribed by § 6 of the act has run. P. 345.

190 App. Div. 967; 231 N. Y. 578, affirmed.

CERTIORARI to a judgment of the Supreme Court of New York, entered on remittitur from the Court of Appeals, affirming a judgment for the plaintiff, Kinney, in an action for personal injuries against the Railroad Company. There were several trials in the New York courts before the amendment passed upon here was made. See 98 Misc. 8; 171 App. Div. 948; 217 N. Y. 325; 185 App. Div. 903; 190 App. Div. 967; 231 N. Y. 578.

Mr. Maurice C. Spratt, with whom *Mr. Herbert W. Huntington* was on the briefs, for petitioner.

The amendment to the complaint alleging engagement of the plaintiff and defendant in interstate commerce introduced an entirely new cause of action, and having been made more than two years after the cause of action accrued was barred by the statute of limitations contained in § 6 of the federal act. The statute having been

pleaded and proven the defendant was entitled to judgment.

While this Court has upheld amendments where the original complaint pointed, although imperfectly, to a cause of action under the laws of Congress, as in *Seaboard Air Line Ry.* v. *Renn,* 241 U S. 290, or where the amendment involved merely the substitution of the personal representative of the deceased, as in *Missouri, Kansas & Texas Ry. Co.* v. *Wulf,* 226 U. S. 570, we do not find that this Court has yet passed upon the question where the facts were as here, except that the logic of the opinion in the *Renn Case* leads unerringly to the conclusion that under facts similar to those in this case the amendment would not have been permitted.

No claim has been or can be made that the plaintiff attempted to maintain or commence any action under the federal statute for eight years after the cause of action accrued.

The cause of action was based squarely upon the New York Employers' Liability Act. There was not only an allegation in the complaint of the service of a notice under the provision of said act, but a copy of the notice alleged to have been so served was attached to the complaint.

Furthermore, upon none of the first three trials of this case was any proof given of interstate commerce nor was it even suggested that either might have been so engaged. Nor did the defendant's answer set up engagement in interstate commerce as a defense. For eight years this suit was absolutely silent as to interstate commerce.

If plaintiff was engaged in interstate commerce, then his original complaint failed to state any cause of action under the state act, the Federal Employers' Liability Act being exclusive and superseding all state laws upon the same subject. By coming into court and alleging that the plaintiff was engaged in interstate commerce, the plaintiff admits that the action as brought and three times tried

could not be maintained. It is not merely the addition of further grounds of liability. It is even more than a substitution of one cause of action for another. It is the substitution of the right to maintain an action barred by the express limitations of the federal statute, in place of a cause of action in which plaintiff has been substantially defeated.

Assume that by final judgment the plaintiff had been defeated in his action under the state act, could he then, eight years after the accident, successfully institute and maintain suit under the federal statute?

The original complaint by its plain language excluded all suggestion of right under the federal statute. The amended complaint excludes all rights under the state statute. The cause of action originally pleaded was wholly inconsistent with the cause of action set forth in the amended complaint. Each excludes the other. Discussing: *Union Pacific Ry. Co.* v. *Wyler,* 158 U. S. 285; *Seaboard Air Line Ry.* v. *Renn,* 241 U. S. 290; *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.,* 227 U. S. 434; *American R. R. of Porto Rico* v. *Didricksen,* 227 U. S. 145; *Gulf, Colorado & Santa Fe Ry. Co.* v. *McGinnis,* 228 U. S. 173; *Hogarty* v. *Philadelphia & Reading Ry. Co.* 255 Pa. St. 236; *Allen* v. *Tuscarora Valley R. R. Co.,* 229 Pa. St. 97; *Hall* v. *Louisville & Nashville R. R. Co.,* 157 Fed. 464; *Hughes* v. *New York, O. & W. R. R. Co.,* 158 App. Div. 443; *Carpenter* v. *Central Vermont Ry. Co.,* 93 Vt. 357; *Ryan* v. *New York Central & Hudson River R. R. Co.,* 171 App. Div. 958; *Findley* v. *Coal & Coke Ry. Co.,* 76 W. Va. 747; *Fort Worth & Rio Grande Ry. Co.* v. *Bird,* 196 S. W. 597; *Walker* v. *Iowa Central Ry. Co.,* 241 Fed. 395; Roberts, Federal Liability of Carriers, § 696, pp. 1210–1212.

Mr. Hamilton Ward for respondent.

If interstate commerce appears upon the trial, the case must be determined by the federal law. The plaintiff can

sue to recover for the wrong done; and the law to be administered, whether state or federal, is determined by the facts proved. A sufficient allegation to establish a cause of action in tort does not necessarily involve the mention of any statute. Where an action is duly commenced by the proper party within the time fixed by the statute of limitations, amendments which do not set up a new cause of action are within the discretion of the court and are not controlled by the statute of limitations. A recovery may be had, where the facts proved warrant it, under the Federal Employers' Liability Act without an express allegation in the pleadings that the parties are engaged in interstate commerce, if such proof be made upon the trial and the defendant be not surprised thereby. An amendment setting up the fact that the parties "at the times and in the manner above set forth were then and there engaged in interstate commerce" does not set up a new cause of action.

Payne v. *New York, S. & W. R. R. Co.,* 201 N. Y. 440; *Lee* v. *Central of Georgia Ry. Co.,* 252 U. S. 109; *Toledo, St. Louis & Western R. R. Co.* v. *Slavin,* 236 U. S. 454; *Seaboard Air Line Ry.* v. *Koennecke,* 239 U. S. 352.

If the federal law would have been applied without the amendment, upon proof of interstate commerce, it would seem idle to ask this Court to say that the allowance of such an amendment, which was justified by the proof, and which was merely in support of the cause of action originally alleged, justifies this Court in setting aside the verdict and granting a new trial. *Smith* v. *Atlantic Coast Line R. R. Co.,* 210 Fed. 761; *Missouri, Kansas & Texas Ry. Co.* v. *Wulf,* 226 U. S. 570; *Davis* v. *New York, Lake Erie & Western R. R. Co.,* 110 N. Y. 646; *St. Louis, San Francisco & Texas R. R. Co.* v. *Smith,* 243 U. S. 630; s. c. 171 S. W. 512; 160 S. W. 317; *Illinois Central R. R. Co.* v. *Lanis,* 246 U. S. 652; s. c. 140 La. 1; *Baltimore & Ohio R. R. Co.* v. *Smith,* 246 U. S. 653; s. c. 169 Ky. 593; *Cur-*

tice v. *Chicago & Northwestern Ry. Co.*, 162 Wisc. 421; s. c. 166 Wisc. 594; 247 U. S. 510.

A recovery can be had under the federal statute without an allegation of interstate commerce in the complaint within two years, where the action has been duly commenced and interstate commerce appears upon the trial, and no different elements of negligence are sought to be established by the plaintiff. *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 593; *Vickery* v. *New London R. R. Co.*, 87 Conn. 634; *Gainesville Midland Ry.* v. *Vandiver*, 141 Ga. 350; *Jorksen* v. *Grand Rapids, etc. R. R. Co.*, 189 Mich. 537; *Bird* v. *Fort Worth, etc. Ry. Co.*, 109 Tex. 323; s. c. 196 S. W. 597; *Nashville, etc. Ry. Co.* v. *Anderson*, 134 Tenn. 666; *Ziknik* v. *Union Pacific R. R. Co.*, 95 Neb. 152; s. c. 239 U. S. 650; *Broom* v. *Southern Ry.*, 115 Miss. 493; *Gropp* v. *Great Atlantic & Pacific Tea Co.*, 161 App. Div. 859; *Smith* v. *Atlantic Coast Line R. R. Co.*, 210 Fed. 761.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit for personal injuries to the plaintiff, the respondent in this Court, caused by the collision of a train upon which he was employed by the defendant, the petitioner, as an engineer, with a train of the Michigan Central Railroad Company. After several trials and about seven years and a half after the suit was begun the plaintiff was allowed to amend his complaint by alleging that at the time of the collision the plaintiff and defendant were engaged in interstate commerce. He got the present judgment under the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65; the jury having found that the parties were so engaged. The defendant contended that the amendment introduced a new cause of action and under § 6 of the act could not be allowed after the two years' limitation had run. See also Act of April 5, 1910,

c. 143, 36 Stat. 291. A writ of certiorari was granted to dispose of this doubt.

The original complaint set forth facts that would have given a cause of action at common law, under the statutes of New York or the act of Congress, as one or another law might govern. It alleged a notice, required by the New York statute and to that extent pointed to that. The amended complaint, against the petitioner alone, while it introduced the allegations objected to, retained the allegation as to notice, and was treated by the trial Court, seemingly with the approval of the higher Courts of the State, as warranting a recovery under either law as the jury should find. There is nothing in the statutes of the United States to prevent this form of pleading, as is indicated incidentally in the case that we are about to cite upon the main point.

In *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, the declaration was by the mother as sole heir and next of kin of an employee of the plaintiff in error, in terms referring to a statute of Kansas giving her a right of action for injuries resulting in death. An amendment was allowed, more than two years after the injury, in which the plaintiff declared both as sole beneficiary and next of kin and as administratrix and relied both on the Kansas law and on the act of Congress. The plaintiff got a judgment under the act of Congress which was sustained by this Court although the original declaration by the plaintiff could not be attributed to the Employers' Liability Act, because the plaintiff sued only in her personal capacity and relied for that, as she had to, upon the Kansas law. 226 U. S. 576. It is true that the fact of the injury arising in interstate commerce was pleaded by the defendant. But it was pleaded as a bar to the action as it then stood and only makes more marked the changes that the amendment introduced. We do not perceive that the effect of the amendment in that case distinguishes it from

this. It really is a stronger case, because, as we have said, here the declaration was consistent with a wrong under the law of the State or of the United States as the facts might turn out. The amendment "merely expanded or amplified what was alleged in support of the cause of action already asserted . . . and was not affected by the intervening lapse of time." *Seaboard Air Line Ry.* v. *Renn,* 241 U. S. 290, 293. "The facts constituting the tort were the same, whichever law gave them that effect." *Seaboard Air Line Ry.* v. *Koennecke,* 239 U. S. 352, 354. See also *St. Louis, San Francisco & Texas Ry. Co.* v. *Smith,* 243 U. S. 630. Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.

We shall not discuss at length other points that technically are open but that did not induce the granting of the writ, such as the sufficiency of the evidence that the parties were engaged in interstate commerce, the instruction as to assumption of risk, &c. We see no sufficient reason for disturbing the judgment and it must stand.

Judgment affirmed.

ST. LOUIS COTTON COMPRESS COMPANY *v.* STATE OF ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 120. Argued November 23, 24, 1922.—Decided December 4, 1922.

1. In determining the constitutionality of a pecuniary exaction made under a state statute in the guise of taxation, this Court is not bound by the characterization of the exaction by the State Supreme Court as an "occupation tax." P. 348.

2. A state law exacting of persons insuring their property situate in the State a so-called tax of 5% of the amounts paid by them as premiums to insurers not authorized to do business in the State, is void as applied to insurance contracted and paid for outside the State by a foreign corporation doing local business. P. 348. *Allgeyer* v. *Louisiana,* 165 U. S. 578.

147 Ark. 406, reversed.

ERROR to a judgment of the Supreme Court of Arkansas in an action brought by the State to recover 5% of amounts paid by the Compress Company to fire insurance companies, not authorized to do business in the State, for insuring its property in Arkansas.

Mr. George B. Rose, with whom *Mr. Wendell P. Barker, Mr. W. E. Hemingway, Mr. D. H. Cantrell* and *Mr. J. F. Loughborough* were on the brief, for plaintiff in error.

Mr. Wm. T. Hammock and *Mr. F. G. Lindsey,* with whom *Mr. J. S. Utley,* Attorney General of the State of Arkansas, and *Mr. Elbert Godwin* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit by the State of Arkansas against a corporation of Missouri authorized to do business in Arkansas. It is brought to recover five per cent. on the gross premiums paid by the defendant, the plaintiff in error, for insurance upon its property in Arkansas, to companies not authorized to do business in the State. A statute of the State purports to impose a liability for this amount as a tax. Crawford & Moses, Digest, (1921) § 9967. The answer alleged that the policies were contracted for, delivered and paid for in St. Louis, Missouri, the domicil of the corporation, because the rates were less than those charged by companies authorized to do business in Arkansas. It also alleged that long before the taxing act was passed the

defendant had made large investments in Arkansas in real and personal property essential to the conduct of its business, which it had held and operated ever since. The plaintiff demurred. The lower Court overruled the demurrer, but the Supreme Court sustained it, holding that the statute denied to the defendant no rights guaranteed to it by the Fourteenth Amendment. Judgment was entered for the plaintiff and the case was brought by writ of error to this Court.

The Supreme Court justified the imposition as an occupation tax—that is, as we understand it, a tax upon the occupation of the defendant. But this Court although bound by the construction that the Supreme Court may put upon the statute is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect. *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362. The short question is whether this so-called tax is saved because of the name given to it by the statute when it has been decided in *Allgeyer* v. *Louisiana,* 165 U. S. 578, that the imposition of a round sum, called a fine, for doing the same thing, called an offence, is invalid under the Fourteenth Amendment. It is argued that there is a distinction because the Louisiana statute prohibits (by implication) what this statute permits. But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act. The name given by the State to the imposition is not conclusive. *Child Labor Tax Case,* 259 U. S. 20. *Lipke* v. *Lederer,* 259 U. S. 557. In Louisiana the detriment was $1000. Here it is five per cent. upon the premiums—which is three per cent. more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that

do not pay tribute to the State. This case is stronger than that of *Allgeyer* in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside. The other limit upon the State's power due to its having permitted the plaintiff in error to establish itself as alleged, need not be considered here. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 414; *Cheney Brothers Co.* v. *Massachusetts,* 246 U. S. 147, 157; *Northwestern Mutual Life Insurance Co.* v. *Wisconsin,* 247 U. S. 132, 140.

Judgment reversed.

DAVIS, DIRECTOR GENERAL OF RAILROADS, AND AGENT UNDER SECTION 206 OF TRANSPORTATION ACT OF 1920, *v.* GREEN, ADMINISTRATRIX OF GREEN.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 132. Argued November 28, 1922.—Decided December 4, 1922.

1. A railroad company is not liable under the Federal Employers' Liability Act for an injury inflicted by the wanton, wilful act of an employee, out of the course of his employment. P. 351.
2. Where the case was tried upon the warranted assumption that the parties were engaged in interstate commerce at the time of the injury, the defendant cannot be deprived on review of rights under the federal act upon the ground that such employment was not adequately proved. P. 352.

125 Miss. 476, reversed.

CERTIORARI to a judgment of the Supreme Court of Mississippi, affirming, with a reduction, a judgment recovered by the present respondent in a consolidated action for the death of her husband.

Mr. T. J. Wills for petitioner.

Mr. J. W. Cassedy, with whom *Mr. E. L. Dent* was on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the Court.

This is an action made up of the consolidation of two suits, both brought to make the plaintiff in error liable for what is alleged to have been the wilful and wanton killing of Jesse Green, a conductor on the line of the Gulf & Ship Island Railroad Company, by one McLendon, an engineer. The first suit, although alleging that the railroad was a common carrier both intra and interstate, may be taken to have been brought under the state law. It was brought by the widow of Green on her own behalf and his children by her as next friend. To this the defendant pleaded in bar among other things that the plaintiffs ought not to have their action because at the time and place the parties were engaged in interstate commerce in this that the defendant and the employees named were engaged in transporting articles of commerce from and to foreign States. The second suit was brought three months later by the widow as administratrix and was intended to state a cause of action under either the law of the State or the act of Congress as the facts should turn out. To this also there was a plea in the words that we have quoted in abridged form. The plaintiff replied denying that she ought not to have her action because at the time and place of the said injury the defendant and the deceased were engaged in interstate commerce in this that, &c., following the words of the plea. This was a plain case of what in the old pleading was called a negative pregnant; it admitted the fact and only denied the conclusion. Very probably it was intended to deny the fact, as this mode of traversing a paragraph as a whole is very

common in the present careless ways, but it did not deny it in legal effect. Directly after the second suit was brought, the principal plaintiff was allowed to change the first to a suit by herself as administratrix and the two suits were consolidated on her motion. As the replication that we have mentioned seems to have been filed after the consolidation, perhaps it was regarded as going to the plea in both suits. Otherwise that in the first suit does not appear to have been put in issue. At the trial the judge ruled that the parties were engaged in interstate commerce, without objection so far as the record shows, but refused, subject to exception, to direct a verdict for the defendant. The plaintiff had a verdict and judgment for $35,000, and the case then was taken to the Supreme Court.

The Supreme Court sustained the judgment, although it held that the case was governed by state law. It held that on the general principle of liability the act of Congress and the law of the State agreed. It held, however, that there were important differences between the two laws with regard to the measure of damages and otherwise, and that as the case was tried under the act of Congress, and as on the evidence the highest amount that could have been recovered under the federal act was $16,000, the plaintiff must remit all above that amount if she would retain her judgment, although under the state law she could have recovered more.

The ground on which the Railroad Company was held was that it had negligently employed a dangerous man with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under

the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words that he did a wilful act wholly outside the scope of his employment while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of *respondeat superior* applies.

As we understand the opinion of the Supreme Court of Mississippi, it based its decision in part upon the assumption that liability for the engineer's act was imposed upon the defendant by both laws, and this assumption would be a sufficient ground for reversing the judgment. But we should come to the same conclusion even if our understanding were shown to be wrong. As the record stands, it appears to us that the case was tried upon the warranted supposition that there was no serious controversy as to the parties having been engaged in interstate commerce, and for that reason the defendant paid but slight attention to proving the fact. It seems at least not improbable that the parties were so engaged. In such circumstances the defendant is not to be deprived of its rights under the law of the United States by a decision that the fact now questioned was not adequately proved. On such matters we must judge for ourselves. If there is a new trial, probably the plaintiff will be allowed to dispute the character of the employment, if she is so advised. See *Bowen* v. *Illinois Central R. R. Co.*, 136 Fed. 306.

Judgment reversed.

McKELVEY ET AL. *v.* UNITED STATES.

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

No. 106. Argued November 21, 1922.—Decided December 4, 1922.

1. An indictment founded on a general statutory provision defining the offense need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere. P. 356.
2. The third section of the Act of February 25, 1885, c. 149, 23 Stat. 321, providing that "no person, by force, threats, intimidation or by any fencing or inclosing, or any other unlawful means, . . . shall prevent or obstruct free passage or transit over or through the public lands," applies to transient acts of force and intimidation as well as continuing obstacles such as a fence or the maintenance of an armed patrol. P. 357.
3. Punishment for offenses defined by the above act is not confined by the fourth section to persons acting as "owner, part owner or agent." P. 357.
4. Congress has power to punish intentional obstruction to free passage over the public lands within a State accomplished by acts of violence, and its exercise works no interference with the power of the State to punish the acts of violence as such. P. 358.

273 Fed. 410, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals, affirming a conviction in the District Court under an indictment for unlawful prevention and obstruction of free passage over the public lands.

Mr. Solon B. Clark, with whom *Mr. Ralph W. Adair* and *Mr. Chase A. Clark* were on the brief, for petitioners.

Mr. H. L. Underwood, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

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

The five petitioners were indicted, tried and convicted in the District Court of the United States for the District

of Idaho upon a charge of unlawfully preventing and obstructing, by means of force, threats and intimidation, free passage over and through certain unoccupied public lands of the United States by designated persons,—they being the three employees hereinafter mentioned. The Circuit Court of Appeals affirmed the judgment. 273 Fed. 410. A writ of certiorari brings the case here.

The record purports to contain the substance of the evidence in chief presented by the United States, but not the evidence produced by the defendants nor that of the United States in rebuttal. That which it does contain tends strongly to establish the following case:

In August, 1919, the owners of a band of sheep then about 30 miles northwest of Mackay, Idaho, committed to three employees the task of driving the sheep to a range on the other side of Mackay. A part of the route lay over unoccupied public lands of the United States in relative proximity to a stream, called Lost River. In that vicinity there were two well known trails. One, recently established,[1] passed on the east side of the river, and the other, theretofore used by the owners of the sheep, passed on the west side. The employees took the latter trail and, while following it in the usual way of driving sheep, were met by some of the defendants, who insisted that the lands thereabouts were used as a cattle range and demanded that the sheep be not driven along that trail, but taken to the trail on the other side of the river, four or five miles away. This occurred about eleven o'clock in the forenoon of August 25th, when it was very warm. One of the employees answered that the sheep should be permitted to rest until it became cooler and that they could not be taken across the river without an order from one of the owners. Such of the defendants as were present then pointed out a place where the sheep could be held

[1] Presumably under § 10 of the Act of December 29, 1916, c. 9, 39 Stat. 862.

in the shade and went away. About four o'clock in the afternoon some of the defendants returned and demanded that the sheep be moved to the other side of the river right away. To this the answer was made that instructions had been received, presumably by telephone, from one of the owners to await his coming, which would be later in the day. One of the defendants then requested his comrades to line up with their rifles, which they did, whereupon he proceeded to make a hostile demonstration against one of the employees and to chase him about, obviously as a matter of intimidation. These defendants then went away. That evening one of the owners arrived and directed that the driving be continued along the trail on which the employees were proceeding,—it being "the trail we always used" and "about three miles wide." Early the next morning, before the employees started the sheep again, one of the defendants returned and inquired what was going to be done and, on learning what the owner had directed, said: "You can't go through there." "Something will happen to you this morning." "Are you willing to take the consequences?" This defendant then rode away and a little later others of them rode up on a gallop, ordered the employees to put up their hands, which was done, and then began shooting. They shot and seriously injured one of the employees, threatened to finish him, and did other things calculated to put all three in terror. The defendants then moved two of the employees and the sheep to the other side of the river and took the wounded employee to a hospital. While some of the defendants were present at one time and some at another, the circumstances were such that what was done was the act of all. The lands through which this trail extended and over which the employees intended to drive the sheep were unoccupied public lands of the United States. The purpose of the defendants in all that they

did was to prevent the employees from proceeding with the sheep over those lands. The lands were comprised in two townships, each six miles square, and within these townships were several small tracts—a minor part of the whole—which were claimed and held by individuals under the public land laws; but the trail did not pass over these small tracts nor were the employees driving or intending to drive the sheep over them.

The indictment was founded on §§ 3 and 4 of the Act of February 25, 1885, c. 149, 23 Stat. 321, which read as follows:

"Sec. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided,* This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

"Sec. 4. That any person violating any of the provisions hereof, whether as owner, part owner, agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding one thousand dollars and be imprisoned not exceeding one year for each offence."

The indictment was challenged on several grounds by a demurrer and a motion in arrest of judgment, both of which were overruled; and error is assigned on these rulings.

One ground of objection is that the indictment contains no showing that the accused were not within the excep-

tion made in the proviso to § 3. This is not a valid ground. By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it. *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 10; *Javierre* v. *Central Altagracia*, 217 U. S. 502, 508, and cases cited.

Another ground is that the words of § 3, "or shall prevent or obstruct free passage or transit over or through the public lands," refer to a continuing obstacle to passage or transit in general, such as a fence or the maintenance of an armed patrol, and not to a transient obstacle to passage or transit by particular persons on a particular occasion, such as is charged here. We think this ground is not tenable. The words "by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means" are as comprehensive of transient means of obstruction as of continuing or relatively permanent means. Besides, it is "free" passage or transit that is to be unobstructed. Passage or transit is free in the sense intended when it is open to all. When some withhold it from others, whether permanently or temporarily, it is not free.

A third ground is that under § 4 the only punishable offenses are those wherein the offender acts as owner, part owner or agent, and that this indictment does not show that any of the defendants were so acting. This ground is without merit. While § 4 is not happily worded, there is no difficulty in getting at its meaning. It is the penal section and broadly fixes the punishment for the several acts made unlawful by the other sections.

Some of the proscribed acts involve an assertion of a groundless right to the exclusive use and occupancy of public lands, a right which the offender might be asserting in his own behalf, or in behalf of himself and another, or in behalf of others whom he serves as agent. But in several of the proscribed acts there is no such element. The offense charged here is of the latter class. With this understanding of the acts made unlawful by the other sections, it is apparent that the words " whether as owner, part owner, agent " in § 4 are intended merely to make sure that offenders acting as owners, part owners or agents are brought within the penal provision, and not to exclude other offenders therefrom or to absolve them from punishment.

It also is contended that § 3, when construed as we construe it, transcends the power of Congress and encroaches on the police power of the States. This contention proceeds on the assumption that the section, so construed, deals with acts of personal violence which do not affect the public lands or the rights of the United States in them. But this is a mistaken assumption. The section in terms, and as we construe it, deals with the obstruction by unlawful means of free passage over the public lands. It makes no attempt at dealing with acts of personal violence as such. Only when and as they are made the means—resorted to for the purpose—of effecting the prohibited obstruction does it take any account of them. The power of the State to deal with and punish them is not affected. Such acts may be an ingredient of an offense against the United States and also in themselves an offense against the State. The following excerpt from *Moore* v. *Illinois,* 14 How. 13, 20, is pertinent:

" The same act may be an offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States,

for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable."

It is firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned. *Camfield* v. *United States,* 167 U. S. 518, 525; *United States* v. *Grimaud,* 220 U. S. 506, 521; *Light* v. *United States,* 220 U. S. 523, 536; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404–405. The provision now before us is but an exertion of that power. It does no more than to sanction free passage over the public lands and to make the obstruction thereof by unlawful means a punishable offense.

It also is settled that the States may prescribe police regulations applicable to public land areas, so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments. Among the regulations to which the state power extends are quarantine rules and measures to prevent breaches of the peace and unseemly clashes between persons privileged to go upon or use such areas.

Two regulations of the latter type by the State of Idaho have been sustained by this Court,—one making it unlawful to herd sheep or permit them to graze within two miles of the dwelling house of another having a possessory claim to the land whereon the house stands, *Bacon* v. *Walker,* 204 U. S. 311, and the other making it unlawful to herd sheep or permit them to graze on a range which

by prior usage has come to be a cattle range, *Omaechevarria* v. *Idaho*, 246 U. S. 343. As construed by the Supreme Court of the State, these regulations are not intended to cover the driving of sheep from one range to another, nor such occasional grazing as is done by the sheep while being driven or during temporary stops for needed rest or similar purposes. In view of the instructions to the jury in this case the verdict must be taken as finding that there was no herding or grazing here which was forbidden by these regulations.

Complaint is made of several rulings on the trial, but we think all were right. As to some the complaint is disposed of by what has been said, and as to the others it is so wanting in substance that it does not call for special notice.

Judgment affirmed.

AMERICAN MILLS COMPANY *v.* AMERICAN SURETY COMPANY OF NEW YORK.

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

No. 118. Argued November 24, 1922.—Decided December 11, 1922.

1. In a suit to cancel a written guaranty for fraud, the defence that the plaintiff has an adequate remedy at law by defending actions brought by the defendant on the guaranty, is waived by the defendant where, without insisting upon it as he might, he introduces proof, under a counterclaim for the amount of the guaranty, putting the instrument in evidence. P. 363.
2. The provision of Equity Rule 30, that the answer must state any counterclaim arising out of the transaction which is the subject-matter of the suit, applies only to equitable, not to legal, claims. P. 363.

273 Fed. 67, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals, affirming a decree of the District Court which canceled a written guaranty for fraud.

Mr. Henry Uttal for petitioner.

Mr. Wm. Marshall Bullitt, with whom *Mr. Henry C. Willcox* and *Mr. Allan C. Rowe* were on the brief, for respondent.

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

This case involves a question of procedure and turns on the construction of Equity Rule 30. An understanding of the point at issue requires a statement of the facts and the course of the litigation.

In September, 1918, the Hartenfeld Bag Company, which was in a failing condition, owed the American Mills Company, the petitioner, about $22,000, which it was unable to pay. The Mills Company and the Bag Company made a contract, the performance of which by the Bag Company the American Surety Company guaranteed. The contract recited that the Mills Company had paid in advance to the Bag Company $22,100 for which the Bag Company was to deliver certain merchandise within seventy-five days, and in default of this delivery, the money was to be returned. The Bag Company delivered only $1,050 worth of goods and then went into bankruptcy. The fact was that the Mills Company had never made the advance payment of $22,000 recited in the contract, but instead of that, some days after the execution of the contract, the Mills Company and the Bag Company exchanged checks for a little less than this amount in order to create the appearance of a genuine transaction. The effect of what was done was that the Mills Company received a guaranty from the Surety Company of a bad debt, while the latter company thought it was insuring the performance of a *bona fide* contract of sale and delivery of goods by the Bag Company for which that company had received the full purchase price in advance. In December, 1918, after demand for payment

and refusal, the Mills Company, a corporation of Georgia, sued the Surety Company, a corporation of New York, on its guaranty in a state court in Georgia and in a state court in Illinois. In March, 1919, the Surety Company, before appearing in the Georgia or Illinois courts, filed the suit at bar in a state court in New York against the Mills Company seeking to cancel the guaranty on the ground of fraud and to enjoin its enforcement. The Mills Company removed the cause to the equity side of the District Court below, and then filed an answer and counterclaim in which it denied the alleged fraud and pleaded as a separate and distinct defense, that the Surety Company had an adequate remedy at law by setting up the alleged fraud as an answer to the suits in Georgia and Illinois, and second, as "a separate and distinct counterclaim to the cause of action alleged in the complaint" set up the execution of the guaranty, the default thereunder, notice to the Surety Company, demand for payment, refusal thereof and a prayer for "judgment against the plaintiff, on defendant's counterclaim, for the sum of $21,050, with interest." Thereafter the Mills Company twice moved to dismiss the action on the ground that the plaintiff had an adequate remedy at law and these motions were denied without prejudice to such action as the trial court might deem advisable. When the cause came on for hearing the Surety Company introduced proof of the fraud. The Mills Company introduced no evidence on the issue of fraud but made proof of the execution of the guaranty and the facts subsequent thereto to show the liability of the Surety Company and put the contract of guaranty in evidence. The court directed that it be delivered to the clerk and impounded. After both sides had rested in the case, the court called for an argument on the law of the case, announcing with emphasis that the fraud had been clearly shown. The court entered a decree canceling the guaranty, holding

that the defendant had waived its defense that there was an adequate remedy at law and had thereby given the court of equity jurisdiction to grant the relief prayed for by cancelation of the guaranty. *American Surety Co.* v. *American Mills Co.,* 262 Fed. 691. On appeal, the decree was affirmed by the Circuit Court of Appeals, 273 Fed. 67.

It is conceded by the respondent that its bill in equity in the District Court should have been dismissed because it had an adequate remedy at law. The cases of *Insurance Co.* v. *Bailey,* 13 Wall. 616, 622, and *Cable* v. *United States Life Insurance Co.,* 191 U. S. 288, 306, 307, settle that. Respondent therefore relies solely on the waiver of this defect by the Mills Company in doing what it did in the District Court. A defendant in a bill of equity may waive such a defect. *McGowan* v. *Parish,* 237 U. S. 285, 295; *Re Metropolitan Railway Receivership,* 208 U. S. 90, 109, 110; *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 380; *Reynes* v. *Dumont,* 130 U. S. 354, 395; 1 Daniell's Ch. Pr. (4th Amer. ed.) 555.

Did petitioner waive it? It made the objection seasonably both by answer and by motions to dismiss. The motions were denied without prejudice to their renewal when the cause should come on for hearing before the trial court. The defendant instead of renewing its motion to dismiss or insisting on the sufficiency of the first defense of its answer, introduced proof of its right to an affirmative judgment for the full amount of the guaranty, putting the written instrument in evidence. This certainly constituted a waiver unless the contention of the defendant, the petitioner here, that Equity Rule 30 required it to put in proof of its claim on penalty of being barred from prosecuting it at law, is sound.

The relevant part of Rule 30 is as follows:

"The answer *must* state in short and simple form any counter-claim arising out of the transaction which is the

subject matter of the suit, and *may,* without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims." (Italics ours.)

The petitioner argues that *must* and *may* are here set over against one another for the purpose of enforcing the intention and effect of the rule to require the defendant in an action in equity to set out any counterclaim arising out of the subject-matter of the bill, but to leave it to the option of the defendant whether a counterclaim or setoff not arising out of the same transaction shall be interposed or shall be prosecuted by independent bill. The respondent contends that while this may be correct, the counterclaim growing out of the same transaction must be an equitable claim and not a legal one as here. We concur in this view.

The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence and by uniting in one action as many issues as could conveniently be disposed of. But they normally deal with subjects-matter of which, under the dual system of law and equity, courts of equity can properly take cognizance. They certainly were not drawn to change in any respect the line between law and equity as made by the federal statutes, practice and decisions when the rules were promulgated. By the construction which petitioner would put upon Rule 30, it is an attempt to compel one who has a cause of action at law to bring it into a court of equity and then try it without a jury whenever the defendant in that cause can find some head of equity jurisdiction under which he can apply for equitable relief in respect of the subject-matter. The order of procedure as between the law and equity

sides in such cases always has been that the equity issue is first disposed of by the chancellor and then, unless that ends the litigation, the original plaintiff may have his action at law and his trial by jury secured him by the Seventh Amendment of the Constitution. *Liberty Oil Co.* v. *Condon National Bank, ante,* 235. Petitioner's construction of Rule 30 would deny the successful defendant in the equity action this right. Petitioner seeks to avoid the dilemma by the suggestion that the rule would be satisfied by merely pleading the action at law without proving it, but this would be futile. The counterclaim referred to in the first part of the paragraph must therefore be an equitable counterclaim, one which like the setoff or counterclaim referred to in the next clause could be made the subject of an independent bill in equity. The counterclaim and the setoff and counterclaim in the two clauses are *in pari materia,* except that the first grows out of the subject-matter of the bill and the other does not. That which grows out of the subject-matter of the bill must be set up in the interest of an end of litigation. That which does not, may be set up if the defendant wishes in one proceeding in equity quickly to settle all equitable issues capable of trial between them in such a proceeding, even though they are not related. *Buffalo Specialty Co.* v. *Vancleef,* 217 Fed. 91. The formality of cross-bills is not required, and the rule goes as far as possible to facilitate the prompt disposition of equitable controversies between the same litigants. The rule should be liberally construed to carry out its evident purpose of shortening litigation, but the limitation of counterclaims to those which are equitable is imperative. Equity Rule 30 was evidently suggested by Order XIX, Rule 3, of the English practice, but as the division between equity and law jurisdictions does not now obtain in the English courts, the English rule applies to all actions either at law or in

equity—Hopkins' Federal Equity Rules, 3rd ed., p. 195—and consideration of it does not aid us in the question we are discussing.

The result is that the petitioner as defendant was not obliged to set up and prove its action at law under Rule 30, and when it did so, by its affirmative action, it waived its previous objection to the equitable jurisdiction and also its right of trial by jury. An analogous effect of such affirmative action in pressing a counterclaim is seen in *Merchants Heat & Light Co.* v. *J. B. Clow & Sons,* 204 U. S. 286, 289, 290, where a non-resident corporation, having saved its right to object to the service of summons, lost it, not by answer, but by a counterclaim.

Decree affirmed.

CHAMPLAIN REALTY COMPANY *v.* TOWN OF BRATTLEBORO.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 128. Argued November 27, 28, 1922.—Decided December 11, 1922.

Logs, under control of their owner, which are being floated in a river in continuous movement from one State to another, or which, in the course of their interstate journey, are being temporarily detained by a boom to await subsidence of high waters and for the sole purpose of saving them from loss, are in interstate commerce and not subject to state taxation. P. 371. *Coe* v. *Errol,* 116 U. S. 517, and other cases, distinguished.

113 Atl. 806, reversed.

This was a suit in assumpsit by the petitioner, the Champlain Realty Company, to recover $484.50 and interest, from the Town of Brattleboro, Vermont, being the amount of taxes levied on logs of pulp wood of the petitioner floating in the West River in that town on April 1, 1919, and paid by the petitioner under protest as illegally collected because the logs were then in transit in interstate commerce to Hinsdale, New Hampshire. The suit

was brought in the County Court, and the defendant having failed to set the cause for jury trial within the time fixed by statute, it was heard by the court, which made findings of fact that under the state practice are conclusive on review by the Supreme Court. The County Court gave judgment for the Realty Company. The Town took the case on exceptions to the Supreme Court.

The Supreme Court summarized the findings of fact by the County Court as follows:

"During the winter of 1918–19, the plaintiff cut pulp wood, in all about 10,000 cords, in the towns of Jamaica, Stratton, Londonderry, and Winhall in this State. The plaintiff maintains a mill at Hinsdale, in the State of New Hampshire, about three miles below Brattleboro, where its pulp wood is rossed and bolted. The wood, cut four feet long, was placed upon the banks of West River and its tributaries to be floated down into the Connecticut and thence to its destination at the mill in Hinsdale. The waters of the West River are wholly in this State and empty in the town of Brattleboro into the Connecticut. West River and its tributaries had been used for driving pulp wood to the mill at Hinsdale in the years 1917 and 1918. A single log boom is provided at the mill to receive the wood floated down the river, but is incapable of holding it all when the water in the Connecticut is high and the current swift, and the wood is liable to be carried over and drawn under the boom and lost. A pond of considerable size is formed near the mouth of West River in the town of Brattleboro by water set back from the Connecticut by the dam at Vernon. Plaintiff maintains a boom at this point to hold and control the logs driven down West River until the water in the Connecticut has receded sufficiently to permit of their being held in the boom at Hinsdale.

"On March 25, 1919, the plaintiff began putting the pulp wood into the West River and its tributaries, the

water in these streams then being high, intending to drive it down the river and thence into the Connecticut and down that river to its mill in Hinsdale. In anticipation of the probable high water in the Connecticut, plaintiff had previously placed its boom across West River near its mouth to hold the wood there until the water in the Connecticut had receded enough to allow it to be held at the mill at Hinsdale. The wood floated down West River on the high water, and at the head of the drive reached the boom at the mouth of West River on March 27, 1919. At that time the Connecticut was so high and its current so swift that it was not thought safe to let the wood into that river, as it could not be held at the Hinsdale boom. For this reason and no other the plaintiff held its wood in the boom at Brattleboro. The Connecticut was not suitable for driving pulp wood from the time the drive began until April 3d, on which date the plaintiff's servants cut the boom at the mouth of West River so that the wood could pass into the Connecticut. Prior to April 3d, only about 4,000 cords of the wood had reached and been held at the West River boom. The balance arriving later went through to Hinsdale without stopping. On March 28, 1919, when there was by estimation about 4,000 cords of wood in the West River boom, it broke, allowing some of the wood to escape into the Connecticut and onto the Retreat meadow in Brattleboro near the mouth of West River. The boom was repaired on March 29, 1919. At this time the part of West River where the wood lay back of the boom, called the holding ground, was frozen, so the wood, if not boomed, could not have continued on its journey into the Connecticut at that time. On April 1, 1919, about 1,500 cords of the pulp wood was being held in plaintiff's boom at the mouth of West River. Some wood that was lodged on an island and the wood on the Retreat meadow remained after the boom was cut. The latter remained on the meadow about two weeks and had

to be taken out by a process called 'booming' or 'warping.' None of this 1,500 cords was cut in the town of Brattleboro. All of it had been carried down West River and was destined for the plaintiff's mill at Hinsdale, N. H., by way of the Connecticut. The drive of pulp wood down West River to the Connecticut and thence to the rossing plant at Hinsdale was in continuous operation from March 25th until it was completed on May 9th, and was conducted properly to make an uninterrupted passage, so far as possible."

On these findings the Supreme Court held that the interstate transit did not begin until the wood left the Brattleboro boom. Everything before that was merely preparations. The floating of the logs from the West River towns to Hinsdale was interrupted, and the interruption, although only long enough to secure safety in the drive, was for the benefit of the owner and in law postponed the initial step in the interstate transit until the wood was released from the Brattleboro boom. The court, therefore, held the wood taxable at Brattleboro and reversed the County Court.

Mr. William C. Cannon and *Mr. Melville P. Maurice,* with whom *Mr. Theodore W. Morris Jr.,* was on the briefs, for petitioner.

Mr. Arthur P. Carpenter and *Mr. Ernest W. Gibson* for respondent.

The facts clearly establish that the immediate destination of the wood, when it was started from the forest, was the pond behind the boom at the mouth of West River in Brattleboro. The wood was cut in the various towns in the West River Valley, and floated down the tributaries of West River, and that river itself, until it was gathered together in that safe haven, the pond, caused by the setback of the water of the Connecticut, behind the plaintiff's boom, called the " holding ground." The petitioner's

intention to float the wood, at some indefinite time, to its rossing mill at Hinsdale, is wholly immaterial. *Coe* v. *Errol,* 116 U. S. 517; *Diamond Match Co.* v. *Ontonagon,* 188 U. S. 82; *Bacon* v. *Illinois,* 227 U. S. 504; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Susquehanna Coal Co.* v. *South Amboy,* 228 U. S. 665; *Burlington Lumber Co.* v. *Willetts,* 118 Ill. 559; *Prairie Oil & Gas Co.* v. *Ehrhardt,* 244 Ill. 634.

When general statements in findings of fact made by the lower court are opposed to specific findings, as to what actually took place, made at the same time, the specific findings will control. *McCormick* v. *National Surety Co.,* 134 Cal. 510; *Gebhard* v. *Merchant,* 84 Ark. 359.

The interpretation given to findings of fact of a lower court by the State Supreme Court is binding here.

The findings of fact referred to when read as a whole and in the light of the specific findings, as to what actually took place, clearly support the interpretation given to them by the Vermont Supreme Court, namely, that at the time of the assessment of the tax, April 1, 1919, the pulp wood " was then at rest in the boom at Brattleboro for a time necessarily indefinite and for a purpose beneficial to the plaintiff." The plaintiff made preparations long in advance of starting the wood down West River and its tributaries to stop the wood in the " holding ground " at Brattleboro. It built and maintained a boom there, and as early as the middle of March, ten days before any of the wood started down the river, it " placed its boom across West River near its mouth and in the town of Brattleboro for the purpose of holding the wood in the West River until the water in the Connecticut had receded enough to allow the wood to be held on said river at plaintiff's said mill at Hinsdale." For whose " convenience and benefit " was this boom at the mouth of West River built and maintained if not for the convenience and benefit of the plaintiff?

The plaintiff apparently loses sight of the distinction between the cases where property is delivered to a common carrier for transportation out of the State and the cases where property, as in this case, is being transported by the owner and is at all times under its control.

The plaintiff had the privilege of continuing the transportation, but of this it might avail itself or not as it chose. It might sell the wood in Vermont or forward it, as it saw fit. It was in its possession with the control of absolute ownership. It may have intended, at an indefinite time, to forward the wood to its rossing mill in Hinsdale, N. H., but this intention, while the wood remained in the boom at Brattleboro and before it had been started from the boom on its final journey, did not make it immune from local taxation.

In an action to recover money paid as a tax the burden is upon the plaintiff to show that the tax was illegally assessed; or, to be specific, to establish the interstate character of the transportation.

Mr. Chief Justice Taft, after stating the case, delivered the opinion of the Court.

The Vermont Supreme Court depended for its conclusions chiefly upon *Coe* v. *Errol,* 116 U. S. 517, which is the leading case on this subject. There logs had been cut on Wentworth's Location in New Hampshire during the winter, and had been drawn down to Errol in the same State, and placed in Clear Stream and on the banks thereof on lands of John Akers and part on land of George C. Demerritt in said town, to be from thence floated down the Androscoggin River to the State of Maine (p. 518).

It is not clear how long they had lain there, but certainly for part of one winter season. This Court, speaking by Mr. Justice Bradley, sought to fix the time when

such logs, in the course of their being taken from New Hampshire to Maine, ceased to be part of the mass of property of New Hampshire and passed into the immunity from state taxation as things actually in interstate commerce. The learned Justice states the rule to be " that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." (P. 527.)

Again, on page 528, Justice Bradley said: " The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri,* and not at all a fixed and certain thing.

" The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the State of

Maine. They had only been drawn down from Wentworth's Location to Errol, the place from which they were to be transported to Lewiston in the State of Maine. There they were to remain until it should be convenient to send them to their destination." (P. 528.)

The question here then is, Where did the interstate shipment begin? When the wood was placed in the waters of the West River in the towns of Jamaica, Stratton, Londonderry and Winhall, or at the boom in Brattleboro? The whole drive was ten thousand cords. Six thousand cords of that, shipped from these towns after the third of April, went through directly to Hinsdale, New Hampshire, without stopping. Certainly that was a continuous passage and the wood when floating in the West River was as much in interstate commerce as when on the Connecticut. Why was it any more in interstate commerce than that which had been shipped before April 3rd from the same towns for the same destination by the same natural carrying agency, to wit, the flowing water of the West and Connecticut Rivers? Did the fact that before April 3rd the waters of the Connecticut were frozen, or so high as to prevent the logs reaching Hinsdale, requiring a temporary halting at the mouth of the West River, break the real continuity of the interstate journey? We think not. The preparation for the interstate journey had all been completed at the towns on the West River where the wood had been put in the stream. The boom at the mouth of the West River did not constitute an entrepot or depot for the gathering of logs preparatory for the final journey. It was only a safety appliance in the course of the journey. It was a harbor of refuge from danger to a shipment on its way. It was not used by the owner for any beneficial purpose of his own except to facilitate the safe delivery of the wood at Hinsdale on their final journey already begun. The logs were not detained to be classified, measured, counted

or in any way dealt with by the owner for his benefit, except to save them from destruction in the course of their journey that but for natural causes, over which he could exercise no control, would have been actually continuous. This was not the case in *Coe* v. *Errol.* It is evident from the statement of that case, and Mr. Justice Bradley's language, that the logs were partly drawn and partly floated to Errol and deposited some in the stream and some on the banks, where " they were to remain until it should be convenient to send them to their destination," and they were being gathered there for the whole previous winter season. It was an entrepot or depot as the Justice several times describes it. The mere fact that the owner intended to send them out of the State under such circumstances did not put them into transit in interstate commerce. But here, we have the intention put into accomplishment by launching, and manifested by an actually continuous journey of more than half the drive, with a halting of less than half of it in the course of the interstate journey to save it from loss, and only for that purpose.

The case at bar is easily distinguishable from the other cases cited by the Vermont Supreme Court. In *Bacon* v. *Illinois,* 227 U. S. 504, Bacon had bought shipments of grain *in transitu* from Western States to New York in the contract for which the carriers had given the shipper the right to remove it " for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination." On arrival of the grain in Chicago, Bacon removed the grain from the cars to his private elevator. This removal was for the purpose of inspecting, weighing, grading, mixing, etc., but not to change its ownership, consignee or destination. It was held that whatever his intention, the grain was at rest within his complete power of disposition and held for his

own benefit and was taxable. His storing of the grain was not to facilitate interstate shipment of the grain, or save it from the danger of the journey. It was to enable him to treat the grain so as to enable him more conveniently to dispose of it. He made his warehouse a depot for its preparation for further shipment and sale. He had thus suspended the interstate commerce journey and brought the grain within the taxable jurisdiction of the State.

So, in *General Oil Co.* v. *Crain,* 209 U. S. 211, the Oil Company had its principal place of business in Memphis, Tennessee, for the manufacture and sale of illuminating oils in interstate commerce. It imported oil from other States and put it into a tank, appropriately marked for distribution in smaller vessels to fill orders for oil already sold in Arkansas, Louisiana and Mississippi. The Court held that the first shipment had ended, that its storage at Memphis for division and distribution to various points was for the business purposes and profit of the company. The Court continued: "It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation." (P. 231.) The tank at Memphis thus became a depot in its oil business for preparing the oil for another interstate journey. So far as it bears upon this case, *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, presented a similar state of facts and ruling.

In *Diamond Match Co.* v. *Ontonagon,* 188 U. S. 82, the company cut one hundred and eighty million feet of timber for the purpose of saving the same from fire and to protect and preserve it put it into the Ontonagon River, Michigan. It was drawn down to the mouth of the river into the township of Ontonagon, Michigan, to the sorting ground and pier jams of the company, and there it was taxed. The logs remained there and were

shipped as they were needed to Green Bay, Wisconsin, to the mills of the company. Not more than forty million feet a season were needed. Palpably the company's sorting grounds and pier jams were a depot for the keeping of the logs for the business purposes of the company and there was no interstate commerce until the final shipment to Green Bay began.

In the cases of *Brown* v. *Houston,* 114 U. S. 622, and *Pittsburg & Southern Coal Co.* v. *Bates,* 156 U. S. 577, the coal in barges in the Mississippi River which was the subject of taxation had come to rest in Louisiana, after a trip from Pittsburg, and was being held for sale to anyone who might wish to buy.

The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative, unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one State to another, in the course of such an uninterrupted journey it is clearly immune. The doubt arises when there are interruptions in the journey and when the property in its transportation is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. *State* v. *Engle,* 34 N. J. L. 425; *State* v. *Carrigan,* 39 N. J. L. 35. This was the case in *Kelley* v. *Rhoads,* 188 U. S. 1, in which sheep, driven 500 miles from Utah to Nebraska, which travelled nine miles a day, were held immune from taxation in Wyoming where they stopped and grazed on their way. Another instance is as to that part of the logs in *Coe* v. *Errol,* which were not before this Court because the Supreme Court of New Hampshire had found them nontaxable in New Hampshire. They were cut in Maine and were floated down the Androscoggin on their way to Lewiston, Maine, but were delayed for a season at Errol,

New Hampshire, because of low water. In the cases just cited the transit had begun in one State and was continued through another on the way to a third. This circumstance strengthened the inference that the interruption in the intermediate State did not destroy interstate continuity of the trip. But this is not always so, as *Bacon* v. *Illinois* and *General Oil Co.* v. *Crain* show. In other words, in such cases interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied.

Of all the cases in this Court where such movable property has been held taxable, none is nearer in its facts than *Coe* v. *Errol* to the case at bar. We have pointed out the distinction between the two which requires a different conclusion here.

Reversed and remanded for further proceedings not inconsistent with this opinion.

UNITED STATES *v.* LANZA ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 39. Argued November 23, 1922.—Decided December 11, 1922.

1. The second section of the Eighteenth Amendment, declaring "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation," means that power to take legislative measures to make the policy of the amendment effective shall exist in Congress in respect of the territorial limits of the United States, and that, at the same time, the like power of the several States within their territorial limits shall not cease to exist. P. 381.

2. The Amendment did not displace or cut down state laws consistent with it. P. 381.
3. The Amendment is not, properly speaking, the source of the State prohibitory power, but, rather, its effect is to put an end to restrictions on the State's power arising from the Federal Constitution, and to leave the State free to enact prohibition laws applying to all transactions within her limits. P. 381.
4. When the same act is an offense against both state and federal governments, its prosecution and punishment by the latter after prosecution and punishment by the former, is not double jeopardy, within the Fifth Amendment. P. 382.
5. In the absence of special provision by Congress to the contrary, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors, is not a bar to a prosecution in a court of the United States under the National Prohibition Law, for the same acts. P. 385.

268 Fed. 864, reversed.

ERROR to an order of the District Court, sustaining a special plea in bar and dismissing five counts of an indictment.

Mr. Solicitor General Beck, with whom *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, was on the briefs, for the United States.

Mr. John F. Dore for defendants in error.

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

This is a writ of error by the United States under the Criminal Appeals Act (c. 2564, 34 Stat. 1246), to reverse an order of the District Court for the Western District of Washington dismissing five counts of an indictment presented against the defendants in error April 28, 1920. The first of these charged the defendants with manufacturing intoxicating liquor, the second with transporting it, the third with possessing it, and the fourth and fifth with having a still and material designed for its manufacture,

about April 12, 1920, in violation of the National Prohibition Act (c. 85, 41 Stat. 305). The defendants filed a special plea in bar setting out that on April 16, 1920, an information was filed in the Superior Court of Whatcom County, Washington, charging the same defendants with manufacturing, transporting and having in possession the same liquor, and that on the same day a judgment was entered against each defendant for $250 for manufacturing, $250 for transporting, and $250 for having in possession such liquor. The information was filed under a statute of Washington in force before the going into effect of the Eighteenth Amendment, and passage of the National Prohibition Act. (Remington's Codes & Stats., § 6262, as amended by Session Laws 1917, c. 19, p. 46.) The Government demurred to the plea. The District Court sustained the plea and dismissed the five counts. *United States* v. *Peterson,* 268 Fed. 864. No point is made by the Government in the assignments of error that counts four and five, for having a still and material in possession, were not covered by the information, and judgment by the state court.

The Eighteenth Amendment is as follows:

" Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

" Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The defendants insist that two punishments for the same act, one under the National Prohibition Act and the other under a state law, constitute double jeopardy under the Fifth Amendment; and in support of this position it is argued that both laws derive their force from the same

authority,—the second section of the Amendment,—and therefore that in principle it is as if both punishments were in prosecutions by the United States in its courts.

Consideration of this argument requires an analysis of the reason and purpose of the second section of the Amendment. We dealt with both sections in the *National Prohibition Cases,* 253 U. S. 350. The conclusions of the Court, relevant here, are Nos. 6, 7, 8 and 9.

"6. The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits.

"7. The second section of the Amendment—the one declaring 'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation'—does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.

"8. The words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

"9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them."

The Amendment was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.

To regard the Amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, state power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the Amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with

it, not from this Amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the *ratio decidendi* of our decision in *Vigliotti* v. *Pennsylvania,* 258 U. S. 403.

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government, *Barron* v. *Baltimore,* 7 Pet. 243, and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States and so is not double jeopardy.

This view of the Fifth Amendment is supported by a long line of decisions by this Court. In *Fox* v. *Ohio,* 5 How. 410, a judgment of the Supreme Court of Ohio was under review. It affirmed a conviction under a state law

punishing the uttering of a false United States silver dollar. The law was attacked as beyond the power of the State. One ground urged was that, as the coinage of the dollar was entrusted by the Constitution to Congress, it had authority to protect it against false coins by prohibiting not only the act of making them but also the act of uttering them. It was contended that if the State could denounce the uttering, there would be concurrent jurisdiction in the United States and the State, a conviction in the state court would be a bar to prosecution in a federal court, and thus a State might confuse or embarrass the Federal Government in the exercise of its power to protect its lawful coinage. Answering this argument, Mr. Justice Daniel for the Court said (p. 435):

"It is almost certain, that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration."

This conclusion was affirmed in *United States* v. *Marigold,* 9 How. 560, 569, where the same Justice said that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal Governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."

The principle was reaffirmed in *Moore* v. *Illinois,* 14 How. 13; in *United States* v. *Cruikshank,* 92 U. S. 542, 550, 551; in *Ex parte Siebold,* 100 U. S. 371, 389, 390, 391; in *Cross* v. *North Carolina,* 132 U. S. 131, 139; in *Pettibone* v. *United States,* 148 U. S. 197, 209; in *Crossley* v. *California,* 168 U. S. 640, 641; in *Southern Ry. Co.* v. *Railroad Commission of Indiana,* 236 U. S. 439; in *Gilbert* v. *Minnesota,* 254 U. S. 325, 330, and, finally, in *McKelvey* v. *United States, ante,* 353.

In *Southern Ry. Co.* v. *Railroad Commission of Indiana, supra,* Mr. Justice Lamar used this language (p. 445):

"In support of this position numerous cases are cited which, like *Cross* v. *North Carolina,* 132 U. S. 131, hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. This concurrent jurisdiction may be either because the nature of the act is such that at the same time it produces effects respectively within the sphere of state and federal regulation and thus violates the laws of both; or, where there is this double effect in a matter of which one can exercise control but an authoritative declaration that the paramount jurisdiction of one shall not exclude that of the other."

These last words are peculiarly appropriate to the case presented by the two sections of the Eighteenth Amendment. The court below is the only District Court which has held conviction in a state court a bar to prosecution for the same act under the Volstead Law. *United States* v. *Holt,* 270 Fed. 639; *United States* v. *Bostow,* 273 Fed. 535; *United States* v. *Regan,* 273 Fed. 727; *United States* v. *Ratagczak,* 275 Fed. 558.

Counsel for defendants in error invokes the principle that, as between federal and state jurisdictions over the same prisoner, the one which first gets jurisdiction may first exhaust its jurisdiction to the exclusion of the other. *Ponzi* v. *Fessenden,* 258 U. S. 254. This is beside the point and has no application. The effect of the ruling of the court below was to exclude the United States from jurisdiction to punish the defendants after the state court had exhausted its jurisdiction and when there was no conflict of jurisdiction.

If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision; but it has not done so. If a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect. But it is not for us to discuss the wisdom of legislation, it is enough for us to hold that, in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts.

Judgment reversed with direction to sustain the demurrer to the special plea in bar of the defendants and for further proceedings in conformity with this opinion.

REGAL DRUG CORPORATION *v.* WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE OF THE FIRST DISTRICT OF CALIFORNIA.

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

No. 108. Submitted November 28, 1922.—Decided December 11, 1922.

Lipke v. *Lederer,* 259 U. S. 557, followed, to the effect that penalties and so-called taxes for alleged violations of the National Prohibition Act, cannot be imposed and summarily enforced by distraint of property, without notice and an opportunity to be heard; and that Rev. Stats., § 3224, does not preclude injunctive relief against such unlawful action. P. 390.

273 Fed. 182, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals, affirming a decree of the District Court, which sustained a demurrer and dismissed the bill in a suit brought by the petitioner to enjoin the respondent revenue collector from enforcing collection of unlawful taxes and penalties.

Mr. John W. Preston for petitioner.

Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt, Assistant Attorney General, and *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, for respondent.

The Government concedes that under the decision in *Lipke* v. *Lederer,* 259 U. S. 557, penalties and double taxes could not be collected in the manner here attempted.

But it contends that under tax laws which antedated the National Prohibition Act, and which were expressly retained under that act, the Commissioner of Internal Revenue properly levied taxes (not double taxes) on the distilled spirits and wines used for beverage purposes,

and the Collector of Internal Revenue properly sought to collect such taxes by distraint proceedings.

Section 35 of the Prohibition Act provides: "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."

There is nothing in *Lipke* v. *Lederer* which militates against this portion of § 35 or which shows that pre-existing taxes may not be collected in the manner in which such taxes had been collectible.

In *United States* v. *Yuginovich,* 256 U. S. 450, this Court said: "That Congress may, under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished, we have no question. . . . Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power."

In the *License Tax Cases,* 5 Wall. 462, it was expressly decided that Congress might tax businesses which were prohibited by valid state laws. See *Youngblood* v. *Sexton,* 32 Mich. 406, per Cooley, C. J.

Mr. Justice McKenna delivered the opinion of the Court.

The case involves the legality of taxes, assessments or penalties under the revenue law or the National Prohibition Act, upon certain distilled spirits and liquors of the Regal Drug Corporation (herein called complainant), and the distraint of its store and the property contained therein.

The remedy sought is by injunction against respondent, Wardell, as Collector of Internal Revenue, from taking or continuing in possession of the store and its property,

or from conducting any action or proceeding to enforce the collection of the taxes, assessments or penalties.

Complainant presented the grounds of its prayer in a bill of complaint filed in the Southern Division of the United States District Court for the Northern District of California.

The Collector demurred to the bill on the ground, among others, that complainant had a "plain, speedy, adequate and complete remedy at law." The District Court sustained the demurrer and decreed the dismissal of the suit. The ruling and decree were affirmed upon appeal of complainant by the Circuit Court of Appeals for the Ninth Circuit.

The bill of complaint is an amended one. A summary of its allegations is all that is necessary and the facts alleged may be assumed to be true. They are as follows: The complainant is a corporation under the laws of California and the defendant (respondent here) is the United States Collector of Internal Revenue for the First District of California. On the 28th day of October, 1919, complainant was the holder of a permit duly issued to it to sell intoxicating liquor and distilled spirits for non-beverage purposes, and continued to be the holder thereof until some time in June, 1920, during which time it was in force.

During that time complainant purchased and withdrew from the bonded warehouses distilled spirits and intoxicating liquors to the amount of 17,900 gallons, and also 450 gallons of sweet wines containing not over 21% of alcohol, and purchased about 20 gallons of dry wines containing not over 14% of alcohol. All taxes and assessments against the spirits and liquors that were levied or could be levied were paid by the complainant in advance, and during the time the permit was in force complainant sold and disposed of the spirits and liquors under the permit, "and under and in accordance with the provisions of the National Prohibition Act." Complainant also complied

with the law in regard to filing a bond in the sum of $100,000.

Complainant had in its drug store during the time mentioned, a stock of drugs, medicines and sundries of the value of about $15,000.

That in or about the month of June, 1920, the Commissioner of Internal Revenue levied against complainant a so-called assessment or tax at the rate of $6.40 per gallon, amounting in the aggregate to $115,092.50, upon all distilled liquors that had been withdrawn by complainant from the bonded warehouses between October 28, 1919, and the time when complainant's permit to sell and dispose of the spirits was revoked, to wit, in the month of June, 1920.

The Commissioner also levied arbitrarily, a so-called tax or assessment against complainant at the rate of 40 cents a gallon on the sweet wines purchased and disposed of by complainant, and 16 cents a gallon on the dry wines.

None of the levies were either taxes or assessments but were fines and penalties imposed on complainant without notice or a hearing.

Complainant had already paid taxes on all of the articles amounting to the sum of $39,656.89. The Commissioner of Internal Revenue claimed and claims there is due the further sum of $75,592.61.

The Commissioner also levied against complainant a penalty of $500 for selling spirits in violation of law, and a penalty of $93.75 for conducting the business of a rectifier, in violation of law, and a penalty of $1,000 a month for having manufactured distilled spirits or intoxicating liquors in violation of law.

The levies of the taxes and assessments were without notice or hearing, or that the same were proposed, and complainant was, therefore, without knowledge or information of the proposed action or the basis or grounds of it. No evidence was taken or received by the Commissioner in regard thereto prior to the attempted levy.

On the 19th day of July, 1920, the Commissioner took possession of complainant's drug store and of the entire stock of drugs and goods therein, excluding complainant therefrom, and is proceeding to and threatening to sell the same in order to satisfy the so-called assessments or taxes and penalties, and that the damage done to complainant will be irreparable.

The District Court, comparing the inconvenience and loss to the parties from a preliminary injunction, said it would grant one but for § 3224 [1] of the Revised Statutes of the United States, which the court considered applied and forbade relief by injunction. The court also expressed a doubt of the validity of the tax but was of the view that the fact did not preclude the application of the statute. For this conclusion the court cited *Snyder* v. *Marks,* 109 U. S. 189; *Dodge* v. *Osborn,* 240 U. S. 118, and other cases.

The court decreed the dismissal of the suit. The Circuit Court of Appeals affirmed the decree, citing the same cases, and expressed the view that they conclusively determined against relief by injunction, even if the tax could be considered " in the nature of a penalty."

Since the decision of the Circuit Court of Appeals we have decided a case which is a necessary factor to be considered. In *Lipke* v. *Lederer,* 259 U. S. 557, the power of a collector of internal revenue under circumstances such as are presented by this record was passed upon, the limitations upon it, and the rights of one against whom it is attempted to be exercised.

The case originated in the District Court of the Eastern District of Pennsylvania, and was brought, as the case at bar is, to restrain the enforcement of a tax on the ground that it was the imposition of a penalty, not a tax, and was not preceded by a hearing. The bill was dis-

[1] Sec. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

missed by the District Court upon the authority of *Ketterer* v. *Lederer,* 269 Fed. 153, that case deciding that an injunction could not be issued to restrain the collection of a tax.

The facts of the case were these: Lipke paid all revenue taxes required by the laws for the year ending June 30, 1920. He held a retail liquor license under the laws of the State. On December 29, 1920, he was arrested for selling liquor, under the National Prohibition Act, and gave bail to appear and answer in the United States District Court.

On March 18, 1921, he was notified that there was assessed against him a tax (its amount was stated), and if not paid within 10 days, a penalty would be added to the tax. On March 31st, he received a second demand and was advised that, if the tax and penalty were not paid within 10 days, collection of the same with accrued interest and costs would "be made by seizure and sale of property."

To restrain the execution of the threat, the suit was brought, Lipke alleging that he was "wholly without adequate remedy at law to prevent such seizure of his property."

Passing on § 3244 of the Revised Statutes, which was urged against the suit, it was decided that the section had no application, and that § 35 of the Prohibition Act did not confer the power the Collector threatened to exercise. Describing the power, we said, that the Collector was undertaking to punish Lipke "by fine and penalty for an alleged criminal offense without hearing, information, indictment or trial by jury, contrary to the Federal Constitution." And we said further that, if the "section has the meaning ascribed to it by the defendant [the Collector], it is unconstitutional."

The distinction between a tax and a penalty was emphasized. The function of a tax, it was said "is to pro-

vide for the support of the government," the function of a penalty clearly involves the "idea of punishment for infraction of the law," and that a condition of its imposition is notice and hearing. *O'Sullivan* v. *Felix,* 233 U. S. 318, 324. And even if the imposition may be considered a tax, if it have punitive purpose, it must be preceded by opportunity to contest its validity. *Central of Georgia Ry. Co.* v. *Wright,* 207 U. S. 127.

We took pains to say that "evidence of crime (§ 29) is essential to assessment under § 35", and that we could not "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 comment and decision are applicable here, and decisive. The Government concedes that the case is conclusive against the "penalties and double taxes", but contends that, of tax laws which antedated the National Prohibition Act, only inconsistent laws are repealed, and that taxes in this case were levied under a law not inconsistent. For this § 35 is adduced. *Lipke* v. *Lederer* manifestly precludes the contention.

The contention encounters, besides, the averments of the bill. They assert that all taxes that were or could be levied were paid by complainant, and that those against which the bill is directed were imposed without notice or hearing as penalties for criminal violations of the law. The facts are not denied. They impel the application of *Lipke* v. *Lederer,* and the reversal of the action of the District Court and that of the Circuit Court of Appeals.

Reversed and remanded to the District Court for further proceedings in accordance with this opinion.

PENNSYLVANIA COAL COMPANY *v.* MAHON ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 549. Argued November 14, 1922.—Decided December 11, 1922.

1. One consideration in deciding whether limitations on private property, to be implied in favor of the police power, are exceeded, is the degree in which the values incident to the property are diminished by the regulation in question; and this is to be determined from the facts of the particular case. P. 413.
2. The general rule, at least, is that if regulation goes too far it will be recognized as a taking for which compensation must be paid. P. 415.
3. The rights of the public in a street, purchased or laid out by eminent domain, are those that it has paid for. P. 415.
4. Where the owner of land containing coal deposits had deeded the surface with express reservation of the right to remove all the coal beneath, the grantees assuming the risk and waiving all claim to damages that might arise from such mining, and the property rights thus reserved, and contracts made, were valid under the state law, and a statute, enacted later, forbade mining in such way as to cause subsidence of any human habitation, or public street or building, etc., and thereby made commercially impracticable the removal of very valuable coal deposits still standing unmined, *held*, that the prohibition exceeded the police power, whether viewed as a protection to private surface owners or to cities having only surface rights, and contravened the rights of the coal-owner under the Contract Clause of the Constitution and the Due Process Clause of the Fourteenth Amendment.[1] P. 413.

274 Pa. St. 489, reversed.

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[1] The following summary of the statute involved is taken from the opinion of the Pennsylvania Supreme Court:

The statute is entitled: "An act regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties."

Section 1 provides that it shall be unlawful "so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of (*a*) Any public building or any structure cus-

ERROR to a decree of the Supreme Court of Pennsylvania, for the defendants in error, in their suit to enjoin the Coal Company from mining under their property in such way as to remove supports and cause subsidence of the surface and of their house.

Mr. John W. Davis with whom *Mr. Frank W. Wheaton, Mr. Henry S. Drinker, Jr.,* and *Mr. Reese H. Harris* were on the brief, for plaintiff in error.

I. The statute impairs the obligation of the contract between the parties.

On August 26, 1921, the Mahons were bound by a valid covenant to permit the Coal Company, which had sold to them or to their ancestor the surface rights only in their lot, to exercise without objection or hindrance

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tomarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations; (*b*) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public; (*c*) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law; (*d*) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed; (*e*) Any cemetery or public burial ground."

Sections 2 to 5, inclusive, place certain duties on public officials and persons in charge of mining operations, to facilitate the accomplishment of the purpose of the act.

Section 6 provides the act "shall not apply to [mines in] townships of the second class [i. e., townships having a population of less than 300 persons to a square mile], nor to any area wherein the surface overlying the mine or mining operation is wild or unseated land, nor where such surface is owned by the owner or operator of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person."

Section 7 sets forth penalties; and § 8 reads: "The courts of common pleas shall have power to award injunctions to restrain violations of this act." P. L. 1921, p. 1198.

by them, its reserved right to mine out all the coal, without liability to them for damages occasioned thereby, which damages had been expressly waived as a condition for the grant. On August 27, 1921, the statute completely annulled this covenant, by giving them the right, by injunction, to prevent such mining. The fact that this contract was contained in a deed of conveyance does not make it any the less a contract within the constitutional protection. A deed is a contract between the parties thereto, even though the grantor is a sovereign State. *Fletcher* v. *Peck,* 6 Cr. 87, 137; *Ohio Trust Co.* v. *Debolt,* 16 How. 416, 432.

II. The statute takes the property of the Coal Company without due process of law.

Whenever the use of the land is restricted in any way or some incorporeal hereditament is taken away which was appurtenant thereto, it constitutes as much a taking as if the land itself had been appropriated. Tiedeman, State and Federal Control of Real and Personal Property, p. 702, § 143; *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166; *Commonwealth* v. *Clearview Coal Co.,* 256 Pa. St. 238.

If an act would be unconstitutional which specifically required one-third of the coal to be left in place to support the surface, it is in no way saved by the subterfuge of permitting the mining, provided this does not cause the subsidence which will inevitably result unless the Coal Company provides artificial support at a cost exceeding the value of the coal. The theoretical right to remove the coal without disturbing the surface is, as a practical matter, no more available than was Shylock's right to his pound of flesh.

As pointed out in Justice Kephart's dissenting opinion, the courts of Pennsylvania have recognized three distinct estates in mining property: (1) The right to use the surface; (2) the ownership of the subjacent minerals; (3) the right to have the surface supported by the subjacent strata.

This third right, called the Third Estate, has been recognized as so distinct from the ownership of the surface or of the minerals that it may be transferred to and held or conveyed by one who was neither the owner of the surface nor of the coal. *Penman* v. *Jones,* 256 Pa. St. 416; *Charnetski* v. *Coal Co.,* 270 Pa. St. 459; *Young* v. *Thompson,* 272 Pa. St. 360.

III. The statute is not a *bona fide* exercise of the police power.

With the swing of the popular pendulum during recent years, the descendants of the able lawyers who, forty years ago, were employed to draft special legislation, are now employed in drafting laws to evade the restrictions of the state and federal constitutions. This legislation divides itself generally into two classes. In the first class fall those laws which are prompted by upright and public spirited progressives who, impelled by the need for the immediate adoption of the reforms which they advocate, are impatient at the constitutional restrictions on federal and state power, and are unwilling to await the enlargement of such powers by constitutional amendment. Examples of this class of law are the two recent Child Labor Acts.

The second class consists of laws passed at the insistence of a determined and organized minority, designed to confiscate for their benefit the rights of producers of property, and passed by a legislature in time of political stress, in its anxiety to secure the votes controlled by the advocates of the measure. Such a law, we submit, is the Kohler Act. To protect a complaisant public from such laws is one of the primary functions of the courts.

When it is asserted that a statute is not what the legislature sought to have it appear, it is necessary for those attacking its constitutionality to point, in the statute itself, to evidences which, viewed in the light of the court's knowledge of human nature and of legislative practice, are sufficient to demonstrate the position taken.

So tested, the Kohler Act is in reality what this Court in *Loan Association* v. *Topeka,* 20 Wall. 655, characterized as "not legislation," but "robbery under the forms of law."

It will be observed that the favored expedient of the draughtsmen of legislation of either of the classes to which we have alluded, is to dress up their statute in the garb of a statute properly coming within one of the recognized powers of the legislative body enacting it.

The Kohler Act speaks as a regulation of the mining of anthracite coal, to protect the lives and safety of the public. It begins with a vivid preamble, from which it would appear that a considerable part of the population of Pennsylvania is in immediate danger of the loss of life and limb by being incontinently projected into unexpected abysses formed by the sudden subsidence of the surface by reason of the mining of anthracite coal. In his dissenting opinion, however, Mr. Justice Kephart states that the actual damage to date is confined to a small portion of the City of Scranton. Anthracite mining, however, is conducted in nine counties under a surface area comprising 496 square miles. While this preamble may possibly be regarded as spontaneous expression by the legislature of the reasons for the passage of the act, we call attention to the fact that an honest and valid law needs no specious preamble to bolster up its constitutionality. Is it not an equally plausible explanation of the preamble that the framers of this act knew full well that it was not really a police regulation and were seeking to coerce the courts into holding it to be such merely by affixing to it a label?

The act also contains a clause emphasizing that it is remedial legislation and craving a broad construction, which, if the act is what it says it is, will not help it, but which, if it is really a confiscatory measure masquerading as a police regulation, merely serves to emphasize this

feature. The preamble and § 9 are the hand of Esau. Section 1 is the voice of Jacob. *Dobbins* v. *Los Angeles,* 195 U. S. 223; *Lawton* v. *Steele,* 152 U. S. 133.

Does the interest of the public generally, as distinguished from the private interest of Mr. and Mrs. Mahon, require that they shall be under no necessity of removing temporarily from their dwelling while the mining under their lot is going on, or of themselves making the necessary expenditures to repair their house and to fill up the cracks in their sidewalk and lawn after the subsidence is completed, using that part of the purchase money which they saved by buying the lot without the right of support?

Are the drastic prohibitions of § 1 reasonably necessary to protect the lives and safety of persons on the Mahon lot or are they unduly oppressive on the Coal Company?

The act shows on its face that its purpose is not to protect the lives or safety of the public generally but merely to augment the property rights of a favored few.

Genuine public streets or public property where the right of support is vested in the public, as well as private property, where such support has not been sold, have been amply protected. Under the Mine Law of 1891 (3 Purd. 2555), the Davis Act (Act of July 26, 1913, P. L. 1439; 6 Purd. 6626) maps of underground workings, both past and prospective, must be filed with State Inspectors and City and Borough Mine Bureaus. Any citizen can at any time determine whether his underlying support is jeopardized. Actual inspection is always available and injunctions easily obtainable. See *Scranton* v. *Peoples Coal Co.,* 256 Pa. St. 332; 274 Pa. St. 63. All this was true before the Kohler Act.

The only interests not heretofore fully protected both by the right to damages and to injunctive relief, were those individuals who were owners of surface rights merely, and whose right of subjacent support had been

withheld or waived, presumably for adequate consideration, or public or quasi-public bodies who, instead of condemning their streets or school buildings and thus paying for and securing the permanent support of the underlying coal, have obtained them at a bargain from parties who acquired only restricted title such as the Mahons possess. The right of such surface owners, the courts of Pennsylvania have properly held, can rise no higher than that of their grantor, no matter whether the present holder be a public service corporation operating water pipes, *Spring Brook Water Co.* v. *Pennsylvania Coal Co.*, 54 Pa. Super. Ct. 380; a school district which has erected its building on a lot acquired without the right of support, *Commonwealth* v. *Clearview Coal Co.*, 256 Pa. St. 328; or a city which has similarly acquired its streets by dedication from one who himself had no right of support, *Scranton* v. *Phillips*, 57 Pa. Super. Ct. 633.

Apart from the consideration that the lives and safety of such classes of persons and those whom they permit to come on their property need no protection other than a proper notice to remove temporarily until it becomes safe to return, it is obvious that the Kohler Act is not directed to the safety of the public, but is for the benefit solely of a particular class.

That there may be other private persons in a situation similar to that of these plaintiffs merely makes the act for the benefit of a particular *class* of individuals, and not for the benefit of the public generally.

A further feature of the Kohler Act which demonstrates that it was not enacted for the protection of the general public is that by its terms it does not apply to all those similarly endangered. The life or safety of a surface owner is obviously subjected to equal jeopardy irrespective of whether the hole into which he falls was formed by the mining of bituminous or anthracite coal, or, for that mat-

ter, of iron ore, quartz or gravel. The Kohler Act, however, applies only to subsidences caused by the mining of anthracite coal.

A further evidence that the act is disingenuous is found in § 5. If it were really to protect life and safety, the municipal authorities would naturally be empowered, in case of threatened subsidence, to rope off the endangered area and to compel the occupants to vacate the premises. Instead, they are merely empowered to shut up the mine and to exclude the workmen therefrom.

Further legislative evidence of the true purpose is found in the provisions of another statute, passed on the same day and conceded to be its twin measure. This is the so-called Fowler Act, discussed in the dissenting opinion. There could be no clearer demonstration than that afforded by the intrinsic evidence of these two interrelated acts, that the sole design of the framers of both was to coerce the coal companies either into donating to the surface owner sufficient coal in place to support the surface, or paying him the damages which, as a means of getting a cheap lot, he had expressly bargained away.

The means adopted by the Kohler Act are not reasonably necessary for the accomplishment of its ostensible purpose, and are unduly oppressive upon individuals.

IV. If surface support in the anthracite district is necessary for public use, it can constitutionally be acquired only by condemnation with just compensation to the parties affected. *Commonwealth* v. *Clearview Coal Co.*, 256 Pa. St. 328; *Raub* v. *Lackawanna County,* 60 Pa. Super. Ct. 462; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Wisconsin,* 238 U. S. 491.

The Barrier Pillar Law, involved in *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, in no sense operates to transfer, without compensation, a permanent property right or easement from one party to another. The compensation to each owner for the burden of maintaining

the pillar on his side is found in the reciprocal benefit from the pillar maintained by his neighbor. See *Bowman* v. *Ross,* 167 U. S. 548. Furthermore, it obviously has a direct relation to the lives and safety of men working in coal mines. The restriction imposed is but temporary and incidental; it applies to but a very small part of the coal at a point along the land line, where it may well be left in place without interfering with the operation until both mines are almost exhausted, whereupon, as the Court doubtless knows, the adjoining owners enter into an agreement to remove the pillar.

The Rent Cases (*Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242) are not authority for the proposition that a property right of one may under the police power be transferred to another without compensation, even in time of emergency. Quite the contrary.

The principle involved in these cases was, it is submitted, not the police power but that of eminent domain. When the State regulates railroad rates, the fair return which the Constitution guarantees to the stockholders is really, when analysed, the just compensation required in condemnation proceedings. Instead of condemning a perpetual lease on the railroad with a fair rental for the stockholders and then operating the road at cost for the use of the entire public, the government allows the stockholders to operate it but requires them to serve the whole public without discrimination and permits them to net only the reasonable return to which their fair rental would have amounted. There is thus an essential difference in kind between a safety appliance act and a rate regulation. The one is an exercise of the police power, a prohibition of something injurious to the public, without the transfer of any property or property right of another either with or without compensation. The other is in its

essence an exercise of the power of eminent domain, involving not only the requirement that it be for the public benefit as distinguished from that of a privileged class, but also the requirement of just compensation. Such were the Rent Laws. The majority opinion disclaimed the introduction of any new principle of constitutional law; it merely held applicable a recognized rule to the admitted facts of the case. There has never been any doubt that a railroad company can be prohibited from charging more than reasonable rates, or that it can be precluded from putting one passenger off its trains to make room for another who is willing to pay a higher fare. There was no suggestion in the arguments or in the minority opinion that the means adopted were not necessary and appropriate to remedy the existing evil or that any other method was available to produce the same result which would be attended with less hardship to the landlords. Nor was there any attempt by the law to require the landlord to give the use of his property for nothing, nor any thought that the tenant should get something for nothing. All that the law did was, in view of the temporary suspension of the law of supply and demand, temporarily to suspend the landlord's arbitrary right of extortion, the power to exercise which was the direct and temporary result of the national crisis.

Even if it appeared that the owners of all the coal under buildings having no contractual right of support, intended presently to remove it, there would be no analogy to the conditions on which the validity of the Rent Laws was based, since there is no thought or suggestion that all the available dwellings, theatres, hotels and cemeteries are situated over such mines.

The Rent Laws were merely a temporary measure. They provided reasonable compensation to the landlord; they constituted virtually a condemnation by the sovereign of the term to November 1, 1922, and a transfer of

this term to the tenant at a reasonable cost, the just compensation provided by the Constitution.

The Kohler Act, however, is a permanent provision. It transfers for all time the Third Estate,—the right to the perpetual use of this coal—in the Mahon lot from the Coal Company to private individuals, and that without any compensation whatever.

In the court below, counsel, in discussing the Rent Cases, contended that the justification for the Kohler Act is even stronger than for the Rent Laws, insomuch as the latter were merely to provide housing facilities, a necessity of life, whereas the Kohler Act is to "protect life itself." The obvious answer to this specious argument is, first, that the Kohler Act is on its face unnecessary to protect the lives of Mr. and Mrs. Mahon, and will be effective to that end only in case they neglect to take the precautions for their own protection which their restricted rights in their property demand that they shall take. Second, there is no rule of law which entitles a State, even to protect life itself, to transfer the property of one citizen without compensation to another.

Just here comes into force the distinction between the police power and the power of eminent domain, so clearly stated in a recent decision by the writer of the majority opinion in the case at bar—*Jackman* v. *Rosenbaum Co.*, 263 Pa. St. 158, 166.

An owner of dangerous drugs may, under the police power, be restricted from selling them without a license, or without a prescription, or may even be prohibited from selling them at all. This would constitute an exercise of the police power.

In time of epidemic it is conceivable that a State might temporarily prohibit the hoarding of essential medicines and might require physicians and druggists to sell them at reasonable rates. Even at such a time, the drug-

gist could not be required to dispense his medicines for nothing, or a baker his bread, and that though people were dying or starving for want of drugs and food.

If every word in the preamble of the Kohler Act were true there would still be no justification for the uncompensated transfer of the beneficial use of the supporting coal from defendant to plaintiff. No emergency will justify the transfer of property or a tangible property right from one citizen to another without just compensation.

The Kohler Act is not a police regulation. It is not a valid exercise of the right of eminent domain because, first, it is not exercised for the benefit of the public generally, and second, because it provides no compensation whatever to the party whose property is taken.

Mr. W. L. Pace, with whom *Mr. H. J. Mahon* was on the brief, for defendants in error.

Mr. George Ross Hull, with whom *Mr. George E. Alter,* Attorney General of the State of Pennsylvania, was on the brief, for the State of Pennsylvania, by special leave of court, as *amici curiae.*

The problem presented to the legislature involved the interests of the public in the life, health and safety of persons living in the mining communities, in the wholesale destruction of surface property, and in securing the maximum yield of coal from the mines; the interest of the surface owner in his property and of the surface dweller in his own safety; the interest of the mine owner in his labor supply and in securing the maximum yield of coal from his property. This problem after elaborate investigation, and abortive attempts, was sought to be met by the "Fowler Act," 1921, P. L. 1192, establishing the State Anthracite Mine Cave Commission and the "Kohler Act," *id.* 1198, here involved.

As was said by Mr. Chief Justice von Moschzisker, in this case: "In determining whether the act is a reason-

able piece of legislation within the police power, we may 'call to our aid all those external or historical facts which are necessary for this purpose and which led to the enactment.'"

A reading of the Kohler Act involved in this appeal discloses that it is not directed to the reimbursement of surface owners for damage which may be caused either to persons or property, but is directed solely to the protection of human life. There are probably millions of dollars in surface improvements which are not reached and which were not intended to be reached by the provisions of this act. In view of the historical facts it is apparent that the good faith of this exercise of the police power is beyond question.

The legislative determination of the existence of a situation inimical to the public welfare which calls for an exercise of the police power, while it may be scrutinized by the courts, is not to be set aside unless it clearly appear that such determination was not well founded. *Lawton* v. *Steele,* 152 U. S. 133; *McLean* v. *Arkansas,* 211 U. S. 539; *Lower Vein Coal Co.* v. *Industrial Board,* 255 U. S. 144; *Nolan* v. *Jones,* 263 Pa. St. 124; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242.

The protection of the life, health and safety of the public in the anthracite mining communities is the primary purpose of the act. Its interference with property rights is merely incidental. *Commonwealth* v. *Alger,* 7 Cush. 84; *Holden* v. *Hardy,* 169 U. S. 392.

Land which is underlaid with coal is a kind of property which, by reason of operations conducted upon it or by reason of contracts made with respect to it, may become a grave menace to the life, health and safety of the public.

The dangers incident to operations conducted on coal lands have been met by extensive and elaborate codes of laws regulating coal mining. The constitutionality of these laws has long since been settled. The danger to

the public arising from the contracts entered into with respect to coal lands, however, was not clearly recognized until recent years.

As the law relating to coal lands developed prior to the enactment of the Kohler Act, it permitted the creation, by appropriate conveyances, of three distinct property rights or estates in lands: (1) the surface, (2) the coal, and (3) the right of support; and these estates might be vested in different persons at the same time. *Graff Furnace Co.* v. *Scranton Coal Co.*, 244 Pa. St. 592; *Penman* v. *Jones*, 256 Pa. St. 416; *Charnetski* v. *Coal Mining Co.*, 270 Pa. St. 459. Owners in fee of coal lands might part with their right to the surface, reserving to themselves the right to mine all of the coal without any obligation to support the surface and without liability for any damage resulting from its subsidence.

It is probable that when conveyances of surface rights were first made, the right to remove coal without liability to the surface owners was reserved merely as a safeguard against an occasional injury which might occur through first mining; and that second mining, or the removal of pillars, was not then in contemplation. The large extent of territory underlaid with anthracite coal, the large number of people living upon its surface, and the very obvious menace to the life, health and safety of these people, clothed these lands and these mining operations with a public interest which manifestly made them a proper subject for the exercise of the police power. If the public welfare be threatened by the existence or the certain occurrence of a grave public danger the legality of an exercise of the police power to prevent or to remedy cannot be questioned.

The exercise of the police power to regulate contracts relating to land has been sustained where the disaster threatened was of less serious consequence than that which is dealt with in the act now under consideration.

Block v. *Hirsh,* 256 U. S. 135; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242.

It will be urged, however, that these cases are not applicable to the case now under consideration, for the reason that in them the acts involved were emergency laws passed to meet an urgent temporary necessity and expressly limited by their terms to a brief period. Ordinarily the operation of economic laws regulates the supply of houses so that dwellings for rent are not clothed with such a public interest as would subject the contracts of landlord and tenant to the regulatory exercise of the police power. The nature of the property, the rights in it and the contracts relating to it, are such that regulation of the character contained in those acts could be justified only by the existence of extraordinary circumstances which the legislature and the courts knew must disappear when the emergency passed. But we do not understand the Court to mean that if a situation which threatened the public safety and welfare might be dealt with in an emergency, it could not be controlled by appropriate regulation if that emergency continued. The sound reason which sustained the validity of those acts during the period when the emergency was reasonably expected to continue will sustain as a permanent change an act which is intended to meet a permanent menace to the public. Accordingly the same fundamental principles of law which sustained the rent laws during the period of emergency, will sustain the Kohler Act.

It should be noted also in considering the application of the rent cases, that the case at bar falls within a class of cases which the dissenting opinion recognized as proper for the exercise of the police power. *Block* v. *Hirsh,* 256 U. S. 135, 167.

The Kohler Act is in line with numerous familiar cases wherein legislation involving the exercise of the police power has been sustained. The well established restric-

tion placed upon the right of public service companies to fix rates by contract, the power to forbid absolutely the sale of oleomargarine for the purpose of preventing possible frauds, the power to prevent the sale of unwholesome meats and other foods, the power to regulate or prohibit the manufacture of corn and rye into whiskey, the power to forbid mining to the boundary of a mine property without leaving a barrier pillar of sufficient thickness to prevent possible injury from the flooding of an adjoining mine, are familiar illustrations of the exercise of the police power enacted to avoid dangers which are neither so grave nor so certain as those which the Kohler Act seeks to prevent.

In its application to all coal lands where the right of surface support is still vested in the surface owner, the effect of the Kohler Act is to prevent the making of any valid contract whereby the right of support may be separated from the surface ownership in such manner as to permit the subsidence of any of the structures or facilities mentioned in the act. It must be remembered that there is a broad field in which the Kohler Act does thus operate. If the circumstances which now exist in the anthracite regions could have been foreseen and certainly predicted by the legislature a half century ago, it would clearly have been within its power to limit the owner's right to contract, by the enactment of such a regulatory measure as the Kohler Act. And we are confident that if it were not for the existence of contracts already entered into, the constitutionality of this act would not have been questioned.

It is an act, prospective in its operation, regulating the future conduct of mining for anthracite coal. It operates generally upon all mines, including those now being operated and all which may be opened and operated in the future. It operates without regard to any private contracts which may have been made relating to surface sup-

port. It operates alike upon lands where the surface owner still has the right of support, and upon those where the right of support has been separated from ownership of the surface and is held by the owner of the coal or by a third person.

But if the act in its operation upon lands where the right of support and the ownership of the surface have not been separated, be a constitutional exercise of the police power, it is equally valid in its operation upon lands where these interests are held by different persons.

Persons cannot remove their property from the reach of the police power by entering into contracts with respect to it. *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170.

All property within the State is held, and all contracts are entered into subject to the future exercise of the police power of the State. Every such agreement was entered into by the parties with full knowledge that whenever the existence of such contracts and the exercise of the license reserved should threaten the life, health or safety of the people, the Commonwealth in its sovereign power might interpose and restrict the use of those contract rights to such extent as might be necessary in the public interest. Owners of coal lands, who saw highways being laid out and improved, railroads and trolley lines built, sewers and gas mains laid, light, telephone and power wires stretched overhead, depots, stores, theatres, hotels and dwellings constructed, and who, perhaps as many of the coal companies did, laid out the surface in building lots dedicating streets and alleys to public use, selling the lots for the purpose of having dwellings erected thereon,—such owners were bound to know that whenever the time should come when the exercise of the license which they had reserved would threaten the welfare of the communities upon the surface, the police power of the State might be interposed to restrict their rights. *Scranton* v. *Public*

Service Commission, 268 Pa. St. 192; *Relief Electric Light, Heat & Power Company's Petition,* 69 Pa. Super Ct. 1, 8.

In *Russell* v. *Sebastian,* 233 U. S. 195, and *New Orleans Gas Light Co.* v. *Louisiana Light Co.,* 115 U. S. 650, no exercise of the police power was involved; in the latter, this Court recognized the principle which we have stated.

The Kohler Act does not take the property of the plaintiff in error. *Commonwealth* v. *Plymouth Coal Co.,* 232 Pa. St. 141; s. c. 232 U. S. 531. The act does not go as far as the Barrier Pillar Act. It contains no provision requiring any mine owner to leave coal in place. If natural support other than coal in the pillars be available, or if artificial support be provided, every pound of coal may be removed from the mines.

Nor does it transfer the right of support from the owner of the coal to the surface owner. This right, license or estate in the land is nothing more than an immunity from civil liability for damages to the surface owner. Under the Kohler Act, this immunity continues.

If the act were designed, as the plaintiff in error contends, for the protection of the property rights of the surface owners, and not as a *bona fide* and reasonable exercise of the police power, it would contain two features which are conspicuously absent from it: First, it would provide that the liability of the defendant for damages to the person or property of the plaintiffs which was released by the contract contained in the deed, should be restored; second, it would apply generally to all valuable structures upon the surface.

Notice to the surface owner to vacate his property is not sufficient to prevent injury to him or to the public. This same objection might have been made to the reasonableness of all of the legislation which has been enacted for the protection of persons employed in mines. Communities must exist in or near the vicinity of the mines or they cannot be operated, and it is a matter of concern to

the public that persons be permitted to dwell there in safety. Even if it were possible to remove whole cities from their present locations, and reconstruct them upon sites beyond the coal measures, those sites may be so distant from the mines and so separated by the topography of the country that access to and from the collieries would be impracticable and the mines would close for want of labor. Moreover, cities are built where nature affords an opportunity for them. Industrial communities cannot be perched upon the mountains nor in places inaccessible to roads and railroads. Nor is it always practicable or possible for the individual dweller upon the surface to find another house in which to live. Throughout the State of Pennsylvania and elsewhere in this and foreign countries there is an acute shortage of houses due to conditions prevailing during the war, and there is no doubt that this condition, which has elsewhere proven so serious as to give rise to the legislation reviewed in the Rent Cases (already cited), has been aggravated in the coal mining communities by reason of the very conditions which gave rise to the Kohler Act. Or it may be that the occupants of the dwelling will recklessly disregard the notice given and take the chance of escaping injury. The notice will not avail to prevent the disastrous results of his necessity or folly. See *Commonwealth* v. *Plymouth Coal Co.,* 232 Pa. St. 141, 146.

The only practicable way in which the life, health and safety of the public in these communities may be adequately safeguarded is by the enforcement of such restrictions as are contained in the Kohler Act, and for this reason those restrictions are reasonable even though they limit to some extent the rights of others.

Mr. Philip V. Mattes, by leave of court, filed a brief on behalf of the City of Scranton, as *amicus curiae.*

Mr. Philip V. Mattes, Mr. Frank M. Walsh and *Mr. Owen J. Roberts,* by leave of court, filed a brief on behalf

of the Scranton Surface Protective Association, as *amici curiae.*

Mr. C. La Rue Munson and *Mr. Edgar Munson,* by leave of court, filed a brief on behalf of the Scranton Gas & Water Company, as *amici curiae.*

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface, but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921, P. L. 1198, commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought, but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other

things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout* v. *Knox,* 148 Mass. 368. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. *Wesson* v. *Washburn Iron Co.,* 13 Allen, 95, 103. The extent of

the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton, and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." *Commonwealth* v. *Clearview Coal Co.*, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This

we think that we are warranted in assuming that the statute does.

It is true that in *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule,

whether they do not stand as much upon tradition as upon principle. *Bowditch* v. *Boston,* 101 U. S. 16. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade* v. *Lynn & Boston R. R. Co.,* 172 Mass. 488, 489. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act. *Block* v. *Hirsh,* 256 U. S. 135. *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170. *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242.

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Decree reversed.

MR. JUSTICE BRANDEIS, dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent " as to cause the . . .

subsidence of any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed." Coal in place is land; and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious,—as it may because of further change in local or social conditions,—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property can not, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private

persons may thereby receive gratuitously valuable special benefits. Thus, owners of low buildings may obtain, through statutory restrictions upon the height of neighboring structures, benefits equivalent to an easement of light and air. *Welch* v. *Swasey,* 214 U. S. 91. Compare *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Walls* v. *Midland Carbon Co.,* 254 U. S. 300. Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end. But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put. The liquor and the oleomargarine cases settled that. *Mugler* v. *Kansas,* 123 U. S. 623, 668, 669; *Powell* v. *Pennsylvania,* 127 U. S. 678, 682. See also *Hadacheck* v. *Los Angeles,* 239 U. S. 394; *Pierce Oil Corporation* v. *City of Hope,* 248 U. S. 498. Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the State need not resort to that power. Compare *Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 358; *Missouri Pacific Ry. Co.* v. *Omaha,* 235 U. S. 121. If by mining anthracite coal the owner would necessarily unloose poisonous gasses, I suppose no one would doubt the power of the State to prevent the mining, without buying his coal fields. And why may not the State, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to

like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value; and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending *ab orco usque ad coelum.* But I suppose no one would contend that by selling his interest above one hundred feet from the surface he could prevent the State from limiting, by the police power, the height of structures in a city. And why should a sale of underground rights bar the State's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. Ordinarily a police regulation, general in operation, will not be held void as to a particular property, although proof is offered that owing to conditions peculiar to it the restriction could not reasonably be applied. See *Powell* v. *Pennsylvania,* 127 U. S. 678, 681, 684; *Murphy* v. *California,* 225 U. S. 623, 629. But even if the particular facts are to govern, the statute should, in my opinion, be upheld in this case. For the defendant has failed to adduce any evidence from which

it appears that to restrict its mining operations was an unreasonable exercise of the police power. Compare *Reinman* v. *Little Rock,* 237 U. S. 171, 177, 180; *Pierce Oil Corporation* v. *City of Hope,* 248 U. S. 498, 500. Where the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to such an extent as to cause a subsidence. It was, doubtless, for this reason that the legislature, estimating the degrees of danger, deemed statutory restriction unnecessary for the public safety under such conditions.

It is said that this is a case of a single dwelling house; that the restriction upon mining abolishes a valuable estate hitherto secured by a contract with the plaintiffs; and that the restriction upon mining cannot be justified as a protection of personal safety, since that could be provided for by notice. The propriety of deferring a good deal to tribunals on the spot has been repeatedly recognized. *Welch* v. *Swasey,* 214 U. S. 91, 106; *Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 358, 365; *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144. May we say that notice would afford adequate protection of the public safety where the legislature and the highest court of the State, with greater knowledge of local conditions, have declared, in effect, that it would not? If public safety is imperiled, surely neither grant, nor contract, can prevail against the exercise of the police power. *Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659; *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548; *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* 248 U. S. 372; *St. Louis Poster Advertising Co.* v. *St. Louis,* 249 U. S. 269. The rule that the State's power to take appropriate measures to guard the safety of all who may be within its jurisdiction may not be bargained away was applied to compel carriers to establish grade crossings at their own expense, despite contracts to the contrary; *Chicago, Burlington & Quincy R. R. Co.* v. *Nebraska,* 170 U. S. 57;

and, likewise, to supersede, by an employers' liability act, the provision of a charter exempting a railroad from liability for death of employees, since the civil liability was deemed a matter of public concern, and not a mere private right. *Texas & New Orleans R. R. Co.* v. *Miller,* 221 U. S. 408. Compare *Boyd* v. *Alabama,* 94 U. S. 645; *Stone* v. *Mississippi,* 101 U. S. 814; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746; *Douglas* v. *Kentucky,* 168 U. S. 488; *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20, 23. Nor can existing contracts between private individuals preclude exercise of the police power. "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 357; *Knoxville Water Co.* v. *Knoxville,* 189 U. S. 434, 438; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342. The fact that this suit is brought by a private person is, of course, immaterial to protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. That it may be done in Pennsylvania was decided by its Supreme Court in this case. And it is for a State to say how its public policy shall be enforced.

This case involves only mining which causes subsidence of a dwelling house. But the Kohler Act contains provisions in addition to that quoted above; and as to these, also, an opinion is expressed. These provisions deal with mining under cities to such an extent as to cause subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law.

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety. Yet it is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be "an average reciprocity of advantage" as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity of advantage is an important consideration, and may even be an essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects, *Wurts* v. *Hoagland,* 114 U. S. 606; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; or upon adjoining owners, as by party wall provisions, *Jackman* v. *Rosenbaum Co., ante,* 22. But where the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in 248 U. S. 498; his brickyard, in 239 U. S. 394; his livery stable, in 237 U. S. 171; his billiard hall, in 225 U. S. 623; his oleomargarine factory, in 127 U. S. 678; his brewery, in 123 U. S. 623; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

Counsel for Parties.

KIRBY ET AL. *v.* UNITED STATES, FOR AND ON BEHALF OF THE CROW TRIBE OF INDIANS.

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

No. 126. Argued November 27, 1922.—Decided December 11, 1922.

A lease of Indian land for cattle grazing, for two years, at a minimum rental of $31,950 per year, provided that the number of cattle to be grazed should "be limited to an average of 9,000 head, the maximum number at any one time not to exceed 11,500 head," and that "any excess over and above such maximum number shall be paid for at the rate of $4.50 per head for each and every head of such excess number," in addition to the rental named. *Held*, reading these with other provisions of the lease and with the written proposal therefor, and considering the subject-matter—

(1) That the average of 9,000 head was for each year separately, to be paid for by the minimum rental, and that the additional charge of $4.50 per head applied to all in excess of that average, and not merely to any excess over 11,500 head grazed at any one time. P. 425.

(2) The $4.50 charge was neither a penalty nor liquidated damages. P. 427.

(3) The act of one of the two lessees, who was in charge of the leased area, in admitting additional cattle to graze, was the act of both. P. 427.

273 Fed. 391, affirmed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment recovered by the United States in the District Court in an action for rent against two lessees and their surety.

Mr. M. S. Gunn and *Mr. Edgar Allen Poe*, with whom *Mr. Carl Rasch, Mr. E. M. Hall, Mr. O. King Grimstad* and *Mr. Rockwood Brown* were on the brief, for plaintiffs in error.

Mr. Assistant Attorney General Seymour, with whom *Mr. Solicitor General Beck* and *Mr. Robert P. Reeder*,

Special Assistant to the Attorney General, were on the brief, for the United States.

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

With the approval of the Secretary of the Interior certain lands of the Crow Tribe of Indians in Montana were leased to George B. Kirby and Charles McDaniels for the grazing of cattle for two years beginning February 1, 1916. A bond, in which the United States Fidelity and Guaranty Company joined as surety, was given by the lessees for the faithful performance of their obligations. The lease required them to pay a minimum rental of $31,950 per year and to abide by the following provision:

"And it is further agreed that the number of cattle to be grazed on the territory described above shall be limited to an average of 9,000 head, the maximum number at any one time not to exceed 11,500 head, and that any excess over and above such maximum number shall be paid for at the rate of $4.50 per head for each and every head of such excess number, in addition to the rental herein named."

The lessees paid the rental of $31,950 for each of the two years, but failed to pay an additional sum claimed under that provision for cattle grazed in excess of the prescribed average.

On behalf of the tribe the United States sued the lessees and the surety company to recover the additional sum so claimed; and the defendants answered denying that there had been any excess grazing. The issues were tried to the court, a jury being waived by written stipulation. The court found that there was no excess grazing during the first year, but that the cattle grazed during the second year exceeded " the contract maximum average of 9,000 head for the year " by what was " equivalent to 6,968 head for one year." For this excess a recovery was allowed at

the rate of $4.50 per head, which was affirmed by the Circuit Court of Appeals. 273 Fed. 391. The defendants prosecute the present writ of error.

The chief controversy is over the meaning and effect of the provision we have quoted from the lease. Pointing to it, the defendants contend (a) that any grazing in excess of an average of 9,000 head was prohibited, and therefore was a trespass for which no recovery could be had in a suit on either the lease or the bond; (b) that the additional payment at the rate of $4.50 per head was to be made only for any excess over 11,500 head grazed at any one time; and (c) that the intended average of 9,000 head was for the full two-year period and not for either year taken separately. Both courts below rejected these contentions.

The provision relied on was loosely framed and, if read alone, might well be regarded as of uncertain meaning. But it is to be read with other provisions of the lease, with the written proposal of the lessees whereby the lease was obtained, and in the light of the conditions which naturally prompted some provision on the subject. When it is examined in this way, the explanation for it and its meaning are shown to be as follows: The parties recognized that pasturage, being an annual crop, is lost if not utilized before the next growing season, and they evidently intended to deal with each year as a distinct period. A minimum rental of $31,950 was to be paid to the lessors for each year. Payment of that sum was to give the lessees the right to graze 9,000 cattle on the leased area for the particular year. But it was not practicable to have a definite number grazing throughout the year, for marketing some and bringing in others would cause the number to vary materially. So, an average of 9,000 head was agreed on. This would permit a shortage in one part of the year to be made up by a corresponding increase in another part. But to prevent this privilege from being carried to extreme lengths, the provision for an average

was qualified by saying "the maximum number at any one time not to exceed 11,500 head." The purpose of that provision, as thus qualified, was to define the grazing which might be done for the minimum rental of $31,950;—in other words, to show that the grazing which might be done without further payment was limited to an average of 9,000 cattle. But the parties recognized the propriety of making some provision respecting the possible grazing of a larger number and the charge to be paid for it. Accordingly, they said in a succeeding clause that "any excess over and above such maximum number shall be paid for at the rate of $4.50 per head." The maximum number there intended was evidently the number which might be grazed for the minimum rental,—that is to say, an average of 9,000 head; for of course the point to which that rental extended must have been the one at which the charge for additional grazing was to begin. It was not intended that any grazing should be free, but, on the contrary, that all that was not covered by the minimum rental should be paid for at the rate of $4.50 per head. The District Court aptly said:

"The language of the lease, that this $4.50 per head is payable for 'any excess over and above such maximum number,' does not necessarily import only cattle over and above 11,500 head, the last antecedent and maximum *eo nomine,* but consistent with the writing and construction can be and is taken to import cattle over and above 9,000 head, the first antecedent and also a maximum, although not in terms so characterized. Nine thousand head are the maximum for the year as a whole, the principal thing, and the 11,500 are the maximum at any time (and for such time as will serve to accomplish the 9,000 maximum), an incidental thing. . . Defendants' argument that by the terms of the lease they are to pay only for excess over 11,500 head, and that for all between 9,000 head and 11,500 head they would be amenable only to the

relevant criminal law applicable to trespassers, is untenable."

The Circuit Court of Appeals construed the lease in the same way, and we think that construction is the correct one. As the three contentions before stated all depend on a contrary construction they must fail.

The $4.50 rate is assailed as being a penalty or liquidated damages, and therefore condemned by a statute of the State. We think it is neither a penalty nor liquidated damages. It was not to be paid for any breach of contract, but as compensation for particular grazing contemplated in the lease and not covered by the rental otherwise fixed. Whether the state statute could affect a contract made by the United States on behalf of Indian wards need not be considered.

At the trial it appeared that the additional cattle were admitted to and grazed on the leased area by one of the lessees, who had special charge of the operations under the lease; and there was a conflict in the evidence as to whether the other lessee consented to or acquiesced in those acts. The District Court ruled that the conflict was immaterial and that the acts of the lessee in charge were the acts of both. Complaint is made of this, but it obviously was right. *Kendall* v. *Carland,* 5 Cush. 74; *Goshorn* v. *Steward,* 15 W. Va. 657, 664.

Judgment affirmed.

COX *v.* HART.

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

No. 71. Argued November 16, 1922.—Decided December 11, 1922.

1. What will constitute possession of a tract of land depends largely upon its character and condition and the use to which it is

adapted; enclosure, or physical occupancy of every part, is not necessary. P. 433.

2. Plowing of a furrow around 320 acres of unoccupied desert land, posting of a notice of claim, leveling, clearing, seeding, irrigating and fencing of parts, with some ditch construction, and marking of a boundary with stakes, *held* a taking of possession of the entire tract and commencement of the work of reclaiming it, within the intent of the Act of March 28, 1908, c. 112, § 1, 35 Stat. 52, amending the Desert Land Law, as against an adverse claimant who occupied part of the tract subsequently, with notice. P. 433.
3. The office of a proviso is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached. P. 435.
4. The Act of March 28, 1908, *supra,* restricted the right to enter desert land to surveyed land, but contains a proviso that any qualified individual "who has, prior to survey, taken possession of a tract of unsurveyed desert land," and "has reclaimed or has in good faith commenced the work of reclaiming the same," shall have the preference right to make entry within 90 days after the filing of the approved plat of survey in the district land office. *Held,* that the proviso includes a case in which possession and work began before the date of the act no less than cases in which they were subsequent. P. 434.
5. Public lands lose their status as "surveyed lands" and become "unsurveyed" when the lines and marks of the original survey have become obliterated for practical purposes and when, for that reason, a resurvey has been directed by an act of Congress. P. 436.

270 Fed. 51, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which adjudged the appellee to be the equitable owner of a tract of land patented to the appellant under the Desert Land Laws, and directed a conveyance of the legal title.

Mr. Charles R. Pierce, with whom *Mr. John M. Sutton* was on the briefs, for appellant.

Mr. Eugene W. Britt, with whom *Mr. George H. P. Shaw* and *Mr. William J. Hunsaker* were on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case involves conflicting claims to a tract of 160 acres of land in Imperial County (formerly San Diego County), State of California. The facts, so far as necessary to be stated, are as follows:

About the years 1854–1856 the body of public lands, which includes the tract in controversy, was surveyed under the authority of the United States. No settlements upon these lands of any consequence were made until the year 1900. In the interval the marks of the survey had so far disappeared as to render it practically impossible to locate the lines which the survey had established. None of the section or township corners originally placed upon or in the vicinity of the land here involved was in place, and it was impossible to determine by reference to that survey in what section it was located.

On July 1, 1902, Congress provided for a resurvey of this body of public lands, by an act (32 Stat. 728) as follows:

"That the Secretary of the Interior be, and he is hereby, authorized to cause to be made a resurvey of the lands in San Diego County, in the State of California, embraced in and consisting of the tier of townships thirteen, fourteen, fifteen, and sixteen south, of ranges eleven, twelve, thirteen, fourteen, fifteen, and sixteen east, and the fractional township seventeen south, of ranges fifteen and sixteen east, all of San Bernardino base and meridian; and all rules and regulations of the Interior Department requiring petitions from all settlers of said townships asking for resurvey and agreement to abide by the result of the same so far as these lands are concerned are hereby abrogated: *Provided,* That nothing herein contained shall be so construed as to impair the present bona fide claim of any actual occupant of any of said lands to the lands so occupied."

The resurvey thus authorized was made and the approved plats filed in 1909.

On March 28, 1908, Congress passed an act to limit and restrict the right of entry and assignment under the desert land law and to authorize an extension of the time within which to make final proof (35 Stat. 52). Section 1 of that act is as follows:

"That from and after the passage of this Act the right to make entry of desert lands under the provisions of the Act approved March third, eighteen hundred and seventy-seven, entitled 'An Act to provide for the sale of desert lands in certain States and Territories,' as amended by the Act approved March third, eighteen hundred and ninety-one, entitled 'An Act to repeal timber-culture laws, and for other purposes,' shall be restricted to surveyed public lands of the character contemplated by said Acts, and no such entries of unsurveyed lands shall be allowed or made of record: *Provided, however,* That any individual qualified to make entry of desert lands under said Acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said Acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office."

The appellee (plaintiff below), during the year 1906, being then of age and qualified, began the work of reclaiming a tract of three hundred and twenty acres, including the lands here in controversy. Previously, and shortly before she was of age, her father, acting in her behalf, had caused a furrow to be plowed around the entire three hundred and twenty acre tract, and had posted a notice claiming it for the appellee. During the year 1906 appellee caused about eighty acres of that portion of

the tract lying east of the lands in controversy to be levelled, cleared and seeded to barley, and ditches for irrigating the same to be constructed. All the lands at that time were unoccupied desert lands, within the meaning of the land laws of the United States. The barley was irrigated several times during the year. After the crop had matured and during the year 1906 the appellee fenced the land upon which it had been grown, and also during the year seeded to barley about 5 acres of the 160 acres in controversy. This crop however did not mature. Early in November, 1906, the appellee constructed a head ditch along the east line of the specific tract in controversy and did some work in preparation for the irrigation of the south half thereof, and also put up stakes upon the south half to mark the lines. She also caused borders to be made along the east line in preparation for the construction of a head ditch. This was the state of things on November 8, 1906, when the appellant put up a tent house upon the land, established a residence and claimed the one hundred and sixty acre tract. Appellant saw the plowed furrows along the east and south sides of the land and was notified by appellee's father that that one hundred and sixty acre tract was included within appellee's three hundred and twenty acre claim. Appellant remained on the tract until he was ejected, in March, 1909, as the result of a judgment obtained by appellee against him in a state court. *Hart* v. *Cox,* 171 Cal. 364. Appellant during his occupancy constructed a ditch one-half mile in length and did some other work on the land.

Appellant, in July, 1907, filed an application for the land in the local land office, but his application was rejected for the reason that the description was defective. Later in the same month appellee filed an application for the entire three hundred and twenty acre tract, but her application was rejected.

In March, 1909, after the resurvey had been completed, appellant filed a new application and shortly thereafter

and within ninety days after the filing of the survey plat, appellee also filed a new application, both applications describing the lands with reference to the resurvey. Decision was rendered in the local land office in favor of appellant. The Commissioner of the General Land Office reversed this decision but the Secretary of the Interior reversed the Commissioner and affirmed the local land office in favor of appellant. Subsequently, on October 24, 1918, a patent was issued to the appellant for the land in controversy.

Appellee thereupon brought suit against the appellant in the United States District Court for the Southern District of California, and prayed a decree declaring that appellant held the land in trust and requiring appellant to convey the legal title to her. That court rendered a decree in favor of appellee and the case was carried by appeal to the Circuit Court of Appeals for the Ninth Circuit, where, after hearing, the decree of the District Court was affirmed. 270 Fed. 51. The case is here upon appeal from the Circuit Court of Appeals.

The rights of the parties turn upon the meaning and effect of the proviso to § 1 of the Act of March 28, 1908, heretofore quoted. That proviso is, in substance, that where a qualified entryman has *prior to survey taken possession* of a tract not exceeding three hundred and twenty acres of *unsurveyed* desert land and has reclaimed or in good faith *commenced the work of reclaiming* the same he shall have the preference right to make entry of such tract within ninety days after the filing of the plat of survey in the local land office. Two questions are, therefore, presented for solution:

(1) Did appellee take possession of the lands and reclaim or in good faith commence the work of reclaiming the same prior to the attempted appropriation by appellant?

(2) Were the lands at the time *unsurveyed* desert lands, to which upon the facts the statutory preference

right to make entry attached? Appellant denies that the lands were unsurveyed and contends, moreover, that, in any event, appellee is not within the terms of the proviso since whatever she did was prior to the passage of the act which is not to be given retrospective operation.

1. Prior to appellant's occupation on November 8, 1906, appellee had entered upon and exercised and was then exercising the acts of dominion herein set forth over the 320 acre tract under a claim of right. When appellant entered upon the land all these evidences of appellee's claim and possession were open and visible and in addition appellant was specifically notified that the claim included the land in controversy.

What will constitute possession of land largely depends upon its character, condition and the use to which it is adapted. Here appellee went upon the land for the purpose of reclaiming it from its desert character. The whole of it obviously could not be reclaimed at once. The building of ditches, the securing of a water supply, the plowing and preparation of the land and the planting of crops were all steps requiring time. Residence upon the land was not required as a prerequisite to securing title under the desert land laws. Having in view all the conditions we are of opinion that the facts sufficiently establish appellee's actual possession of the entire tract at the time appellant sought to make his appropriation. *Ellicott* v. *Pearl,* 10 Pet. 412, 442; *Ewing* v. *Burnet,* 11 Pet. 41, 53; *Hart* v. *Cox,* 171 Cal. 364; *Booth & Graham* v. *Small & Small,* 25 Iowa, 177, 181; *Illinois Steel Co.* v. *Bilot,* 109 Wis. 418, 443, 446. It is not necessary to constitute actual possession that there should be an enclosure or any physical or visible occupancy of every part of the land. As well said by the Supreme Court of Iowa in *Booth & Graham* v. *Small & Small, supra:*

" Possession of land is the holding of and exclusive exercise of dominion over it. It is evident that this is not,

and cannot be, uniform in every case, and that there may be degrees in the exclusiveness even of the exercise of ownership. The owner cannot occupy literally the whole tract,—he cannot have an actual *pedis possessio* of all, nor hold it in the grasp of his hands. His possession must be indicated by other acts. The usual one is that of inclosure. But this cannot always be done, yet he may hold the possession in fact of uninclosed land, by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable, and acquire the profits it yields in its present condition,—such acts, being continued and uninterrupted, will amount to actual possession, and, if under color of title, or claim of right, will be adverse." That appellee, in addition to taking possession of the entire 320 acres before appellant's occupancy, had in good faith commenced the work of reclaiming the same does not admit of doubt. Indeed she had actually reclaimed more than one-fourth of the entire area, which included five acres of the tract in controversy.

2. It remains to determine whether the lands at the time appellee took possession of them were *unsurveyed* lands and whether appellee was entitled to the preference right granted by the proviso heretofore quoted.

We first dispose of the contention that, even if the lands were unsurveyed, it cannot be held that appellee was within the terms of the proviso because that would be to give the proviso a retroactive effect and there is nothing to show that Congress so intended. The rule is, of course, well settled that unless the contrary plainly appear a statute operates prospectively only. Does the application of the proviso here proposed contravene this rule?

Prior to the Act of March 28, 1908, 35 Stat. 52, unsurveyed lands, as well as surveyed lands, came within the purview of the Desert Land Laws (19 Stat. 377). That act, however, from and after its passage restricted " the right to make entry of desert lands . . . to *surveyed*

public lands" and expressly declared that "no such entries of *unsurveyed* lands shall be allowed or made of record." Then follows the proviso now being considered. The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached. *Minis* v. *United States,* 15 Pet. 423, 525. Although it is sometimes misused to introduce independent pieces of legislation. *Georgia Railroad & Banking Co.* v. *Smith,* 128 U. S. 174, 181; *White* v. *United States,* 191 U. S. 545, 551. Here, however, the proviso is plainly employed in its primary character. The effect of the substantive enactment was to forbid the entry of unsurveyed lands. But the law theretofore had been otherwise and one purpose of the proviso evidently was to exclude from the operative effect of the new rule cases which might have arisen under the prior law,—that is cases of persons who had taken possession of and undertaken to reclaim unsurveyed lands at a time when the law conferred the right to do so. Any such person, no less than one who acted subsequently, is within the words of the proviso. He is literally "a person who has, prior to survey, taken possession," etc. The proviso so construed impairs no vested right and brings into existence no new obligation which affects any private interest. No reason is perceived why the words employed should not be given their natural application and so applied the case of appellee is included. Indeed, this does not give the proviso a retroactive operation. The language in terms applies to one who at the time of the enactment occupied a particular *status,* viz: the status of a person who *has done* the things enumerated. A statute is not made retroactive merely because it draws upon antecedent facts for its operation. *Regina* v. *Inhabitants of St. Mary, Whitechapel,* 12 Q. B. Rep. 120, 127; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 342.

Passing this point, however, it is contended that the lands in question were in fact surveyed. It is true the lands had been surveyed in 1854–1856, but the lines of that survey by the year 1900 had disappeared to such a degree that for practical purposes they had become non-existent. A survey of public lands does not *ascertain* boundaries; it *creates* them. *Robinson* v. *Forrest,* 29 Cal. 317, 325; *Sawyer* v. *Gray,* 205 Fed. 160, 163. Hence the running of lines in the field and the laying out and platting of townships, sections and legal subdivisions are not alone sufficient to constitute a survey. Until all conditions as to filing in the proper land office and all requirements as to approval have been complied with, the lands are to be regarded as unsurveyed and not subject to disposal as surveyed lands. *United States* v. *Morrison,* 240 U. S. 192, 210; *United States* v. *Curtner,* 38 Fed. 1, 10. It follows that although the survey may have been physically made, if it be disapproved by the duly authorized administrative officers the lands which are the subject of the survey are still to be classified as unsurveyed. In other words, to justify the application of the term " surveyed " to a body of public land something is required beyond the completion of the field work and the consequent laying out of the boundaries, and that something is the filing of the plat and the approval of the work of the surveyor. If, pending such approval, or, still more, if after disapproval of the survey, the lands in contemplation of law are unsurveyed, it is difficult to see why the same result may not follow when the survey originally approved and platted is subsequently annulled or abandoned because the lines and marks established have become obliterated. A purpose to annul or abandon such survey we think may be disclosed by an act of Congress directing a resurvey plainly based upon the fact of such obliteration.

Turning now to the record in the case under consideration it appears that the lines and marks of the original

survey of 1854–1856 had for all practical purposes ceased to be. This is apparent not only from a consideration of the record but is in accord with repeated declarations of the land department. See *In re Peterson,* 40 L. D. 562, 566, 570, where it is said not only that all the corners which had been established north of the fourth standard parallel were missing, but that the survey itself was "grossly inaccurate," that in making the resurvey an attempt to retrace the old original survey had failed " and it is now a physical impossibility to identify on the ground sections 16 and 36, according to the original surveys. . . . All vestiges of that survey have been wiped away." See also *Stephenson* v. *Pashgian,* 42 L. D. 113, 114. In the land office contest between the parties hereto for the land in controversy the Secretary of the Interior, although ruling in favor of appellant, stated that the description of the land by reference to the lines of the old survey " was an impossible condition." *Hart* v. *Cox,* 42 L. D. 592, 594. Both courts below reached the same conclusion.

The District Court said: " The evidence of the survey of 1856 upon the ground in that vast area, covered by said act had become useless, by reason of the fact that the lines of the survey were obliterated, and all that was left were some prominent monuments. This act [the resurvey act] recognized that the survey of 1856 was of no practical use and that the lands were, for all practical purposes, unsurveyed lands. It was impracticable to dispose of these lands by congressional subdivision according to the survey of 1856."

The Circuit Court of Appeals, after referring to the original survey and the fact that no settlement was made until nearly fifty years later, said:

" It was then found that the marks of the survey had so far been obliterated that it was practically impossible to locate the lines thereof." *Cox* v. *Hart,* 270 Fed. 51.

From the foregoing it results and we hold that the Resurvey Act of 1902 was in effect and intent a legislative

declaration that the lands therein described were, when the act was passed and for all purposes of settlement and sale, unsurveyed lands. With the disappearance of the physical evidences the old survey survived only as an historical event. As a tangible, present fact it ceased to exist and a new survey became necessary to reëstablish the status of the area over which it had extended as surveyed lands of the United States.

The decree below is

Affirmed.

HEITLER *v.* UNITED STATES.

PERLMAN *v.* UNITED STATES.

GREENBERG *v.* UNITED STATES.

McCANN *v.* UNITED STATES.

QUINN *v.* UNITED STATES.

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

Nos. 185–189. Motion to transfer to Circuit Court of Appeals submitted December 11, 1922.—Decided January 2, 1923.

1. Under the Act of September 14, 1922, c. 305, 42 Stat. 837, a case brought here from the District Court upon the mistaken assumption that it presents a substantial constitutional question, but which involves other questions within the jurisdiction of the Circuit Court of Appeals, should be transferred to that court. P. 439.
2. This statute should be construed liberally. P. 440.

Cases transferred.

APPLICATIONS to transfer these cases, heretofore dismissed for want of jurisdiction (*post*, 703), to the Circuit Court of Appeals. For the opinion of the District Court, see 274 Fed. 401.

Mr. Weymouth Kirkland and *Mr. Robert N. Golding,* for plaintiffs in error, in support of the motion.

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

These were writs of error issued directly to the District Court under § 238 of the Judicial Code to review sentences of fine and imprisonment on the ground that they were cases in which the constitutionality of the National Prohibition Act, under which the convictions were had, was drawn in question. In addition to the constitutionality of the Prohibition Act, the assignments of error raised many questions as to the admissions of evidence and the charge of the court. We held that in view of our previous decision affirming the validity of the National Prohibition Act (*National Prohibition Cases,* 253 U. S. 350), the plaintiffs in error were precluded from raising the question again and basing thereon a claim of jurisdiction for a writ of error under § 238, that the question made was, therefore, not substantial but frivolous, and that the writ should be dismissed for want of jurisdiction on the authority of *Sugarman* v. *United States,* 249 U. S. 182, 184, and cases cited. *Heitler* v. *United States, post,* 703. This conclusion made it impossible for us to consider the other errors assigned.

The plaintiffs in error now invite our attention to an Act of Congress approved September 14, 1922, c. 305, 42 Stat. 837, adding § 238 (a) to the Judicial Code, which provides that " . . . if an appeal or writ or error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of, a circuit court of appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force

and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."

This is a remedial statute and should be construed liberally to carry out the evident purpose of Congress. The fact that the opportunity therein given to litigants in the Circuit Courts of Appeals where they have mistakenly sought a review in this Court may at times be abused and unduly prolong the litigation and delay the successful party below, is no reason why when the case comes clearly within the language of the statute the transfer should not be made. The successful party below may avoid undue delay by a prompt motion to dismiss in this Court in such cases.

The cases before us are clearly within the remedy of the statute. Based on the assumption of the presence of a real constitutional question in the case, plaintiffs in error sought review here not only of that question but of the numerous other errors assigned in the record. *Williamson* v. *United States,* 207 U. S. 425, 432, 434; *Goldman* v. *United States,* 245 U. S. 474, 476. We find that there is no constitutional question of sufficient substance to give us jurisdiction to consider these other errors. In other words, we find that to have such alleged errors considered and reviewed, the writ of error herein should have issued out of the Circuit Court of Appeals of the proper circuit. Accordingly we hold that these several cases should be transferred to the Circuit Court of Appeals of the Seventh Circuit at the costs of the respective plaintiffs in error, that that court be thereupon possessed of the jurisdiction of the same and proceed to the determination of said writs of error as if such writs had issued out of such court.

And it is so ordered.

SIOUX CITY BRIDGE COMPANY *v.* DAKOTA COUNTY, NEBRASKA.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 105. Argued November 20, 1922.—Decided January 2, 1923.

1. Intentional and arbitrary assessment of the property of one owner for taxation at its true value, in accordance with the state constitution and laws, while all other like property is systematically assessed much lower, is a violation of the equal protection of the laws. P. 445.
2. The owner aggrieved by this discrimination is entitled to have his assessment reduced to the common level, since by no judicial proceeding can he compel reassessment of the great mass of such property at its true value as the law requires. P. 446.
3. Mere errors of judgment in fixing an assessment do not support a claim of discrimination; there must be in effect an intentional violation of the principle of practical uniformity. P. 447.

105 Neb. 843, reversed.

CERTIORARI to a judgment of the Supreme Court of Nebraska, affirming a judgment of a lower court which dismissed an appeal from action of a board of equalization, fixing an assessment for taxation.

Mr. F. W. Sargent, with whom *Mr. Wymer Dressler* and *Mr. R. N. Van Doren* were on the briefs, for petitioner.

Mr. R. A. Van Orsdel, with whom *Mr. George W. Leamer* and *Mr. J. W. McGan* were on the brief, for respondent.

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

This case is here by writ of certiorari to the Supreme Court of Nebraska. The question is whether the taxing authorities of the State of Nebraska and of Dakota County in assessing taxes against the petitioner, the Sioux

City Bridge Company, upon that part of its bridge across the Missouri River at South Sioux City, which is in the jurisdiction of Nebraska, deprived the Bridge Company of due process of law and denied it the equal protection of the laws in violation of the Fourteenth Amendment.

For a number of years before 1918, the Bridge Company had returned the Nebraska part of the bridge for taxation at $600,000. In that year the assessor of Dakota County sent the blank return to the Bridge Company as usual, but the Bridge Company sent back the proposed return, refusing to sign, and insisting that the valuation was too high. The assessor then returned the bridge at $600,000 as formerly. The Bridge Company appealed to the Board of Equalization of the county. Only the counsel for the Bridge Company and for the city of South Sioux City appeared. No witnesses were called and no evidence produced, but the Board of Equalization, on the appeal of the Bridge Company for reduction, raised the assessment above that of the assessor $100,000. From this ruling an appeal was taken to the District Court of Dakota County for relief against the action of the Board of Equalization on the ground that the valuation was excessive, was without evidence and arbitrary, that it violated the constitution of the State requiring a uniformity of taxing burdens, and that it deprived the Bridge Company of due process and equal protection of the law as forbidden by the Fourteenth Amendment.

Seventy-four per cent. of the total value of the bridge is in Dakota County, Nebraska, and twenty-six per cent. is in Iowa. The original cost of the bridge was $941,000, but some wooden trestles in the original construction were taken out and steel substituted and this increased the original cost to $1,022,000. The bridge was built in 1888. Since 1907 it has been under lease to two railroads and jointly they maintain the bridge, pay the taxes and 8 per cent. on the original cost of $945,800. The leases are

short-time leases because the bridge while in good repair is too light for modern traffic and can only be used under burdensome and expensive restrictions. One of the railroad companies has made soundings for a new bridge. The engineers report the existing bridge to be totally out of date and estimate a depreciation in its value on this account of $300,000 from its original cost. The same witnesses testified that to build the bridge just as it was would cost at present prices from $1,300,000 to $1,500,000, but that it would be most foolish to build a bridge of that old type now.

A tax commissioner of one of the lessee railroads, with long experience in taxation and valuation, testified that from an examination of the sales of real estate as shown by deeds of record in Nebraska and in Dakota County and the tax list, the acre property in Dakota County was assessed at 55.70 per cent. of its value, that improvements in city property were assessed at 49.29 per cent. of their selling value, and had been so assessed for seven years. The county assessor thought such sales were not best evidence of true value in money and denied that there was any attempt to value at less than such value.

The District Court held the reasonable value of the bridge in Nebraska to be more than $700,000 as assessed and dismissed the appeal. It made no finding upon the issue as to whether there was an undervaluation of other real estate and improvements in Dakota County or the State and did not refer to it.

The Bridge Company carried the case on appeal to the Supreme Court. That court found from the evidence that $700,000 as the true value was not so manifestly wrong that it was justified in disturbing the assessment.

Taking up the objection that the real property and improvements were undervalued in Dakota County, the court said:

"It is finally urged that this court should reduce the true value of the bridge as found by the court to 55

per cent. of such value, for the reason that other property in the district is assessed at 55 per cent. of its true value, and that it would be manifestly unjust to appellant to assess its property at its true value while other property in the district is assessed at 55 per cent. of its value.

"While undoubtedly the law contemplates that there should be equality in taxation, we are of the view that the plan of equalization proposed by appellant is not the proper remedy. The rule is now settled by a recent decision of this court that when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced. *Lincoln Telephone & Telegraph Co.* v. *Johnson County,* 102 Neb. 254. In the argument of appellant the soundness of this ruling is assailed, and authorities in other jurisdictions are cited which seem at variance with our holding. We are not willing, however, to recede from the rule of that case."

Section 1, Article IX, of the Constitution of Nebraska, contains the following:

"The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the Legislature shall direct. . . ."

Section 6300 of the Revised Statutes of Nebraska, 1913, provides:

"All property in this state not expressly exempt therefrom shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at twenty per cent. of such actual value. Such assessed value shall be entered in separate column opposite each item, and shall be taken

and considered as the taxable value of such property, and the value at which it shall be listed and upon which the levy shall be made. Actual value as used in this chapter shall mean its value in the market in the ordinary course of trade."

In the case of *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 352, 353, this Court said:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 35, 37." Analogous cases are *Greene* v. *Louisville & Interurban R. R. Co.,* 244 U. S. 499, 516, 517, 518; *Cummings* v. *National Bank,* 101 U. S. 153, 160; *Taylor* v. *Louisville & Nashville R. R. Co.,* 88 Fed. 350, 364, 365, 372, 374; *Louisville & Nashville R. R. Co.* v. *Bosworth,* 209 Fed. 380, 452; *Washington Water Power Co.* v. *Kootenai County,* 270 Fed. 369, 374.

The charge made by the Bridge Company in this case was that the State, through its duly constituted agents, to wit, the county assessor and the County Board of Equalization, improperly executed the constitution and taxing laws of the State and intentionally and arbitrarily assessed the Bridge Company's property at 100 per cent. of its true value and all the other real estate and its improvements in the county at 55 per cent.

The Supreme Court does not make it clear whether it thinks the discrimination charged was proved or not, but assuming the discrimination, it holds that the Bridge Company has no remedy except "to have the property

assessed below its true value raised, rather than to have property assessed at its true value reduced." The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent. of the value of their property in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage in violation of the law, has been often dealt with by courts and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the federal courts in the enforcement of the uniformity clauses of state statutes and constitutions and of the equal protection clause of the Fourteenth Amendment. The exact question was considered at length by the Circuit Court of Appeals of the Sixth Circuit in the case of *Taylor* v. *Louisville & Nashville R. R. Co.*, 88 Fed. 350, 364, 365, and the language of that court was approved and incorporated in the decision of this Court in *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 516, 517, 518. The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district. This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect the decision

of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment.

But we construe the action of the court not to be equivalent to a finding that such intentional discrimination existed between the valuation of the Bridge Company's property and that of all other real property and improvements in the county, but rather a ruling that even if it did exist, the Bridge Company must continue to pay taxes on a full 100 per cent. valuation of its property. It was on the same principle, doubtless, that the District Court ignored the issue of discrimination altogether. It is therefore just that upon reversal we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well-established rule in the decisions of this Court, cited above, that mere errors of judgment do not support a claim of discrimination, but that there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 353.

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

WALKER *v.* GISH.

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

No. 135. Argued November 28, 29, 1922.—Decided January 2, 1923.

1. The rule allowing a lot-owner to erect a party wall on the lot line, and obliging his neighbor, if he use it, to pay part of the cost, is a condition attached to the lots within the original Federal City under the powers granted by the original proprietors of the land;

and, as extended to other parts of the District under an act authorizing the District Commissioners to establish building regulations, it has the force of a custom binding wherever a party wall is erected by one lot-owner without objection by the adjoining owner. P. 449.

2. And, in the absence of evidence to the contrary, it must be presumed that the erection of such a wall was done without such objection. P. 451.
3. A lot-owner who used a party wall waived his right to object, in defense of an action for the value of the use, that the building regulations, with which he complied, deprived him of his property without due process of law. P. 452.

51 App. D. C. 4; 273 Fed. 366, affirmed.

Error to a judgment of the Court of Appeals of the District of Columbia affirming a judgment for Gish in an action to recover the value of the use of a party wall by Walker.

Mr. S. Herbert Giesy for plaintiff in error.

No appearance for defendant in error.

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

Genevieve K. Gish sued Ernest G. Walker in the Municipal Court of the District of Columbia for $150 for the use of a party wall on premises 2327 Ashmead Place, Washington, in that part of the District of Columbia not included in the original Federal City, and recovered $144.63. Walker appealed the case to the Supreme Court of the District. That court on the first trial directed a verdict for Walker, the defendant, on the ground that he had not used the wall. On appeal, the Court of Appeals of the District reversed the judgment because the question whether the defendant used the wall was a disputable fact which should have been submitted to the jury. On the second trial, the court submitted the issue to the jury which found for the plaintiff, and fixed

the value of the use at $85. The Court of Appeals affirmed the judgment, and the case comes here by writ of error on the issue of the constitutional validity of the building regulations of the District of Columbia, which by the Act of June 14, 1878, c. 194, 20 Stat. 131, are given the effect of congressional legislation. It is urged that they deprived defendant of his property without due process of law, in violation of the Fifth Amendment. The question was seasonably raised by a request for a charge on the trial and by proper assignment of error in the proceedings for review. Judicial Code, § 250; *Smoot* v. *Heyl,* 227 U. S. 518, 522.

The history of the law of party walls in Washington is interesting. Its application is not free from difficulty in that part of the present Washington which was not included within the original Federal City. The original proprietors of the land in the Federal City conveyed it in trust to certain named persons to be laid out in such streets, squares and lots as the President of the United States should approve. Under the trust provisions, the lots to be sold or distributed were to be subject to such terms and conditions as might be thought reasonable by the President for regulating the materials and manner of the buildings and improvements. President Washington issued regulations, one of which is in force today. They provided that a person appointed to superintend buildings might enter on the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof, that the foundations were to be laid equally upon each lot and to be of the breadth and thickness thought proper by the superintendent, that the first builder was to be reimbursed one-half of the cost of the wall, or so much thereof as the next builder might use, but that such use could not begin till he had paid the amount fixed by the superintendent. This has been held to be a condition

annexed to every house lot in the original Washington. *Miller* v. *Elliot,* 5 Cr. C. C. 543; 17 Fed. Cas. 315, No. 9568. It has been decided to be the only source of the right of a lot owner in Washington to put his party wall on his neighbor's land. *Fowler* v. *Saks,* 7 Mackey, 570, 579. By the Act of Congress of 1878, *supra,* the District Commissioners were authorized to establish building regulations which should have the force of law; but the regulation of General Washington was continued in force by them and applied not only to the Federal City but to the whole of Washington. The question then arose what was the effect of this regulation as applied to the outlying districts of the city which were not included in the lots of the Federal City, and which were not affected by the grant upon condition by the original owners of that city. This question was fully considered in the case of *Fowler* v. *Koehler,* 43 App. D. C. 349, which was a suit like the one at bar for the value of appropriated use of a party wall in the newer part of the city. The Court of Appeals of the District held that because party walls had in thousands of instances been erected by one of the adjoining owners on the lot of the other in the belief of both that it was the exercise of a lawful right as in the original city, a custom had grown up. So general was this that the court felt justified when erection of a party wall by one owner was without objection by the other, in implying an agreement which would rebut inference of a trespass. Thus there had developed a practical uniformity as to practice in respect of party walls and the law governing them between the lots in the Federal City and those outside, except where, in the outlying district, the adjoining owner objected to the erection of the wall at the time of the construction and took measures to prevent it. The court in *Fowler* v. *Koehler* further held that where party walls were erected in the outside district under such implied agreements, the same obligation to

contribute to the cost of the wall arose in the outlying district as against the adjoining owners as in the Federal City, if they used the party wall, and that the relations between the parties were regulated by the District building regulations.

We think the reasoning of the court in *Fowler* v. *Koehler* sustains its conclusion and that the conclusion helps to the solution of an unfortunately difficult matter of much importance. The status of the party wall in the case at bar is thus established. There is no evidence of the circumstances under which the party wall was erected and we must presume that it was done by the predecessor in title of the plaintiff below with the consent of a grantor of the defendant below.

Plaintiff in error says that even if this be true, the effect of the District regulations is equivalent to a statute and deprives him of his property without due process of law. The effect of §§ 74 and 56 of those regulations is, shortly stated, this: One of the two adjoining owners may build a two-story house and a party wall nine inches thick, occupying 4½ inches of his neighbor's land. If, thereafter, his neighbor wishes to build a house of three stories, that neighbor is required to have his wall 13 inches thick. He can take down the existing party wall, but he can occupy only 4½ inches of the other's lot and must pay all the expenses of the change, including the damage done to the owner of the two-story house, so that his party wall will be 8½ inches on his own land, while he uses but 4½ inches of his neighbor's. Or he can build a nine-inch wall against the two-story wall and widen his wall to 13 inches when it reaches the third story, resting on 4½ inches of the original party wall on his own land. He thus is compelled to occupy with his wall 13 inches of his own lot and let his neighbor have 4½ inches of his land without corresponding advantage. Counsel for plaintiff in error urges that the fundamental idea in the

institution of party walls is mutual benefit, (*Smoot* v. *Heyl,* 227 U. S. 518, 523), which implies equality of easement of support and of occupation of land between the neighbors, and that to give to the builder of the first wall such great advantage over his neighbors as these regulations give him deprives his neighbor of property without due process of law.

The questions thus raised might justify discussion if the plaintiff in error were in a position to urge them, and had not used the original party wall of which he complains. His contention below was that he had not used the wall of his neighbor, that he had built a new wall at the side of the original party wall as high as the original wall and then had widened it to 13 inches so as to extend over the original wall without resting on it. The jury found against him on this issue. If he did use the original wall, then he must pay for the value of the use. *Fowler* v. *Saks,* 7 Mackey, 570, 581; *Fowler* v. *Koehler,* 43 App. D. C. 349, 360. In using it, he waived the right to object to the regulations with which he complied without objection, until he was called upon to pay his share of that which he had taken and used.

The judgment is affirmed.

BLAMBERG BROTHERS *v.* UNITED STATES.

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

No. 165. Argued December 5, 1922.—Decided January 2, 1923.

The second section of the Suits in Admiralty Act does not authorize a suit *in personam* against the United States, as a substitute for a libel *in rem,* when the United States vessel is not in a port of the United States or of one of her possessions. P. 458.

272 Fed. 978, affirmed.

APPEAL from a decree of the District Court dismissing a libel in admiralty for want of jurisdiction.

Mr. D. Roger Englar, with whom *Mr. James W. Ryan, Mr. J. Edward Tyler, Jr., and Mr. T. Catesby Jones* were on the briefs, for appellant.

The remedy afforded by § 2 of the Act of March 9, 1920, is not limited to cases where, if the vessel were privately owned, a proceeding in admiralty could have been maintained within the territorial limits of the United States, but is available generally to all persons who could have maintained proceedings in admiralty against vessels of the United States anywhere in the world prior to the passage of this act. *Smith* v. *United States* (unreported, Dist. Court, Eastern Dist. Louisiana, August 4, 1922); *Phoenix Paint & Varnish Co.* v. *United States* (unreported, Dist. Court, Eastern Dist. Pennsylvania, November 17, 1921).

This conclusion is supported by the fact that, if the substitute remedy were not available so long as the vessel remained outside the United States, § 5 of the act would deprive the libelant of any remedy in cases like the present, where the vessel did not return within the time provided for suit.

The argument of the Government and the decision of the judge below proceed on the assumption that the United States desired to force its citizens to sue its vessels in the courts of foreign countries wherever this remedy was available to them, although opening its own courts to such suits where jurisdiction could be had only in those courts. As might be expected, this view finds no support in the language of the act. On the contrary, § 7 indicates an intent by Congress to prevent, as far as lay in its power, the seizure of vessels of the United States in foreign countries as well as in the United States; and to concentrate all such litigation in its own courts.

Moreover, the United States would thus avoid incurring the expense of furnishing surety bonds, and of retaining counsel to defend it in litigation in foreign countries.

Congress clearly intended to substitute the personal credit of the United States for the security of the particular vessel. In the present case the libelant had a right to arrest the "Catskill" as security for its claim. Having that right, it was within the class of vessel-creditors entitled to sue the United States *in personam*.

Section 8 of the act, providing that decrees in suits under the act shall be payable "out of any money in the Treasury of the United States not otherwise appropriated," is substantially a pledge by the United States of those unappropriated moneys in the Treasury as a fund or stipulation to meet the liabilities incurred by the Shipping Board's vessels. This general pledge or stipulation was apparently intended as a substitute for multitudinous stipulations to release individual vessels from arrest. It was intended to be available to everyone who previously had a right to have a United States vessel arrested as security.

If Congress intended to prevent vessels from being delayed because of arrest under legal process, the theory of the lower court that the libelant in the present case should have arrested the vessel in Cuba would, by encouraging delay to the vessel, violate the intention of Congress.

Congress intended to grant a right to sue the United States *in personam* to everyone who had a cause of action against the vessel under § 9 of the Shipping Act of 1916. This would be so even if the libelant had no present ability to arrest the vessel, provided it had a right or cause of action against her.

Sections 1 and 7 of the Suits in Admiralty Act repeal the remedy provided by § 9 of the Shipping Act of 1916. The first sentence of § 2 of the Suits in Admiralty Act

defines that part of § 9 of the Shipping Act of 1916 which is not repealed. In other words, the first sentence of § 2 of the Suits in Admiralty Act deals only with causes of action, substantive rights or liabilities. The second sentence deals only with venue. Therefore, the phrase in the first sentence, if "a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for," requires only that the cause of action or substantive right be of an admiralty nature, and was merely intended to exclude common-law causes of action on which the vessel might be arrested under foreign attachment.

The first sentence does not require that the libelant be able to arrest the vessel at the time he files his libel. It merely requires that he have an admiralty cause of action enforceable, if the vessel were privately owned, on her coming within the court's territorial jurisdiction. Congress eliminated from the original bill a proposed requirement in the first sentence that the substitute remedy should be available only if, in addition to there being an admiralty cause of action, "the vessel or cargo could be arrested or attached at the time of the commencement of suit." As finally passed, the act merely requires the libelant to show that his cause of action or substantive right is one such as District Courts "ordinarily have cognizance" of "in their admiralty and maritime jurisdictions."

The United States, by appearing generally and answering in this suit, there having been at the time the suit was commenced jurisdiction of the person or vessel at Havana, waived any requirement as to venue or jurisdiction of the person. *United States* v. *Hvoslef,* 237 U. S. 1, 11. A suit in Havana against a vessel owned by the United States would be a suit against the United States. *The Western Maid,* 257 U. S. 491.

It was unnecessary for the libelant to elect whether to proceed *in personam* or *in rem;* but the libelant did in

fact elect to proceed in accordance with the principles of libels *in rem.*

Mr. Solicitor General Beck, with whom *Mr. Assistant Attorney General Ottinger, Mr. J. Frank Staley,* Special Assistant to the Attorney General, and *Mr. Norman B. Beecher* were on the brief, for the United States.

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

This is an appeal from the District Court of Maryland on a question of jurisdiction duly certified by the District Judge.

The appellant, a corporation of Maryland, February 26, 1921, filed a libel *in personam* against the United States under the Suits in Admiralty Act, approved March 9, 1920, c. 95, 41 Stat. 525. The libel alleged that on October 6, 1920, the libelant had shipped 1500 bags of corn from Baltimore to Havana, Cuba, to its own order, upon the barge "Catskill," that the corn had never been delivered in accordance with the terms of the bills of lading, and that due to the delay the corn had greatly deteriorated in value, whereby libelant had been damaged in the sum of $15,000. The libel contained this averment, "Third. That said barge 'Catskill' is now, or will be, during the pendency of process hereunder, within this District and within the jurisdiction of this Honorable Court."

The United States made answer April 22, 1921, through the district attorney. It admitted that it was the qualified owner of the "Catskill," but denied that it was or had ever been, in charge of the operation of the barge. It alleged that it entered into a contract for the sale of the barge July 26, 1920, for sixty thousand dollars, six thousand dollars in cash and the balance in monthly instalments of three thousand dollars, that the vendee had defaulted in all the monthly payments, that the

barge was delivered to the vendee June 30, 1920, and the United States had no control over her management or operation, and did not make the contract of affreightment described in the libel. In answer to the third paragraph of the libel the respondent alleged that it was advised that the barge was in Havana and had no knowledge when it would arrive in the jurisdiction of the court. On May 3, 1921, having obtained leave of court, the United States as respondent filed a suggestion of want of jurisdiction in which it averred positively that the barge was then in the port of Havana, Cuba, where it had been libeled in the sum of $3,725 for wage claims. It further averred that libels *in personam* had been filed against it in three other district courts of the United States for claims aggregating a sum in excess of the value of the barge which was alleged not to exceed $50,000. The suggestion concludes that the respondent can not be proceeded against by a libel *in personam,* or by a libel in the nature of an *in rem* proceeding as provided for by the Suits in Admiralty Act, for the reason that at the time of filing the libel, and at all times thereafter, the barge "Catskill" was and had been at the port of Havana, Cuba, and without the jurisdiction of the court. The libelant, answering the suggestion, alleged that, although under the facts as alleged, no direct personal liability arose against the respondent under the general law, yet under the Suits in Admiralty Act, a right to bring a libel *in personam* was created as a substitute for an ordinary libel *in rem* and that the presence of the barge in the jurisdiction of the court was not essential to such jurisdiction *in personam.*

The first section of the Suits in Admiralty Act provides that no vessel or cargo owned by the United States "shall hereafter, in view of the provision herein made for a libel in personam; be subject to arrest or seizure by judicial process in the United States or its possessions."

The second section provides that in cases where, if such vessel were privately owned, a proceeding in admiralty could be maintained, a libel *in personam* may be brought against the United States, provided the vessel is employed as a merchant vessel or a tugboat. The suits are to be brought in the United States District Court where the libelants live or have their principal place of business in the United States, or in which the vessel or cargo charged with liability may be found. Provision is made for manner of service and, upon application of either party, for the transfer of such libels to any other district in the discretion of the court.

By the seventh section of the act, if any vessel or cargo of the United States is seized by process of a court of any country other than the United States, the Secretary of State of the United States in his discretion, upon request of the Attorney General, may direct the United States consul residing near the port of seizure to claim immunity from such suit and seizure and to execute a bond on behalf of the United States as the court may require for the release of the vessel or cargo.

The District Court on the facts stated held that it was without jurisdiction under this statute to entertain a libel *in personam* against the United States. We agree with that holding. The first section of the act is limited in its inhibition of seizures of vessels and cargoes of the United States to ports of the United States and its possessions. The second section is *in pari materia,* and the same limitation must be implied in its construction. This act was passed to avoid the embarrassment to which the Government found itself subjected by the Act of September 7, 1916, c. 451, 39 Stat. 728, by the ninth section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens. *The Lake Monroe,* 250 U. S.

246. It was intended to substitute this proceeding *in personam,* as the first section of the act expressly indicates, in lieu of the previous unlimited right of claimants to libel such vessels *in rem* in the ports of the United States and its possessions. Congress had no power, however, to enact immunity from seizure in respect of such vessels when in foreign ports, and therefore the embarrassment of seizures was to be mitigated in another way, *i. e.,* by claiming immunity on international grounds and, if that failed, by stipulation or bond in the name of the United States. The provisions of the seventh section confirm the construction by which provisions of the second section are limited in their application to vessels within the jurisdiction of the United States.

A number of important questions as to the construction of this statute have arisen in other cases, and the argument before us has taken a wide range. Those questions do not require decision here, and we do not decide them. All we hold here is that the District Court was right in construing the second section of the Suits in Admiralty Act not to authorize a suit *in personam* against the United States as a substitute for a libel *in rem* when the United States vessel is not in a port of the United States or of one of her possessions.

Affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* VAN ZANT.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 142. Argued December 4, 1922.—Decided January 2, 1923.

1. By forbidding common carriers engaged in interstate commerce to issue free passes for interstate journeys, except to specified classes of persons, (Hepburn Act, 1906,) Congress took over the

subject to the exclusion of state laws, not only as to what passes may be issued and used, but also as to their limitations, conditions and effect upon the rights and responsibilities of the passenger and railway company, respectively. P. 468.

2. A condition affixed to a free pass, issued under the Hepburn Act, that the person accepting and using it assumes all the risk of accident and personal injury, is valid. P. 468.

289 Mo. 163, reversed.

CERTIORARI to review a judgment of the Supreme Court of Missouri, affirming a judgment recovered by the respondent from the Railway Company in an action for personal injuries suffered by her, in that State, while she was traveling from Kansas to Oklahoma by means of a free pass, which had been issued to her as the mother of one of the company's employees.

Mr. Samuel W. Moore, with whom *Mr. Frank H. Moore* and *Mr. Cyrus Crane* were on the brief, for petitioner.

The original Act to Regulate Commerce, passed in 1887, did not expressly prohibit free transportation, and it was only when such transportation constituted discrimination and was not in the exception contained in § 22 of the act that it was illegal. The first general prohibition of free transportation, and the first express authorization of free transportation, except in certain specified instances permitted by § 22, appeared in the amendment of 1906. In the Act of April 13, 1908, a proviso was added expanding the meaning of the word "employees." In the amendment of June 18, 1910, which is not involved herein, a further proviso was added making provision for the exchange of passes or franks with telegraph, telephone and cable lines.

The evident purpose of Congress, in its amendment of 1906, was to bring the whole subject of interstate transportation under direct national control. The issue of free transportation, unregulated except by the general

anti-discrimination provisions of the Act of 1887, and by the several States whose efforts to enforce their statutes were not attended with great success, had resulted in gross discrimination. National legislation of a comprehensive character, therefore, was imperatively necessary to provide one uniform rule covering the subject of free transportation, and one uniform method of its enforcement. The amendment of 1906 was responsive to this demand.

Congress, we contend, reached out and took over the entire subject of free interstate transportation, specifying with particularity the persons to whom it might lawfully be issued and providing penalties for infractions of the law by individuals as well as the carriers. This of necessity deprived the States of all power or authority to legislate with respect to such transportation. The exertion of national power would be frustrated and nullified if authority remained in the several States to encroach upon or in any manner to affect the subject-matter with conflicting statutes or decisions.

The stipulation in a free interstate pass releasing the carrier from liability is a part of the pass itself. The pass is a license, and the person to whom it is issued is a licensee. *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440, 454. The terms and conditions on which it is issued and given validity are an integral part of the license itself. A release of all claims for personal injuries has always been a condition to the use of free transportation. Such a stipulation was upheld in 1858. *Welles* v. *Railway Co.*, 26 Barb. 641; affd. 24 N. Y. 181.

The fact that the release was on the back of the pass instead of on its face is of no consequence. The pass consisted of writing and printing on both sides of the paper. This was the pass over which Congress assumed jurisdiction by the amendment of 1906. That part of the pass which consists of the release, equally with that

part which authorized the plaintiff to travel free was thus withdrawn from the domain of state legislation.

Congress is presumed to have enacted the amendment of 1906 with full knowledge of the decisions of this Court in *Northern Pacific Ry. Co.* v. *Adams, supra;* and *Boering* v. *Chesapeake Beach Ry. Co.,* 193 U. S. 442. It knew that the usual release stipulation was an integral part of the pass itself, and that the use of a free pass involved a waiver on the part of the carrier of its compensation, and likewise a waiver on the part of the user of the pass of any claim for damage to his person. It may also be assumed that Congress knew of the conflicting state statutes, some of which gave and others denied compensation.

The validity of a stipulation against liability contained in a free interstate pass issued by a railway company under the Act of 1906 came before this Court in *Charleston & Western Carolina Ry. Co.* v. *Thompson,* 234 U. S. 576.

A pass is ordinarily conditioned to be non-transferable and subject to forfeiture if presented for passage by any other than the person to whom it was issued. Is the validity of these provisions to be tested by state statutes and decisions of state courts? Passes also contain a time limit, during which they are valid for passage. Is this likewise subject to state regulation? Following the passage of the Act of 1906, the Interstate Commerce Commission promulgated various rulings relative to the issue of free interstate transportation, prescribing its form, designating the persons who come within its provisions, defining the word "family" as used in the act, etc. I Watkins, Shippers and Carriers, 3d ed., pp. 648–652. May these rulings and regulations be amended or repealed or superseded by state authority? Many other illustrations might be given.

The confusion that would result is aptly illustrated by the confusion which actually existed in the enforcement

of a carrier's liability for loss or damage to freight shipments prior to the amendment of 1906. *Adams Express Co.* v. *Croninger,* 226 U. S. 491.

The Act of 1906, providing for the issue of free interstate transportation, is silent on the subject of the liability of the pass-holder for personal injuries; but this is no answer to our contention that the federal authority has taken over the entire subject of free interstate transportation, including the stipulations upon which it may be issued, and their validity. *Postal Telegraph Co.* v. *Warren-Godwin Lumber Co.,* 251 U. S. 27; *Western Union Telegraph Co.* v. *Boegli,* 251 U. S. 315.

Similarly, it has been held by this Court that the Federal Employers' Liability Act has occupied the entire field with respect to the liability of carriers for damages to employees, to the exclusion of state control. *New Orleans & Northeastern R. R. Co.* v. *Harris,* 247 U. S. 367; *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147; *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492; *Pryor* v. *Williams,* 254 U. S. 43.

The same argument that is made by the respondent here might be urged in support of the proposition that as the statute was silent touching the transferability of mileage, excursion or commutation passenger tickets, that subject was not taken over by Congress, but remained subject to state regulation. But this Court, in *Bitterman* v. *Louisville & Nashville R. R. Co.,* 207 U. S. 205, decided otherwise.

The stipulation against liability contained in the pass was a contract entered into pursuant to federal authority. The Hepburn Act permitted carriers to issue free interstate transportation to employees and their dependents, and, by necessary implication, to issue such transportation on the usual and customary conditions. In authorizing the issuance of a free pass, Congress likewise authorized this inseparable incident to all free transporta-

tion. The parties to such a contract authorized by an act of Congress are entitled to have its validity determined and its terms construed in accordance with the rules which obtain in the federal courts to the exclusion of the rules which obtain in state courts. *Tullock* v. *Mulvane,* 184 U. S. 497; *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin,* 241 U. S. 319; *Missouri, Kansas & Texas Ry. Co.* v. *Harriman,* 227 U. S. 657.

Mr. Charles H. Montgomery, for respondent, submitted.

Federal legislation as to carriage of a person on an admittedly free pass has not occupied the field of liability for negligent injury to such person even on an interstate journey. No attempt has been made to regulate or control this liability, and no mention made of it. The same is true as to a contract designed to exempt the carrier from liability. Until Congress does act affirmatively on these subjects, the state courts are free to apply their local laws, even though, in so doing, they may indirectly affect interstate commerce contracts of carriage. Hepburn Act, § 1, c. 3591, 34 Stat. 584; *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher,* 248 U. S. 359; *Savage* v. *Jones,* 225 U. S. 501; *Pennsylvania R. R. Co.* v. *Hughes,* 191 U. S. 477; *Southern Pacific Co.* v. *Schuyler,* 227 U. S. 601; *Clark* v. *Southern Ry. Co.,* 69 Ind. App. 697; *Weir* v. *Roundtree,* 173 Fed. 779; *Smith* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 194 Fed. 81; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Wiley* v. *Grand Trunk Ry. Co.,* 227 Fed. 129; *Fowler* v. *Railroad Co.,* 229 Fed. 375; *Minnesota Rate Cases,* 230 U. S. 352.

In passing on the question of liability of the carrier for negligent injury to a person riding on a free pass, and the question of the validity of a contract exempting the carrier from such liability, a federal court does not determine those questions by reason of any provision of the Hep-

burn Act, but by its own interpretation of the common law. *Southern Pacific Co.* v. *Schuyler, supra; Weir* v. *Roundtree, supra; Smith* v. *Atchison, Topeka & Santa Fe Ry. Co., supra; Martin* v. *Pittsburg & Lake Erie R. R. Co.,* 203 U. S. 284.

Where the stipulation on the pass is void under the local law where the injury occurred and where the case is tried in the state court, the state law will be enforced by this Court on review from the state court. It is only where the case is tried originally in a federal court, or brought there for trial by the process of removal, that the federal court will apply its own interpretation of the common law. Williams, Juris. & Pr. in Fed. Cts., p. 193, par. 4; *Southern Pacific Co.* v. *Schuyler, supra; Weir* v. *Roundtree, supra; Smith* v. *Atchison, Topeka & Santa Fe Ry. Co., supra; Fowler* v. *Railroad Co., supra; Tweeten* v. *Railroad Co.,* 210 Fed. 830; *Charleston & Western Carolina Ry. Co.* v. *Thompson,* 234 U. S. 576.

Authorities cited by defendant fall under the class of cases tried in a federal court, or arise either under the federal enactments with regard to the carriage of interstate telegrams or express, or under federal enactments with regard to employers' liability, in both of which cases Congress has dealt at length and has occupied the entire field of liability of the carrier, including the subjects of the action and defenses.

The stipulation on the back of the free pass in the instant case does not cover the matter of a negligent injury to the person of the passenger riding on the pass, and there is no contract in this case purporting to exempt the carrier from liability for such negligent injury. The case may be sustained independently of a federal question, and, for that reason also, the holding of the state court should not be disturbed. *Northern Pacific Ry. Co.* v. *Adams,* 192 U. S. 440; *Charleston & Western Carolina Ry. Co.* v. *Thompson, supra; Boering* v. *Chesapeake*

Beach Ry. Co., 193 U. S. 442; *Southern Pacific Co.* v. *Schuyler, supra.*

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The case presents the effect of a condition in a free pass issued by petitioner to respondent and used by her in transportation in interstate commerce—whether determined by the provisions of § 1 of the Hepburn Act (34 Stat. 584) or by the laws of Kansas and Missouri.

There is practically no dispute about the facts. The pass was authoritatively and gratuitously issued and she sustained injuries in Missouri while using it in an interstate journey. This injury she alleged, and prayed judgment against the Railway Company in the sum of $25,000.

The Railway Company opposed the pass to the action. It contained the following condition: "The person accepting and using it, thereby assumes all risk of accident and damage to person and baggage."

The company averred that it was an interstate carrier by rail and issued the pass "under Art. 5 [1] of the Federal Law, known as the Interstate Commerce Act," and it was to be "interpreted and controlled in its effect and operation by decisions of the Federal Courts" construing the act.

To the defense respondent replied that at the time of receiving the pass she resided in Kansas, and that in accepting it "she did not and could not assume the risk of accident or damage to her person and baggage, caused by the negligence" of the company, and that the condition upon the pass expressing such effect was void under the provisions of Art. 3, c. 98, of the General Statutes of

[1] This reference is evidently to a subdivision of § 8563 of the publication known as "U. S. Compiled Statutes, 1916."—Reporter.

the State of Kansas, 1915, relating to railroads and other carriers, and that, under the statutes and the common law of Kansas, the condition was against public policy.

She further pleaded that under the laws of Missouri the condition was also against public policy and void, and that the action was not, and is not, brought "upon any Federal Statute or any Federal law, but upon the common law liability in force" in Missouri and that "the action was and is brought in the Circuit Court of Jasper County, Missouri, under the laws of the State of Missouri," and that the company's liability to her was to be determined by the laws of that State.

The trial court took and expressed the view that the condition upon the pass was void under the laws and public policy of both States, and ruled that the condition upon it constituted no defense to the action and excluded it from the case. Declarations of law recognizing the relevancy and controlling effect of the condition were refused.

The court thereupon found for respondent (plaintiff) and fixed her damages at $8,000—that amount having been stipulated as representing her injury. Judgment was entered for that amount, and was affirmed by the Supreme Court of the State.

The Supreme Court discussed at some length the Hepburn Act, the extent of its regulation, and what it permitted to state powers or excluded from them, and said, adopting the language of a Supreme Court Commissioner of the State, "Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States."

The comment concedes the supremacy of federal control, and leaves only the inquiry, Has control been exerted in the Hepburn Act?

The act was passed June 29, 1906, and was an amendment to the Interstate Commerce Act of 1887. It was, as the act it amended was, a regulation of carriers in interstate commerce, and it provided that "no common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families. . . ." And a carrier violating the act is subject to a penalty, and any person not of those excepted, who uses the pass, is also subject to a penalty.

The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of, not only their permission and use, but the limitations and conditions upon their use. Or to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsibility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of. And that responsibility and those rights, this Court has decided, the railroad company can control by conditions in the passes. Antecedently to the passage of the Hepburn Act, we decided that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence, and no public policy is violated thereby. *Northern Pacific Ry. Co.* v. *Adams,* 192 U. S. 440; *Boering* v. *Chesapeake Beach Ry. Co.,* 193 U. S. 442.

Those cases were considered and applied as giving validity to the stipulations of passes issued under the act

in *Charleston & Western Carolina Ry. Co.* v. *Thompson,* 234 U. S. 576, according thereby freedom of transportation to the possessor of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right and its incident obligations, and be a means of exacting from the company indefinite damages. In this case the prayer was for $25,000—the recovery was for $8,000. Circumstances might have made it the larger sum—and this, it is the contention and decision, is the determination of state laws which could neither permit nor forbid the gift. We cannot assent. The pass proceeded from the federal act; it is controlled necessarily in its incidents and consequences by the federal act to the exclusion of state laws and state policies, and such is the effect of the cited cases.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

ST. LOUIS MALLEABLE CASTING COMPANY *v.* GEORGE C. PRENDERGAST CONSTRUCTION COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 154. Argued December 7, 8, 1922.—Decided January 2, 1923.

An owner of property within a special sewer district, who connected his premises with the sewer when constructed and availed himself of its benefits, is estopped from maintaining a suit in which, upon the ground that the manner of constituting the district and apportioning the cost infringed his rights under the Fourteenth Amendment, he seeks to cancel the tax bill issued to the contractor against his property. P. 472.

288 Mo. 197, affirmed.

ERROR to a decree of the Supreme Court of Missouri, affirming a decree dismissing a suit brought by the plain-

tiff in error to cancel a sewer tax bill issued against its property to the defendant construction company.

Mr. Lambert E. Walther, with whom *Mr. John S. Leahy* and *Mr. Walter H. Saunders* were on the briefs, for plaintiff in error.

Mr. Wm. K. Koerner, with whom *Mr. Jas. R. Kinealy* and *Mr. Wm. B. Kinealy* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the Court.

Suit in equity to have declared invalid and canceled, a tax bill issued against the property of plaintiff in error, herein designated as plaintiff, for the construction of sewers in Baden Sewer District Number Two, City of St. Louis.

There is a charge of excess and resultant invalidity in the tax bill because the taxing district (sewer district) does not contain tracts of land which it should contain and that are within its drainage area.

The Fourteenth Amendment is invoked against the tax: (1) In that the limits of the sewer district and the apportionment of the cost between the several lots or parcels of land and their respective owners, without a hearing being accorded, deny plaintiff due process of law. (2) In the exclusion from the district of tracts of land as above stated, plaintiff is denied due process of law and the equal protection of the law.

There is an elaborate detail of the particulars upon which the charges are alleged to rest. The particulars include the charter of the city and the various ordinances passed in executing its purpose, the action of the Board of Aldermen, and the action of the Board of Public Service in execution of the direction to contract for the construction of the sewers, and when constructed, to cause the

entire expense to be computed, to levy and assess such expense as a special tax in accordance with the requirements of the charter, and to issue a special tax bill against each parcel of ground liable.

And it is alleged that the defendant was awarded, under the requirement and directions of the ordinances, the contract, and received from the city special tax bills as authorized by the charter and ordinances, among which was one issued against the property of plaintiff for $9,168.86 which, it is alleged, purports to confer upon the holder thereof a lien authorized by the charter of the city.

The trial court, after reciting that it found "in favor of the defendant on the issues joined" and that the plaintiff was "not entitled to the relief prayed," adjudged and decreed that the suit be dismissed.

The Supreme Court affirmed the decree. The court reviewed at length the pleadings of plaintiff and said that the plaintiff made "a very plausible case by the allegations of its petition, but it is not supported by either the evidence in the case or finding of the trial court." The conclusion of the court, therefore, was that there was no arbitrary or discriminating exclusion of property from the district that was within the benefit of the sewer. And further, that "Defendant's evidence tended to show: The sewer, for proportionate part of cost of which appellant's ground was assessed, had been fully completed when this suit was brought, and appellant had *connected its said premises with this sewer and was in actual enjoyment of the benefits thereof.* [Italics ours.] The evidence fails to show any act of commission or omission on the part of the contractor. The appellant does not question the utility of the sewer. Yet, without offering to pay any part of its cost, appellant comes into a court of equity and asks that the entire assessment against its property be canceled."

The conclusion, in effect, was that the fact of connecting its premises with the sewer estopped plaintiff from denying the validity of the tax bill, and the conclusion was supported by the citation of a number of cases, including *Wight* v. *Davidson,* 181 U. S. 371.

The evidence leaves no doubt of the fact that plaintiff, during the construction of the district sewer, made application for a license to connect with it, and afterward did connect with it. The only reply that counsel make is that the court meant nothing more by its conclusion and the cases cited "than the statement of an abstract legal principle" which was "in no way connected up with the evidence." It is further said that "Nowhere in the statement does the Supreme Court find any facts constituting an estoppel."

The comment is not justified. Our quotations from the court's opinion establish the contrary, and that the plaintiff did something more than stand by and make no protest; it availed of the benefits of the sewer. The state cases cited are, therefore, not in point. Nor is *O'Brien* v. *Wheelock,* 184 U. S. 450, 489, of relevant consideration. It is not attempted here, as there, to enforce a law as of validity by estoppel to particular persons, though invalid, under the constitution of the State, to all of the world besides.

Finally, it is said that if the Supreme Court had intended to hold plaintiff estopped from raising the questions under the Federal Constitution, the case would have been peremptorily disposed of without discussing or ruling against those questions. And "Neither is it conceivable," it is further said, "that the petition for a writ of error to this court would have been granted by the Chief Justice of the Supreme Court of Missouri, if the case had been decided against plaintiff in error upon a question of local law." The propositions are not estimable in meaning except there is concession in them that if the estoppel

was ruled it was adequate to justify the court's decree. It was ruled. The effect is not lessened because the court ruled as well on the constitutional questions. As we have seen, the court said that the "plausible case" made by plaintiff "by the allegations of its petition" was "not supported by either the evidence in the case or finding of the trial court." Whether this conclusion received or needed aid from the force the court considered should be assigned to the establishment of the sewer district as furnishing an indisputable presumption of notice, is not absolutely clear. Nor is it clear whether the court considered that notice of the meeting of the Board of Public Service and opportunity to be heard before the Board satisfied the constitutional requirements urged by plaintiff.

However, we are not called upon to resolve the uncertainty, if any there be, in the grounds of the court's ruling upon the constitutional questions. It is enough for our action that the court considered plaintiff estopped to contest the validity of the sewer or the validity of the tax which was imposed by connecting its premises with the sewer. In that conclusion we concur.

Decree affirmed.

GALVESTON WHARF COMPANY ET AL. *v.* CITY OF GALVESTON ET AL.

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

No. 19. Argued December 7, 1922.—Decided January 2, 1923.

1. The power of eminent domain cannot be contracted away; and a contract of that kind is not within the protection of the Contract Clause of the Federal Constitution. P. 476.
2. A bill relying on the contrary hypothesis does not state a substantial federal question within the jurisdiction of the District Court. P. 476.

Affirmed.

APPEAL from a decree of the District Court dismissing a bill for want of jurisdiction.

Mr. J. W. Terry for appellants.

Mr. Frank S. Anderson, with whom *Mr. James W. Wayman* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an appeal from a decree of the District Court dismissing a bill in equity for want of jurisdiction, on the ground that the bill states no federal question. The ground appears by the decree and also by the certificate of the Judge. Act of March 3, 1911, c. 231, (the Judicial Code), § 238, 36 Stat. 1087, 1157; amended by Act of January 28, 1915, c. 22, 38 Stat. 803, 804.

The bill alleges a contract embodied by consent in a decree of April 1, 1869, that compromised a suit brought by the city against the present plaintiff, the Galveston Wharf Company, the appellant, concerning flats in Galveston Bay. It is enough to state the general features of the arrangement. The title of the Wharf Company to certain lands was established, but it was provided that the City should become owner of one-third of the Wharf Company's stock, which was to be increased to that end, and of an undivided one-third of the Wharf Company's property, in trust for the present and future inhabitants of Galveston—all to be inalienable except by a four-fifths vote of all the qualified voters. This was confirmed by the Legislature in 1870. There was a later contract of March 9, 1905, not now material except that it again confirmed the decree of 1869, and has been performed up to the date of the bill.

But in May, 1920, the City, which is self-governing, amended its charter by giving itself power to purchase,

condemn and operate the various means and instrumentalities of public service such as gas and electric lighting plants, dock and wharf railway terminals, docks, wharves, and other things named, including the property jointly owned by the Galveston Wharf Company and the City, for the purpose of owning and operating any such public service and distributing it, with provision as to the mode of exercising eminent domain. By another amendment details were arranged in case the City should acquire the joint property by purchase or condemnation and by still another the City was authorized to compel a partition of the same property when authorized by a majority of its qualified voters, and to that end to prosecute a suit. It is alleged that the purpose of a partition would be a sale of one-third of the property upon a majority vote of the citizens, whereas the contract required a vote of four-fifths; and that a condemnation equally would impair the obligation of contracts and would deprive the plaintiff of its property without due process of law, contrary to the Constitution of the United States. The plaintiff further shows large expenditures to improve the property at its own cost and points out other property that it says can be taken more fairly if the City wishes to start municipal wharves.

Without going into greater detail we will assume that the alleged contract was made and bound the City, and that its terms will be departed from if the City should exercise the new power. The bill alleges that the proper officers will declare the amendments adopted, and that unless restrained the City " will attempt to partition said property or condemn the same, or both," and prays for an injunction against attempting to enforce the amendments in any manner so far as the above mentioned property is concerned. The case was heard upon the pleadings and documentary evidence but it is unnecessary to state them further since the decree went upon the ground

that the bill did not state a case within the jurisdiction of the Court.

We are of opinion that the decree was right. If the bill can be taken to allege sufficiently any threat and intent of the defendant it does not show that the City will go beyond an exercise of the right of eminent domain. The allegation is, will attempt to partition or condemn. If questions can be raised about the constitutionality of the ordinance authorizing partition, the City may confine itself to condemnation, and will, so far as appears. But there is nothing to prevent the exercise of eminent domain by the legislative power. *West River Bridge Co.* v. *Dix,* 6 How. 507. *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685. *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20. These cases not only dispose of the objection based upon the contract but also show the difference between an attempt to transfer property from one private person to another and the taking it for public administration by a public body. 166 U. S. 694. There is no question about the principle and therefore there is no substantial federal question raised by the bill. This seems to us so plain that we have not thought it necessary to consider whether the suit was prematurely brought.

Decree affirmed.

UNITED STATES *v.* STAFOFF, ALIAS ELIOFF.

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

BROOKS *v.* UNITED STATES.

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

UNITED STATES *v.* REMUS ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 26, 197, 403. Argued November 29, 1922.—Decided January 2, 1923.

1. An act of Congress can not make past conduct criminal by purporting to construe a former act as having been in force at a time when this Court has held it was repealed. P. 480.
2. As applied to criminal prosecutions, (1) for carrying on the business of rectifier, wholesaler or retailer of liquor for beverage purposes, without having paid the special tax therefor, (2) for keeping a still for production of such spirits "for beverage and commercial purposes" without having registered it with the Collector of Internal Revenue, (3) for carrying on the business of a distiller of spirits for beverage purposes without having given bond, and, (4) for making a mash for production of such spirits, in an unauthorized distillery, and separation of spirits therefrom,—Rev. Stats. §§ 3242, 3258, 3281 and 3283, respectively, were repealed by the National Prohibition Act. P. 479. *United States* v. *Yuginovich,* 256 U. S. 450.
3. These laws, however, were revived by the Supplementary Prohibition Act of November 23, 1921, c. 134, § 5, 42 Stat. 223, as to conduct subsequent to its enactment. P. 480.
4. Congress may tax what it also forbids. P. 480.
5. A conviction upon an indictment based upon Rev. Stats. §§ 3258, 3281 and 3282, repealed, can not be sustained under the National Prohibition Act by spelling out acts violative of that statute from the indictment. P. 481.

268 Fed. 417, (No. 26) affirmed.

283 Fed. 685, (No. 403) affirmed in part and reversed in part.

THE first and third of these cases came on writs of error sued out by the United States to review judgments of District Courts sustaining demurrers to counts of indictments based on sections of the Revised Statutes relating to internal revenue. The second arose upon questions certified by the Circuit Court of Appeals in a similar case in which the defendant, Brooks, had been convicted.

Mrs. Mabel Walker Willebrandt, Assistant Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Howard T. Jones* were on the brief, for the United States.

Mr. Samuel Herrick, with whom *Mr. George L. Taylor* was on the brief, for Brooks.

Mr. Elijah N. Zoline for defendants in error in No. 403.

No appearance for defendant in error in No. 26.

MR. JUSTICE HOLMES delivered the opinion of the Court.

In the first of these cases Stafoff was indicted with another for having had in their possession a still intended for the production of distilled spirits for beverage and commercial purposes, without having registered it with the Collector of Internal Revenue, as required by Rev. Stats. § 3258; and in a second count for having unlawfully manufactured on premises other than an authorized distillery a mash fit for the production of distilled spirits, to wit, whiskey, contrary to Rev. Stats. § 3282. A demurrer to these counts was sustained, 268 Fed. 417, and the United States brings the case here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.

The case of Brooks comes here on a certificate from the Circuit Court of Appeals for the Ninth Circuit. Brooks was convicted under the above mentioned §§ 3258 and 3282, and also under Rev. Stats. § 3281 for having

carried on the business of a distiller without having given bond as required by law. The third and fourth counts under § 3282 respectively charged the making of a mash as above and the separating by distillation of alcoholic spirits from a fermented mash. The questions certified are whether the three sections mentioned are repealed by the National Prohibition Act of October 28, 1919, c. 85, 41 Stat. 305; and whether if they are repealed the cause should be remanded with directions to enter judgment and impose sentence under the last named act.

In the third case Remus and his associates were charged in six counts with having carried on the business of a wholesale liquor dealer, that of a retail liquor dealer, and that of a rectifier, without having paid the special tax as required by law. Rev. Stats. § 3242. A demurrer to these counts was sustained. 283 Fed. 685. The United States took a writ of error under the Criminal Appeals Act.

In *United States* v. *Yuginovich,* 256 U. S. 450, it was decided that §§ 3281 and 3282 were repealed by the later law, at least as to the production of liquor for beverage purposes. Since that decision and with reference to it, as appears from the House Report, No. 224, 67th Cong., 1st sess., and the debates, 61 Cong. Rec., Part 3, pp. 3095, 3096, the Act Supplemental to the National Prohibition Act was passed. Act of November 23, 1921, c. 134, § 5, 42 Stat. 222, 223. By § 5 of this statute "all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act." (But if an act violates both the former and the latter a conviction under one is a bar to prosecution under the

other.) This section is not declaratory even in form. It does not purport to construe the National Prohibition Act as leaving in force what this Court has declared to have been repealed. It could not in this way give a retrospective criminality to acts that were done before it was passed and that were not criminal except for the statutes held to have been repealed. *Ogden* v. *Blackledge,* 2 Cranch, 272, 277. *Koshkonong* v. *Burton,* 104 U. S. 668. Of course a statute purporting to declare the intent of an earlier one might be of great weight in assisting a Court when in doubt, although not entitled to control judicial action. But that is not this case. The decision in *United States* v. *Yuginovich* must stand for the law before November 23, 1921. In that case, besides what we have mentioned, it was held also that the penalty imposed by Rev. Stats. § 3257 on a distiller for defrauding the United States of the tax on the spirits distilled by him was repealed. So far as the liquor is for beverage purposes the same reasoning must apply to the penalty in § 3242 for carrying on the business of rectifier or wholesale or retail liquor dealer without having paid the special tax imposed by law.

But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms. The form of words is not material when Congress manifests its will that certain rules shall govern henceforth. *Swigart* v. *Baker,* 229 U. S. 187, 198. Of course Congress may tax what it also forbids. 256 U. S. 462. For offenses committed after the new law, *United States* v. *Yuginovich* can not be relied upon. Three counts in the Remus case charge carrying on the business mentioned up to April 1, 1922, and therefore are governed in part by the Supplemental Act. So far as the decision of the Court below neglected this dis-

tinction it was wrong. The decision in Stafoff's case dealt with conduct before the date of the Supplemental Act and was right. The keeping of a still to make liquor for beverage purposes contrary to § 3258 is within the principle of the *Yuginovich Case,* and the addition of the words " and commercial " to the statement of the purposes does not seem to us enough to take it out. The reference to this section in Title III, § 9, of the Prohibition Act may have been inserted simply for greater caution. It is one of the several considerations tending to a different conclusion in *United States* v. *Yuginovich,* but as they did not prevail then they cannot prevail now.

There remain the questions certified in *Brooks* v. *United States.* They are somewhat broader than we indicated in our summary statement, as they include the Revenue Laws generally as well as the §§ 3258, 3281 and 3282. The general question manifestly is too broad to require an answer. From the summary given of the indictment we infer that what we have said is sufficient with regard to the sections named. The fourth question, whether, in view of what we have decided, the case should be remanded for judgment and sentence under the National Prohibition Act, must be answered, No. The indictment plainly purported to be drawn under the old law and it would be unjust to treat the conviction as covering an offense under a law of fundamentally different policy if facts could be spelled out that might fall within the latter, although alleged with no thought of it or any suggestion to the accused that he must be prepared to defend against the different charge.

No. 26. Judgment affirmed.

No. 403. Judgment on counts 2, 4 and 6 affirmed. Judgment on counts 3, 5 and 7 reversed.

No. 197. Questions 1, 2 and 3, as limited above answered, Yes. Question 4 answered, No.

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UNITED STATES, OWNER OF THE STEAMSHIPS "CLIO," "MOOSEABEE," "FORT LOGAN," AND "MORGANZA," ET AL. *v.* CARVER ET AL., CO-PARTNERS, UNDER THE FIRM NAME OF BAKER, CARVER, AND MORRELL.

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

No. 402. Argued December 6, 1922.—Decided January 2, 1923.

1. Under the Maritime Lien and Ship Mortgage Acts, June 23, 1910, c. 373, 36 Stat. 604; June 5, 1920, c. 250, § 30, 41 Stat. 1000, 1005, no lien arises for supplies furnished a chartered vessel where the charter forbids it, and where the material-man, by reasonably diligent investigation, could have ascertained there was a charter and gained knowledge of its terms. P. 489.
2. A charter-party provided that the charterer would not "suffer nor permit to be continued any lien . . . which has or might have priority over the title and interest of the owner," and that, in any event, within fifteen days, the charterer would provide for the satisfaction or discharge of every claim that might have such priority, or cause the vessel to be discharged from such lien, in any event, within fifteen days after it was imposed. *Held*, that the charterer was under a primary obligation not to suffer any lien to be imposed. P. 489.

QUESTIONS certified by the Circuit Court of Appeals, arising upon an appeal from a judgment of the District Court, in admiralty, upholding a claim of right to a maritime lien, in a suit *in personam* brought against the United States and the receiver of a ship corporation, under the Suits in Admiralty Act.

Mr. Norman B. Beecher, with whom *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger, Mr. J. Frank Staley,* Special Assistant to the Attorney General, and *Mr. Arthur M. Boal* were on the briefs, for the United States.

Maritime liens for necessaries or supplies would not have arisen against either the Clio or Morganza had both vessels been privately owned.

The person ordering the supplies or necessaries was without authority from the owner to impose maritime liens on either the Clio or Morganza.

The fact that the order for the supplies came from a shore agent and not from the master put the supply man on inquiry as to the extent of the authority of the person giving the order to bind the vessel. His failure to make any inquiry rebuts any possible presumption of authority in the person giving the order to impose liens on the vessel.

Under the lien statutes a supply man receiving an order from a person other than the master, is put upon inquiry as to the relation of the person giving the order to the vessel. If he fails to make any inquiry he is charged with such knowledge as a reasonable inquiry would have disclosed of any lack of authority in the person giving the order to bind the vessel.

Any possible presumption of authority in the person ordering the supplies for the Morganza to impose a maritime lien on the vessel is rebutted by knowledge in fact in the supply man of his lack of such authority.

The United States is not liable for what would have been a maritime lien had the vessels affected been privately owned.

The United States is not liable for the personal indebtedness of the States Steamship Corporation in respect of supplies and necessaries furnished to a vessel in respect of which no maritime lien would have arisen had such vessel been privately owned.

Mr. E. Curtis Rouse for Carver et al.

A maritime lien arose for the supplies furnished the Clio which would have been enforceable *in rem* had that vessel been privately owned.

Whether the contracts under which the State Steamship Corporation obtained possession of the Clio and Morganza be called conditional or partial payment purchase contracts or charters, the fact remains that they were a complete and absolute demise of the vessels. The corporation was the owner *pro hac vice* of the vessels at the time. That the corporation was in lawful possession has never been questioned.

The person ordering the supplies for these vessels was the person to whom the management of the vessels at the port of supply had been intrusted.

The certificate states that these libelants had no notice or knowledge of any charter or contract under which the State Steamship Corporation held the Clio, or that they were other than owners, and that they had no cause to suspect the existence of one.

The paragraphs of the Maritime Lien Statute of 1910 (36 Stat. 604), material to the consideration of the question here presented, are in §§ 1 and 2.

Since that statute, demised vessels have uniformly been held liable *in rem,* and subject to liens for supplies furnished on the order of the representatives named in the statute, although appointed by charterers or conditional vendees in possession under such contracts and clauses as exist here. The various Circuit Courts have been uniform in their construction of this statute. *The Oceana,* 244 Fed. 80 (certiorari denied 245 U. S. 656); *The Yankee,* 233 Fed. 919, 926 (certiorari denied 243 U. S. 649); *The Penn,* 276 Fed. 118; *The St. Johns,* 273 Fed. 1005; 277 Fed. 1020 (certiorari granted 257 U. S. 626); *The Ascutney,* 278 Fed. 991; *The Portland,* 273 Fed. 401; *The South Coast,* 251 U. S. 519; *The Cratheus,* 263 Fed. 693.

The appellant, relying on a forced construction of certain language used in the decision in *Piedmont Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1, urges here, exactly as was unsuccessfully urged in *The Oceana,* that,

in the case where a charter exists, the Lien Statute of 1910 does not apply, and that the rule of *The Valencia,* 165 U. S. 264, still obtains, and that a supplyman cannot obtain a lien where a charterer ordered the supplies.

Both of the objections pointed out by the Court in *The Valencia,* have been expressly eliminated by the Lien Statute of 1910 (and also that of 1920). First, by dispensing with the so-called home port rule and the presumption of dealing on the credit of the owner only and, secondly, by expressly giving the presumption of a lien for supplies upon the order of any one of a certain class of persons, whether appointed by a charterer, or agreed purchaser, or other owner *pro hac vice.* This did away with the requirement for the express contract for lien referred to in that decision.

The statute was passed directly after the *Valencia* decision and obviously to modify its harshness and yet render practical the protection of the lien for maritime supplies. This interpretation of the decision is supported by *Piedmont Coal Case,* 254 U. S. 1, and *The South Coast,* 251 U. S. 519.

There is nothing in the decision supporting the argument made by the appellant here that the mere fact of the existence of a charter prevents a supplyman procuring a lien and puts him on notice. On the contrary, the case supports the argument sustained in *The Oceana* and in the lower court in this case, that there must be some condition or circumstance brought home to the supplyman which puts him on inquiry or notice of the existence of a restriction which would prevent his acquiring a lien. This is made clear by the concluding paragraph of the *Valencia* opinion.

The rule urged by the appellant would bring back a worse chaos than ever existed before the statute. It would nullify in fact the entire point and force of the

statute. It would require that every supplyman, on receiving an order, would have to initiate an inquiry, not as to the home port, it is true, but as to whether he was dealing with a representative of a charterer, vendee or other owner *pro hac vice*. If he found that he was dealing with other than an owner personally, he would be obliged, at his peril, to inquire the exact authority of that person to order for the ship, and the fact that the person was in open, visible control of the management of the vessel at the port of supply or said he was the owner would be immaterial. He would be obliged to go to the original charter or contract or letter of appointment and record title. He could not rely on the statement of the purchaser or of the charterer. It is not always true that these charters or contracts are readily available. Therefore, the express words of the statute that these respective officers or agents, when appointed by a charterer, agreed purchaser in possession, or owner *pro hac vice*, are to have the same authority as when appointed by the owner, or as the owner himself, would be expressly nullified. It seems too clear for extended argument that this could not have been the intention of the framers of the statute.

It is urged by the appellant that this difficulty would be cured by insisting on the order being signed by the master. The weakness of this lies in the fact that usually these charters are bareboat form, where the master is the appointee of the charterer, or agreed purchaser in possession. He has no greater authority than they, and, being the appointee of the charterer or vendee, his authority must necessarily be subject to the same inquiry. The master, as master, has no inherent power, in absence of the statute, to pledge the credit of the vessel. He never could do it in the home port, or where the owner was present. He could not do it in a foreign port unless necessity was shown, and also he had no funds and the

owner had no credit. But by § 2 of the statute he is now given that power and is placed in the same class as managing owner, ship's husband or any other person such as the marine or port superintendent, or captain, to whom the management of the vessel, at the port of supply, is entrusted. This is the force of the decision in *The South Coast,* 251 U. S. 519, as applied to the present case.

The charter clearly contemplates that a lien may, in the course of operations, be incurred, and that this lien may be continued to exist for a limited time; that the vessel may be arrested to enforce such lien and may continue under such arrest for a limited time. It is practically the same clause which this Court said in *The South Coast,* 251 U. S. 519, was not a prohibition; *The Oceana, supra; The Yankee, supra.* The lien was not denied, in the *Valencia Case,* because of the language of the clause, but because of the home port rule.

A maritime lien arose for the supplies furnished the Morganza herein which would have been enforceable *in rem* had that vessel been privately owned.

There being a right to a lien *in rem* against the ships, had they been privately owned, this suit was maintainable under the Suits in Admiralty Act.

Mr. Justice Holmes delivered the opinion of the Court.

This is a libel *in personam* against the United States and the receiver of State Steamship Corporation, a company of the State of Delaware, bankrupt, to charge the United States for supplies furnished to the steamships Clio and Morganza. Act of March 9, 1920, c. 95, 41 Stat. 525. The United States owned the vessels, but they were in the possession of the corporation under charters by which the corporation was to pay all costs and expenses incident to the use and operation of the vessels, and " will not suffer nor permit to be continued any lien, encum-

brance, or charge which has or might have priority over the title and interest of the owner in said vessel." It was stipulated further that in any event within fifteen days the charterer would make adequate provision for the satisfaction or discharge of every claim that might have priority over the title, &c., or would cause such vessel to be discharged from such lien in any event within fifteen days after it was imposed. Supplies or necessities were furnished to the Clio upon the orders of the corporation's port captain who was charged with the duty of procuring them. The libelants did not know any facts tending to show that the corporation did not own the vessel, and so far as appears made no inquiry or effort to ascertain what the facts might be. The case of the Morganza is similar except that before furnishing some of the supplies the libelants' agent who dealt with the corporation knew facts putting the libelants upon inquiry but preferred to avoid making it. The liability of the corporation is admitted. That of the vessels is asserted under the Act of June 23, 1910, c. 373, 36 Stat. 604, and the Ship Mortgage Act, being § 30 of the Merchant Marine Act, 1920; Act of June 5, 1920, c. 250, § 30, subsections P. Q. & R., 41 Stat. 988, 1000, 1005.

The questions certified are whether a maritime lien would have arisen against (1) the Clio or (2) the Morganza, if they had been privately owned; (3) if yes, whether the United States is liable for the amount of what would have been the lien; and (4) whether the United States is liable for the personal indebtedness of the State Steamship Corporation for supplies in respect of which no maritime lien would have arisen if the vessel had been privately owned.

We take up first questions 1 and 2. The Act of 1910, by which the transactions with the Clio were governed, after enlarging the right to a maritime lien and providing who shall be presumed to have authority for the owner to

procure supplies for the vessel, qualifies the whole in § 3 as follows: "but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor." We regard these words as too plain for argument. They do not allow the material-man to rest upon presumptions until he is put upon inquiry, they call upon him to inquire. To ascertain is to find out by investigation. If by investigation with reasonable diligence the material-man could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if in the same way he could have found out its terms he was chargeable with notice of its terms. In this case it would seem that there would have been no difficulty in finding out both. The Ship Mortgage Act of 1920 repeats the words of the Act of 1910.

But it is said that the charter-party if known would have shown that the master at least, if not the agent who ordered the supplies, had authority to impose a lien, since the charter-party contemplated the possibility of one being created and provided for its removal. *The South Coast,* 251 U. S. 519, is cited as establishing the position. But there is a sufficient difference in the language employed there and here to bring about a different result. In *The South Coast* the contract went no farther than to agree to discharge liens within a month. Here the primary undertaking was that "the charterers will not suffer nor permit to be continued any lien," &c. We read this as meaning will not suffer any lien nor permit the same to be continued. Naturally there are provisions for the removal of the lien if in spite of the primary undertaking one is imposed or claimed. But the primary undertaking

is that a lien shall not be imposed. We are of opinion that the libelants got no lien upon the Clio, and *a fortiori* that the Morganza was free. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times. Therefore it is unnecessary to consider whether the libelants' argument is supported by the decisions to which they refer. *The Yankee, sub nom. Rivers & Harbors Improvement Co.* v. *Latta,* 243 U. S. 649. *The Oceana, sub nom. Morse Dry Dock & Repair Co.* v. *Conron Brothers Co.,* 245 U. S. 656.

As the libelants disclaim the contention that the United States is liable even if the vessels would not have been subject to a lien it is unnecessary to answer the fourth question. It is enough that the first and second are answered, No.

Answer to questions 1 and 2, No.

OSAKA SHOSEN KAISHA ET AL. *v.* PACIFIC EXPORT LUMBER COMPANY.

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

No. 129. Submitted November 23, 1922.—Decided January 2, 1923.

1. Whether the ship is subject to a lien to secure damages resulting from breach of a maritime affreightment contract, is a question of maritime law not controllable by a state statute. P. 495.
2. Acceptance of part of the designated cargo under a contract of affreightment creates no lien upon the ship for damages resulting from refusal to take all. P. 495.
3. The maritime lien or privilege adhering to a vessel is a secret one which may operate to the prejudice of general creditors and purchasers without notice, and is therefore *stricti juris,* not to be extended by construction, analogy, or inference. P. 499.
4. The lien, created by law, presupposes mutuality and reciprocity as between ship and cargo. P. 499.

272 Fed. 799, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals, affirming a decree of the District Court for the libelant (the present respondent) in a proceeding *in rem* to enforce a claim of maritime lien.

Mr. William H. Hayden for petitioners. *Mr. Frank Adams Huffer* and *Mr. Gerald H. Bucey* were also on the briefs.

Mr. Erskine Wood for respondent.

The moment a ship enters upon the performance of her charter by taking even a small part of the cargo on board, she binds herself to the performance of her contract just as if she were a living being. Her taking on part of the cargo is her signature to the contract, so that whereas prior to that act, only her owner was liable *in personam,* after that act she herself becomes liable *in rem;* in other words, a maritime lien in favor of the charterer has arisen against her.

Our opponents, building up their case on the maxim that the ship is bound to the cargo and the cargo to the ship, say that it is impossible there should be a lien on the Saigon for leaving part of the lumber behind, because the ship had no lien on this left-behind cargo, and that unless there is such reciprocity of liens there can be no lien at all.

The point is an interesting one that has never been passed upon by this Court, though we think the current of authority as it may be followed through the history of maritime law is in our favor. Consulato de la Mer, c. 209; Benedict, 4th ed., § 131; Marine Ordinances, Louis XIV, " Maritime Contracts," § XI, Tit. I.

We concede that the old continental maritime law that a ship was liable for breach of an executory contract of affreightment, has been modified in this country to the extent that she is no longer liable *in rem* when the contract remains wholly executory. But, we contend, that is the extent of the modification; and where a ship partly

executes the contract, as by taking on part of her cargo, she herself is liable for all breaches of the contract. The argument on this point may be summarized thus:

1. Under the old continental codes ships were liable *in rem* for breaches of contracts made by the managing owner on their behalf, including executory contracts of affreightment.

2. Even if this were not true, such was certainly the law of this country as announced in the earlier decisions of our admiralty courts, up to the time of *The Freeman,* 18 How. 182, and *The Yankee Blade,* 19 How. 82.

3. *The Yankee Blade* and *The Freeman* did not really settle the point, but they did contain *dicta* that a vessel was not liable for breach of a contract of affreightment which was purely executory.

4. In deference to these *dicta* the lower courts have decided that purely executory contracts do not bind the vessel.

5. But this is the limit of the extent to which the old law has been modified, and the lower courts, as if jealous to preserve that old law, in so far as the *dicta* will allow, have many times held that where the vessel partly executes the contract, as by taking on part of the cargo, she herself becomes liable *in rem* for all breaches of the contract.

6. The statement by counsel that the liens must be reciprocal, that the ship is bound to the cargo and the cargo to the ship, relates to the case where the cargo has been delivered to the ship, and is true so far as it goes. But it in no way contradicts the theory that the lien on the ship may go further. It is in no way inconsistent with the theory that she is liable for breaches of her partly executed contracts, even where she has no corresponding lien in return. There are many cases of liens on ships with no reciprocal lien in their favor. As witness breach of her contract to carry a passenger. *The Rebecca,* 1

Ware, 188; *The Paragon,* Fed. Cas. No. 10,708; *The Tribune,* 3 Sumner, 144; *The Flash,* 1 Abb. Adm. 67; *The Pacific,* 1 Blatchf. 569; *Oakes* v. *Richardson,* 2 Lowell, 173; *The Williams,* 1 Brown Adm. Rep. 208; *The Hermitage,* 4 Blatchf. 474; *The Ira Chaffee,* 2 Fed. 401; *The Monte A,* 12 Fed. 331; *The J. F. Warner,* 22 Fed. 342; *The Director,* 26 Fed. 708; *The Missouri,* 30 Fed. 384; *The Guilio,* 34 Fed. 909; *The Starlight,* 42 Fed. 167; *The Oscoda,* 66 Fed. 347; *The Eugene,* 83 Fed. 222; 87 Fed. 1001; *The Helios,* 108 Fed. 279; *The Oceano,* 148 Fed. 131; *The Margaretha,* 167 Fed. 794; *Wilson* v. *Peninsula Bark & Lumber Co.,* 188 Fed. 52; *The Thomas P. Sheldon,* 118 Fed. 945; *The S. L. Watson,* 118 Fed. 952; *Stone* v. *The Relanpago,* Fed. Cas. No. 13,486.

It is to be noted, in considering this reciprocal relation of liens, that the lien of a vessel on her cargo is of an entirely different nature and origin from the lien of the cargo on the vessel. The lien of the cargo on the vessel is of a higher order. It is a *jus in re* and follows the ship into whosoever hands the ship goes. The lien on the cargo, upon the other hand, is not a *jus in re* but a mere possessory lien and is lost the moment the cargo leaves her possession. The lien on the cargo is nothing more than the right to hold the goods until the freight is paid.

It is hardly necessary to point out that where a vessel enters upon the performance of her contract of affreightment by actually taking on a portion of her cargo, she has signified by as definite and conspicuous an act as it is possible for her to perform that she is undertaking a contract and is herself bound for its performance. You could hardly have a more definite rule or test than that. And the lien arising would be no more " secret " than a lien for seamen's wages, salvage, general average, collision, materials, supplies, repairs, necessaries, bottomry loans, pilotage, wharfage, or any other of the liens which a ship's activities may give rise to.

It would surely be a great miscarriage of justice to allow this Saigon Maru, after deliberately refusing to receive part of the cargo, to then say that we had no lien on her because she had no lien on that part of the cargo which she herself had wrongfully refused. This would be to permit her to profit by her own wrong. We can see no more reason for denying the lien under the state statute in this case, on the ground of lack of uniformity, than for denying it in those quite numerous death cases where the state statutes have been invoked to give a lien where the maritime law gave none.

[Argument was made on the construction as well as the applicability of the statute; the amount of deckload; the seaworthiness of the vessel; and the measure of damages.]

Mr. Justice McReynolds delivered the opinion of the Court.

March 19, 1917, through its agent at Tacoma, Wash., Osaka Shosen Kaisha, incorporated under the laws of Japan and owner of the Japanese steamer "Saigon Maru," then at Singapore, chartered the whole of that vessel, including her deck, to respondent Lumber Company to carry a full cargo of lumber from the Columbia or Willamette River to Bombay. In May, 1917, the vessel began to load at Portland, Ore. Having taken on a full under-deck cargo and 241,559 feet upon the deck, the captain refused to accept more. After insisting that the vessel was not loaded to capacity and ineffectively demanding that she receive an additional 508,441 feet, respondent libeled her, setting up the charter party and the captain's refusal, and claimed substantial damages. The owner gave bond; the vessel departed and safely delivered her cargo.

The Lumber Company maintains that it suffered material loss by the ship's refusal to accept a full load; that

she is liable therefor under the general admiralty law and also under the Oregon statute (Olson's Laws of Oregon, § 10,281), which declares every vessel navigating the waters of the State shall be subject to a lien for the damages resulting from non-performance of affreightment contracts.

Petitioner excepted to the libel upon the ground that the facts alleged showed no lien or right to proceed *in rem.* The trial court ruled otherwise and awarded damages upon the evidence. 267 Fed. 881. The Circuit Court of Appeals approved this action. 272 Fed. 799.

Little need be written of the claim under the state statute. The rights and liabilities of the parties depend upon general rules of maritime law not subject to material alterations by state enactments. *The Roanoke,* 189 U. S. 185; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Union Fish Co.* v. *Erickson,* 248 U. S. 308.

Both courts below acted upon the view that while the ship is not liable *in rem* for breaches of an affreightment contract so long as it remains wholly executory, she becomes liable therefor whenever she partly executes it, as by taking on board some part of the cargo. In support of this view, it is said: Early decisions of our circuit and district courts held that under maritime law the ship is liable *in rem* for any breach of a contract of affreightment with owner or master. That *The Freeman* (1856), 18 How. 182, 188, and *The Yankee Blade* (1857), 19 How. 82, 89, 90, 91, modified this doctrine by denying such liability where the contract remains purely executory, but left it in full force where the vessel has partly performed the agreement, as by accepting part of the indicated cargo. *The Hermitage,* 12 Fed. Cas. No. 6410; *The Williams,* 29 Fed. Cas. No. 17,710; *The Ira Chaffee,* 2 Fed. 401; *The Director,* 26 Fed. 708; *The Starlight,* 42 Fed. 167; *The Oscoda,* 66 Fed. 347; *The Helios,* 108 Fed. 279; *The Oceano,* 148 Fed. 131; *Wilson* v. *Peninsula Bark & Lumber Co.,* 188 Fed. 52, were cited.

We think the argument is unsound.

Prior to *The Freeman* and *The Yankee Blade,* this Court had expressed no opinion on the subject; but, so far as the reports show, the lower courts had generally asserted liability of the ship for breaches of affreightment contracts. "It is grounded upon the authority of the master to contract for the employment of the vessel, and upon the general doctrine of the maritime law, that the vessel is bodily answerable for such contracts of the master made for her benefit." *The Flash,* 1 Abb. Adm. 67, 70; *The Rebecca,* 1 Ware, 188; *The Ira Chaffee, supra.* Since 1857, some of the lower courts have said that the ship becomes liable for breaches of affreightment contracts with her owner or master whenever partly executed by her; but it is forcibly maintained that in none of the cases was the point directly involved. *The Hermitage, The Williams, The Ira Chaffee, The Director, The Starlight, The Oscoda, The Helios, The Oceano, Wilson* v. *Peninsula Bark & Lumber Co., supra.*

The Freeman and *The Yankee Blade* distinctly rejected the theory of the earlier opinions. They are inconsistent with the doctrine that partial performance may create a privilege or lien upon the vessel. And in so far as the lower courts express approval of this doctrine in their more recent opinions, they fail properly to interpret what has been said here.

While, perhaps, not essential to the decision, this Court, through Mr. Justice Curtis, said in *The Freeman:* "Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it."

In *The Yankee Blade,* Mr. Justice Grier, speaking for the Court, declared:

"The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re,*' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding *in rem.* This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the State courts, though by analogy loosely termed proceedings *in rem,* are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore '*stricti juris,*' and cannot be extended by construction, analogy, or inference. 'Analogy,' says Pardessus, (Droit Civ., vol. 3, 597,) 'cannot afford a decisive argument, because privileges are of *strict right.* They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another.'

"Now, it is a doctrine not to be found in any treatise on maritime law, that every contract by the owner or master of a vessel, for the future employment of it, hypothecates the vessel for its performance. This lien or privilege is founded on the rule of maritime law as stated by Cleirac, (597:) 'Le batel est obligée à la marchandise et la marchandise au batel.' The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges, (unless released by the covenants of the charter-party,) and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel. Where there is a charter-party, its

covenants will define the duties imposed on the ship. Hence it is said, (1 Valin, Ordon. de Mar., b. 3, tit. 1, art. 11,) that 'the ship, with her tackle, the freight, and the cargo, are respectively bound (affectée) by the covenants of the charter-party.' But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter-party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases. . . .

"And this court has decided, in the case of *The Schooner Freeman* v. *Buckingham,* 18 Howard, 188, 'that the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it.'"

In *Bulkley, Claimant of the Barque Edwin,* v. *Naumkeag Steam Cotton Co.,* 24 How. 386, 393, the barque was libeled to recover damages for not delivering part of the cotton—707 bales—which the master had agreed to carry from Mobile to Boston. With most of the cargo on board the vessel was towed below the bar, there to receive the remainder from lighters. A lighter carrying 100 bales sank, and the cotton was lost or damaged. The barque delivered 607 bales at Boston in good condition. The owner of the vessel claimed exemption for her upon the ground that she never received the 100 bales. This Court said: "In the present case the cargo was delivered

in pursuance of the contract, the goods in the custody of the master, and subject to his lien for freight, as effectually as if they had been upon the deck of the ship, the contract confessedly binding both the owner and the shipper; and, unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it."

Later opinions approve the same general rule.

"The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed and so long settled, that it would be useless labor to restate it, or the principles which lie at its foundation. The case of the *Schooner Freeman* v. *Buckingham,* decided by this court, is decisive of this case." *The Lady Franklin,* 8 Wall. 325, 329.

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master or some one authorized to receive it." *The Keokuk,* 9 Wall. 517, 519.

The maritime privilege or lien, though adhering to the vessel, is a secret one which may operate to the prejudice of general creditors and purchasers without notice and is therefore *stricti juris* and cannot be extended by construction, analogy or inference. *The Yankee Blade, supra.* The contract of affreightment itself creates no lien, and this Court has consistently declared that the obligation between ship and cargo is mutual and reciprocal and does not attach until the cargo is on board or in

the master's custody. We think the lien created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the ship owner upon the cargo. See *The Thomas P. Sheldon,* 113 Fed. 779, 782, 783.

The theory that partial acceptance of the designated cargo under a contract of affreightment creates a privilege or lien upon the ship for damages resulting from failure to take all, is inconsistent with the opinions of this Court and, we think, without support of adequate authority. In *The S. L. Watson,* 118 Fed. 945, 952, the court well said:

"The rule of admiralty, as always stated, is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been decided otherwise disregarded the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by any relation to any visible fact. It is in harmony with this rule that no lien lies in behalf of a vessel against her cargo for dead freight, or against a vessel for supplies contracted for, but not actually put aboard. *The Kiersage,* 2 Curt. 421, Fed. Cas. No. 7,762; Pars. Ship. & Adm. (1869), 142, 143. It follows out the same principle that Mr. Justice Curtis states in *The Kiersage,* 2 Curt. 424, Fed. Cas. No. 7,762, that admiralty liens are *stricti juris,* and that they cannot be extended argumentatively, or by analogy or inference. He says, 'They must be given by the law itself, and the case must be found described in the law.'"

Reversed.

CHARLES A. RAMSAY COMPANY *v.* ASSOCIATED BILL POSTERS OF THE UNITED STATES AND CANADA ET AL.

WM. H. RANKIN COMPANY *v.* ASSOCIATED BILL POSTERS OF THE UNITED STATES AND CANADA ET AL.

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

Nos. 100, 101. Submitted November 15, 1922.—Decided January 2, 1923.

1. A combination of many billposters, throughout the United States and Canada, to destroy competition in the business of posting bills and secure a monopoly, by limiting and restricting commerce in posters to channels dictated by them, to exclude others from the trade, and to enrich themselves by demanding noncompetitive prices, *held* violative of the Anti-Trust Act. P. 511.
2. Solicitors of advertising, for customers in many States, who prepared, designed, purchased and sold posters and caused them to be displayed by local billposters in many places throughout the Union and Canada, and whose business suffered from the above-mentioned combination, were entitled to sue the alleged conspirators for triple damages under the Anti-Trust Act. P. 511.

271 Fed. 140, reversed.

ERROR to judgments of the Circuit Court of Appeals affirming judgments of the District Court which sustained demurrers and dismissed the complaints in two actions for triple damages under the Sherman Act.

Mr. John A. Hartpence and *Mr. Thomas G. Haight* for plaintiffs in error. *Mr. John B. Johnston* was also on the brief.[1]

[1] On motion of counsel for plaintiff in error, the writ of error, in each case, as to the defendants Kings County Trust Company, Annie Link and Kirwin H. Fulton, executors of the estate of Barney Link, deceased, was, on November 15, 1922, dismissed without costs to either party.

It is difficult to conceive of a plan better calculated to bring about a complete monopoly in the billposting business than that devised and put into effect by the defendants. There was to be only one billposter in each city or town in the United States and Canada and no member was to compete with another; members were furnished with funds of the association to buy out competing concerns in their respective localities; advertisers could not have their billposting done by members of the association if they did business with a non-member; no lithographer could furnish stock posters to independent billposters or advertisers (unless the latter were to have the posters placed by members of the association) except under penalty of having the members of the association refuse to deal with them; and finally business could be taken by members only through twelve licensed solicitors throughout the whole of the United States and Canada. The inevitable effect was to monopolize the billposting business throughout the United States and Canada. *United States* v. *Associated Bill Posters,* 235 Fed. 540, 541.

A further result of the monopoly thus created was that it enabled the members of the association to fix what rates they saw fit, and to drive out of business all but the favored twelve of those who had theretofore been engaged in the legitimate business of advertising agents or who might thereafter desire to engage in that business.

The immediate and direct effect was also to restrain interstate commerce. This follows from either of two aspects of the cases.

(A) When the defendants and other members of the association combined and took the steps which they did to prevent lithographers from selling stock or sample posters to independent billposters, and to make it impossible for advertisers to purchase such posters if they desired and purposed to have them posted by non-mem-

bers, they directly restrained commerce; and, as the lithographers were in most cases located in different States than the purchasers of the posters, they directly restrained interstate commerce.

In this aspect, the cases cannot be distinguished from *Montague & Co.* v. *Lowry,* 193 U. S. 38; *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U. S. 600, and *Belfi* v. *United States,* 259 Fed. 822. Moreover, they fall clearly within the principle of the decisions of this Court in *Loewe* v. *Lawlor,* 208 U. S. 274, and *Swift & Co.* v. *United States,* 196 U. S. 375.

In *Hopkins* v. *United States,* 171 U. S. 578, as well as in *Anderson* v. *United States,* 171 U. S. 604, it was pointed out that there was no evidence of any act on the part of the defendants preventing purchases and sales of cattle by anyone other than that such sales were prevented by the mere refusal on the part of the defendants to do business with non-members (commission merchants) in a manner violative of the rules of the respective exchanges. See *Swift & Co.* v. *United States,* 196 U. S. 375, 397. *Blumenstock Brothers Advertising Agency* v. *Curtis Publishing Co.,* 252 U. S. 436, is not applicable to this case. See *Stafford* v. *Wallace,* 258 U. S. 495.

(B) In another aspect of the case also, the defendants have directly restrained interstate commerce. The purchase of posters by advertisers or agents, such as the plaintiffs, and the shipment of the same to other States to be posted on billboards surely constitute interstate commerce within the decisions of this Court. The purchase, shipment and posting must be considered in the light of one complete commercial transaction. When the defendants, therefore, conspired to refuse to accept for posting upon their billboards the advertising matter of any advertiser who gave any of his business to a non-member, and by the other means before mentioned made it impossible for him to deal with non-members, they re-

strained interstate commerce—they restricted the number of persons with whom advertisers could deal and prevented the natural flow of commerce; they made impossible the complete commercial transaction. It will not do to overlook the great part which poster advertising plays in the commercial intercourse of the nation. In determining whether there has been an unlawful restraint, all of the elements which make up the completed scheme or plan to monopolize the billposting business must be considered, and although the parts may be lawful, the plan as a whole may make them unlawful. *Swift & Co.* v. *United States,* 196 U. S. 375, 396. Therefore, although it may have been, standing alone, lawful for the defendants to refuse to post the bills of certain advertisers, yet if the whole plan or scheme of which that was merely a part was unlawful, the refusal became unlawful.

The business of plaintiffs bore a direct relation to the interstate commerce unlawfully restrained, and was injured in such a way as to entitle them to maintain an action under § 7 of the Sherman Act. *United Copper Securities Co.* v. *Amalgamated Copper Co.,* 232 Fed. 574; *Chattanooga Foundry & Pipe Works* v. *Atlanta,* 203 U. S. 390.

The plaintiffs purchased and sold the advertising posters and shipped them from State to State. Their contracts with their customers or clients necessarily involved, therefore, the movement of goods in interstate commerce; as, for the same reason, did also their dealings with the billposters. There was nothing of that kind in the *Blumenstock Case.* Moreover, in that case the complaint was that the defendant was attempting to monopolize certain advertising business. 252 U. S. 441. Consequently, the business there attempted to be monopolized had to be interstate commerce to come within the Sherman Act, and the defendants, therefore, engaged therein. In the cases at bar, the charge is that the de-

fendants conspired to restrain interstate commerce; hence, they need not have been engaged themselves in interstate commerce. *Loewe* v. *Lawlor,* 208 U. S. 274.

If it be decided that the only unlawful restraint is that imposed upon the sale of the posters, it is impossible to say that the injuries, which the plaintiffs' businesses sustained, were not due to some considerable extent to that restraint.

It is inconceivable that there is no direct relation between an unlawful restraint and an injury, when the plan as a whole, containing one or more unlawful restraints, is so devised as to drive the plaintiffs out of business. *United Copper Securities Co.* v. *Amalgamated Copper Co.,* 232 Fed. 577.

The plaintiffs are not barred from recovery because they were formerly licensed to solicit work and place it with members of the association. Distinguishing, *Bluefields S. S. Co.* v. *United Fruit Co.,* 243 Fed. 1.

Mr. Richard T. Greene for defendants in error. *Mr. Daniel S. Murphy* and *Mr. H. C. Lutkin* were also on the brief.

Neither the posting of posters nor the soliciting of such business affects interstate commerce, except incidentally. Therefore, if, as claimed, the plan has brought about a complete monopoly of the billposting business, it is not condemned by the Sherman Act. *Federal Baseball Club* v. *National League,* 269 Fed. 681; affirmed, 259 U. S. 200; *Blumenstock Brothers Advertising Agency* v. *Curtis Publishing Co.,* 252 U. S. 436; *Hopkins* v. *United States,* 171 U. S. 578; *Anderson* v. *United States,* 171 U. S. 604.

There is no allegation in the complaints that defendants attempted in any way to restrict freedom of production, sale, transportation or use of *special* posters, which constitute the great volume of the business, or that the rules and regulations adopted by the defendant associa-

tion affected interstate commerce in *special* posters, except remotely and incidentally.

The plaintiffs are engaged in soliciting national business only, in which special posters are used exclusively. Such restraint as existed affecting stock posters was segregated from and did not in any way affect the business of national outdoor advertising.

No claim is made that rates fixed for billposting service were unreasonable or excessive. The *Hopkins Case* is authority for the proposition that the mere power to fix rates for intrastate transactions, does not necessarily imply a restraint of interstate trade and commerce.

The limitation of the number of licensed solicitors of billposting contracts is a legitimate and proper regulation of the billposting business under the decision in the *Hopkins Case.*

In the *Blumenstock Case* the advertisements were published in magazines which were intended to be and were thereafter objects of interstate commerce; but this Court held that the refusal to accept advertisements was too remote in its relation to the interstate commerce of circulating magazines to render the defendant liable under the Sherman Act. The refusal to accept advertisements for the billboards is even more remote in its relation to interstate commerce in posters, which precedes the publication of the advertisements by posting the posters on the billboards. The posters are consumed upon the billboards.

There is no allegation in the complaints that the defendants ever purchased posters; and the allegation that the members of the association threatened to refuse " to deal " with lithographers is meaningless, because the members of the association never had any dealings with lithographers and their business was such that they had no occasion to deal with lithographers. They dealt with advertisers and solicitors exclusively. There is, therefore, no allegation that the defendants have exercised any direct restraint upon interstate commerce.

The plan of organization of the defendant association, as alleged, was not designed, and was not in any way used, to effect any restraint upon commerce in posters. In so far as there was any direct restraint upon interstate commerce in stock posters, it was effected solely by threats that the members of the association would refuse to buy stock posters. The purchase of stock posters was not a part of the billposters' business. There is no allegation in the complaints that any of the measures adopted by the association took cognizance of the source of any poster offered to members for posting. Whether or not the posters offered to defendants for posting were manufactured by lithographers engaged in selling stock posters to independent billposters or to advertisers intending to use them on independent boards, they would be accepted and posted by the defendants if they came through one of the licensed solicitors from an advertiser who gave all his billposting business to members of the association. It thus appears that, in the alleged attempt to prevent the sale of stock posters to independent billposters and to advertisers intending to place them upon independent boards, the defendants did not make any use of the measures adopted by the association relating to the billposting business, but relied solely upon threats of refusal of members to buy stock posters. The alleged combination to monopolize the billposting business was separate and distinct from, and had no relation to, the alleged restraint upon interstate commerce in stock posters. But even if it could be said, as claimed by plaintiffs, that these separate and distinct things were parts of an entire scheme or plan, it would nevertheless be true, as held by Judge Hand, that the plaintiffs have not been injured in their business or property " by reason of anything forbidden or declared to be unlawful " by the Sherman Act.

Any restraint upon interstate commerce in special posters which may have resulted from the control which

the defendants exercised over the business of posting posters upon billboards was too remote, being merely incidental to the object of the defendants, which was to regulate and control the billposting business. On the other hand, the restraint upon interstate commerce in stock posters which it is claimed is alleged in the complaints, if it existed at all, was the direct result of the threats of refusal by members of the association to buy stock posters. Plaintiffs were not affected by such restraint upon interstate commerce in stock posters.

Even if, as claimed, the business of the plaintiffs had a direct relation to interstate commerce in special posters, the decision in the *Blumenstock Case* is an authority against the claim of plaintiffs that they are entitled to recover for the injury to their business occasioned by the incidental restraint upon interstate commerce in special posters. Under the *Blumenstock Case* the alleged attempt to monopolize the billposting business is too remote in its relation to interstate commerce in special posters to come within the Sherman Act.

But the plaintiffs' business was not that of buying and selling posters. Incidentally and as agent for or in aid of their advertising customers, they supervised the production of the special posters and settled the lithographer's bills and included them in their own charges. Their business was purely that of solicitors of advertising contracts. They were not merchants or traders in goods.

Plaintiffs cannot maintain an action against their former associates in the alleged unlawful combination based upon defendants' refusal to renew plaintiffs' licenses to continue in such combination and to reap their share of the profits of the alleged unlawful combination. *Bluefields S. S. Co.* v. *United Fruit Co.,* 243 Fed. 1; appeal dismissed, 248 U. S. 595; *Eastman Kodak Co.* v. *Blackmore,* 277 Fed. 694; *Lee Line Steamers* v. *Memphis Co.,* 277 Fed. 5; *McMullen* v. *Hoffman,* 174 U. S. 639;

Continental Wall Paper Co. v. *Voight & Sons Co.*, 212 U. S. 227.

Mr. Justice McReynolds delivered the opinion of the Court.

These are separate actions for treble damages under the Sherman Act. The plaintiffs are distinct corporations and demand different sums; otherwise their complaints are identical. Holding no cause of action was stated the trial court dismissed both complaints, upon demurrer, and the Circuit Court of Appeals affirmed this action. 271 Fed. 140. It will suffice to state the substance of the pertinent allegations.

Plaintiffs were solicitors of advertising for customers in many States. They prepared, designed, purchased and sold posters and caused them to be displayed by local operators in many cities and towns throughout the United States and Canada. They contracted with their customers and received pay for the entire service of preparing, designing, purchasing and posting the advertisements and were engaged in interstate commerce.

Defendants are a New York corporation and its officers and directors, together with certain favored solicitors.

Advertising by posters has become common, and in most of the larger cities and towns throughout this country and Canada one or more local concerns follow the business of displaying them. Usually advertisers contract with a lithographer directly or through agents (solicitors) such as plaintiffs for the manufacture or purchase of posters, and with the local billposter for displaying them. Often the lithographer does business in a different State from the advertiser and both operate in different States from those where most of the billboards are located. Some posters are prepared for the exclusive use of an advertiser and some ("stock" or "sample" ones) for general use. Nearly all are put out by six or eight lithographers.

In 1891 many billposters throughout the United States and Canada, theretofore in competition, entered into a combination and conspiracy to monopolize the business in their respective localities and to dominate and control all trade and commerce in posters within such limits. To that end they organized a voluntary association—afterwards incorporated—whose membership is now very large.

The following were among the means adopted for carrying out the purposes of the combination and conspiracy. (a) Membership has been restricted to one employing billposter in each town or city and members have been prohibited from competing with each other. (b) Funds have been furnished to members for buying out competitors. (c) Rules prevent members accepting certain work from an advertiser who has given business to a nonmember. (d) A schedule of prices has been fixed and members have been prohibited from accepting certain kinds of work from any one except solicitors (twelve in all) arbitrarily selected and licensed, who are forbidden to patronize a nonmember in any place where any member does business. (e) By threats of withdrawal of patronage, manufacturers have been prevented from furnishing posters to independent billposters or to advertisers desiring to do business with independents except upon prohibitive terms.

The Association's membership has become large, its powers and influence great, while the number of independent billposters has greatly declined, and it is now practically impossible for an advertiser to utilize posters except by employing members of the Association and upon terms arbitrarily fixed. Advertisers are not permitted to purchase " stock " posters unless willing to have them displayed upon boards of members, and independent billposters cannot purchase such matter at all.

Plaintiffs had developed a lucrative and profitable business when in July, 1911, the Association canceled their

licenses and refused to renew the same. Now, as a result of the defendants' unlawful acts, they are disabled from competing in the markets and their business is restricted and unprofitable.

The court below held: "The business of the solicitors is to send their customers' advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that, after the posters have arrived at destination, the posting of them by the bill poster is a purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in *Hopkins* v. *United States,* 171 U. S. 578."

We cannot accept this view. The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the States and with Canada. As a direct result of the defendants' joint acts plaintiffs' interstate and foreign business has been greatly limited or destroyed. *Hopkins* v. *United States* is not applicable. There the holding was that the rules, regulations and practices of the association directly affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding noncompetitive prices. The allegations clearly show the result has been as designed, that the statute has been violated and plaintiffs' business has suffered.

This Court has heretofore laid down and adequately discussed the applicable principles. *Montague & Co.* v. *Lowry,* 193 U. S. 38, 45, 46; *Swift & Co.* v. *United States,*

196 U. S. 375, 396; *Loewe* v. *Lawlor,* 208 U. S. 274, 293, *et seq.; Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 438; *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U. S. 600, 609. See also *United States* v. *Associated Bill Posters,* 235 Fed. 540. The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade. The alleged actions of defendants are directly opposed to this beneficent purpose and are denounced by the statute.

We find no adequate support for the claim that plaintiffs were parties to the combination of which they now complain.

Reversed.

GREENPORT BASIN & CONSTRUCTION COMPANY *v.* UNITED STATES.

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

No. 31. Argued November 17, 1922.—Decided January 2, 1923.

1. A judgment of the District Court in an action against the United States under Jud. Code, § 24, par. 20, to recover taxes paid under protest, is reviewable here by writ of error. P. 514.
2. In computing the excess profits tax imposed by the Act of October 3, 1917, c. 63, 40 Stat. 300, the exaction prescribed by § 201 is to be imposed, in its successive stages, upon the entire net income, except that, from the part of the net income prescribed for the first stage, the allowances made by § 203 are to be deducted. So *held,* where the allowances were less than 15 per cent. of the invested capital. P. 514.

269 Fed. 58, affirmed.

ERROR to and appeal from a judgment of the District Court sustaining a demurrer and dismissing the complaint in an action against the United States to recover taxes.

Mr. M. Hampton Todd, with whom *Mr. Percy L. Housel* was on the briefs, for plaintiff in error and appellant.

Mr. Assistant Attorney General Ottinger, with whom *Mr. Solicitor General Beck* and *Mr. Charles H. Weston,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. Justice Brandeis delivered the opinion of the Court.

The Greenport Company had, in 1917, an invested capital of $215,615.55. Its net income was $76,361.20 in the taxable year ending October 31, 1917. Its prewar annual net income, calculated on a 7 per cent. basis, was $15,093.08; and the fixed statutory deduction $3,000. The company was thus subject (for five-sixth of the year) to the excess profits tax imposed by the Revenue Act of October 3, 1917, c. 63, §§ 201, 203, 40 Stat. 300, 303, 304.[1] The Government, following Treasury Regulation No. 41, Articles 16, 17, and form 1103, assessed the tax at $16,837.76. The company insisted that the correct amount was $12,417.36; paid the tax as assessed, under protest; and brought this suit for the difference, $4,420.40, in the

[1] Section 201: "That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax . . . equal to the following percentages of the net income:

"Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year;

"Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital;

"Thirty-five per centum of the amount of the net income in excess of twenty per centum and not in excess of twenty-five per centum of such capital;

federal court for the Eastern District of New York, under the Tucker Act. (Judicial Code, § 24, par. 20.) That court sustained a demurrer to the petition and entered judgment for defendant. 269 Fed. 58. The case is brought here by both writ of error and appeal. It is properly here on writ of error, *Chase* v. *United States,* 155 U. S. 489; *J. Homer Fritch, Inc.* v. *United States,* 248 U. S. 458. The sole question presented for decision is whether the method of calculating the taxes adopted by the Treasury is in harmony with the provisions of the Revenue Act.

The rate of exaction imposed by the excess profits tax grows, in stages, with the increase in the percentage earned on the capital. In the first stage—net income up to 15 per cent. on capital—the rate of exaction is four-twentieth. In the second-stage—net income from 15 to 20 per cent.—the rate is five-twentieth. In the third stage—net income from 20 to 25 per cent.—the rate is seven-twentieth. In the fourth stage—net income from 25 to 33 per cent.—the rate is nine-twentieth. In the last stage—net income over 33 per cent.—the rate is twelve-twentieth. What the net income is to which the respective rates of exaction apply is the question for decision. The company contends, in effect, that net in-

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"Forty-five per centum of the amount of the net income in excess of twenty-five per centum and not in excess of thirty-three per centum of such capital; and

"Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital."

Section 203: "That for the purposes of this title the deduction shall be as follows, except as otherwise in this title provided—

"(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $3,000."

come as used concerning each stage, means not the whole net income—but the balance remaining after deducting from the net income the allowance for prewar profits and the fixed deduction. Under this contention the base to which the exactions should be applied would be, not $76,361.20, but that sum less $18,093.08, or $58,268.12. The Government insists that the exaction should be applied to the whole net income, except that from the net income prescribed for the first stage the allowances specifically provided for are to be deducted.[2] The differences in detail resulting from the two methods of calculation are shown in the margin.[3]

[2] Treasury Regulation No. 41, Article 17, provided that if the deduction exceeded 15% of the invested capital the amount in excess should be applied to the next succeeding tax bracket and so on until the deduction should be absorbed. Compare § 301(d) Act of February 24, 1919, c. 18, 40 Stat. 1057, 1089.

[3] Methods of Computation.

I. Government's Method.

First, apportion the net income into the tax brackets:

Percentages of invested capital	Amount
(1) 0 to 15%	$32,342.33
(2) 15% to 20%	10,780.77
(3) 20% to 25%	10,780.77
(4) 25% to 33%	17,249.24
(5) Above 33%	5,208.09
Total net income	$76,361.20

Second, apply the deduction to the first tax bracket:

(1) $32,342.33 minus $18,093.08 leaves $14,249.25.

Third, compute the tax:

(1) $14,249.25 at 20%	$2,849.85
(2) $10,780.77 at 25%	2,695.19
(3) $10,780.77 at 35%	3,773.27
(4) $17,249.24 at 45%	7,762.15
(5) $5,208.09 at 60%	3,124.85
$58,268.12 Total tax	$20,205.31
Pro rate (5/6)	$16,837.76

II. Plaintiff's Method.

First, apply the deduction:

$76,361.20 minus $18,093.08 leaves $58,268.12 as taxable income.

Second, apportion the taxable income into the tax brackets:

Percentages of invested capital	Amount
(1) 0 to 15%	$32,342.33
(2) 15% to 20%	10,780.77
(3) 20% to 25%	10,780.77
(4) 25% to 33%	4,364.25
(5) Above 33%	none
Total taxable income	$58,268.12

Third, compute the tax:

(1) $32,342.33 at 20%	$6,468.47
(2) $10,780.77 at 25%	2,695.19
(3) $10,780.77 at 35%	3,773.27
(4) $4,364.25 at 45%	1,963.91
(5) none at 60%	none
$58,268.12 Total tax	$14,900.84
Pro rate (5/6)	$12,417.36

The method of calculation adopted by the Treasury follows the clear language of the act; and its correctness is confirmed by the statement, and the illustrative tables, presented by the chairman of the Ways and Means Committee in submitting the Conference Report on the bill. 55 Cong. Rec., 65th Cong., 1st sess., Part 7, pp. 7580–7593. As the language of the act is clear, there is no room for the argument of plaintiff drawn from other revenue measures. Nor is there anything in *La Belle Iron Works* v. *United States,* 256 U. S. 377, 383–388, which lends support to plaintiff's contention.

Affirmed.

ROSENBERG BROS. & COMPANY, INC. *v.* CURTIS BROWN COMPANY.

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

No. 102. Argued November 16, 1922.—Decided January 2, 1923.

1. An order of the District Court quashing the summons in an action against a foreign corporation upon the ground that the defendant was not found in the State is in effect a final judgment, reviewable here under Jud. Code, § 238. P. 517.
2. Purchases of goods by a foreign corporation for sale at its domicile, and visits by its officers on business related to such purchases, are not enough to warrant the inference that it is present within the jurisdiction of the State where such purchases and visits are made; and service of summons on its president while temporarily in that State on such business is, therefore, void. P. 517.
3. The fact that the cause of action arose in the State of suit will not confer jurisdiction of a foreign corporation not found there. P. 518.

285 Fed. 879, affirmed.

ERROR to a judgment of the District Court quashing the summons, for want of jurisdiction, in an action against a foreign corporation.

Mr. George H. Harris for plaintiff in error.

Mr. Jacob H. Corn, with whom *Mr. Isaac Siegel* was on the brief, for defendant in error.

Mr. Justice Brandeis delivered the opinion of the Court.

Rosenberg Bros. & Company, Inc., a New York corporation, brought this suit in the Supreme Court of that State against Curtis Brown Company, an Oklahoma corporation. The only service of process made was by delivery of a summons to defendant's president while he was temporarily in New York. Defendant appeared specially; moved to quash the summons on the ground that the corporation was not found within the State; and, after evidence was taken but before hearing on the motion, removed the case to the federal court for the Western District of New York. There, the motion to quash was granted, upon the ground that the defendant was not amenable to the process of the state court at the time of the service of the summons. A writ of error was sued out under § 238 of the Judicial Code; and the question of jurisdiction was duly certified. The order entered below, although in form an order to quash the summons and not a dismissal of the suit, is a final judgment; and the case is properly here. *Goldey* v. *Morning News,* 156 U. S. 518; *Conley* v. *Mathieson Alkali Works,* 190 U. S. 406. Compare *The Pesaro,* 255 U. S. 216, 217.

The sole question for decision is whether, at the time of the service of process, defendant was doing business within the State of New York in such manner and to such extent as to warrant the inference that it was present there. *Philadelphia & Reading Ry. Co.* v. *McKibbin,* 243 U. S. 264, 265. The District Court found that it was not. That decision was clearly correct. The Curtis Brown

Company is a small retail dealer in men's clothing and furnishings at Tulsa, Oklahoma. It never applied, under the foreign corporation laws, for a license to do business in New York; nor did it at any time authorize suit to be brought against it there. It never had an established place of business in New York; nor did it, without having such established place, regularly carry on business there. It had no property in New York; and had no officer, agent or stockholder resident there. Its only connection with New York appears to have been the purchase there from time to time of a large part of the merchandise to be sold at its store in Tulsa. The purchases were made, sometimes by correspondence, sometimes through visits to New York of one of its officers. Whether, at the time its president was served with process, he was in New York on business or for pleasure; whether he was then authorized to transact any business there; and to what extent he did transact business while there, are questions on which much evidence was introduced; and some of it is conflicting. But the issues so raised are not of legal significance. The only business alleged to have been transacted by the company in New York, either then or theretofore, related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the State. Compare *International Harvester Co.* v. *Kentucky,* 234 U. S. 579; *People's Tobacco Co.* v. *American Tobacco Co.,* 246 U. S. 79. And as it was not found there, the fact that the alleged cause of action arose in New York is immaterial. Compare *Chipman, Limited* v. *Thomas B. Jeffery Co.,* 251 U. S. 373, 379.

Affirmed.

SOUTHERN RAILWAY COMPANY *v.* WATTS AND WATTS, AS COMMISSIONER OF REVENUE, ET AL.

ATLANTIC & YADKIN RAILWAY COMPANY *v.* WATTS AND WATTS, AS COMMISSIONER OF REVENUE, ET AL.

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

SEABOARD AIR LINE RAILWAY COMPANY *v.* WATTS AND WATTS, AS COMMISSIONER OF REVENUE, ET AL.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* WATTS AND WATTS, AS COMMISSIONER OF REVENUE, ET AL.

NORFOLK SOUTHERN RAILROAD COMPANY *v.* WATTS AND WATTS, AS COMMISSIONER OF REVENUE, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

Nos. 368, 369, 381, 382, 383. Argued November 22, 23, 1922.—Decided January 2, 1923.

1. The Equality Clause does not require that the methods of assessing and equalizing state taxes on railroads shall be the same as those applied to other classes of property. P. 525.
2. Undervaluation of property for taxation, as compared with valuation of other property of the same class, does not violate the Equality Clause if it is not intentional and systematic. P. 526.
3. The *ad valorem* taxes imposed on complainant railroads, through an application of the unit rule of assessment, under the Revaluation Act of North Carolina, Public Laws 1919, c. 84, do not violate the Due Process or the Commerce Clauses of the Federal Con-

stitution or the true value and uniformity provisions of the constitution of North Carolina, Arts. V and VII. P. 527.

4. Mere errors of judgment upon the part of the assessing authorities are not subject to review in these suits to enjoin the collection of the taxes. P. 527.
5. The North Carolina Revaluation Act, *supra,* though referring to data commonly used in valuing railroads and authorizing the state taxing board to require railroads to furnish such information, did not make mandatory any particular method of valuing railroads, but required the board to exercise an informed and honest judgment in that regard. P. 527.
6. Failure to follow methods referred to in earlier statutes could not render illegal the revaluation of railroads made under that act by the state board in 1920, since such valuation was tentative and became an assessment by the legislature through approval by North Carolina Laws 1920, Ex. Sess., c. 1. P. 528.
7. The state board, though empowered to reduce this statutory assessment, was not required to make a new valuation, or to apply any particular method of valuation. P. 528.
8. The so-called franchise tax imposed for state purposes on railroad companies by North Carolina [Laws 1920, Ex. Sess., c. 1, § 82 (6½); Laws 1921, c. 34,] equal to one-tenth of one per cent. of the value of each company's property within the State, is not an additional property tax, and does not violate the Uniformity Clause of the state constitution or the Equality or Commerce Clauses of the Federal Constitution. P. 529.
9. The aggregate burden imposed by the property tax, the franchise tax, and the income tax does not obstruct interstate commerce. P. 530.
10. Section 82 (3½) of c. 34, North Carolina Laws 1921, has no application to railroads. P. 530.

289 Fed. 301, affirmed.

Appeals from decrees of District Courts, under Jud. Code, § 266, denying interlocutory injunctions in suits by divers railroad companies to enjoin collection of taxes in North Carolina.

Mr. S. R. Prince, with whom *Mr. L. E. Jeffries, Mr. W. M. Hendren* and *Mr. C. O. Amonette* were on the briefs, for appellants in Nos. 368 and 369.

Mr. Murray Allen, with whom *Mr. Forney Johnston* and *Mr. James F. Wright* were on the brief, for appellant in No. 381.

Mr. Thomas W. Davis, with whom *Mr. George B. Elliott, Mr. Harry Skinner* and *Mr. H. W. Whedbee* were on the brief, for appellant in No. 382.

Mr. W. B. Rodman, with whom *Mr. C. M. Bain, Mr. John M. Robinson* and *Mr. W. B. Rodman, Jr.,* were on the brief, for appellant in No. 383.

Mr. James S. Manning, Attorney General of the State of North Carolina, *Mr. William P. Bynum,* and *Mr. Sidney S. Alderman,* with whom *Mr. Frank Nash, Mr. George H. Brown, Mr. Locke Craig* and *Mr. Thomas D. Warren* were on the briefs, for appellees.

Mr. Justice Brandeis delivered the opinion of the Court.

These five cases were heard together and present largely the same questions of law. Each is an appeal from a decree entered by a federal District Court for North Carolina under § 266 of the Judicial Code denying an interlocutory injunction. In each a railroad company engaged in interstate commerce seeks to enjoin the taxing officials from collecting the *ad valorem* property taxes for the year 1921, imposed for local purposes, and the franchise tax imposed for state purposes. Some of the corporations plaintiff are foreign; some, domestic. One has its lines wholly within the State; four have lines also in other States. But these differences are without legal significance in this connection. The property taxes are assailed on the ground that, as assessed, they violate the equal protection clause, the due process clause, and the commerce clause of the Federal Constitution, the uniformity provision of the state constitution, and the statutory method of valuation. The franchise taxes are assailed on

the ground that the statute under which they are laid violates the commerce clause, the equal protection clause, and the due process clause of the Federal Constitution, as well as the uniformity clause of the state constitution; that the amounts of these taxes were illegally calculated, in violation of the statutes of the State; and that since they are fixed by a percentage of the *ad valorem* valuations, they must fall because those valuations were illegally made. Many of the objections made raise questions as to the meaning and effect of recent statutes of the State which have not yet been construed by its courts; and we are reluctant to pass upon these questions. Some of the objections raise issues of fact on which the evidence is submitted by affidavit and is in certain respects conflicting. But in all the cases jurisdiction rests upon substantial federal questions. The objections to the validity of the legislation and of the assessments, whether arising out of the Federal Constitution or out of the constitution or statutes of the State, may be presented in a single suit. We must, therefore, determine state, as well as federal, questions. *Michigan Central R. R. Co.* v. *Powers,* 201 U. S. 245, 291; *Greene* v. *Louisville & Interurban R. R. Co.,* 244 U. S. 499, 508; *Davis* v. *Wallace,* 257 U. S. 478. All the objections urged have been considered. We are of opinion that none of them should be sustained. The more important ones will be discussed.

The controversy arose in this way.[1] By the constitution of North Carolina taxation of real and personal property must be uniform and *ad valorem* " according to

[1] See Constitution of North Carolina, Articles V and VII; Laws of North Carolina, 1919, c. 90, Revenue Act, particularly §§ 3, 76, 77, 78 and 82; c. 84, Revaluation Act, particularly §§ 1, 3, 4, 7, 25, 26 and 31; Laws of North Carolina, 1920, c. 1, Adopting Revaluation, particularly §§ 1, 2, 3, 4, 5, 7a, 7b, 7d and 82(6½); Laws of North Carolina, 1921, c. 34, Revenue Act, particularly §§ 1, 2, 3, 26, 76, 77, 79, 79a, 80, 81, 82, 82(1), 82(2), 82(3), 82(3½), 82(4), 82(6), 82(6½),

its true value in money." In the assessments made prior to 1920 nearly all classes of property had been grossly undervalued; but the undervaluation varied greatly in degree. The Revaluation Act of 1919, Public Laws, 1919, c. 84, was passed in order to provide for new and fundamentally changed valuations of all property at full values. The valuation of real estate was to be made by county officials; that of railroad property by a state board under an application of the unit rule; and the assessment so made was to be allocated by the state board to the counties on a mileage basis.[2] By that act the valuations made by these taxing boards were to become effective as assessments only upon approval by the legislature. When so approved, they were to be the basis of the taxation for the years 1920 to 1923 inclusive. Revaluations of real estate and of railroads were made under that act and were approved by the legislature in August, 1920. Public Laws, 1920, c. 1. Through these revaluations the assessments of railroad property were, on the average, doubled, as compared with the assessments prevailing in 1919;[3] and

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82(7), 82(8), 82(9), 82(10), 82(11), 82(12), 82(13), 82(15), 82(16), 82(17) and 82(18); c. 38, Machinery Act, particularly §§ 28*a*, 28*b*, 28*c*, 28*d*, 28*e*, 28*f*, 28*g*, 61, 62, 62*a*, 63, 64 and 65; c. 40, Transferring Powers of State Tax Commission to State Department of Revenue, §§ 1, 2 and 3. Act of Special Session December, 1921, to amend c. 34 of Public Laws, 1921, §§ 1, 2 and 3; to amend c. 38 of Public Laws, 1921; Act of December 19, 1921, to refund tax illegally assessed.

[2] Prior to 1921 railroad property was valued and assessed (apart from the action by the legislature in 1920) by the State Tax Commission. In 1921 the powers of the State Tax Commission were transferred to the Department of Revenue under a Commissioner of Revenue. In this opinion "state board" is used throughout to refer to state authorities as distinguished from county boards which assessed local real estate.

[3] The increases were: Southern Railway $46,869,942 to $96,605,694; Atlantic & Yadkin Railway, $1,975,806 to $4,104,710; Seaboard Railway, $20,191,720 to $34,768,440; Atlantic Coast Line Railway, $34,645,345 to $50,867,800.

those of real estate were quadrupled. The aggregate assessment of all the railroad properties as revalued in 1920 was $250,587,158; the aggregate of the real estate $2,006,124,997; that of the personal property $807,866,-443; and that of industrial and financial institutions $444,748,145.

The relatively larger increase in the revaluations of real estate and of other property resulted in railroad taxes for 1920 lower than had prevailed theretofore; and these taxes were duly paid. But widespread objection to continuing the 1920 revaluations as a basis for the taxation of real estate developed in the latter part of 1920. A severe depression in business had occurred; there was an abrupt decline in commodity prices, particularly farm products; and real estate values were affected by this decline. The legislature, thereupon, made provision, Public Laws, 1921, c. 38, § 28, under which, upon application of taxpayers, the 1920 revaluations of real estate could be reviewed by county boards and those of railroad property by the state board. These boards were authorized to make corrections wherever assessments were found to exceed existing values. By proceedings under the Act of 1921 reductions were made in 67 counties, varying from 1 to 50 per cent. in the valuations of real estate (including that belonging to the railroads not used in the transportation service). In 33 counties no reduction in the valuations of real estate was allowed. The legislature of 1921 had made no provision for reviewing the revaluations of personal property; and the assessments thereon remained unchanged, although the valuations of personalty had also been greatly increased in 1920. Under the Transportation Act, 1920, the Interstate Commerce Commission issued, in the latter part of 1920, orders pursuant to *Ex parte 74, Increased Rates,* 58 I. C. C. 220, raising freight rates in North Carolina 25 per cent. and passenger rates 20 per cent. over those prevailing when the revaluation of 1920

was made. Thereafter, the five railroads applied to the state board for reduction of their valuations as the basis for taxation in 1921 and subsequent years. The application of the Norfolk & Southern was granted in part; and its assessment was reduced from $27,023,462 to $22,840,932. But, after due hearing, and rehearings, the state board refused to modify the assessments of the other four railroads which had been fixed by the legislature of 1920. Thereupon these suits were begun.

The contention of the railroads that the property taxes as assessed are obnoxious to the Federal Constitution was rested here mainly on the claim that there is a denial of equal protection of the laws. This claim is asserted on several grounds. It is contended, in the first place, that the Act of 1921 providing for the review of valuations is void. The argument is that the railroads were discriminated against, because real estate owners are given an appeal on assessments from the county board to the State Board of Equalization, but that no such appeal is provided from the assessment of railroads. It is also argued that there is discrimination in this: While c. 38, § 28*g*, provides for reduction by the state board in the valuation of a railroad only where it applies therefor, reductions in the value of all real estate within the county were, under § 28*a*, to be made provisionally, if the county board determined that the 1920 valuation was, as a whole, in excess of a fair value; and that in such event the percentage of the average excess would be applied to each parcel in the county, unless and until the assessment of individual real estate owners should be revised by the State Tax Commission. The differences in the classes of property, and in the conditions of ownership, obviously made difference in treatment unavoidable. Differences in the machinery for assessment or equalization do not constitute a denial of equal protection of the laws. *New York State* v. *Barker,* 179 U. S. 279.

The claim that plaintiffs have been denied equal protection of the laws appears to rest more largely on the charge that discrimination has been practiced against them in administering the tax laws. It is urged that county boards, proceeding under § 28*a* of the Act of 1921, reduced real estate valuations quite generally, but that the state board, acting under § 28*g*, refused to reduce the valuation of any railroad except that of the Norfolk & Southern. The rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20. This may be true although the discrimination is practiced through the action of different officials. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499. But, unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause. *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 353; *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock*, 204 U. S. 585; *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S. 599; *Sioux City Bridge Co.* v. *Dakota County, ante*, 441. Plaintiffs have clearly failed to establish that there was intentional and systematic undervaluation by the county boards. Strong evidence to the contrary is furnished by the fact that in 33 counties, including those in which the largest cities are located, no reduction was made in the valuation of real estate and that in the remaining 67 counties the reduction varied from 1 to 50 per cent. Plaintiffs have failed, likewise, in showing systematic refusal on the part of the state board to allow a proper reduction in the valuation of any railroad. The further contention that by reduction of the Norfolk & Southern's assessment the other plaintiffs were discriminated against is also unfounded.

The claims that the assessments made by the legislature in 1920 violate the due process and commerce clauses of the Federal Constitution and the true value and uniformity clauses of the state constitution, rest largely upon the contentions that the valuations were made on wrong principles and are excessive. There was ample opportunity to be heard; and the opportunity was availed of. There is no suggestion of bad faith. At the most there have been errors of judgment; and mere errors of judgment are not subject to review in these proceedings. *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Backus,* 154 U. S. 421; *Brooklyn City R. R. Co.* v. *New York,* 199 U. S. 48, 52. There was no taxation of interstate commerce. *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688; *Western Union Telegraph Co.* v. *Taggart,* 163 U. S. 1. There is not shown any taxation of property without the State as in *Wallace* v. *Hines,* 253 U. S. 66. Because these several constitutional objections are, in our opinion, unfounded, we do not deem it necessary to consider the contention of defendants that there was open to plaintiffs the opportunity of reviewing the assessments in the state courts by writ of certiorari, and that, unless and until such remedy had been exhausted, there was no right to seek relief by these bills in equity. See *Keokuk & Hamilton Bridge Co.* v. *Salm,* 258 U. S. 122, 125.

The claim that the railroads' property taxes are void under the statutes of the State seems to rest, in the main, on the charge that in valuing them in 1920, and in passing upon the application for reduction under the Act of 1921, the state board failed to follow the method of valuation prescribed. It is argued, among other things, that there was no separate assessment of tangible and intangible property; or if so, that plaintiffs were not notified as to what that separation was; that there was no due consideration of the actual cost of replacement of the property, with just allowance for depreciation of rolling stock; that

the franchise or intangible value was not assessed by a due consideration of the gross earnings as compared with operating expenses, or of the market value of the stocks and bonds; that the particular method prescribed by the statutes for assessing interstate roads was not followed; and that erroneous methods of valuation were adopted. To these contentions there appear to be several answers. The Revaluation Act did not make mandatory any particular method of valuation. The legislature recognized that the difficulties inherent in valuing a railroad are great. It desired that the valuers should have access to every fact which might aid them in performing their duty. The data concerning the railroads referred to in the act, like the methods of valuation referred to in earlier and later legislation, are among those commonly used when an attempt is made to ascertain the value of a railroad. But they are merely aids. Such data are commonly in the possession of the railroad companies; and are often not readily accessible to others. The legislature by the Revaluation Act authorized the state board to require the railroads to furnish the information. But it did not undertake to prescribe to what extent or how the information should be used by them. Their duty was merely to exercise an informed and honest judgment in fixing values for purposes of taxation. Compare *Minnesota Rate Cases,* 230 U. S. 352, 434. Another answer to plaintiffs' contention is that mere failure to follow methods of valuation referred to in earlier statutes could not, in any event, render illegal the revaluation made by the state board in 1920; since it was, by the Revaluation Act, made tentative merely. That tentative valuation became an assessment by the legislature, and, hence the law, through approval by c. 1, Laws Extra Session, 1920, which made it the assessment for the next four years. The state board, when applied to in 1921, had power to reduce the statutory assessment; but in acting on the applications it was not,

as we read the statutes, required to make a new valuation, or to apply any particular method of valuation.[4]

The railroad franchise tax, equal to one-tenth of one per cent. of the value of the company's property within the State, is imposed wholly for the support of the state government. Such taxes are expressly authorized by the state constitution, Article V. Before 1920 the contribution of railroads toward the expenses of the state government was made partly by a small privilege tax dependent on gross earnings per mile, partly from a percentage of the *ad valorem* property tax paid by them; and in valuing railroad property there was included among the intangibles what is frequently called the franchise or the corporate excess. In 1920 this mileage privilege tax was abolished; payment for general state purposes of a percentage of the property tax was discontinued; and by § 82 (6½) of c. 1, Laws Extra Session, 1920, and Revenue Act

[4] The following statutory provisions show that no assessment was made by the State Tax Commission in 1920 or 1921 or by the Commissioner of Revenue in 1921, but that the assessment was made by the legislature in 1920. The only power of the Commissioner of Revenue in 1921 was to make reductions in certain cases.

Revaluation Act, Public Laws, 1919, c. 84, § 6, provided that all real property should be valued as of May 1, 1919, and such value should be used for all tax purposes for 1920, 1921, 1922, and 1923. Section 31 provided for a complete revaluation of all railroad companies to be used as the basis for computing taxes for such companies for 1920, 1921, 1922 and 1923. Section 3 provided that the assessment made under said act was not to be used as a basis for computation of taxes until it had been approved by the legislature.

Act of Special Session, 1920, c. 1, § 1, approved the "assessment or valuation" made under Revaluation Act of 1919 and adopted it as the basis for levy of tax rates by the State and all subdivisions thereof for 1920, and the valuation of real property so fixed was adopted for 1921, 1922 and 1923, "except as such valuations may be hereafter changed according to law."

Machinery Act, Public Laws, 1921, c. 38, § 64, provided for the valuation of railroads (laying down rules therefor) "at such dates as real estate is required to be assessed for taxation."

of 1921, c. 34, the so-called franchise tax here in question was imposed. It is argued that this franchise tax is an additional property tax which is not imposed on others, and that, consequently, it violates the uniformity clause of the state constitution and the equal protection clause of the Federal Constitution. It is true that the franchise tax is measured by the value of property already subjected to the *ad valorem* tax. But a privilege tax is not converted into a property tax because it is measured by the value of property (compare *Clark* v. *Titusville,* 184 U. S. 329, 333, 334); nor by the fact that in this measure is included property not used in the transportation service. Railroads differ in so many respects from other properties that they may, as a class, be taxed differently or additionally, if that is not inconsistent with the constitution of the State.

Nor is there any basis for the claim that the franchise tax act violates the commerce clause. The tax appears to be upon the privilege of doing an intrastate business. Compare *Armour Packing Co.* v. *Lacy,* 200 U. S. 226. It is not of the character which is held a burden upon interstate commerce. *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119, 120; *St. Louis-San Francisco Ry. Co.* v. *Middlekamp,* 256 U. S. 226. Payment of the tax is not made a condition precedent to granting a railroad permission to do interstate business. Compare *Leloup* v. *Mobile,* 127 U. S. 640. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119. And there is no basis for the contention that the aggregate burden imposed by the property tax, the franchise tax, and the income tax, operates to obstruct interstate commerce.

The remaining objections to the franchise taxes relate merely to the amounts at which they are calculated. It is insisted that § 82 (3½) of the Revenue Act of 1921 applies, and that therefore upon the facts stated the tax should be for one-twentieth, not for one-tenth, of one per cent. of the value of the company's property within

the State. The Norfolk & Southern, insisting likewise that the section applies, argues that the taxes assessed upon others thereunder would be only one-half the percentage it is required to pay, and, therefore, contends that the act denies to it equal protection of the laws. Upon this question of statutory construction the courts of the State have not yet passed. The taxing officials insist that § 82 (3½) has no application to railroads; and in support of their contention point to the history of the legislation. We think that they are right.

A further objection peculiar to the Atlantic & Yadkin Railway should be mentioned. This road is located wholly within North Carolina. Its entire capital stock is owned by the Southern; and it is operated as a part of the Southern System. The state board assessed all the lines operated by the Southern System at $101,960,413, and then apportioned to the Atlantic & Yadkin the sum of $4,104,710, a sum alleged to be grossly excessive. Defendants aver that the amount represents the actual value of the property. They say, further, that the apportionment was made in accordance with the plan suggested by the tax commissioner of the Southern System; that neither the Southern Railway nor the Atlantic & Yadkin was, in any way, prejudiced by assessing the property together; or by allocating this amount to the latter; that if the Atlantic & Yadkin was overassessed, the Southern was, to that extent, underassessed; and that the company is estopped by its conduct from questioning the assessment on this ground. A doubt is raised whether the taxes assessed upon this plaintiff should be sustained. But even if the objection can be availed of in this suit, the state of the record is not such as to justify us in reversing, on this ground, the decree denying an interlocutory injunction to the Atlantic & Yadkin. It will, of course, be open to this plaintiff to renew the objection upon the final hearing.

Affirmed.

STOCKLEY ET AL. *v.* UNITED STATES.

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

No. 74. Argued November 20, 1922.—Decided January 2, 1923.

1. Section 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1099, applicable to homestead and other entries, provides that, after the lapse of two years from the date of the issuance of "the receiver's receipt upon the final entry," when no contest or protest against the validity of the entry shall be pending, the entryman shall be entitled to a patent conveying the land entered, and the same shall be issued to him. *Held:*

(*a*) That the limitation began to run when a homesteader submitted his final proofs, paid the fees and commissions then due, and obtained the receiver's receipt therefor, although the proofs were not passed upon and no register's certificate was issued. P. 537.

(*b*) The original meaning of the statute in this regard cannot be altered to suit an altered practice of the Land Department whereby examination of proofs and issuance of register's certificate are postponed when receiver's receipt issues, instead of issuing the certificate and the receipt together, as was customary when the statute was enacted. P. 538.

(*c*) The statute applies even though the receipt was issued contrary to the instructions of the Commissioner of the General Land Office. P. 541.

(*d*) When the period of the statute has run in favor of a homestead entry, the question whether the land was mineral in character is no longer open. P. 543.

2. Where an order of the President withdrew a body of public lands from all forms of appropriation "subject to existing valid claims"; an existing preliminary homestead entry, attended by compliance with the requirements of the homestead law up to the time of the order, was within the exception, and when followed, after the withdrawal, by the issuance of a receiver's receipt upon final entry, and the lapse of two years thereafter, was protected under the Act of 1891, *supra,* from attack under a subsequent protest alleging that the land entered was mineral. P. 543.

271 Fed. 632, reversed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which ordered that possession of a tract of land be restored to the United States with damages for oil and gas extracted from it.

Mr. S. L. Herold, with whom *Mr. R. L. Batts* and *Mr. D. Edward Greer* were on the brief, for appellants.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

The receipt issued in this case was not a receiver's receipt upon final entry within the meaning of the proviso in § 7 of the Act of March 3, 1891, 26 Stat. 1099.

This question was not involved in *Lane* v. *Hoglund,* 244 U. S. 174, and *Payne* v. *Newton,* 255 U. S. 438.

It is important to note the limitations imposed by the General Land Office on the register and receiver by instructions of December 15, 1908, allowing receipt of applications and proofs touching claims antedating the withdrawal, but forbidding receipt of the purchase money or issuance of final certificate, pending investigation, during which entries and proofs were to be suspended.

The proviso in § 7 can never become operative and the two-year period does not begin to run until after the register and receiver in fact pass upon the final proofs and issue a receiver's receipt, if the proof is found regular in all respects.

Obviously, the first inquiry is to ascertain the commonly accepted meaning of the words "receiver's receipt" when Congress passed the Act of March 3, 1891, and the prevailing practice of the Land Office at that time in the issuance of patents.

The duties of the register and receiver are prescribed by statute and regulations, and call for the exercise of judgment. Circular of October 21, 1878, Copp's Pub. Land Laws, 1415; Instruction September 17, 1883, 2

L. D. 199. This Court has recognized that they must exercise judgment and discretion. In *Parsons* v. *Venzke,* 164 U. S. 89, 92, it is said: "Whenever the local land officers approve the evidences of settlement and improvement and receive the cash price they issue a receiver's receipt."

Curiously enough, the homestead laws make no specific provisions for the issuance of a receiver's receipt, nor do they define its effect. The language of Rev. Stats. §§ 2291, 2238, points to the fact that the certificate (and not the receiver's receipt) is the basis upon which patent issues. And this at once suggests that when Congress used the words "receiver's receipt upon the final entry," in the proviso in § 7 of the Act of 1891, it did so upon the supposition that a receiver's receipt was a receipt for the purchase price which was issued simultaneously with the certificate of entry. This, it would seem, was the prevailing practice. Circular October 1, 1880, Copp's Pub. Land Laws, 247, 292. The courts not infrequently use the terms "receiver's receipt" and "certificate of entry" as equivalents. Receiver's receipt: *Parsons* v. *Venzke, supra; United States* v. *Detroit Lumber Co.,* 200 U. S. 321. Certificate of entry: *Witherspoon* v. *Duncan,* 4 Wall. 210; *Guaranty Savings Bank* v. *Bladow,* 176 U. S. 448.

Two years before the passage of the Act of 1891, Congress used the words "receiver's receipt" as denoting a receipt issued after the final proofs have been examined and approved, and as representing the last act to be done before sending the papers to Washington for patent. Act of March 2, 1889, § 6, 25 Stat. 854.

The receipt upon which Stockley relies was issued without either the register or the receiver passing upon the final proofs.

The similarity between a receiver's receipt and a certificate on final entry is strikingly shown by the very section under consideration.

It is of course well settled that when the full equitable title passes, the public lands become subject to state taxation; but until this occurs, the States are powerless to tax. Under the circumstances disclosed by this record, the lands never have been subject to state taxation. *Witherspoon* v. *Duncan,* 4 Wall. 210; *Wisconsin Central R. R. Co.* v. *Price County,* 133 U. S. 496; *Bothwell* v. *Bingham County,* 237 U. S. 642.

The oral testimony shows that at the time the Act of 1891 was passed, a receiver's receipt was never issued until the final proofs had been examined and approved. On July 1, 1908, a radical change in this practice took place.

The rules under which the receipt in question was issued plainly show that it is not to be regarded as a final receipt.

The difference in the form of a receiver's receipt in vogue at the time the Act of 1891 was passed, and the receipt issued to Stockley, emphasizes the radical difference in the nature of the two.

The Land Department has given the act in question an administrative interpretation in harmony with our contention. 29 L. D. 539; 44 L. D. 115; 46 L. D. 496; 47 L. D. 135.

Whether the Commissioner had the power to issue the instructions of December 15, 1908, is a matter of no moment. He did issue them, and as a result the register and the receiver were forbidden to pass upon the final proofs. The two-year period begins to run, not from the date when the receiver's receipt on final entry should have been issued, but from the date of its actual issuance. If the register and the receiver should of their own volition refuse to take any action until compelled by mandamus, obviously the two-year period would begin to run not from the time the receipt on final entry should have issued but from the time it is issued in obedience to the writ.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit in equity brought by the United States, as plaintiff, against the appellants, as defendants, by which a decree was sought adjudging the plaintiff to be the owner of a tract of land in the Parish of Caddo, Louisiana, enjoining all interference therewith, and requiring the defendants to account for the value of oil and gas extracted by them therefrom.

The United States District Court for the Western District of Louisiana, upon the report of a master, found for the plaintiff and entered a decree in accordance with the prayer of the bill ordering a restoration of possession and awarding damages against some of the defendants, including Stockley, for about $62,000.

The case comes to this Court by appeal from the decree of the Circuit Court of Appeals affirming the decree of the District Court. 271 Fed. 632.

The defendants denied plaintiff's title and alleged that the land was the property of the defendant Stockley by virtue of his compliance with the homestead laws of the United States.

The conceded facts are that in 1897 Stockley took possession of the land and on November 13, 1905, made a preliminary entry thereof as a homestead. He complied with the provisions of the Homestead laws, submitted final proof, including the required non-mineral affidavit, paid the commissions and fees then due, and on January 16, 1909, obtained the receiver's receipt therefor. Prior to that time, viz, on December 15, 1908, a large body of public lands, embracing within its boundaries the land in question, was withdrawn by an order of the President of the United States from all forms of appropriation. The withdrawal order was expressly made " subject to existing valid claims." The receiver's receipt, omitting unnecessary matter, is in the following words:

"Received of Thomas J. Stockley . . . the sum of Three Dollars and One Cents, in connection with Hd. Final, Serial 0188, for: [lands described] 71.25 acres. . ."

On March 17, 1910, Stockley leased the property in question to the defendant the Gulf Refining Company, which company subsequently drilled wells and developed oil. The rights of the other defendants are wholly dependent upon the title asserted on behalf of Stockley.

On July 16, 1910, after the report of a special agent confirming Stockley's claim of residence upon and cultivation and improvement of the lands, the Commissioner of the General Land Office ordered the case "clear-listed and closed as to the Field Service Division." Subsequently, and more than three years after the issuance of the receiver's receipt, viz., on February 27, 1912, a contest was ordered by the Commissioner of the General Land Office before the local register and receiver upon the charge that the land was mineral in character, being chiefly valuable for oil and gas, and that when Stockley made his final proof he knew or, as an ordinarily prudent man, should have known this fact. After a hearing, the register and receiver decided in favor of Stockley, but the Commissioner of the General Land Office reversed the decision and ordered the entry canceled. The Secretary of the Interior affirmed the Commissioner with a modification allowing Stockley to obtain a patent for the surface only, under the provisions of the Act of July 17, 1914, c. 142, 38 Stat. 509.

The defendants contended that the Commissioner of the General Land Office and the Secretary of the Interior were without authority to entertain this contest because prior thereto full equitable title had vested in Stockley and he had become entitled to a patent by virtue of the provisions of § 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099. That section, so far as necessary to be stated, provides:

"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor."

The court below rejected defendants' contention, holding that the receipt issued to Stockley was not a "receiver's receipt upon the final entry" for the reason that, in the view of that court, a final entry could not become effective until the issuance of the certificate of the register. In other words, it was the opinion of the lower court that in order to constitute a final entry within the meaning of the statute above quoted, there must be an adjudication upon the proofs and the issuance of a final certificate, evidencing an approval thereof.

We think the language of the statute does not justify this conclusion. It must be assumed that Congress was familiar with the operations and practice of the Land Department and knew the difference between a receiver's receipt and a register's certificate. These papers serve different purposes. One, as its name imports, acknowledges the receipt of the money paid. The other certifies to the payment and declares that the claimant on presentation of the certificate to the Commissioner of the General Land Office shall be entitled to a patent.

The evidence shows that prior to the passage of the statute, and thereafter until 1908, the practice was to issue receipt and certificate simultaneously upon the submission and acceptance of the final proof and payment of the fees and commissions. In 1908 this practice was changed, so that the receipt was issued upon the submis-

sion of the final proof and making of payment, while the certificate was issued upon approval of the proof and this might be at any time after the issuance of the receipt. The receiver and register act independently, the former alone being authorized to issue the receipt and the latter to sign the certificate. The receipt issued to Stockley was after submission of his proof and payment of all that he was required to pay under the law. No certificate was ever issued by the register.

It is contended by the Government that the receiver's receipt named in the statute should be restricted to a receipt issued simultaneously with the register's certificate after approval of final proofs, and that, after the change of 1908 in the practice of the Department, a receipt issued before such approval does not come within the meaning of the statute. Such a receipt, it is contended, obtains no validity as a "receiver's receipt upon the final entry" until after the proof has in fact been examined and approved.

We cannot accept this conception of the law. A change in the practice of the Land Department manifestly could not have the effect of altering the meaning of an act of Congress. What the act meant upon its passage, it continued to mean thereafter. The plain provision is that the period of limitation shall begin to run from the date of the "issuance of the receiver's receipt upon the final entry." There is no ambiguity in this language and, therefore, no room for construction. There is nothing to construe. The sole inquiry is whether the receipt issued to Stockley falls within the words of the statute. In *Chotard* v. *Pope,* 12 Wheat. 586, 588, this Court defined the term entry as meaning: "That act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known, in the legislation of several States, by the epithet of an entry-taker, and corresponding

very much in his functions with the registers of land-offices, under the acts of the United States." It was in this sense that the term "final entry" was used in this statute. Having submitted to the proper officials proof showing full compliance with the law, and having paid all the fees and commissions lawfully due, Stockley had done everything which the law required on his part and became entitled to the immediate issuance of the receiver's receipt, and this receipt was issued and delivered to him. No subsequent receipt was contemplated or required. From the date of the receipt the entry may be held open for the period of two years, during which time its validity may be contested. Thereafter the entryman is entitled to a patent and the express command of the statute is that "the same shall be issued to him." *Lane* v. *Hoglund,* 244 U. S. 174; *Payne* v. *Newton,* 255 U. S. 438.

That Stockley's acts constituted final entry is borne out by rulings of the Land Department. Thus in *Gilbert* v. *Spearing,* 4 L. D. 463, 466, Secretary Lamar said:

"When the homestead application, affidavit and legal fees are properly placed in the hands of the local land officers, and the land applied for is properly subject to entry, from that moment the right of entry is complete and in contemplation of law the land is entered."

See also *Iddings* v. *Burns,* 8 L. D. 224, 226.

We are not at liberty to add to or take from the language of the statute. When Congress has plainly described the instrument from whose date the statute begins to run as the "receipt upon the final entry," there is no warrant for construing it to mean only a receipt issued simultaneously with the certificate or one issued after the adjudication on the final proof, which might be—and in this instance was—postponed indefinitely. It was to avoid just such delays for an unreasonable length of time—that is, for more than two years—that the statute was enacted. *Lane* v. *Hoglund, supra,* and Land Depart-

ment decisions cited. The purpose and effect of the statute are clearly and accurately stated by the Commissioner of the General Land Office in Instructions of June 4, 1914, 43 L. D. 322, 323, in the course of which it is said:

"There is no doubt that Congress chose the date of the receiver's receipt rather than of the certificate of the register as controlling, for the reason that payment by the claimant marks the end of compliance by him with the requirements of law. It would be manifestly unjust to make the right to a patent dependent upon the administrative action of the register, subjecting it to such delays as are incident to the conduct of public business and over which the claimant has no control. Payment, of which the receiver's receipt is but evidence, is, therefore, the material circumstance that starts the running of the statute, inasmuch as a claimant is and always has been entitled to a receipt when payment is made."

It is urged, however, that in any event the receiver exceeded his authority in issuing the receipt, since the Commissioner of the General Land Office, on December 15, 1908, had instructed the register and receiver, among other things, as follows:

"Applications, selections, entries, and proofs based upon selections, settlements, or rights initiated prior to the date of withdrawal may be received by you and allowed to proceed under the rules up to and including the submission of final proofs. You must not, however, in such cases receive the purchase money or issue final certificates of entry, but must suspend the entries and proofs pending investigation as to the validity of the claims with regard to the character of the land and compliance with the law in other respects."

These instructions were issued, as shown upon their face, in view of the Presidential withdrawal order of the same date. We suggest, without deciding, that, inasmuch as the withdrawal order was expressly made subject to

existing valid claims, and Stockley's claim was obviously existing and valid, this instruction of the Commissioner was itself without authority, since, as applied to Stockley, it was in conflict with the withdrawal order. This has nothing to do with the question as to whether the lands were, in fact, mineral in character, which is another and different matter dealt with later. However, Stockley, as already shown, did, in fact, make final entry and the receiver did, in fact, issue and deliver his receipt thereon. The case, therefore, falls within the terms of the statute and must be governed by it, unless the receipt be held for naught on the ground that it was issued contrary to the Commissioner's instructions. But the very object of the statute was to preclude inquiry upon that or any other matter, except as provided by the statute, after the expiration of two years from the date of the receiver's receipt. In *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476, this Court had under consideration § 8 of the same act (26 Stat. 1099), limiting the time within which suits by the United States might be brought to annul patents. That section, it was said, recognizes "that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, be conclusive against the Government, and this notwithstanding any errors, irregularities or improper action of its officers therein." It was said further: "Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department."

In *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447, 450, this section of the act was again under

consideration. A patent was attacked as void for the alleged reason that the land which it purported to convey had been reserved for public purposes, and upon that ground the application of the statute was denied, but this Court said:

"It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use."

To hold that the receipt here under consideration falls outside the terms of the statute would be to defeat the purpose of the statute and perpetuate the mischief which it sought to destroy. Prior to the decision in the case of *Jacob A. Harris,* 42 L. D. 611, 614 (quoted with approval in *Lane* v. *Hoglund, supra*), it had been held that the statute did not affect the conduct or action of the Land Department in taking up and disposing of final proof of entrymen after the lapse of the two-year period (*In re Traganza,* 40 L. D. 300), but this view was sharply challenged and overruled in the *Harris Case,* where it was said:

"Passed, primarily, to rectify a past and to prevent future abuses of the departmental power to suspend entries, the proviso is robbed of its essential purpose and practically repealed by the decision in the Traganza case."

The effective character of the receiver's receipt being established, the question, after the lapse of the two-year period, as to whether the land was mineral bearing, was no longer open. Inquiry upon that ground was then foreclosed, along with all others. *Payne* v. *Newton, supra.*

The bar of the statute likewise prevails, notwithstanding the executive withdrawal of December 15, 1908. The validity of that order is, of course, settled by the decision

in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, but, as already stated, there is excepted from the operation of the order "existing valid claims." Obviously this means something less than a vested right, such as would follow from a completed final entry, since such a right would require no exception to insure its preservation. The purpose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated and which, upon full compliance with the land laws, would ripen into a title. The effect of a preliminary homestead entry is to confer upon the entryman an exclusive right of possession, which continues so long as the entryman complies in good faith with the requirements of the homestead law. *Stearns* v. *United States*, 152 Fed. 900, 906; *Peyton* v. *Desmond*, 129 Fed. 1, 12. Since it is conceded that Stockley made such an entry in 1905 and his compliance with the requirements of the homestead law prior to the withdrawal order is not questioned, it follows that he had, when that order was issued, an existing valid claim, within the meaning of the exception. The action of the Commissioner of the General Land Office, therefore, in directing a contest against Stockley's entry three years after the issuance to him of the receiver's receipt was unauthorized and void.

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

MASON ET AL. *v.* UNITED STATES.

EUBANK ET AL *v.* UNITED STATES.

MacMULLEN ET AL. *v.* UNITED STATES.

MATTHEWS ET AL. *v.* UNITED STATES.

HUNSICKER ET AL. *v.* UNITED STATES.

NORVELL ET AL. *v.* UNITED STATES.

PALMER ET AL. *v.* UNITED STATES.

ARKANSAS NATURAL GAS COMPANY ET AL. *v.* UNITED STATES.

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

Nos. 117, 115, 116, 114, 104, 113, 111, and 112. Argued November 17, 20, 1922.—Decided January 2, 1923.

1. The order of December 15, 1908, whereby, to conserve the public interests and in aid of contemplated legislation, specified public lands in Louisiana were "withdrawn from settlement and entry, or other form of appropriation," was within the power of the Executive. P. 553. *United States* v. *Midwest Oil Co.*, 236 U. S. 459.
2. The words "other form of appropriation" in this order include appropriations by mining locations. P. 553.
3. The *ejusdem generis* rule is a rule of construction resorted to only as an aid in ascertaining the meaning of doubtful words and phrases; it will not be so employed as to render general words in a statute meaningless by assigning them to a genus fully occupied by the specific terms employed. P. 553.
4. Defendants who entered upon parcels of the withdrawn lands under mining locations, and extracted oil, in "moral good faith," in the honest though mistaken belief that the order of withdrawal was void, were liable in damages under the laws of Louisiana, only for the value of the oil taken after deducting the cost of drilling,

and equipping and operating the wells by means of which it was extracted. P. 555.

5. A specific finding of fact, made by a master after seeing and hearing the witnesses, and supported by evidence, will be accepted here. P. 556.
6. Location of one hundred and sixty acres of oil land by an association of eight persons and lease of the tract on the same day to a corporation, in pursuance of an understanding had prior to the location, is not fraudulent under the federal mining laws. P. 557.
7. A general rule of state statutory law for measuring damages in cases of conversion is binding on the federal courts sitting in the State, in suits in equity involving title to land there situate and seeking to restrain continuing trespasses upon it, in which damages for conversion of oil wrongfully extracted from the land are claimed as an incident to the equitable relief. P. 557.
8. The enforcement of such a statute in an equity suit does not trammel or impair the equity jurisdiction of the federal courts. P. 558.
9. Revised Statutes, § 721, providing that the laws of the States shall be rules of decision in trials at common law in the courts of the United States, is merely declarative of the rule that would exist in its absence, and does not by implication exclude such laws as rules of decision in equity suits. P. 558.
10. Where some of a number of joint trespassers extract oil from land (in Louisiana) and pay royalties thereon to the others who share none of the cost of mining, all are liable to the land owner for the amount of the royalties without any deduction of expenses; but a decree against all for the royalties and against the operating trespassers for the net proceeds of the oil extracted, in so far as it allows a double recovery of the royalties, is erroneous. P. 559.

273 Fed. 135, 142, reversed.

APPEALS from decrees of the Circuit Court of Appeals, affirming with modifications decrees of the District Court in suits brought by the United States to confirm its title to various tracts of public land in Louisiana, to restrain continuing trespasses and to secure accountings for the value of oil and gas wrongfully extracted.

Mr. R. L. Batts and *Mr. S. L. Herold,* with whom *Mr. D. Edward Greer, Mr. Hampden Story, Mr. J. A. Thigpen* and *Mr. E. P. Lee* were on the briefs, for appellants.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. H. L. Underwood* were on the brief, for the United States.

The withdrawal order contemplated and had the effect of withdrawing the lands from mining location.

The damages were properly fixed upon the basis of wilful trespasses.

It is undisputed that appellants knew of the withdrawal order and that they went upon the lands well aware that the Government authorities had declared that no claims could be initiated thereon. In the face of this warning, they cannot claim to be innocent trespassers. *Goodson* v. *Stewart,* 154 Ala. 660; *Chilton* v. *Missouri Lumber Co.,* 144 Mo. App. 315.

Their acts were clearly wilful and intentional, done with the purpose to ignore and defy the withdrawal order, and they knew that they were speculating upon the validity of that order. They did not mistake the facts but the law. A mistake of law does not lessen their liability nor make them innocent trespassers. *United States* v. *Murphy,* 32 Fed. 376.

That a mistake of law is not a defense against a charge of wilful trespass is also established by the decisions in *Guffey* v. *Smith,* 237 U. S. 101, and *Benson Mining Co.* v. *Alta Mining Co.,* 145 U. S. 428. These cases we think controlling and decisive in the cases at bar. To the same effect is *Union Naval Stores Co.* v. *United States,* 240 U. S. 284. Cf. *Pine River Logging Co.* v. *United States,* 186 U. S. 279.

Durant Mining Co. v. *Percy Mining Co.,* 93 Fed. 166, and *United States* v. *Van Winkle,* 113 Fed. 903, proceed upon the theory that the mistake was one of fact.

Erroneous advice of counsel in the face of knowledge of an asserted adverse claim is not a defense in cases such as these. *Central Coal & Coke Co.* v. *Penny,* 173 Fed. 340; *Chilton* v. *Missouri Lumber Co., supra.*

In *United States* v. *Homestake Mining Co.*, 117 Fed. 481, the mining company consulted with the Secretary of the Interior with reference to cutting the timber involved, made a verbal agreement with that official as to the cutting and the price, and proceeded thereunder. Here, the appellants proceeded without consulting any official and in defiance of the order withdrawing the lands.

As the appellants were wilful trespassers, the measure of damages is the value of the oil and gas in the pipe line when sold, without deduction for extraction. *Woodenware Co.* v. *United States*, 106 U. S. 432; *Guffey* v. *Smith*, *supra*.

But if innocent, the appellants would not be entitled to allowance of cost of drilling. *United States* v. *Midway Northern Oil Co.*, 232 Fed. 619; *United States* v. *McCutchen*, 238 Fed. 575; *St. Clair* v. *Cash Gold Mining Co.*, 9 Colo. App. 235; *Hall* v. *Abraham*, 44 Oreg. 477.

It is, however, to be borne in mind that not all of the defendants sought the advice of counsel, and accordingly the defense of good faith is not open to them.

In an action for malicious prosecution, where both malice and want of probable cause must be shown, the defendant is, of course, permitted to show that he sought the advice of counsel in order to prove the existence of probable cause. *Stewart* v. *Sonneborn*, 98 U. S. 187. But testimony of this sort is unavailing if the proof shows that the advice was sought colorably. 18 L. R. A. (N. S.) 62.

The same reasoning applies in a suit of this sort. In this case the Court of Appeals in effect found that the locators did not seek legal advice in good faith, but for an ulterior purpose. Its finding ought not to be disturbed. *Lawson* v. *United States Mining Co.*, 207 U. S. 1.

The location involved in the Norvell case is inherently bad. The location was fraudulent, of which the defendants not only had notice, but all of them actively participated in the fraud. That the location was made for the

benefit of the Gulf Refining Company is apparent. The general manager of the Gulf Refining Company approached the president of the First National Bank, telling him that there was a tract of vacant government land in Louisiana supposed to contain oil; that he had been advised that the company could locate only twenty acres; that his company was taking up oil lands in that vicinity; and that if the president of the bank and his friends would locate the land the company would lease or buy it. On the very day the location was filed the parties who participated in it, consisting of the officers and employees of the bank, executed a contract with the oil company for the operation of the land. Under this contract the so-called locators were to receive $500 each in the event the land proved to be oil land. The locators had not seen the land, nor did they themselves take part in locating it, but they appointed an agent, also an employee of the Gulf Refining Company, to make the location for them

The placer mining laws, which were extended to lands containing petroleum by the Act of February 11, 1897, 29 Stat. 526, provide that locations of not more than 160 acres each by two or more persons, or association of persons, having contiguous claims, are permitted, there being a proviso to the effect that "no such location shall include more than 20 acres for each individual claimant." Rev. Stat. § 2331.

This limitation upon the number of acres one individual may locate necessarily means something, hence "any scheme or device entered into whereby one individual is to acquire more than that amount or proportion in area constitutes a fraud upon the law, and consequently a fraud upon the Government." *Nome & Sinook Co.* v. *Snyder,* 187 Fed. 385; *Cook* v. *Klonos,* 164 Fed. 529; *United States* v. *Brookshire Oil Co.,* 242 Fed. 718.

There can be no valid location without a discovery. And while the Act of March 2, 1911, 36 Stat. 1015, recognizes that a mining claim may be sold prior to discovery, there is nothing in the act to validate a location otherwise invalid.

It is by no means clear that this act authorizes the sale of more than 20 acres to a single individual, and in no event does it apply to an invalid location or to lands which at the time of the inception of development were withdrawn from mineral entry.

To say that a corporation or a single individual may acquire by transfer prior to discovery any number of mining claims, irrespective of the area they contain, is to nullify that provision of the placer law which limits the claim to 20 acres to a single individual.

That all the locators, including the Gulf Refining Company, had knowledge of the fraudulent character of this location is plainly apparent from the record. It is therefore submitted that none of them can claim to be innocent trespassers.

The United States, with respect to the measure of damages, is not bound by the state law or decisions.

It is well settled that the United States is not bound by state statutes of limitation; and if the Government sues and a balance is found in favor of the defendant, no judgment can be rendered against the United States either for such balance or in any case for costs. *United States* v. *Thompson,* 98 U. S. 486.

It has also been held that the statute of a State requiring landowners to fence their lands does not apply to the United States; that the Federal Constitution has delegated to Congress without limitation the power to dispose of and make all needful rules and regulations concerning the public domain; and that the exercise of that power cannot be restricted or embarrassed in any degree by state legislation. *Shannon* v. *United States,* 160 Fed.

870. See also, *Utah Power & Light Co.* v. *United States,* 243 U. S. 389.

Such being the law, no reason appears why the Government should be bound by such laws in fixing the measure of damages for trespasses on its public lands.

In *Woodenware Co.* v. *United States,* 106 U. S. 432, it is said that in the case of a wilful trespass the trespasser is liable for the full value of the property taken without allowance for expenditures made by him. The *Woodenware Case* arose in Wisconsin, and this Court referred to the milder rule in that State, which it did not see fit to follow, but followed the rule prevailing generally in this country and in England. Moreover, it is not entirely clear that the rule in Louisiana is what the appellants claim it to be. They rely upon the decision of this Court in *Jackson* v. *Ludeling,* 99 U. S. 513, in which it was held that parties in possession of a railroad under fraudulent foreclosure proceedings were entitled to be reimbursed for money spent in repairing the road and restoring it to its former condition under Art. 2314 of the Code.

That rule has no application here, because the money spent in exploring for oil was not expended in the preservation of the land.

In *Jackson* v. *Ludeling, supra,* the Court referred to a series of cases in which it was held by the Supreme Court of Louisiana that a person without title going into possession of the public lands of the United States cannot set up a claim for improvements against the Government. See *Hollon* v. *Sapp,* 4 La. Ann. 519.

There was no error in allowing interest from the date of the master's report. *Jones* v. *United States,* 258 U. S. 40.

Mr. Justice Sutherland delivered the opinion of the Court.

These cases, involving the same questions, were consolidated for trial in the District Court as well as for hear-

ing on appeal in the Circuit Court of Appeals and argued together here.

The United States, as plaintiff, brought separate suits in equity in the United States District Court for the Western District of Louisiana against the several groups of appellants (defendants in the bills) to have its title to various parcels of land confirmed, possession thereof restored, defendants enjoined from setting up claims thereto, extracting oil or other minerals therefrom, or going upon or in any manner using the same. There was in addition a prayer for an accounting in respect of the oil and gas removed from the lands by the defendants. The cases were referred to a master, and upon his report the District Court entered decrees in favor of the plaintiff in all the cases, from which appeals were taken by defendants and cross appeals by plaintiff to the Circuit Court of Appeals. That court affirmed the decrees generally but reversed the trial court in so far as it had allowed drilling and operating costs as a credit against the value of the oil extracted and converted by the defendants respectively. 273 Fed. 135, 142. The cases come here by appeal.

The lands in question were public lands of the United States and the only claim thereto asserted by the defendants was based upon locations purporting to have been made under the mining laws. The lands were withdrawn on December 15, 1908, by an executive order which reads:

"To conserve the public interests, and, in aid of such legislation as may hereafter be proposed or recommended, the public lands in Townships 15 to 23 North, and Ranges 10 to 16 West, Louisiana Meridian, Natchitoches Land Office, Louisiana, are, subject to existing valid claims, withdrawn from settlement and entry, or other form of appropriation."

After the promulgation of this order, at various times, mining locations were made upon the several parcels of

land by the respective groups of defendants or persons in privity with them. These locations, it will be assumed for the purposes of the case, complied with the requirements of the laws relating to the acquisition of mining rights. Before the locations were made the question had been submitted by some of the defendants to counsel learned in the law who advised that the President was without authority to make the withdrawal and that the order, in any event, did not include appropriations of lands valuable for their deposits of mineral substances. All the locations, it is claimed, were made by the defendants in the honest belief that the order not only was made without authority but that it did not purport to preclude appropriations under the mining laws.

Whatever legitimate doubts existed at the time of the locations respecting the validity of the executive order, were resolved by the subsequent decision of this Court in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, where it was held that a similar order, issued in 1909, was within the power of the executive. Upon the authority of that case the order here in question must be held valid.

Passing this, it is insisted that the order does not apply to the cases here presented. The point sought to be made rests upon the rule of statutory construction that words may be so associated as to qualify the meaning which they would have standing apart. Here, it is said, the general words of the order " or other form of appropriation " must be read in connection with the specific words " settlement and entry " immediately preceding, and that so read they must be restricted to appropriations of a similar kind with those specifically enumerated. The words " settlement and entry ", it is said, apply only to the act of settling upon the soil and making entry at a land office, as, for example, under the homestead laws; that mining lands are acquired, not by settlement or entry, but by location and development; and that this

process is not covered by the words " other form of appropriation," limited, as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. The rule is one well established and frequently invoked, but it is, after all, a rule of *construction,* to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true intent. It cannot be employed to render general words meaningless, since that would be to disregard the primary rules, that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning. Here the supposed specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate. See *United States* v. *Mescall,* 215 U. S. 26; *Danciger* v. *Cooley,* 248 U. S. 319, 326; *Higler* v. *People,* 44 Mich. 299; *United States* v. *First National Bank,* 190 Fed. 336, 344. If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized? None has been suggested and we can think of none. A purchase of land or an appropriation for railroad uses or rights of way, if not actually involving settlement and entry, is no more akin to that method than an appropriation for mining purposes. Reasons which, under the rule, would justify the exclusion of one from the operation of the general words would equally justify the exclusion of all. It would therefore result, there being nothing *ejusdem generis,* that the application of the rule contended for would nullify the general words altogether. Moreover, the circumstances leading up to and accompanying the issuance of the order demonstrate conclusively that its main, if not its only, purpose was to preserve from private appro-

priation the oil and gas which the lands were thought to contain pending investigation and congressional action, and this purpose would have been subverted by appropriations of the nature here involved quite as much as by other forms. We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order and consequently were prohibited by it.

The trial court so decided, but, following the report of the master, held that these locations were made in moral good faith, and that under the laws of Louisiana, where the lands are situated, the defendants were liable only for the value of the oil after deducting therefrom the cost of drilling, equipping and operating the wells, through and by means of which the oil was extracted. It was to reverse this latter holding that the cross appeals were prosecuted. The Circuit Court of Appeals reversed the District Court in this particular upon the ground that the defendants' mistake, if any, was one of law, and constituted no excuse, and that the Louisiana law could have no application since the suit was one in equity, to be governed by general principles and not by local laws or rules of decision.

Whether the defendants were innocent trespassers within the principles of the common law we find it unnecessary to determine. That the measure of damages applied by the District Court was in consonance with the statute law of Louisiana as interpreted by the highest court of that State is clear. The Louisiana Civil Code (Article 501), in terms provides that the "fruits produced by the thing belong to its owner, although they may have been produced by the work and labor of the third person . . . on the owner's reimbursing such person his expenses." This provision is taken substantially from Article 548 of the Code Napoleon, respecting which, Laurent, a distinguished commentator, says: "This is a principle of equity which will not permit the

owner to enrich himself at the expense of another, even though he be in bad faith. This applies to all the expenses to which the possessor has been subjected." *Martel* v. *Jennings-Heywood Oil Syndicate,* 114 La. 351, 359. The decisions of the Supreme Court of Louisiana have settled the rule that under the provisions of this article of the Louisiana Civil Code, in awarding damages to the owner of property from which oil has been extracted the cost of production must be first deducted from the value of the oil produced, even though the defendant went into possession in technical bad faith but in moral good faith. *Cooke* v. *Gulf Refining Co.,* 135 La. 609, 618, and cases cited.

The defendants here, it is true, took possession of the lands in violation of the withdrawal order, but they did so in the honest, though mistaken, belief that the order was wholly without authority. Some of them had legal advice from competent counsel to that effect. It is common knowledge that the validity of the withdrawal order in question, as well as the later order of 1909, was in grave doubt until the decision of this Court in *United States* v. *Midwest Oil Co., supra.* Not only was a substantial opinion to be found among members of the profession that the order was invalid, but the decision here was by a divided court. In view of these circumstances, we think it fair to conclude that the mining locations by defendants and the occupation and use of the lands thereunder were in moral good faith, within the meaning of the Louisiana Code and decisions. *New Orleans* v. *Gaines,* 131 U. S. 191, 218. The Circuit Court of Appeals suggested doubts respecting the honesty of defendants' motives in seeking or in acting upon advice of counsel; but we cannot ignore the finding of the master explicitly to the effect that the locators proceeded in "moral good faith." His finding was made after hearing and seeing the witnesses and, having support in the evidence, will be accepted here. See *Adamson* v. *Gilliland,* 242 U. S. 350, 353.

The Norvell case is sought to be distinguished from the others. It appears that the location covered one hundred and sixty acres and was made by an association of eight persons. The lands were leased to the Gulf Refining Company upon the same day in pursuance of an understanding had prior to the location. But there is nothing in the federal mining laws which renders such a transaction fraudulent, and a careful reading of the evidence discloses nothing in the circumstances which would make the Louisiana statute as to the measure of damages inapplicable.

Was the lower court right in its conclusion that the Louisiana law was not applicable in an equity suit?

Subject to certain exceptions, the statutes of a State are binding upon the federal courts sitting within the State, as they are upon the state courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the federal equity jurisdiction. *Mississippi Mills* v. *Cohn*, 150 U. S. 202. That jurisdiction is conferred by the Constitution and laws of the United States and must be the same in all the States. *Neves* v. *Scott*, 13 How. 268. But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation. See *Missouri, Kansas & Texas Trust Co.* v. *Krumseig*, 172 U. S. 351, 358. In *Brine* v. *Insurance Co.*, 96 U. S. 627, 639, this Court said:

"We are not insensible to the fact that the industry of counsel has been rewarded by finding cases even in this court in which the proposition that the rules of practice of the Federal courts in suits in equity cannot be controlled by the laws of the States, is expressed in terms so emphatic and so general as to seem to justify the inference here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts substantial rights

conferred by the statute of a State, or to add to or take from a contract that which is made a part of it by the law of the State, except where the law impairs the obligation of a contract previously made."

See, also, *Independent District of Pella* v. *Beard,* 83 Fed. 5, 13, where it is said:

"It is undoubtedly true that the United States courts sitting as courts of equity have a freedom of action in this respect which they do not possess as courts of common law, and that, as a general proposition, the equity jurisdiction of the federal courts cannot be limited or restrained by a state. *Green* v. *Creighton,* 23 How. 90; *Payne* v. *Hook,* 7 Wall. 430; *Ridings* v. *Johnson,* 128 U. S. 212; *Mississippi Mills* v. *Cohn,* 150 U. S. 202. But these decisions relate to the practice, the impairing of jurisdiction, rather than to the determination of the rights of parties after jurisdiction has been acquired."

Here, while the suit is one in equity, the statute and decisions relied upon have nothing to do with the general principles of equity or with the federal equity jurisdiction, but simply establish a measure of damages applicable alike to actions at law and suits in equity. The case presented by the bills is primarily one involving title to land and seeking an injunction against continuing trespasses. The conversion of the oil, for which damages are sought, is incidental and dependent. The entire cause of action is therefore, local (*Ellenwood* v. *Marietta Chair Co.,* 158 U. S. 105), and the matter of damages within the controlling scope of state legislation. See *Mullins Lumber Co.* v. *Williamson & Brown Land & Lumber Co.,* 255 Fed. 645, 647. The enforcement of such a statute in an equity suit in no manner trammels or impairs the equity jurisdiction of the national courts.

It was urged upon the argument that § 721 of the Revised Statutes, which provides that the laws of the several States shall be regarded as rules of decision in trials *at common law* in the courts of the United States, by impli-

cation excludes such laws as rules of decision in equity suits. The statute, however, is merely declarative of the rule which would exist in the absence of the statute. *Bank of Hamilton* v. *Lessee of Ambrose Dudley, Jr.*, 2 Pet. 492, 525; *Bergman* v. *Bly*, 66 Fed. 40, 43. And it is not to be narrowed because of an affirmative legislative recognition in terms less broad than the rule. The rule that an affirmative statute, without a negative express or implied, does not take away the common law (Potter's Dwarris, 68; Sedgwick Statutory Construction, 29, 30) affords an analogy. See *Bailey* v. *Commonwealth*, 11 Bush. (Ky.) 688, 691; *Johnston* v. *Straus*, 26 Fed. 57, 69.

There are numerous cases, both in this Court and in the lower federal courts, where the rule has been applied in suits in equity, and while § 721 was not mentioned, it is scarcely possible that it was overlooked. See, for example, *Jackson* v. *Ludeling*, 99 U. S. 513, 519, a suit in equity, where this Court held that a law of Louisiana based upon the civil law, relating to the measure of damages, was controlling. The law there involved was Article 2314 of the Civil Code, which provides:

"He to whom property is restored must refund to the person who possessed it, even in bad faith, all he had necessarily expended for the preservation of the property."

The general purpose and principle of that provision and of the provision which is relied upon in the instant case are the same.

The defendants in some of the cases enumerated in the title complain of the action of the master and the District Court in charging against them various sums paid to co-defendants as royalties, notwithstanding the fact that the cost of drilling, equipping and operating the wells exceeded the value of the oil extracted, or that the exaction was in addition to the value after deducting such cost. These royalties arose from and were paid out of proceeds of the oil; but this oil belonged to the plaintiff as owner of the property from which it had been taken. The de-

fendants who received the royalties were obviously not entitled to retain them, and having incurred no expense in connection with the mining operations, were liable for the entire amount and the defendants who paid the royalties were jointly liable as co-wrongdoers. A joint judgment against all was therefore proper. In the Mason case, however, the net value of the oil extracted exceeded in amount the royalties paid. The gross value was $67,732.94, the drilling and operating cost was $34,067.13, which, being deducted, left the net value of $33,665.81. Royalties were paid by the producer, the Gulf Refining Company, to its co-defendants, amounting to $11,294.20. The master found and the District Court held that the Gulf Refining Company was liable for the $33,665.81, and that the recipients of the royalties and the Gulf Refining Company were liable *in solido* for the additional sum of $11,294.20, making the total judgment $44,960.01. We think this was erroneous. For reasons already stated, plaintiff was entitled to recover the amount of the royalties without deduction in any event, but it was not entitled to recover them twice and this is clearly the effect of the decree, the amount of which should be reduced to $33,665.81.

The District Court reserved the question of the adjustment of equities among the several defendants in respect of the royalties and no doubt an opportunity will be afforded by that court for its presentation and consideration. As to the rights of the respective defendants in that matter, however, we express no opinion.

The decrees of the Circuit Court of Appeals are reversed and those of the District Court are affirmed in all the cases except that the decree in the Mason case is modified by reducing the amount to $33,665.81—$22,371.61 against the Gulf Refining Company and $11,294.20 against that defendant and the respective royalty recipients in solido—and as so modified, it is affirmed.

JEEMS BAYOU FISHING & HUNTING CLUB ET AL *v.* UNITED STATES.

UNITED STATES *v.* JEEMS BAYOU HUNTING & FISHING CLUB ET AL.

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

Nos. 119 and 137. Argued November 21, 22, 1922.—Decided January 2, 1923.

1. The rule that where lands are patented according to an official plat, showing meander lines along or near the margin of a body of water, the plat is to be treated as part of the conveyance and the water itself constitutes the boundary, does not apply when it is conclusively shown that no body of water exists or existed at or near the place indicated or where no attempt to survey tracts lying beyond the meander line was actually made. P. 564.
2. The United States can not be estopped to question the existence of a survey by statements made in correspondence by officials of the Land Department. P. 564.
3. Defendants who took possession of land in Louisiana and extracted oil, in good faith, under a patent which had long been erroneously treated by government officials as conveying the tract, are liable, as innocent trespassers, for the value of the oil after deducting the cost of drilling and operating the wells. P. 564. See *Mason* v. *United States, ante,* 545.

274 Fed. 18, affirmed.

APPEAL and cross appeal from a decree of the Circuit Court of Appeals affirming a decree of the District Court in a suit by the United States to quiet its title to a tract of public land, enjoin trespasses and secure an accounting for oil wrongfully extracted.

Mr. Harry T. Klein and *Mr. Hampden Story,* with whom *Mr. Elias Goldstein* and *Mr. H. C. Walker* were on the brief, for Jeems Bayou Fishing & Hunting Club et al.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. Justice Sutherland delivered the opinion of the Court.

The United States brought suit in equity in the District Court of the United States for the Western District of Louisiana, against the defendants (appellants and cross appellees here) to have its title to 85.22 acres of land in the Parish of Caddo, Louisiana, confirmed, possession restored, assertion of claims thereto by defendants enjoined, and an accounting had for the value of oil removed therefrom by the defendants, or any of them.

That court, upon the report of a master, entered a decree for the plaintiff and awarded damages for the value of the oil removed, after deducting the cost of drilling and operating the wells by means of which the oil was recovered.

The case is here by appeal from the decree of the Circuit Court of Appeals, affirming that of the District Court. 274 Fed. 18.

The Fishing & Hunting Club claimed title through mesne conveyances from one Stephen D. Pitts, to whom a patent had been issued in 1860 for the southwest fractional quarter of Section 10, in Township twenty North, Range 16 West, "according to the official plat of the survey of said lands, returned to the General Land Office by the Surveyor General." The other defendants depend upon a lease from the Fishing & Hunting Club to the Producers Oil Company. The official plat referred to in the Pitts patent was the plat of a survey made by A. W. Warren, in 1839, and approved and filed in the General Land Office the same year. The fractional quarter section described contained about 48 acres, though the patent erroneously gave it as 23 acres. The land in question lies

west and south and immediately adjoining, but other lands still intervene between it and the permanent lake shore. According to the plat, the land so patented to Pitts borders upon Ferry Lake, or Jeems Bayou, a navigable body of water, and is shown on the plat as a small peninsula extending into the water and connected by a narrow neck with the mainland. The evidence, which is voluminous and substantially uncontroverted, makes it very clear that no such peninsula exists or existed at the time of the survey in 1839. On the contrary, a later survey, called an extension survey, made in 1916–1917, shows that a large compact body of upland, more than 500 acres in extent, which is, and in 1839 was, well timbered with a growth of pine, oak and other trees, lies between this supposititious peninsula and the shore line of the lake in every direction except for a short distance along the east boundary as delineated upon the plat. This body of land extends beyond the boundaries of Section 10 into the adjoining Sections 9, 15 and 16. Across the lands in controversy, which are included in the larger body just mentioned, the actual shore line of the lake is, and was in 1839, from a few hundred feet to three-quarters of a mile distant from the outside boundaries of the land patented to Pitts, as shown on the Warren plat.

The Warren field notes describe the peninsular shaped tract of land, not by lines purporting to meander the margin of any body of water but by courses and distances. There is nothing in the field notes to indicate a water boundary, unless as a matter of mere inference, which the most casual inspection of the locality would instantly dissipate. The inaccuracy of the plat is plainly apparent upon a like inspection. Why Warren made the survey and returned the plat as he did is a matter of speculation but the facts demonstrate that no survey of the large, compact body of land which includes the tract in controversy, was ever made. The circumstances, as well as the

extent and character of the lands, necessitate the conclusion that the omission was of deliberate purpose or the result of such gross and palpable error as to constitute in effect a fraud upon the Government.

The defendants rely upon the rule that where lands are patented according to an official plat of survey, showing meander lines along or near the margin of a body of water, the plat is to be treated as a part of the conveyance and the water itself constitutes the boundary. The rule is familiar and has received the approval of this Court many times. *Producers Oil Co.* v. *Hanzen,* 238 U. S. 325, 338, and cases cited. But it is not absolute, as this Court has also frequently decided. It will not be applied where, as here, the facts conclusively show that no body of water existed or exists at or near the place indicated on the plat or where, as here, there never was, in fact, an attempt to survey the land in controversy. *Security Land & Exploration Co.* v. *Burns,* 193 U. S. 167; *Lee Wilson & Co.* v. *United States,* 245 U. S. 24; *Producers Oil Co.* v. *Hanzen, supra; Horne* v. *Smith,* 159 U. S. 40; *French-Glenn Live Stock Co.* v. *Springer,* 185 U. S. 47; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District,* 232 U. S. 186.

But it is asserted that plaintiff is estopped from claiming title to the land because of certain correspondence with the Commissioner of the General Land Office, in 1897, wherein that officer said that there were no unsurveyed lands in the locality in question and because of an official letter from the Director of the Geological Survey to the same effect. It is clear, however, that the United States cannot be so estopped. *Lee Wilson & Co.* v. *United States, supra; Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408.

We think the measure of damages adopted by the courts below was correct. The defendants were in possession of the land and extracted the oil therefrom in good faith.

The land had been for many years treated by the officials of the Government as having been conveyed by the Pitts patent. The defendants were innocent trespassers within the rule laid down by this Court in *United States* v. *St. Anthony R. R. Co.,* 192 U. S. 524, 542. Moreover, the case is governed in this respect by the more liberal rule of the Louisiana Civil Code (Article 501), as interpreted by the decisions of the highest court of that State. *Mason* v. *United States, ante,* 545.

The decree of the Circuit Court of Appeals is affirmed.

BALTIMORE & OHIO RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 99. Submitted November 16, 1922.—Decided January 2, 1923.

1. An action to recover money paid as stamp taxes under the Act of May 12, 1900, as amended June 30, 1902, can not be maintained if no claim for redemption or allowance was made to the Commissioner of Internal Revenue within the two-year period prescribed by the act. Rev. Stats., § 3226. P. 567.
2. A request to the Commissioner for an informal ruling on the taxability of particular deeds, after which stamps were affixed in accordance with the ruling and without protest, *held* not a claim for abatement or refund. P. 567.

56 Ct. Clms. 279, affirmed.

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

Mr. George E. Hamilton, Mr. John F. McCarron and *Mr. R. Marsden Smith* for appellant.

Mr. Solicitor General Beck and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The appellant brought an action in the Court of Claims against the United States to recover the sum of $55,158.00, alleged to have been illegally exacted as stamp taxes upon thirteen deeds of conveyance made and delivered to appellant by its subsidiary companies. The deeds were without valuable consideration and were executed for the sole purpose of transferring legal title to enable appellant to mortgage the property conveyed. On February 11, 1915, before the delivery of these deeds, appellant exhibited three of them to the Commissioner of Internal Revenue and asked for a ruling, thereby making what it alleges was a claim in abatement. The Commissioner held that the Stamp Tax Act applied and the appellant, without protest, affixed to the thirteen deeds the requisite amount of stamps.

Four years later the Commissioner, in construing a similar act of 1918 held that "where no valuable consideration passed, stamps were not required on conveyances."

Appellant thereupon filed with the Commissioner a claim for refund of the taxes paid which was rejected because barred by the statute of limitations.

Appellant now alleges that its claim for a refund constitutes an amendment of its original so-called claim in abatement. The Court of Claims sustained a demurrer to appellant's petition alleging the foregoing upon the ground that the original request to the Commissioner for a ruling was not a claim either for abatement or refund, but that the claim for a refund was in effect first made in 1919, and, therefore, that the Commissioner's ruling was right.

The Act of May 12, 1900, c. 393, 31 Stat. 177, as amended by the Act of June 30, 1902, c. 1327, 32 Stat. 506, provides in part:

"That the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps, issued under authority of law, to denote the payment of any internal-revenue tax, as may have been spoiled . . . or in any manner wrongfully collected. . . . *Provided further,* That no claim for the redemption of or allowance for stamps shall be allowed unless presented within two years after the purchase of said stamps from the Government."

By § 3226, Rev. Stats., no suit can be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally collected until appeal has been made to the Commissioner of Internal Revenue, as provided by law, and the decision of the Commissioner thereon has been had.

The preliminary request to the Commissioner for an informal ruling was in no sense a claim for abatement or refund. Appellant affixed the stamps to the deeds without protest and after that no effort was made to secure redemption of or allowance for the stamps until long after the two-year period had expired.

On the facts alleged in the petition the Court of Claims could not have done otherwise than sustain the demurrer. *Rock Island, Arkansas & Louisiana R. R. Co.* v. *United States,* 254 U. S. 141.

The judgment of the Court of Claims is

Affirmed.

FEDERAL TRADE COMMISSION *v.* CURTIS PUBLISHING COMPANY.

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

No. 86. Argued November 17, 1922.—Decided January 8, 1923.

1. In a proceeding taken by the Federal Trade Commission, under the Federal Trade Commission Act and the Clayton Act, the ultimate determination of what constitutes unfair competition under the former, is for the court, upon review of the Commission's order; and the same rule applies where the charge is that sales or agreements substantially lessen competition or tend to create monopoly, in violation of the Clayton Act. P. 579.
2. Upon such a review, the Commission's findings of fact are conclusive, if supported by evidence; but the court may examine the whole record and ascertain for itself whether there are material facts not reported by the Commission; and if there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, and the interests of justice clearly require that the controversy be decided without further delay, the court has full power under the statute to do so without referring the matter to the Commission for additional findings. P. 580.
3. A contract between a publisher and a distributer, as agent, whereby the former undertakes to consign its publications to the latter, retaining title until they are sold, and the latter agrees: to supply the demand of distributers and dealers at specified prices; to promote sales; not to anticipate the dates fixed for publication, or dispose of copies in territory of other agents, or act as agent for, or supply at wholesale rates, periodicals of other publishers, or furnish names and addresses of customers to other publishers or agents, without the former's consent; and to train boys as distributers, subject to the principal's directions, and to return unsold copies, their cover pages or headings,—is not, without more, a contract of sale upon condition within the Clayton Act, but is a contract of agency. P. 581.
4. Engagement by a publisher of numerous agents for the distribution of its magazines exclusively, when done in the orderly development of the business and without unlawful motive, *held* not an unfair method of competition, within the Federal Trade Commis-

sion Act, although many of the agents, when so engaged, were general distributers of newspapers and magazines. P. 582.
270 Fed. 881, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals which set aside an order entered against the respondent by the Federal Trade Commission.

Mr. Solicitor General Beck, with whom *Mr. W. H. Fuller* and *Mr. Adrien F. Busick* were on the briefs, for petitioner.

It was the manifest purpose of Congress to make the Commission the judge of the weight of the evidence and to make its findings conclusive upon the court if there was any legal evidence in the record to support them. *Wholesale Grocers Assn.* v. *Federal Trade Commission,* 277 Fed. 657; *National Harness Manufacturers' Assn.* v. *Federal Trade Commission,* 261 Fed. 170.

It has been generally held by this Court that where a statute makes the findings of fact by an administrative body conclusive if supported by evidence, the administrative body is the judge of the weight and effect of the evidence. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88. The right asserted by the court below to make additional findings deprives the Commission of its statutory authority to pass upon the weight and effect of the evidence. Manifestly, the court and the Commission may differ on these points, and the finding by the court, therefore, be contrary to a finding by the Commission. The court should have remanded the case to the Commission with instructions to find the additional facts. This Court has consistently held this to be the proper practice in cases arising under the Commerce Act. *Louisville & Nashville R. R. Co.* v. *Behlmer,* 175 U. S. 648; *Interstate Commerce Commission* v. *Clyde S. S. Co.,* 181 U. S. 29; *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 186 U. S. 320.

The findings made by the court are contrary to those made by the Commission, and in part contrary to the evidence.

Both contracts of the respondent company are contracts of sale.

Whether the second contract is one of agency or of sale must be determined from the surrounding circumstances. Merely styling it an agency contract and the parties principal and agent is not controlling. *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 164 Fed. 803; *Poirier Mfg. Co.* v. *Kitts,* 18 N. Dak. 556; *American Seeding Machine Co.* v. *Stearns,* 109 App. Div. 192; *Henry Bill Pub. Co.* v. *Durgin,* 101 Mich. 458. Nor will the mere inclusion in the contract of a clause reserving the title in the seller make the contract one of agency or consignment. A contract containing such a reservation may, nevertheless, be one of absolute or of conditional sale. *Re Carpenter,* 125 Fed. 831; *Sutton* v. *Baker,* 91 Minn. 12; *Poirier Mfg. Co.* v. *Kitts,* 18 N. Dak. 556; *Arbuckle Bros.* v. *Gates,* 95 Va. 802.

If the transaction constitutes a conditional sale, it is within the terms of § 3 of the Clayton Act, which covers "a sale or contract for sale" on condition that the purchaser shall not deal in the goods of a competitor or competitors of the seller. There is ample authority to hold that there is here at least a conditional sale, title to pass to the dealers upon resale of the publications. *Chickering* v. *Bastress,* 130 Ill. 206; *Granite Roofing Co.* v. *Casler,* 82 Mich. 466; *Blow* v. *Spear,* 43 Mo. 496; *Lemp* v. *Ryus,* 7 Colo. App. 37; *House* v. *Beak,* 141 Ill. 290; *In re Morris,* 156 Fed. 597; *Re Carpenter,* 125 Fed. 831; *Re Wells,* 140 Fed. 752; *Re Rose,* 206 Fed. 991.

A particular feature of the contract which unmistakably stamps it as a contract of sale is found in a clause in which the dealer guarantees to sell a specified number of the respondent's magazines. Under another he is required to

deposit money with the respondent, which is held by the latter to insure the faithful performance by the dealer of his obligations and guarantees. The only guarantee which the dealer makes is to sell a specified number of the respondent's publications. If he fails his deposit is liable for the price of those unsold. See *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, 498.

The real character of the transaction as a sale is unmistakably stamped by the circumstances under which the contracts were made. The first contracts were clearly contracts of sale. When the validity of these contracts was questioned and when the District Court practically held them to be contracts of sale, the respondent sought, by merely changing the form of the contract, to disguise its purpose and to retain all the benefits of the old contract, including the exclusion of real competitors from the wholesale channels of distribution, and yet by such change of form to escape the prohibitions of the Clayton Act. The real relation of the parties remains the same under the new contract. The character of the business of the dealers is still that of independent traders, buying and selling for their own account—not as commission men or factors. As such independent dealers they still constitute, in all instances, a valuable channel of distribution for publishers of newspapers and magazines; in many instances they are the only, and in others the most important, wholesale outlet for such publishers. *Park* v. *Hartman*, 153 Fed. 24.

Respondent's sales are made upon the condition that the dealer shall not deal in the publications of competitors.

The effect of the respondent's sales and contracts for sale is to substantially lessen competition. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, 168; *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502.

Respondent's contracts constitute an unfair method of competition. The effect of the contracts to substantially lessen competition is identical, whether in form they be contracts of agency or contracts of sale. This Court has held in *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, and more recently in *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, that the prohibition against the use of unfair methods of competition extends to all practices contrary to public policy " because of their dangerous tendency unduly to hinder competition or create a monopoly."

In these two decisions, and in *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483, this Court holds that the language of the Trade Commission Act is sufficiently inclusive to reach all acts or practices which have the prohibited effect of unduly hindering or suppressing competition.

Where the results prohibited by § 3 are accomplished through contracts which are in form contracts of agency, but where the surrounding facts disclose that the so-called agents are in fact wholesale independent traders, and the real purpose of the contracts is to exclude competitors from the usual channels of distribution, this Court will apply the provisions of the Trade Commission Act and declare the use of the contracts to be an unfair method of competition. *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 164 Fed. 803.

While under the decisions of this Court the prohibition against unfair methods of competition may include a case of unfair trading at common law, since such methods of competition are contrary to good morals because characterized by fraud, it also includes those practices which are in no wise characterized by fraud but which have a dangerous tendency unduly to hinder competition.

Mr. John G. Milburn, with whom *Mr. Joseph W. Welsh, Mr. John G. Milburn, Jr.,* and *Mr. Ralph B. Evans* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The court below entered a decree setting aside an order of the Trade Commission, dated July 21, 1919, which directed respondent Publishing Company to cease and desist from entering into or enforcing agreements prohibiting wholesalers from selling or distributing the magazines or newspapers of other publishers. 270 Fed. 881. And the cause is here by certiorari.

The Commission issued an original complaint July 5, 1917, based mainly on a restrictive clause in existing contracts with so-called district agents. Thereafter, respondent changed its agreement. An amended complaint followed, which amplified the original allegations and attacked the second contract and consequent conditions.

The first section of the amended complaint declares there is reason to believe that respondent has been and is using unfair methods of competition contrary to § 5, Act of Congress approved September 26, 1914, c. 311, 38 Stat. 717,[1] and specifically charges: That respondent, a

[1] Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission

Pennsylvania corporation with principal place of business at Philadelphia, has long engaged in publishing, selling and circulating weekly and monthly periodicals in interstate commerce. That with intent, purpose and effect of suppressing competition in the publication, sale and circulation of periodicals it now refuses and for some months past has refused to sell its publications to any dealer who will not agree to refrain from selling or distributing those of certain competitors to other dealers or distributors. That with the same intent, purpose and effect it is making and for several months last past has made contracts with numerous wholesalers to distribute its periodicals as agents, and not to distribute those of other publishers without permission. That wholesalers so restricted are the principal and often the only medium for proper distribution of weekly and

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requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. . . . If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. . . .

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modi-

monthly periodicals in various localities throughout the United States, and many of the so-called agents formerly operated under contracts with respondent which abridged their liberty of resale.

The second section declares there is reason to believe respondent is violating § 3, Act of Congress approved October 15, 1914,—Clayton Act—c. 323, 38 Stat. 730,[1] and

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fying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. . . .

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

[1] "Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery,

specifically charges: That respondent publishes, sells and circulates weekly and monthly periodicals in interstate commerce. That for some months past, in such commerce, it has sold and is now selling and making contracts for the sale of its publications and periodicals for use and resale and is fixing the price charged on condition, agreement or understanding that the purchaser shall not sell other publications or periodicals, thereby substantially lessening competition and tending to create a monopoly.

Respondent replied to the notice to show cause why it should not be required to desist "from the violations of law charged in this complaint." It denied unlawful conduct and claimed that the parties contracted with as agents were such in fact; that their services were necessary for the maintenance of the plan originated by it of distributing publications through school boys, who require special superintendence; and further, that such agents had lawfully agreed to abstain from other connections and devote their time and attention to superintending the boys and to the general upbuilding of sales. Copies of respondent's first and second agreements with distributors accompanied the answer. The first had then been superseded and largely discontinued.

The second contract provides that upon requisition respondent will consign its publications to the agent as he may require, retaining title until they are sold; that the agent will supply the demand of boys and dealers at specified prices; will use reasonable efforts and devote all nec-

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supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 11 authorizes the Trade Commission to enforce § 3, with certain exceptions, and directs that this shall be done as prescribed by the act establishing the Commission, *supra*, with like power of review in the courts.

essary time to promoting the sales of such publications; " that without the written consent of the publisher he will not display, deliver or sell any copies of any one of said publications before the authorized publication date as specified in the printed requisition blanks, or dispose of any copies of said publications in the territory of any other district agent or special agent of the publisher, or *act as agent for or supply at wholesale rates any periodicals other than those published by the publisher,* or directly or indirectly furnish to any other publisher or agent the names and addresses of the persons to whom the publisher's publications are sold or delivered; " that subject to the principal's direction and control the agent shall train, instruct and supervise an adequate force of boys for distributing the publications; and that he will return unsold copies, their cover pages or headings.

After taking much testimony—2500 pages—the Commission made a brief and rather vague report of two pages, containing findings and conclusions based on the second contract with dealers and without direct reference to the earlier one. The substance of the report follows.

Paragraph one. Respondent, a Pennsylvania corporation with principal place of business at Philadelphia, is engaged in publishing, selling and distributing weekly and monthly periodicals among the States.

Paragraph two. " That in the course of such commerce, the respondent has entered into contracts with certain persons, partnerships or corporations to sell or distribute its magazines, by the terms of which contracts such persons, partnerships or corporations, have agreed, among other things, *not to 'act as agent for or supply at wholesale rates any periodicals other than those published by the publisher,'* [1]*—the respondent herein—without the written consent of such publisher; that of such persons,*

[1] These words are quoted from the second contract.

partnerships or corporations, approximately four hundred forty-seven (447), hereinafter referred to as 'dealers,' are and previous to entering into such contracts with respondent were regularly engaged in the business of wholesale dealers in newspapers or magazines, or both, and as such are as aforesaid engaged in the sale or distribution of magazines, or newspapers, or both, of other publishers; that many of said four hundred forty-seven (447) dealers, and many others who have become such wholesale dealers since entering into such contracts, bound by said contract provision as aforesaid, have requested respondent's permission to engage also in the sale or distribution of certain publications competing in the course of said commerce, with those of respondent, which permission as to said competing publications has been uniformly denied by respondent; that in enforcing said contract provision as to said dealers, and in denying them said permission, respondent has prevented and now prevents certain of its competitors from utilizing established channels for the general distribution or sale of magazines or newspapers, or both, of different and sundry publishers; that such established channels are in most instances the principal and most efficient, and in numerous cases, the only medium for the distribution of such publications in the various localities of the United States; that such method of competition so employed by respondent in the course of such commerce, as aforesaid, has proved and is unfair."

Paragraph three. "That in the course of such commerce, the respondent has made sales of its magazines to, or entered into contracts for the sale of the same with certain persons, partnerships or corporations, by the terms of which sales or contracts for such sales, such persons, partnerships or corporations have agreed, among other things" [here follow, without material change, the words of paragraph two printed, *supra,* in italics]; "that the effect of said contract provision has been, and is, to sub-

stantially lessen competition with respondent's magazines and tends to create for the respondent a monopoly in the business of publishing magazines of the character of those published by respondent."

The Commission concluded that the method of competition described in paragraph two of the report violates § 5, Act of September 26, 1914, and that the acts and conduct specified in the third paragraph violate § 3, Act of October 15, 1914. And it thereupon ordered: That the respondent cease and desist, while engaged in interstate commerce, from entering into any contracts, agreements or understandings which forbid persons, partnerships or corporations already engaged in the sale or distribution of magazines or newspapers, or both, of other publishers, from acting as agents for, selling or supplying to others at wholesale rates, periodicals other than respondent's without its consent; and from contracting with those already engaged in the sale or distribution of magazines or newspapers, or both, of other publishers, forbidding them from selling or distributing or continuing to sell or distribute the same; and from enforcing any provision of an outstanding contract whereby one now engaged in the sale or distribution of magazines or newspapers, or both, of other publishers is forbidden to sell or distribute the same without respondent's permission.

The statute provides (§ 5) that when the Commission's order is duly challenged it shall file a transcript of the record, and thereupon the court shall have jurisdiction of the proceedings and the question determined therein and shall have power to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside the order; but the Commission's findings as to the facts, if supported by evidence, shall be conclusive. The court is also empowered to order the taking of additional evidence for its consideration.

We have heretofore pointed out that the ultimate determination of what constitutes unfair competition is for

the court, not the Commission; and the same rule must apply when the charge is that leases, sales, agreements or understandings substantially lessen competition or tend to create monopoly. *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427.

Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do. The language of the statute is broad and confers power of review not found in the Interstate Commerce Act. *Louisville & Nashville R. R. Co.* v. *Behlmer,* 175 U. S. 648, 675, 676; *Interstate Commerce Commission* v. *Clyde S. S. Co.,* 181 U. S. 29, 32; and *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 186 U. S. 320, 340, while helpful as to proper practice, do not determine the present problem.

Here we find a vague general complaint charging unfair methods of competition and also sales and contracts for sales on condition that the purchaser shall not deal in other publications. This is followed by an answer setting out the original agreement with dealers and also the substituted form. The findings of fact make no refer-

ence whatever to the first agreement, but do show that respondent had entered into the second (quoting its language) with "certain" (no number is given but there were 1535) persons, partnerships and corporations, approximately 447 of whom before making such contracts were wholesale dealers in newspapers and magazines. Further, that many of this 447, as well as other parties to such contracts, have been denied permission to distribute the periodicals of other publishers. And that in these ways the most efficient established channels of distribution have been closed to competitors, competition lessened and a tendency to monopoly established.

The present record clearly discloses the development of respondent's business, how it originated the plan of selling through school boys, the necessity for exclusive agents to train and superintend these boys and to devote their time and attention to promoting sales, and also contracts with 1535 such agents. The Commission's report suggests no objection as to 1088 of these representatives who, prior to their contracts, had not been engaged in selling and distributing newspapers or periodicals for other publishers. There is no sufficient evidence to show that respondent intended to practice unfair methods or unduly to suppress competition or to acquire monopoly, unless this reasonably may be inferred from making and enforcing the second or substituted agreement with many important wholesale dealers throughout the country.

Judged by its terms, we think this contract is one of agency, not of sale upon condition, and the record reveals no surrounding circumstances sufficient to give it a different character. This, of course, disposes of the charges under the Clayton Act.

The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the exclusion of all others, where noth-

ing else appears, has long been recognized as proper and unobjectionable practice. The evidence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. And such practice cannot reasonably be inferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient.

Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute.

In the present cause the Commission has not found all the material facts, but considering those which it has found and the necessary effect of the evidence, the order to desist is clearly wrong and should be set aside without further delay.

Affirmed.

MR. CHIEF JUSTICE TAFT, doubting.

The sentence in the majority opinion, which makes me express doubt, is that discussing the duty of the court in reviewing the action of the Federal Trade Commission when it finds that there are material facts not reported by the Commission. The opinion says:

" If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should

be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do."

If this means that where it clearly appears that there is no substantial evidence to support additional findings necessary to justify the order of the Commission complained of, the court need not remand the case for further findings, I concur in it. It is because it may bear the construction that the court has discretion to sum up the evidence *pro* and *con* on issues undecided by the Commission and make itself the fact-finding body, that I venture with deference to question its wisdom and correctness. I agree that in the further discussion of the evidence, the reasoning of the opinion of the Court would seem to justify the view that it does not find the evidence sufficient to support additional findings by the Commission justifying its order. I only register this doubt because I think it of high importance that we should scrupulously comply with the evident intention of Congress that the Federal Commission be made the fact-finding body and that the Court should in its rulings preserve the Board's character as such and not interject its views of the facts where there is any conflict in the evidence.

I am authorized to say that Mr. Justice Brandeis concurs with me in this.

AMERICAN RAILWAY EXPRESS COMPANY *v.* LINDENBURG.

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

No. 138. Argued December 4, 1922.—Decided January 8, 1923.

1. In a proceeding under the Cummins Amendment (amended by Act of August 9, 1916, c. 301, 39 Stat. 441,) the Interstate Commerce Commission authorized various express companies to maintain rates dependent upon declared or agreed values of property shipped and authorized a new form of receipt; and thereafter another express company, not a party to the proceeding nor mentioned in the Commission's order, published and filed with the Commission a tariff referring to the order and containing the form of receipt, and put the tariff in effect. *Held* that, in the absence of proof to the contrary, it would be presumed that the action of the company was authorized by the Commission. P. 588.
2. A stipulation in an express receipt is not rendered unlawful by the presence of others which are so, but which are separable from it and inapplicable to the shipment in question or to the obligations of the carrier respecting it. P. 589.
3. The Cummins Amendment, in allowing carriers, when expressly authorized by the Interstate Commerce Commission, to "establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value", does not require the signature of the shipper. P. 590.
4. A shipper, by receiving and acting upon an express receipt, for an interstate shipment, signed only by the carrier, assents to its terms, and it thereby becomes the written agreement of the parties. P. 591.
5. And where the terms of the receipt and the carrier's lawful filed schedules show that the charge made was based upon a specified valuation of the goods, by which the carrier's liability was to be limited, the shipper is presumed to have known this, and is estopped from asserting a higher value when goods are damaged in transit. P. 591.

88 W. Va. 439, reversed.

CERTIORARI to a judgment of the Supreme Court of Appeals of West Virginia affirming a judgment against the petitioner in an action against it brought by the respondent to recover for damages to goods shipped.

Mr. A. M. Hartung, with whom *Mr. H. S. Marx* and *Mr. Staige Davis* were on the brief, for petitioner.

Mr. E. B. Dyer and *Mr. Morgan Owen* for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On July 22, 1918, at Indianapolis, Indiana, respondent caused to be delivered to petitioner two trunks weighing 200 pounds and 100 pounds, respectively, and a package weighing 10 pounds, for transportation to him at Charleston, West Virginia. A receipt was given for the property, which recited that its terms and conditions were agreed to by the shipper. The receipt, among other things, stipulated that in no event "shall this Company be held liable or responsible, nor shall any demand be made upon it beyond the sum of fifty dollars upon any shipment of 100 lbs. or less, and for not exceeding 50 cents per pound upon any shipment weighing more than 100 lbs., and the liability of the Express Company is limited to the value above stated unless the just and true value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under this Company's schedule of charges for excess value."

This receipt was produced at the trial and put in evidence by the respondent in support of his action. At the time of the shipment the value of the property was neither stated by the respondent nor demanded by the petitioner. The charges paid were on the basis of the limited liability set forth in the receipt. One of the trunks when delivered

at destination was in bad order, some of the goods therein being damaged and others destroyed. Respondent alleged damages in the sum of $1,500.00. Petitioner answered, admitting liability for $110.00, under the terms of the receipt. The trial court gave judgment for $916.15, which the state appellate court affirmed. 88 W. Va. 439. The case is here on certiorari.

The case is governed by the provisions of the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441. The amendment requires every common carrier receiving property for interstate transportation to issue a receipt or bill of lading, and makes it liable for the full, actual loss, damage or injury to such property caused by it or any connecting carrier participating in the transportation on a through bill of lading, notwithstanding any limitation of liability of the amount of recovery or representation or agreement as to value. Any such attempted limitation is declared to be unlawful and void. Then follows a proviso, which appears in full in the margin,[1] and the question for determination is whether, under the facts, the case is within its terms.

The Interstate Commerce Commission on April 2, 1917, in a proceeding wherein the Adams Express Company and a number of other express companies (but not including

[1] "*Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or

this petitioner) were parties, made an order in conformity with this proviso, authorizing the express companies to maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property. The basic rate to be established was upon a valuation not exceeding $50 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound for any shipment in excess of 100 pounds, the rates to be progressively increased with increased valuations. The express companies were further authorized, after notice, to amend the terms and conditions of the uniform express receipt in accordance with a form prescribed.

The new form, so prescribed, contained a provision to the effect that "in consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds," the shipper agrees, unless a greater value be declared at the time of shipment, that the company shall not be liable in any event for more than these amounts. At the time of the shipment, the evidence shows there was in effect a tariff of petitioner governing transportation between Indianapolis and Charleston, duly published and filed

agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation."

with the Interstate Commerce Commission, setting forth the form of receipt prescribed by the Commission; and that the charges made were in accordance with this tariff. The receipt issued by petitioner, it will be seen, limits the liability of the petitioner, not in the precise words of, but substantially in accordance with, the provision contained in the receipt authorized by the Commission; but it was upon an old form which had been used previous to the order of the Commission and contained some conditions which were contrary to and declared to be void by the Cummins Amendment. Neither the receipt nor any declaration or agreement was signed by respondent or by anyone in his behalf.

The judgment of the state appellate court is made to rest upon the sole ground that petitioner did not take from the shipper a written declaration of value or a written agreement as to value *signed by him.* Respondent here seeks to justify the judgment upon other grounds as well; and these we first consider.

In the first place, it is said that petitioner was never expressly authorized or required by the Interstate Commerce Commission to establish or maintain rates dependent upon declared or agreed values. It is true the order of the Commission, hereinbefore referred to, was made in a proceeding in which petitioner's name did not appear, but petitioner subsequently published and filed with the Commission a tariff, specifically referring to the order of the Commission in that proceeding and containing the form of receipt therein authorized, which tariff was in effect at the time of the shipment, and had been in effect for more than a year prior thereto. The transportation charges were in conformity with the tariff, and the receipt issued, in so far as the limitation of liability is concerned, was in substantial accord with the authorized receipt. The petitioner appears to have proceeded upon the assumption that the publication and filing of the tariff were

authorized by the Commission's order, and there is nothing in the record to indicate that the Commission did not so regard it. A copy of the tariff, certified by the Secretary of the Commission, was put in evidence. If these facts do not warrant the logical inference of a grant of authority, they do afford the basis for a legal presumption to that effect, for, if petitioner was not duly authorized by the Commission, its action in attempting to limit its liability was unlawful, and, as this Court said in *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin,* 241 U. S. 319, 327:

"It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct."

It is a rule of general application that "where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act." *Knox County* v. *Ninth National Bank,* 147 U. S. 91, 97. See also *New York Central & Hudson River R. R. Co.* v. *Beaham,* 242 U. S. 148, 151; *Young* v. *South Tredegar Iron Co.,* 85 Tenn. 189; *Scottish Commercial Insurance Co.* v. *Plummer,* 70 Me. 540, 544.

In the absence of proof to the contrary, we, therefore, indulge the presumption that in basing its transportation charges upon the values recited in the receipt, the petitioner had due authority.

It is next contended that the receipt which was issued was unlawful and void because it contained conditions forbidden by the Cummins Amendment and prior statutes, the principal condition being a limitation of the carrier's liability to its own routes or lines. But it does not appear

that the shipment in question came within the terms of any of these conditions or that the obligations of petitioner in respect of the matter were in any way affected thereby. Assuming their unlawful character, there is no difficulty in separating them from the condition limiting the liability by the declared valuation. We do not, therefore, deem it necessary to inquire in respect of the nature or extent of these alleged unlawful conditions, since, in any event, their presence would not have the effect of rendering unenforceable the severable, valid provision here relied upon. *McCullough* v. *Virginia,* 172 U. S. 102, 113; *United States* v. *Bradley,* 10 Pet. 343, 360; *Chicago, St. Louis & New Orleans R. R. Co.* v. *Pullman Southern Car Co.,* 139 U. S. 79, 91. In *Pickering* v. *Ilfracombe Ry. Co.,* L. R. 3 C. P. C. 235, 250, the rule is stated by Willes, J., as follows: "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." See also *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179, 185.

We come now to the point on which the judgment of the state appellate court is grounded. That court held that the petitioner should have given the shipper "a receipt specifying a value fixed by himself, and evidenced by his signature. . . . A writing not signed by him, although specifying value, was not a declaration or agreement in writing by him." 88 W. Va. 439, 443–4.

Neither the statute nor the order of the Commission requires the signature of the shipper. The pertinent words of the statute are: ". . . rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value. . . ." It is not to be supposed that the Commission would attempt to add anything to the substantive requirements of the stat-

ute, and its order does not purport to do so; but the form of receipt which the express companies were authorized to adopt contains a recital to the effect that as evidence of the shipper's agreement to the printed conditions he "accepts and signs this receipt," and a blank space is provided for his signature. Naturally, such signature would be desirable as constituting the most satisfactory evidence of the shipper's agreement, but it is not made a prerequisite without which no agreement will result, and a subsequent report of the Commission on the subject of bills of lading is persuasive evidence that there was no such intention. *In the Matter of Bills of Lading,* 52 I. C. C. 671, 681, where it is said:

"It is sufficient if the shipper accepts the carrier's bill of lading without himself signing it. It becomes binding upon him by his acceptance, he being presumed to know and accept the conditions of the written bill of lading."

The respondent, by receiving and acting upon the receipt, although signed only by the petitioner, assented to its terms and the same thereby became the written agreement of the parties. *McMillan* v. *Michigan, S. & N. I. R. R. Co.,* 16 Mich. 79; *The Henry B. Hyde,* 82 Fed. 681. In the absence of a statutory requirement, signing by the respondent was not essential. *Missouri, Kansas & Texas Ry. Co.* v. *McCann,* 174 U. S. 580, 590; *Inman & Co.* v. *Seaboard Air Line Ry. Co.,* 159 Fed. 960, 966. His signature, to be sure, would have brought into existence additional evidence of the agreement but it was not necessary to give it effect. See *Girard Insurance & Trust Co.* v. *Cooper,* 162 U. S. 529, 543. And his knowledge of its contents will be presumed. *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427, 431; *Kansas City Southern Ry. Co.* v. *Carl,* 227 U. S. 639, 652, 653, 656. "The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper

that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission." *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 508–509, 510. Having accepted the benefit of the lower rate dependent upon the specified valuation, the respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing. *Hart* v. *Pennsylvania R. R. Co.,* 112 U. S. 331, 340; *Adams Express Co.* v. *Croninger, supra.* In *Kansas City Southern Ry. Co.* v. *Carl, supra,* this Court said: "To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

The judgment of the state appellate court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

HILL ET AL., EXECUTORS OF HILL, *v.* SMITH.

CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 164. Argued January 3, 1923.—Decided January 15, 1923.

1. A federal question which was treated as open, and decided, by the State Supreme Court, will be reviewed here without inquiring whether its federal character was adequately called to the attention of the state trial court. P. 594.
2. A question of burden of proof may amount to a federal question when intimately involving substantive rights under a federal statute. P. 594.

3. The burden of proof is one thing and the necessity of producing evidence to meet that already produced another. P. 594.
4. A creditor who would avoid the effect of a discharge under the Bankruptcy Act upon the ground that the debt was not scheduled, with his name, must prove himself within that exception, and the debtor who would excuse the omission of the creditor's name upon the ground that the creditor had notice or actual knowledge of the bankruptcy proceedings must prove himself within that exception to the exception. P. 594.

232 Mass. 188, affirmed.

CERTIORARI to a judgment of the Superior Court of Massachusetts, entered on a finding for the plaintiff made subject to exceptions, which were overruled by the Supreme Judicial Court, in an action on a judgment.

Mr. George S. Fuller, with whom *Mr. Edward E. Blodgett* and *Mr. Irving F. Carpenter* were on the brief, for petitioners.

Mr. Edward F. McClennen, with whom *Mr. Allison L. Newton* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit upon a judgment. The defendant, Warren H. Hill, pleaded a discharge in bankruptcy. Subsequently he died and his executors, the petitioners, took his place. There was a trial before a judge without a jury. The plaintiff introduced proof that the judgment was unsatisfied and rested. The defendants proved the discharge and rested. In rebuttal the plaintiff introduced the schedules of creditors in bankruptcy of Hill in which schedules the plaintiff's name did not appear. The defendants asked for rulings that the burden was upon the plaintiff to show that he was not notified of the defendant's bankruptcy and that he had no knowledge of it.

These were refused subject to exceptions and the Court found for the plaintiff. The exceptions were overruled by the Supreme Judicial Court and judgment was entered upon the finding. 232 Mass. 188. A writ of certiorari was allowed by this Court.

It is argued for the respondent that there is no jurisdiction in this Court because the attention of the trial judge was not called specifically to the Bankruptcy Act as a ground for the rulings asked, and because, even if it had been, it is said, the burden of proof is to be determined by the practice of the State. As we are of opinion that the judgment was right we shall not discuss these objections at length. We deem it enough to say, as to the first, that the appellate Court treated the question as open and decided it; and as to the second that here as in *Central Vermont Ry. Co.* v. *White,* 238 U. S. 507, though perhaps in a somewhat less intimate and obvious way, the burden of proof is so connected with the substantive rights given to the respective parties by the statute—indeed so flows from the words of the statute—that the ruling upon it may be reviewed here.

The merits were fully and adequately discussed by the Supreme Judicial Court. In order to dispose of them it will not be necessary to repeat the distinction, familiar in Massachusetts since the time of Chief Justice Shaw, *Powers* v. *Russell,* 13 Pick. 69, and elaborated in the opinion below, between the burden of proof and the necessity of producing evidence to meet that already produced. The distinction is now very generally accepted, although often blurred by careless speech. Thayer, Preliminary Treatise on Evidence, c. 9.—The Bankruptcy Act of July 1, 1898, c. 541, § 17*a*(3), 30 Stat. 550, amended, Act of Feburary 5, 1903, c. 487, § 5, 32 Stat. 798, provides that a discharge "shall release a bankrupt from all of his provable debts, except such as . . . (3) have not been duly scheduled in time for proof and

allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." (The Amendment of March 2, 1917, c. 153, 39 Stat. 999, does not change this language, and was adopted after the discharge.) By the very form of the law the debtor is discharged subject to an exception, and one who would bring himself within the exception must offer evidence to do so. *Kreitlein* v. *Ferger,* 238 U. S. 21, 26. *McKelvey* v. *United States, ante,* 353. But there is an exception to the exception, "unless the creditor had notice," &c., and, by the same principle if the debtor would get the benefit of that he must offer evidence to show his right. We agree with the Court below that justice and the purpose of the section justify the technical rule that if the debtor would avoid the effect of his omission of a creditor's name from his schedules he must prove the facts upon which he relies.

The petitioners urge two further objections. They say that it did not appear that the debtor knew the name of his creditor. The trial judge was warranted in inferring that when a judgment had been recovered against him in Boston, where he lived, he knew the name of the man who recovered it and who lived hard by. Again, they say that the debt may have been scheduled under some other name. The judge had the schedule before him and for all that appears well may have inferred that it was not. But we cannot treat these questions as open. The Supreme Judicial Court stated that the questions presented related wholly to the burden of proof and it was said at the argument and not denied that in their brief before that Court the petitioners asserted that the sole issue was on the refusal to give the requests stated above. That is all that is before us now, although we have been unwilling to let the petitioners suppose that were it otherwise they would be better off.

Judgment affirmed.

SNAKE CREEK MINING & TUNNEL COMPANY *v.* MIDWAY IRRIGATION COMPANY ET AL.

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

No. 68. Argued October 17, 1922.—Decided January 15, 1923.

Under the law of Utah, an appropriation of the water of a natural stream to a beneficial use so far attaches to underground waters feeding the stream by percolation through adjacent public lands, that one who, as an incident to mining operations after those lands have become private, intercepts and collects such percolating waters by a tunnel, is not entitled to sell to others the right to use on distant lands the waters so collected and thus injuriously diminish the supply of the prior appropriator. P. 598.

271 Fed. 157, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals reversing a decree of the District Court, in a suit to determine conflicting claims to underground waters.

Mr. H. R. Macmillan, with whom *Mr. Andrew Howat, Mr. John A. Marshall* and *Mr. B. S. Crow* were on the briefs, for petitioner.

Mr. A. B. Irvine and *Mr. William H. Folland,* with whom *Mr. Sam D. Thurman* was on the briefs, for respondents.

Mr. William H. Folland, by leave of court, filed a brief on behalf of Salt Lake City, as *amicus curiae.*

Mr. J. F. Callbreath, by leave of court, filed a brief on behalf of the American Mining Congress, as *amicus curiae.*

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

This is a suit to determine conflicting claims to underground waters collected and brought to the surface by a mining tunnel in Utah. The plaintiff (petitioner here) is a mining company incorporated in Delaware and the defendant an irrigation company incorporated in Utah. Each seeks to have the right to use the waters quieted in itself as against the other. The District Court, with some hesitation, gave a decree for the mining company, which the Circuit Court of Appeals reversed with a direction that one for the irrigation company be given. 271 Fed. 157. A writ of certiorari brings the case here. 256 U. S. 687.

The mining company owns and operates a mine in a mountain along a tributary of the Provo River and, in furtherance of its mining operations, has driven a tunnel 14,500 feet into the mountain from a portal near the stream. The tunnel intercepts and collects waters percolating through the bosom of the mountain and conveys them to the portal, whence they now flow into the stream. The tunnel was begun in 1910 and these waters are intercepted and collected along its course after it gets well into the mountain. The mining company owns a tract of land surrounding the portal and we assume it has a right of way for the tunnel beyond that tract, although this does not appear. It has not used and does not now use any of the waters in connection with its tunnel or mine, but asserts an exclusive right to them and has arranged, and is intending, to sell to others the right to use them for irrigating distant lands.

The irrigation company is a corporate agency of a community of farmers and holds, controls and administers for their mutual advantage the water rights which enable them to irrigate and cultivate their lands, all of which are naturally arid. Long prior to the driving of the tunnel, and while the lands through which it extends were

public lands of the United States, the irrigation company or its stockholders appropriated all the waters of the stream for irrigation and other beneficial uses; and under that appropriation these waters long have been applied and devoted to such uses on the lands of the stockholders some distance down stream from the portal of the tunnel.

The waters intercepted and collected by the tunnel are percolating waters which before it was driven found their way naturally,—but not in a defined channel,—through the rocks, gravel and soil of the mountain into open springs near the stream and thence by surface channels into the stream. At all seasons this was one of the stream's sources of supply, and in the late summer and early fall one of its most dependable sources. The amount of water so naturally finding its way underground into the springs and thence into the stream has been materially diminished by the tunnel,—the diminution conforming substantially to the discharge at the portal. All the natural flow of the stream as it was before the tunnel was driven is required to satisfy the prior appropriation of the irrigation company or its stockholders and to irrigate the lands of the latter, to which it long has been applied; and, unless the waters so intercepted and collected by the tunnel be permitted to flow from its portal into the stream in such way that they can be used under the prior appropriation, a material part of the lands heretofore reclaimed and irrigated thereunder will be without water and their cultivation must be discontinued.

Several questions were presented to and decided by the Circuit Court of Appeals, but only one merits discussion here. It is whether under the law of Utah the waters which the tunnel intercepts, collects and conveys to its portal belong to the mining company or are within the appropriation made by the irrigation company or its

stockholders before the lands through which the tunnel extends became private lands.

The parties, while agreeing that the Utah law is controlling, differ as to what that law is. On the part of the mining company it is contended that when the tunnel site was acquired and the tunnel driven, Utah had adopted and was applying the common-law rule respecting underground waters; that by that rule such waters, where not moving in a known and defined channel, are part of the land in which they are found and belong absolutely to its owner; and that, if the law of Utah in this regard has since been changed, rights vested before the change are not affected by it. On the part of the irrigation company it is insisted that the common-law rule never was adopted or in force in Utah; that her law always has regarded waters percolating underground, where within the public lands, as open to appropriation for irrigation or other beneficial uses, subject only to a reasonable use of them in connection with the land in which they exist by whoever may come to own it, and that her law likewise has regarded an appropriation of the natural flow of a surface stream as reaching and including its underground sources of supply within the public lands, subject only to the qualification just indicated.

Both courts below experienced some embarrassment in solving this question of Utah law,—the District Court observing that the Supreme Court of the State, although having the question before it a number of times, "has never definitely announced its adherence" to either view, and the Circuit Court of Appeals that the early decisions, although "not always harmonious," "seem to have favored the English rule," while the later decisions have given effect to the other view. That there was some basis for the embarrassment is plain. Particularly was this true when the District Court made its ruling. Thereafter, and before the ruling by the Circuit Court of Appeals, the

situation was partly clarified by two decisions in the state court,[1] and it now has been further clarified by two still later decisions in that court.[2]

Utah is within the semi-arid region of the West, where irrigation has been practiced from the time of the earliest settlements and is indispensable to the cultivation of the lands. She was made a Territory in 1850 and became a State January 4, 1896. While she was a Territory and most of the lands within her borders were part of the public domain, Congress passed three acts which require notice.

The Act of July 26, 1866, c. 262, 14 Stat. 251, provided, in its ninth section: "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 Act of July 9, 1870, c. 235, 16 Stat. 217, declared, in its seventeenth section, that "all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights" recognized by the provision of 1866. And the Act of March 3, 1877, c. 107, 19 Stat. 377, after providing for the sale of desert lands in small tracts to persons effecting the reclamation thereof by an actual appropriation and use of water, declared that "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

[1] *Stookey* v. *Green,* 53 Utah, 311; *Rasmussen* v. *Moroni Irrigation Co.,* 56 Utah, 140.

[2] *Peterson* v. *Lund,* 57 Utah, 162; *Horne* v. *Utah Oil Refining Co.,* 59 Utah, 279.

purposes subject to existing rights." This Court has said of these enactments that "the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention of the common law rule, which permitted the appropriation of the waters for legitimate industries."

By an Act of February 20, 1880, the legislative assembly of the Territory declared (Laws 1880, c. 20, § 6): "A right to the use of water for any useful purpose, such as . . . irrigating lands, . . . is hereby recognized and acknowledged to have vested and accrued, as a primary right, . . . under any of the following circumstances: First—Whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, water course, lake, or spring, or other natural source of supply. . . ."

It was in the presence of these enactments, congressional and territorial, and prior to any decision thereon in Utah, that the irrigation company or its stockholders made the appropriation in question.

The first case in Utah involving rights asserted under an appropriation such as is described in these enactments was *Stowell* v. *Johnson,* 7 Utah, 215. The controversy was between one who relied on such an appropriation from a surface stream and another who owned lands along a lower section of the stream and was relying on the common-law doctrine of riparian rights. The Supreme Court of the Territory sustained the appropriation and distinctly held that the common-law doctrine was not applicable to the conditions in the Territory and never was in force there. On the latter point the court said (p. 225): "Riparian rights have never been recognized in this Territory, or in any State or Territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doctrine of riparian proprietorship. If that had

been recognized and applied in this Territory, it would still be a desert; for a man owning ten acres of land on a stream of water capable of irrigating a thousand acres of land or more, near its mouth, could prevent the settlement of all the land above him. For at common law the riparian proprietor is entitled to have the water flow in quantity and quality past his land as it was wont to do when he acquired title thereto, and this right is utterly irreconcilable with the use of water for irrigation. The legislature of this Territory has always ignored this claim of riparian proprietors, and the practice and usages of the inhabitants have never considered it applicable, and have never regarded it." This ruling has been reaffirmed but never recalled or qualified.

The next case was *Sullivan* v. *Northern Spy Mining Co.*, 11 Utah, 438. It involved an asserted appropriation of underground water, not in a known or defined channel. At the time of the appropriation the land where the water was found was public land. Afterwards the land was located and patented under the public land laws. The appropriator continued, as before, to take and use the water, and the owner of the land challenged the appropriation and sued to recover damages as for a trespass. In stating the question for decision, the territorial court said: " The federal government, as proprietor of the public lands, early recognized the necessity of permitting persons in this arid region to acquire an interest in water sources on the public lands distinct from the lands themselves. It had always been the settled law that the owner of land was likewise the owner of all waters situate thereon or percolating therein. This may be said to have been the universal rule in the United States, prior to the settlement of California. Local decisions, arising from the necessities of the people, soon altered it there, and in 1866 Congress passed an act," etc. " The question is, then, is the right of defendant to use water, under the facts stated,

one that is recognized by the local customs and laws?" The court reviewed the enactments we have set forth above, said they should not be narrowly construed, and held (p. 443): "In our opinion, wherever the industry of the pioneer has appropriated a source of water, either on the surface of or under the public lands, he and his successors acquire an easement and right to take and use such water to the extent indicated by the original appropriation, and that a private owner who subsequently acquires the land takes it burdened with this easement, and we also hold that this easement carries with it such rights of ingress and egress as are necessary to its proper enjoyment." But, notwithstanding this very definite pronouncement, the court, in concluding its opinion, added (p. 444): "This right of an appropriator is, of course, subject to the rule of law which will permit the owner to sink an adjoining well on his own premises although he should thereby dry up that of the first appropriator." This addendum was inconsistent with the principal decision and, so far as appears, was not necessary to a full disposal of the case. With this comment it may be put out of view, for the court afterwards declared it dictum.[1]

Shortly after the decision in that case came the constitution of the State, which says (Art. 17, § 1): "All existing rights to the use of any of the waters of this State for any useful or beneficial purpose, are hereby recognized and confirmed."

The next case to engage the court's attention was *Crescent Mining Co.* v. *Silver King Mining Co.*, 17 Utah, 444. It presented a controversy between two mining companies over percolating water intercepted and collected by a tunnel. One company had driven the tunnel into two patented mining claims of which it was the owner and had been permitting the water to flow from the portal into a

[1] *Stookey* v. *Green*, 53 Utah, 311, 317.

so-called lake. The water was not a natural source of supply for the lake, nor had it been in any way appropriated before the mining claims were patented and the tunnel driven. After it began flowing through the tunnel and thence into the lake the other company attempted to appropriate it at the lake by diverting it therefrom and using it. The company owning the tunnel challenged that appropriation and proceeded to use the water for purposes which prevented it from flowing into the lake. The other company then brought the suit, claiming that by its appropriation it had acquired a right to have the water flow from the tunnel into the lake uninterruptedly and continuously. The court held that underground waters collected by a tunnel from the private lands of its owner were not open to subsequent appropriation by others, and that the company owning the land and tunnel and bringing the waters, theretofore unappropriated, to the surface had the better right to use them. This, without more, determined the controversy; but in the opinion much was said which, had it been essential to a decision of the case, might well be taken as commiting the court to the common-law rule respecting underground waters. But it was not essential, and the court has since recognized that the real decision was as we have just stated.[1]

For several years after the ruling in that case the decisions were largely in a state of flux,—the opinions disclosing pronounced differences among the judges and tending at times in favor of the common-law rule and at other times against it. A notable case of that period was before the court on two successive appeals. *Herriman Irrigation Co.* v. *Butterfield Mining Co.,* 19 Utah, 453; *Herriman Irrigation Co.* v. *Keel,* 25 Utah, 96. Like the present case, it involved a controversy between an irrigation com-

[1] *Stookey* v. *Green,* 53 Utah, 311, 318; *Horne* v. *Utah Oil Refining Co.,* 59 Utah, 279.

pany having an early appropriation of the natural flow of a surface stream and a mining company having a subsequent patent for adjacent lands pierced by a tunnel which encountered underground waters and conducted them to its portal whence they flowed into the stream. As here, the mining company had arranged to sell to others the right to use the waters elsewhere. Two matters were in dispute,—first, whether the underground waters constituted one of the stream's natural sources of supply, and, secondly, if they did, whether the mining company was entitled to take and sell them as against the irrigation company which had appropriated the natural flow of the stream when the lands pierced by the tunnel were public lands. On the first appeal the judgment of the trial court was reversed and a new trial directed because of incomplete and erroneous findings of fact; but the plain purport of the opinion, which had the approval of all the judges, was that if in fact the waters collected by the tunnel constituted one of the stream's natural sources of supply at the time its natural flow was appropriated by the irrigation company, which was when the lands were part of the public domain, that company had the better right to those waters. On the second appeal the decision turned chiefly on questions of fact; but the judges, in separate opinions, entered into an extended discussion of the question of law with which we here are concerned. One judge thought the common-law rule was in force, and another that it had been rejected and that the decision on the first appeal had proceeded on that view. The remaining judge left his attitude on the question in some uncertainty. The case settled no principle and is without force as a precedent. Other cases during the same period are cited by counsel and particular expressions in the opinions are relied on as making for one view or the other; but it suffices here to say of these cases that they do not show any settled rule of decision.

The later decisions have all tended in one direction and have resulted in establishing the rule for which the irrigation company contends, and which the Circuit Court of Appeals applied. These decisions frankly deal with the prior situation as we have described it, reaffirm the principles announced in the early cases of *Stowell* v. *Johnson* and *Sullivan* v. *Northern Spy Mining Co.*, point out the dicta and uncertainty in the opinions delivered in several cases, hold that the common-law rule is not applicable to the conditions in Utah, and show that it never was definitely adopted or followed there. *Mountain Lake Mining Co.* v. *Midway Irrigation Co.*, 47 Utah, 346; *Bastian* v. *Nebeker*, 49 Utah, 390; *Peterson* v. *Eureka Hill Mining Co.*, 53 Utah, 70; *Stookey* v. *Green*, 53 Utah, 311; *Rasmussen* v. *Moroni Irrigation Co.*, 56 Utah, 140; *Peterson* v. *Lund*, 57 Utah, 162; *Horne* v. *Utah Oil Refining Co.*, 59 Utah, 279.

We conclude, therefore, that the decree of the Circuit Court of Appeals was right.

Decree affirmed.

MR. JUSTICE SUTHERLAND did not take part in the consideration or decision of this case.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

IN EQUITY.

No. 18, Original. Argued April 25, 26, 27, 1922.—Decided January 15, 1923.

1. The boundary line between the States of Texas and Oklahoma along the Red River, as determined by the Treaty of 1819 between the United States and Spain, is along the southerly bank of the stream. P. 625.
2. There is a material difference between taking the bank of a river as a boundary and taking the river itself. P. 626.

3. The bank intended by the treaty, is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed, which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and preserve the course of the river. P. 631.
4. The boundary intended is on and along this bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it. P. 632.
5. The bed includes all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for years at a time; but excludes lateral valleys having the characteristics of relatively fast land and usually covered by upland vegetation, although temporarily overflowed in exceptional instances when the river is at flood. P. 632.
6. The provisions of the Treaty of 1819, *supra,* that "the use of the waters, and the navigation of the Sabine to the sea, and of the said Rivers Roxo [Red] and Arkansas, throughout the extent of said boundary, on their respective banks, shall be common to the respective inhabitants of both nations", doubtless reserve and secure right of access to the water at all stages for enjoyment of the permitted use (the part of Red River now in question, however, is not navigable,) but they afford no reason for regarding the boundary as below the bank or within the river bed. P. 632.
7. Applying the treaty to the physical situation here revealed by the evidence, the Court finds that the boundary should be located along the southerly of the two water-worn banks designated as the "cut banks," which separate almost uniformly the sand bed of the river from land in its valley, on either side, overflowed at times, but having the physical characteristics of upland and which has heretofore been dealt with as such by the United States and Texas, respectively. P. 633.
8. The doctrine of erosion, accretion and avulsion applies to boundary rivers, including the Red River, which changes rapidly and materially in flood. P. 636. *Nebraska* v. *Iowa,* 143 U. S. 359.
9. The party asserting that the course has changed by avulsion since the treaty became effective, in 1821, has the burden of proving it. P. 638.
10. Evidence of avulsive change, *held,* insufficient in some instances and sufficient in others. P. 638.

In this suit the court first decided that the boundary between Oklahoma and Texas is along the south bank of Red River (256 U. S. 70), and made an interlocutory decree for the taking of evidence and for a further hearing to determine what constitutes the south bank and the proper location of the boundary line along it (256 U. S. 608). These matters are now disposed of by the present opinion.[1]

Mr. W. W. Dyar, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck, Mr. Assistant Attorney General Riter,* and *Mr. John A. Fain,* Special Assistant to the Attorney General, were on the brief, for the United States.

On the face of *Indiana* v. *Kentucky,* 136 U. S. 479, and *Arkansas* v. *Tennessee,* 246 U. S. 158, there would seem to be a distinction between the case in which the boundary follows a bank and the case in which it follows the main channel of navigation. If *Indiana* v. *Kentucky* controls the former class of cases, then any changes in the location of the bank of Red River since the date of the treaty would not affect the position of the boundary line.

Red River, through a large part of its course, has, in a broad sense, two sets of banks in many places, namely, flood plain banks and bluff banks; and the first question to be solved is which of these banks on the south side is to be taken as the boundary line. The real question is, Where is the fixed, permanent, stable south bank of Red River, contemplated as a permanent boundary, marking for all time the sovereignty and jurisdiction of sovereign States?

The bank of a river is that elevation of land which contains its waters at the highest flow. The rule seems to be settled that when a conveyance is made of land to a

[1] For the other decisions and orders reported in this case, see: 256 U. S. 602 et seq; 257 U. S. 609, 611, 616; 258 U. S. 574, 606; 259 U. S. 565.

stream, on a stream, or by a stream, the grantee takes to low water mark of the stream, including the flats between the bank and the low water mark, but a different rule is found if the grant is to a bank, or on the bank, or to a monument on the bank. In such case, the grantee is limited to the high water mark of the river on the bank in question. *Thomas* v. *Hatch,* 3 Sumner, 170; *Howard* v. *Ingersoll,* 13 How. 381; *Alabama* v. *Georgia,* 23 How. 505; *People* v. *Board of Supervisors,* 125 Ill. 9; Gould on Waters, 3d ed., 105; *State* v. *Longfellow,* 169 Mo. 109; *Sun Dial Ranch* v. *May Land Co.,* 61 Oreg. 205; 17 Amer. State Papers, 91; *Paine Lumber Co.* v. *United States,* 55 Fed. 854; *Minor's Heirs* v. *New Orleans,* 115 La. 301; *Gibbs* v. *Williams,* 25 Kans. 214; *Stone* v. *Augusta,* 46 Me. 127; *Hatch* v. *Dwight,* 17 Mass. 289; *Ventura Land Co.* v. *Meiners,* 136 Cal. 284; *Anaheim Union Water Co.* v. *Fuller,* 150 Cal. 327; *Morgan* v. *Livingston,* 6 Martin (La.), 229.

The rule is even stronger and applies with greater force when the bank defined is a boundary line between States or Nations. *Kingman* v. *Sparrow,* 12 Barb. 201.

The water flowing in Red River a large part of the year is bordered upon each side in many places by broad, low-lying flood plains which Oklahoma and the United States contend lie within the true fast-land banks and in the larger sense comprise a part of the river itself. If that contention is upheld, it is apparent that during considerable portions of each year some parts of the Texas land along the boundary will not be in contact with the waters of Red River.

The treaty does not in terms or by its natural import secure to the inhabitants of Texas any rights running with the lands bordering upon the stream. The right secured was simply a personal right, extending to all the inhabitants of the Spanish possessions, to use and navigate the waters along and coterminous with the common

boundary. Those owning or occupying lands fronting upon Red River were not by the treaty given any higher or better rights than those living in other parts of the Spanish possessions. It is clear that inhabitants of the interior of the Spanish possessions had no right either under the treaty or by the municipal laws of that country to reach the Red River for the purpose of utilizing or navigating its waters by passing over the lands of private owners lying between them and the river. To enjoy these rights they must, of course, reach the river by the public highways. And, to those owning lands along the northern boundary, if the bank on their part of the line was so situated as to separate them during a part of the year from contact with the water, they would have had to reach it for purposes of use and navigation by the public highways or by such ways or easements as might exist or be arranged across the intervening flat lands or flood plains. The contention of Texas in this behalf seems to be fully and completely met by *Marine Ry. & Coal Co.* v. *United States,* 257 U. S. 47.

It seems clear, however, that neither Texas nor her inhabitants have at this date any rights whatever under this provision of the treaty. It is true that the boundary line as there fixed, together with the provision as to the use and navigation of the waters, was incorporated in the Treaty of 1828 with Mexico, and later, in 1838, with the Republic of Texas. But Texas came into the Union voluntarily, with her boundaries fixed in accordance with the Treaty of 1819; and when she was admitted any rights secured by the treaty, not running with the land and of a purely personal character, such as those here involved, were immediately abrogated. By the act of entering the Union the State and her inhabitants submitted themselves to the laws and Constitution of the United States, and the personal rights of access to and use of the waters were thereafter controlled and regu-

lated thereby, and ceased entirely to depend upon the treaty.

The question as to what constitutes the south bank of Red River must now be determined, therefore, by the rules and precedents applicable to the ascertainment of the banks of rivers in general, with such modifications as the peculiar conditions, character and regimen of Red River and its banks necessarily impose. The treaty, however, and the negotiations leading up to it may no doubt be invoked for the purpose of ascertaining the intentions of the contracting parties, because the line selected by them has been perpetuated to the present day.

It will be remembered that Mr. Adams steadily insisted that the boundary should be along the farther banks of the three rivers because that was a definite, fixed and stable line which (as he supposed) could be easily ascertained, while, as he said, it would take a hundred years to find where the middle of the three rivers was and to whom the numerous islands therein would belong.

As to the upper river—from the 100th meridian to Cache Creek and the Big Wichita, 135 miles, including the receivership lands—we rest our ultimate claim on four propositions, viz.,

(1) At times of high flood the waters of Red River flow in a practically continuous sheet from bluff to bluff. The bluffs themselves are the fast land banks—the elevations of land which confine the waters at their highest flow.

(2) The flood plains are utterly unstable, both in detail and as a whole. The river in its swings from side to side of the valley trough, rapidly cuts them away, predominantly and normally along their upper and outer edges, and builds them out predominantly and normally at their lower ends. They thus migrate downstream in procession; the river comes back for a time to the bluff banks at practically every point in a comparatively short period measured in years. In each of these periods the river works over practically all the materials between the bluffs.

(3) The flood plains build up and extend themselves, not by slow additions to existing shore lands, but by the formation of sand-bar islands separated from the shores and from each other by threads of the braided channel system. As the islands build up, the channels ultimately become clogged and are abandoned by a series of avulsions. Many of the channels long remain as high water channels often occupied during the higher ordinary floods.

(4) The great body of the Big Bend flood plain, as it exists today, has been formed since 1821; and all of it, except possibly certain short narrow strips manifestly older than the rest, became definitely attached to the Texas bluff since the date of the treaty. What is true of the Big Bend in this regard is true generally of the others, because all are the result of the same processes.

Proof that the high flood waters cover the bottom of the valley trough clear to the bluffs, with the exceptions indicated, rests almost wholly upon testimony of living witnesses whose recollections go back to various periods from about 1860 onward. Their evidence, while more or less contradictory in details, is clear and definite, in general, to the effect that the waters reached from bluff to bluff in the floods of 1866, 1876, 1891, 1908, 1915, and covered the flood plains to a somewhat lesser extent in 1897, 1921 and at other times. While these high floods are of comparatively rare occurrence, yet their sweeping down the valley in a broad, continuous, and uninterrupted sheet of water from bluff to bluff indicates that the bluffs themselves are the true fast land,—the containing banks of the river in flood stages.

The proofs that the flood plains migrate or disappear and the river comes to the bluffs at substantially all points in the course of about a century comprise: (a) The testimony of living witnesses; (b) the showing of the maps; (c) the scientific and engineering testimony.

It is utterly impossible to say where the cut banks—the flood plains banks—were at the date of the treaty any-

where along the upper river. If those banks as they exist today are taken as the boundary, it is certain that the boundary everywhere will be far distant from its location in 1821.

It is equally certain that where now the cut bank is at or north of mid-valley, in 40, 60, 100 years from now it will be at or near the south bluff; and where now it is at the foot of the bluff it will then, in many places, be at or beyond mid-valley. So that, if the boundary, once declared, is to follow subsequent changes in the cut banks, it will be a constantly shifting boundary. If, on the other hand, it is forever to remain where the court now ascertains the cut bank to be, the boundary will in a few years be at or beyond the middle of the river itself; and where the boundary now follows the bluff, there will then lie in front of it new-made flood plain lands from a quarter to a mile and a quarter wide. Such a state of affairs would certainly be a remarkable outcome of the efforts of the treaty-makers to select a stable boundary line.

But we are confident that no such result is inherent in the situation. In a most real and substantial sense, the bluff banks are the banks of this river. Its high floods are contained by them and all between is covered by flowing water. But for the sand dune dykes built solely by the winds, the river would pour across the flood plains in numerous channels at every moderate flood. In the course of a century, even the low water channels and the sand bed itself come back to the bluffs all along the line, and the river works over all the materials between. Those materials are a part of the river. They are under its control. The atoms of which they are composed are being carried toward the sea, and they themselves, while preserving a continuous existence, are pushed along by the river. We believe that both movements are so rapid, so characteristic of this river, as to differentiate it from the normal rivers of previous boundary litigation.

Ordinarily, we think of a river chiefly as a body of water flowing in a channel; but in physiography the accepted definition is that a river is a mass of waste, comprising water mostly, but also the earth, the sand, the leaves—whatever may be going along with the water. In the Red River the water waste and the silt go swiftly on together; the river bed sand, stirred up by the floods, goes only less swiftly, and stops between floods; the flood plains do too, much less swiftly but just as inevitably. The differences are merely of degree.

As we see it, the only embarrassment the Court will meet in recognizing and giving effect to the real and essential facts of this situation, lies in the old definitions placing the bank at that declivity usually marked by the line of vegetation. But that definition is not inflexible. Like all other definitions and rules it adjusts itself to varying conditions. It was not applied by Judge Story in the old case of *Thomas* v. *Hatch, supra.* The Supreme Court of California had no great difficulty in recognizing the existence of two sets of banks in the *Ventura Case, supra,* and we believe this Court will not be less ready to modify the usual definitions and rules so as to meet adequately the new and unique facts of this situation. And in any event, in the typical case of the Big Bend, the bank, even by the old criteria, was along the foot of the bluff a century ago (except, possibly, as to a small strip), and the lands now in front of it have been built up and joined to the mainland by processes of avulsion.

[Counsel also discussed somewhat, the conditions in the middle and lower sections of the river.]

Mr. Thomas W. Gregory and *Mr. W. A. Keeling,* Attorney General of the State of Texas, with whom *Mr. Walace Hawkins, Mr. Bruce W. Bryant, Mr. G. Carroll Todd, Mr. R. H. Ward* and *Mr. C. M. Cureton* were on the brief, for defendant.

The Treaty of 1819 fixed the boundary line along the south bank of Red River at low water mark,—the edge of the water at that usual and ordinary stage in which it was found during most of the year.

The diplomatic correspondence leading up to the treaty, Art. 3 of the treaty, and the decree in the *Greer County Case,* 162 U. S. 1, establish that the river and the north bank belonged to the United States, and the south bank to Spain; hence, irrespective of the provision of the treaty that the inhabitants of Spain should have the use of the waters of the river on its south bank, *Handly's Lessee* v. *Anthony,* 5 Wheat. 374, is decisive of the question involved, since that case settled in favor of defendant the rule of law and construction involved, especially in view of the fact that the decision was rendered March 4, 1820, just prior to the ratification of the treaty by the King of Spain on October 24, 1820, and by the United States on February 19, 1821, and its proclamation by the President of the United States on February 22, 1821.

The bank of a stream is the land between ordinary high and ordinary low water marks. *Child* v. *Star,* 4 Hill, 375, 376; *Freeman* v. *Bellegarde,* 108 Cal. 187; *Peoria* v. *Central National Bank,* 224 Ill. 43; *State* v. *Muncie Pulp Co.,* 119 Tenn. 72.

A call in a grant for the bank of the stream conveys land to the low water mark. Jones, Real Prop. in Conveyancing, § 488; *Daniels* v. *Cheshire R. R. Co.,* 20 N. H. 85; *Halsey* v. *McCormick,* 13 N. Y. 297, 298; *Freeman* v. *Bellegarde,* 108 Cal. 188, 189; *Lamb* v. *Rickets,* 11 Ohio St. 311; *Yates* v. *Van De Bogert,* 56 N. Y. 531; *Pelton* v. *Strycker,* 28 Pa. Dist. 179; *Murphy* v. *Copeland,* 58 Iowa, 410, 411.

Throughout substantially the entire boundary involved, Red River has a normal and ordinary low water stage where it is to be found flowing in one channel, during from nine to eleven months of the year.

The rights reserved, by Art. 3 of the treaty, to the inhabitants of Spain to the use of the waters and navigation of Red River throughout the extent of the boundary, on its south bank, are inconsistent with the claim of the United States and Oklahoma that the boundary line along the south side of Red River is at high water mark, as was decided by this Court in *Maryland* v. *West Virginia,* 217 U. S. 580.

In *Marine Ry. & Coal Co.* v. *United States,* 257 U. S. 47, Mr. Justice Holmes, in saying that the compact between Virginia and Maryland in 1785 need not be considered in the case before him, recognized that the compact did not purport to establish a boundary line.

The treaty makers treated the river as navigable, and it must be so considered in determining their intention. In 1819 the river was navigable by the then instrumentalities of commerce. Throughout one-half of the boundary the river has always been navigable, even by steamboats.

While the eastern half of the river along the boundary involved has been the portion principally used in navigation, the waters of the river along the entire boundary have been, and still are, of inestimable value to the inhabitants of Texas for stock watering, fishing, domestic and other purposes; this has been peculiarly true along the western half of the boundary, where the river was for many years the only source of water during long periods of the year, and where, until the development of wells within the last thirty years, it furnished practically the only water supply.

The fixing of the boundary at the foot of the Texas bluffs would include in Oklahoma more than half a million acres of land south of the river having on it churches, cemeteries, schoolhouses, voting boxes and farms, much of it having been in cultivation for almost a hundred years.

The fixing of the boundary at the cut bank would include in Oklahoma far more than fifty thousand acres of

land between the line so fixed and the ordinary stage of the water, much of it being in cultivation and pasture, much of it covered with timber, and at least a portion containing deposits of oil.

By prescription, resting on the practical construction and application of the Treaty of 1819 by Governments and States concerned and their inhabitants, the boundary line along the south bank of Red River has been fixed as far north as the edge of the water at its usual and ordinary stage. There has been a consistent and exclusive occupation of, and claim of ownership by Texas or under Texas titles, to the land on the south side of the river up to low water mark, and a failure on the part of any person claiming under an Oklahoma or United States title to occupy or claim any of said land until oil was discovered in the vicinity of the river in 1918.

There was a joint construction of the treaty by the United States and the Republic of Texas in marking the boundary along the Sabine at the edge of the water at its ordinary stage.

In dealing with lands in the Indian Territory, Congress, the President of the United States, the Secretary of the Interior, the Commissioner of Indian Affairs, the Geological Survey of the United States, and judicial officers of United States courts in Texas, by almost innumerable acts, proclamations, rulings and maps considered or described these lands as running to Red River, or running down, or up or along Red River, or down the middle of Red River, and in no instances do any of these indicate a claim to, or assertion of jurisdiction by the United States over, land on the south bank of the river, but the contrary.

By their pleadings, complainant and defendant agree that Texas is now asserting and exercising, and has for a long time asserted and exercised, civil, criminal and political jurisdiction north of the south bank of Red River.

The Republic of Mexico, in its grants of lands on Red River, called for the south margin of the stream.

The early historical works and maps of Texas show the boundary at, or on the north side of Red River, and none show that it stopped short of the river on the south side.

From 1836, the first year of the Republic of Texas, Texas has by its legislative enactments claimed to the middle of Red River (and hence certainly to the edge of the water) in laying off its land districts and counties.

Ferries across Red River were licensed and taxed by Texas as far back as 1859, and toll-bridges authorized and regulated since 1890.

Texas has collected taxes on the land in controversy, but the officers of Oklahoma have not attempted to do so.

During the last ninety-two years Mexico and Texas have issued grants to most of the land in controversy.

The courts of Texas have consistently held for more than forty years that the State has jurisdiction to the middle of Red River, and hence to low water mark on the south side, and have exercised that jurisdiction.

Indiana v. *Kentucky,* 136 U. S. 479; *Virginia* v. *Tennessee,* 148 U. S. 503; *Louisiana* v. *Mississippi,* 202 U. S. 1; *Maryland* v. *West Virginia,* 217 U. S. 577.

The general habits and characteristics of Red River are shown by witnesses and public documents. The testimony establishes without contradiction that there is a constant flow in Red River as high up as the mouth of Cache Creek, which empties into Red River some thirty miles east of the receivership area; and beyond question that Red River has a normal and practically constant flow to a point considerably west of the receivership area.

Along the most western fifty or seventy-five miles of the boundary involved the river flows from six to nine months of the average year. The sand plain of the river, which is covered only in times of rises, varies in width so greatly that the same rise will differ materially in height at

different points. The ordinary rises at some points where the sand plain is wide rarely exceed five or six feet, while, at points where this plain is narrower, the rise may be as high as twenty feet. The usual time for rises is in May and June, and any substantial rises at other times are unusual; these May and June rises are usually known as "Spring rises," and many witnesses testified that Spring corn and other crops can be and are planted and harvested below high water mark after the period referred to has passed.

At many places Red River flows where it did as far back as old inhabitants can remember. With the exception of the crossings, where the river leaves the curve which is playing out on one side and crosses the sand plain to the beginning of the curve on the opposite side, its habit is to hug the bends and remain in substantially the same position with the exception of more or less erosion and accretion.

It is admitted by practically all witnesses that the changes in Red River from Denison, Texas, east, are by the usual processes of erosion and accretion with certain well-defined exceptions of avulsion where the river has cut across the necks of oxbow bends. It is also substantially agreed that, along what is termed the middle portion of the boundary in question, the processes of erosion and accretion are almost entirely responsible for the changes which have taken place, and that along the most eastern two-thirds of the boundary involved, according to the scientific witnesses of United States and Oklahoma, the river is, in the main, a normal stream. It is contended, however, by the United States and Oklahoma that along the most western one-third of the boundary involved the river is not normal in its processes; that the changes occurring along this most westerly one-third are much more rapid than those occurring further east; that this rapidity of change is caused by the decreased water

flow, the increased amount of sand carried by the stream, the wider sand plain in which the river flows, the steeper gradient of the river, and the unusual and violent floods.

The rule of law, defining the result of erosion and accretion on the one hand and avulsion on the other, rests upon the ability to identify the land affected. If the river suddenly changes its course leaving a tract of land as it was before with an identity established, the ownership can be traced and remains as before. If, on the other hand, the land affected cannot be identified, but has been built up by particles, the ownership of which cannot be identified, the land affected becomes the property of the person against whose land it is formed. Neither the rapidity of the process nor the size of the area affected is the determining factor. *Nebraska* v. *Iowa,* 143 U. S. 359; *Jeffries* v. *East Omaha Land Co.,* 134 U. S. 178; *Missouri* v. *Nebraska,* 196 U. S. 36; *Arkansas* v. *Tennessee,* 246 U. S. 173, 175; *McCormack* v. *Miller,* 239 Mo. 469; *Yutterman* v. *Grier,* 112 Ark. 366.

The facts in *Nebraska* v. *Iowa, supra,* in regard to the Missouri River, were almost identical with those claimed by the United States and Oklahoma to exist on the western one-third of the boundary in question, and the results growing from those conditions bring the land affected within the law applicable to erosion and accretion, as decided in that and other cases cited, and not to that applicable to avulsion.

Erosion and accretion is the usual process, avulsion is unusual and extraordinary, and, in the absence of definite testimony to the contrary, it must be presumed that changes occurred by the former process. 1 Farnham on Waters, 321; *Nebraska* v. *Iowa,* 143 U. S. 366.

Following the rule of rivers, avulsion on Red River is rare, and occurs almost exclusively on the eastern one-third of the boundary involved. It is the habit of Red River to make its changes by erosion and accretion.

If the so-called island building process takes place at all, it is in rare instances and is not the habit of the river. There is hardly a case of a real island in Red River.

The sand dunes vary in stability. There is no uniform regularity about their lines or formations, and they are frequently destroyed or changed by winds or high water.

The changes which occur in Red River, exclusive of the few instances of avulsion, are between river bends on opposite sides, between the point where the river leaves the outer rim of the curve on one side and goes across to the beginning of the curve on the opposite side.

The situation in the Big Bend (including the oil area) is typical of the processes of the river, and the changes in that territory since the making of the Treaty of 1819 have been slight and have arisen from erosion and accretion.

Among the issues tendered by the United States and Oklahoma in this case are, that the valley lands of Red River, at least from Denison westward, are in the main less than 100 years of age; that substantially all the valleys from approximately where the Big Wichita River enters Red River westward to the 100th meridian are of less age; they declare that the Big Bend Valley, in which is located an oil field, is positively less than 100 years of age.

Another issue offered by them is that all the valleys of Red River from about the mouth of the Wichita westward, and particularly the Big Bend Valley, and most of the valleys from the mouth of the Wichita to Denison, were not formed by accretion, in accordance with the usual law of moving waters; but that they were formed by a new theory of valley building, to wit: The Island Theory of Valley Building, which they rely upon in this case.

They also say that the main channel of Red River ran against the Texas bluffs in the Big Bend area 100 years ago.

On the other hand, the State of Texas contends that all the great Red River valleys are more than 100 years of age; that the channel of Red River did not run against the Texas bluffs 100 years ago; but, on the contrary, that it was running against the concave walls on the Oklahoma side, where it has been running for a period of time which cannot be computed in years, in accordance with the natural laws governing rivers. And further, it contends that the great valleys of Red River were built by the ordinary and normal process of accretion, in accordance with the universal obedience of moving waters to natural laws.

The United States and Oklahoma attempt to prove their case by scientific testimony; the State of Texas meets the issue with the testimony of living witnesses, who have known the river in various sections for more than fifty years, and, in turn, by scientific testimony flatly contradicting the conclusion reached by the government scientists.

The United States and Oklahoma and their scientists claim that Red River, particularly in the oil field section, does not obey the usual and natural laws of rivers in locating and maintaining their channels and building their valleys; while, on the other hand, the State of Texas and its scientists claim that Red River does obey all the usual and natural laws of moving waters and rivers.

Mr. Joseph W. Bailey, with whom *Mr. Orville Bullington, Mr. C. B. Felder, Mr. Leslie Humphrey* and *Mr. A. H. Carrigan* were on the brief, for Mrs. Lillis Morgan et al., Texas patented land owners, interveners.

Mr. S. P. Freeling for complainant.

Mr. C. L. Bass filed a brief on behalf of the Bass Petroleum Company, intervener.

Mr. K. C. Barkley filed a brief on behalf of the General Oil Company and the National Oil & Refining Company, interveners.

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

A principal object of this suit, originally brought in this Court, is to settle a controversy over that part of the boundary between the States of Texas and Oklahoma which follows the course of the Red River from the 100th degree of west longitude to the easterly limit of Oklahoma. This boundary is part of an old one between the territory of the United States and the Spanish possessions to the southwest which was agreed on and defined in the third article of the Treaty of 1819. 8 Stat. 252. As to the line in question that definition is still controlling; it has been reaffirmed on several occasions, but never changed. The controversy arises chiefly out of diverging views of what the definition means and how it is to be applied. The full treaty provision reads as follows:

"Article 3. The boundary line between the two countries, west of the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or Red River; then following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818. But, if the source of the Arkansas river shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the

said parallel of latitude 42, and thence, along the said parallel, to the South Sea: All the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

"The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions, to the territories described by the said line; that is to say: the United States hereby cede to his Catholic Majesty, and renounce forever, all their rights, claims, and pretensions, to the territories lying west and south of the above-described line; and, in like manner, his Catholic Majesty cedes to the said United States, all his rights, claims, and pretensions, to any territories east and north of the said line; and for himself, his heirs, and successors, renounces all claim to the said territories forever."

In the early stages of the suit the chief point of difference between the parties was that Oklahoma and the United States were claiming the south bank of the river as the boundary, while Texas was contending for the thread or middle of the stream. That difference was disposed of in an opinion delivered April 11, 1921, wherein this Court recognized that in the earlier case of *United States* v. *Texas,* 162 U. S. 1, it had been adjudged that the boundary, as fixed by the treaty, is along the south bank. 256 U. S. 70. The purport of that opinion was embodied in an interlocutory decree of June 1, 1921, which also made provision for taking additional evidence and for a further hearing to determine what constitutes the south bank, where along that bank the boundary is, and the proper mode of locating it on the ground,—these being matters on which the parties were unable to agree. 256

U. S. 608. Additional evidence filling several printed volumes was afterwards taken, and the further hearing was had near the close of the last term.

On the questions of what constitutes the south bank, and where along the same the boundary is, the parties are still far apart. Oklahoma and the United States contend that the bank and boundary are at the foot of a range of hills or bluffs which fringes the south side of the valley through which the river runs, while Texas insists that they are " at low water mark " on that side of the river,—meaning, as is said in the brief, " the edge of the water at that usual and ordinary stage in which it is found during most of the year." This is now the principal issue and to it the evidence and arguments are largely directed. Its solution involves a consideration of what was intended by the treaty provision and of the physical situation to which the provision is to be applied.

The treaty provision names three rivers,—the Sabine, the Red and the Arkansas. It expressly locates the boundary along the " western bank " of the Sabine and the " southern bank " of the Arkansas, and describes the intermediate section as leaving the Sabine at a designated point and running due north until it " strikes " the Red, then " following the course " of the Red westward to the 100th Meridian, then " crossing " the Red and running due north to the Arkansas. Thus, while the boundary is in exact words fixed along a designated bank of the Sabine and the Arkansas, it is not expressly so fixed as respects the Red. This difference in terms, if not otherwise overcome, might well be taken as signifying a difference in purpose. But that it has no such signification is otherwise made plain. We say this, first, because the direction for " crossing " the Red at the 100th Meridian on a line running north strongly implies that the preceding course is somewhere on the southerly side of the river; secondly, because the declaration that " the use of the waters, and

the navigation of the Sabine to the sea, and of the said rivers Roxo [Red] and Arkansas, throughout the extent of the said boundary, on their respective banks," shall be common to the respective inhabitants of both nations, distinctly shows that a bank boundary is intended along the Red just as along the Sabine and the Arkansas; and, thirdly, because available historical data relating to the negotiations which culminated in the treaty show indubitably that those who framed and signed it on behalf of the United States and Spain intended to establish, and understood they were establishing, a bank boundary along all three rivers. 4 American State Papers, Foreign Relations, pp. 621–622; 4 Memoirs of John Quincy Adams, pp. 255–256, 260–261, 266–270; *United States* v. *Texas,* 162 U. S. 1, 27. The words " throughout the extent of the said boundary, on their respective banks," are the last by which the treaty provision denotes the relation of the boundary to the rivers, and, as those words are otherwise supported, they point with controlling force to what was in the minds of the high contracting parties. It follows from these considerations that the meaning of the treaty provision is just what it would be if the Red River section of the boundary were expressly described as along the south bank.

We therefore are concerned with an instance in which the bank of a river, and not the river itself, has been made the boundary between two nations,—now between two States of the Union.

In many jurisdictions it is settled that there is a material difference between taking the bank of a river as a boundary and taking the river itself; and this rule has been recognized and applied by this Court from an early time in the adjudication of controversies over state boundaries.

During the Revolutionary period Virginia ceded to the United States all her " territory north west of the river

Ohio." Afterwards Kentucky and Indiana were admitted into the Union as States, with the southerly or initial line of that cession as the boundary between them. A controversy over that boundary was brought before this Court in *Handly's Lessee* v. *Anthony*, 5 Wheat. 374. The question presented was whether the boundary was along low water mark or at the line reached by the river when at medium height. In an opinion delivered by Chief Justice Marshall the Court held the boundary was along low water mark, but was careful to say: "In pursuing this inquiry, we must recollect, that it is not the bank of the river, but the river itself, at which the cession of Virginia commences." Mr. Justice Story participated in the decision of that case and concurred in the opinion. Subsequently, when holding the Circuit Court for the District of Maine, he had occasion to interpret two conveyances of land adjacent to a stream in that State. One tract was described as bounded by the stream from one point to another, and the other as bounded by the bank of the stream from one point to another. The learned Justice was of opinion that the two bounding lines were essentially unlike, and he held as to the first tract that the conveyance included the flats below the bank at least to low water mark, and as to the second that the conveyance limited the grant to the bank and excluded the flats below. *Thomas* v. *Hatch*, 3 Sumner, 170.

A controversy over the boundary between Georgia and Alabama was before this Court in *Howard* v. *Ingersoll*, 13 How. 381. The boundary had been defined in a cession by Georgia to the United States as beginning on the western bank of the Chattahoochee River where it crosses a stated line and running thence up the river "along the western bank thereof" to the great bend. (See 1 American State Papers, Public Lands, pp. 113–114.) The nature of the controversy was such that it called for an interpretation and application of the words just quoted.

At the *locus* there was an abrupt and high bank on the western, or Alabama, side which was washed by the river in periods of ordinary high water. In periods of low water, which comprised two-thirds of the year, a sloping strip of from thirty to sixty yards of dry land lay between the abrupt bank and the water. The flowing stream was about two hundred yards wide in periods of ordinary high water and about thirty yards in periods of low water. At that point the water never reached the top of the abrupt bank, but at other points, where the bank was lower, the water in exceptional times of flood overflowed the bank and temporarily submerged adjacent lands. The case was tried in an Alabama court, which ruled that the boundary was at the line of ordinary low water. That ruling was sustained by the Supreme Court of the State, 17 Ala. 780, and the case was brought here on writ of error. Another case involving the same questions, and brought here from the Circuit Court for the District of Georgia, was heard at the same time, but a description of the first suffices for present purposes. This Court, upon much consideration, held that the boundary was not at the line of ordinary low water, but along the water-washed bank or elevation which bounds the river bed and confines the water within definite outer limits, save in the exceptional instances when it is so far at flood that it overflows its restraining banks and spreads over adjacent lands. The ruling and the grounds on which it was put are indicated in the following excerpts from the opinion:

(P. 415.) "When the commissioners used the words bank and river, they did so in the popular sense of both. When banks of rivers were spoken of, those boundaries were meant which contain their waters at their highest flow, and in that condition they make what is called the bed of the river. They knew that rivers have banks, shores, water, and a bed, and that the outer line on the bed of a river, on either side of it, may be distinguished

upon every stage of its water, high or low; at its highest or lowest current. It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. But it may include spots lower than the bluff or bank, whether there is or is not a growth upon them, not forming a part of that land which, whether low or high, we know to be upland or fast lowland, if such spots are within the bed of the river. Such a line may be found upon every river, from its source to its mouth. It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river, in any stage of water. With such an understanding of what a river is, as a whole, from its parts, there is no difficulty in fixing the boundary-line in question."

(P. 417.) "The call is for the bank, the fast land which confines the water of the river in its channel or bed in its whole width, that is to be the line. The bank or the slope from the bluff or perpendicular of the bank may not be reached by the water for two thirds of the year, still the water line impressed upon the bank above the slope is the line required by the commissioners, and the shore of the river, though left dry for any time, and but occasionally covered by water in any stage of it to the bank, was retained by Georgia as the river up to that line. Wherever it may be found, it is a part of the State of Georgia, and not a part of Alabama. Both bank and bed are to be ascertained by inspection, and the line is where the action of the water has permanently marked itself upon the soil."

(P. 418.) "Our interpretation . . . is that the western line of Georgia . . . is a line to run up the

river on and along its western bank, and that the jurisdiction of Georgia in the soil extends over to the line which is washed by the water, wherever it covers the bed of the river within its banks. The permanent fast land bank is referred to as governing the line."

The members of the Court all agreed that the call "along the western bank" distinguished the case from that of *Handly's Lessee* v. *Anthony* and that the Alabama court had erred in treating the ordinary low water as the boundary intended; but three members, while concurring in the judgment of reversal to that extent, differed from the Court's reasoning and conclusion in other respects.

That was a private litigation and seven years later the same questions—this time covering the full length of the boundary—were presented to this Court by the two States. *Alabama* v. *Georgia,* 23 How. 505. Alabama claimed the "usual or common low-water mark" as the boundary and Georgia contended for "the western bank at high-water mark, using high-water mark in the sense of the highest line of the river's bed; or, in other words, the highest line of that bed, where the passage of water is sufficiently frequent to be marked by a difference in soil and vegetable growth." Alabama asserted and Georgia admitted that the banks of the river, though abrupt and high at some places, were low and relatively flat at others and that at the latter, when the river was high, the water overflowed the outer limits of its bed and spread over adjacent lands,—at some places as much as a half mile. The controversy thus presented was disposed of in an opinion having the approval of the entire Court. The Court said:

(P. 511) "In making such construction, it is necessary to keep in mind that there was by the contract of cession a mutual relinquishment of claims by the contracting parties, the United States ceding to Georgia all its right,

title, &c., to the territory lying east of that line, and Georgia ceding to the United States all its right and title to the territory west of it."

(P. 514) "With these authorities and the pleadings of this suit in view, all of us reject the low-water mark claimed by Alabama as the line that was intended by the contract of cession between the United States and Georgia. And all of us concur in this conclusion, that by the contract of cession, Georgia ceded to the United States all of her lands west of a line beginning on the western bank of the Chattahoochee river where the same crosses the boundary line between the United States and Spain, running up the said Chattahooche river and along the western bank thereof.

"We also agree and decide that this language implies that there is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil *which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.*

"The western line of the cession on the Chattahoochee river must be traced on the water-line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the preceding paragraph of this opinion."

Upon the authority of these cases, and upon principle as well, we hold that the bank intended by the treaty provision is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which

separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course of the river, and that the boundary intended is on and along the bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it. When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time; and we exclude the lateral valleys which have the characteristics of relatively fast land and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood.

The conclusion that the boundary intended is on and along the bank and not at low water mark or any other point within the river bed has full confirmation in available historical data respecting the negotiations which attended the framing and signing of the treaty. 4 American State Papers, Foreign Relations, pp. 621–622; 4 Memoirs of John Quincy Adams, pp. 255–256, 260–261, 266–270.

Texas places some reliance on the concluding words of the treaty provision, " but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo [Red] and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations." As already observed, these words show that the boundary intended is " on " the bank. No doubt they reserve and secure a right of access to the water, at all stages, adequate to the enjoyment of the permitted use; but they afford no basis for regarding the boundary as below the bank or within the river bed. *Dunlap* v. *Stetson,* 4 Mason, 349, 366. This part of the treaty provision is quite unlike the old compact considered in *Maryland* v. *West Virginia,* 217

U. S. 577, which gave to the citizens of Virginia full property in the *shore* of the Potomac, and so carried the jurisdiction and title to the water's edge. See *Handly's Lessee* v. *Anthony,* 5 Wheat. 374, 385. In an earlier opinion disposing of other phases of this suit it was determined that the section of the Red River adjacent to this boundary is not navigable. 258 U. S. 574.

Texas refers to the proceedings in 1840 and 1841 whereby the United States and the Republic of Texas jointly traced and marked so much of the treaty boundary as lies along the western bank of the Sabine, and claims that what was done makes for a view different from that here expressed. We do not so understand the proceedings. General Hunt, who represented the Republic of Texas in that undertaking, took the position that portions of the river bed often immersed could be treated as the bank and that low-water mark should be regarded as the boundary. Mr. Overton, who represented the United States, dissented and said: "The term bank does not imply, I conceive, a line of the character proposed by you, but it rather means that natural barrier which confines the waters, and compels them to flow within a well-defined channel, although the surface of the river may fluctuate in elevation between its banks at various seasons of the year. The same conception of the meaning of this term precludes on my part the idea that it would be just to claim the western margin of any inundations caused by the river overflowing its banks, because in such cases the usual well-defined barrier is temporarily surmounted." Mr. Overton's view prevailed and, as nearly as can be told now, the work proceeded on the view that the boundary was along the mean water line on what he defined as the bank. H. R. Ex. Doc. 51.

With what was intended by the treaty provision in mind, we turn to the physical situation to which the provision is to be applied.

This section of the Red River flows eastward in a serpentine course through a valley bordered on either side by a range of bluffs or hills. The distance along the river is 539 miles and on a direct line 321 miles. The valley widens irregularly from about two miles on the west to fifteen or more on the east. The bed over which the water flows is composed of light, loose sand and is of varying breadth, the maximum being one and one-fourth miles and the average one-third of a mile. On either side are stretches of valley land which vary in both width and length by reason of the winding of the river and the irregularities in the face of the bluffs. This land is fairly covered with grasses and other upland growth and often is studded with trees. Many of the trees are old and among them are elm, pecan and other kinds of hard wood. A slight depression or a succession of depressions usually lies along the foot of the bluffs. The river or a channel may have been there in years that are gone, but, if so, no one knows when. Almost uniformly the valley land is separated from the sand bed of the river by a clearly defined water-worn bank, designated by witnesses and counsel as a cut bank. This bank ranges in height from two to ten or more feet, the height generally increasing from west to east and the lower parts usually being where the bed is wide. On the valley side of the bank is vegetation and on the river side bare sand. The cut banks effectively confine the water to the sand bed, save in exceptional instances when the river is at flood and overflows adjacent lands for a few days. There is some overflowing almost every year and in one year out of twelve or fifteen the overflow reaches back to the bluffs in many places.

When the water is in substantial volume it flows over the whole of the sand bed and washes both banks, but when the volume is relatively low much of the bed is dry. The latter is the prevailing condition,—and this because the source and upper reaches of the river are within a

region where the rainfall is light, seasonal only and quickly carried into the stream. Along the western part of the boundary the bed is entirely dry in long stretches for weeks at a time; and when the water is flowing, but low, it is found in shallow channels which divide and shift about over the bed. Witnesses accustomed to crossing there speak of finding the flowing channel near one side of the bed in the morning and in the middle or near the other side in the evening. Only in pronounced bends are the channels relatively stable. Along the eastern part of the boundary the volume of water always is substantial, but there again it is inclined to divide into separate channels and to cross and recross the bed frequently. Along both parts when the water is low, as is the rule, the channels in which it moves have low marginal elevations, but these are composed of mere sand, have no permanency and yield readily to the action of the water and the winds. Material changes in them are habitual, not exceptional.

This survey of the physical situation demonstrates that the banks of the river are neither the ranges of bluffs which mark the exterior limits of the valley, nor the low shifting elevations within the sand bed. And that this is the natural and reasonable view of the situation is illustrated by a long course of public and private action.

The valley land always has been dealt with as upland. The United States surveyed and disposed of that on the north side under its public land and Indian laws, and Texas surveyed and disposed of that on the south side under her land laws. Both treated the cut banks as the river banks and carried their surveys to those banks, but not beyond. Patents were issued for practically all the land. Individuals freely sought and dealt with it as upland. Much of that on the south side was disposed of by Texas fifty years ago, some of it seventy. Thousands of acres on that side were improved, occupied and cultivated under these disposals, and a larger acreage was occupied

and used under them for pastures. Through the long period covered by this course of action there never was any suggestion that this valley land was part of the river bed, nor that the shifting elevations of sand within the sand bed were the river's banks, nor that the land on the south side belonged to the United States. Not until some land on the south side and part of the river bed were discovered to be valuable for oil was this unbroken course of action and opinion drawn in question. However much the oil discovery may affect values, it has no bearing on the questions of boundary and title.

Our conclusion is that the cut bank along the southerly side of the sand bed constitutes the south bank of the river and that the boundary is on and along that bank at the mean level of the water when it washes the bank without overflowing it.

The boundary as it was in 1821, when the treaty became effective, is the boundary of today, subject to the right application of the doctrines of erosion and accretion and of avulsion to any intervening changes. Of those doctrines this Court recently said:

"It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel." *Arkansas* v. *Tennessee,* 246 U. S. 158, 173.

Oklahoma and the United States question the applicability of the doctrine of erosion and accretion to this river, particularly the part in western Oklahoma,—and

this because of the rapid and material changes effected during rises in the river. But we think the habit of this river is so like that of the Missouri in this regard that the ruling relating to the latter in *Nebraska* v. *Iowa,* 143 U. S. 359, 368, is controlling. It was there said, p. 368, *et seq.:*

"The Missouri River is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand. . . . The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where above the loose substratum of sand there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. . . . No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto.

"Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel, and the

washing from the one side and on to the other, the law of accretion controls on the Missouri River, as elsewhere; and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between States."

Common experience suggests that there probably have been changes in this stretch of the Red River since 1821, but they cannot be merely conjectured. The party asserting material changes should carry the burden of proving them, whether they be recent or old. Some changes are shown here and conceded. Others are asserted on one side and denied on the other.

A controverted one is ascribed to the so-called Big Bend Area, which is within the oil field. That area is now on the south side of the river and connected with the bluffs on that side. Oklahoma and the United States assert that in 1821 a channel of the river ran between it and the bluffs and that the river has since abandoned that channel. Texas denies this and insists that the situation in 1821 was practically as now. Stimulated by the large values involved, the parties have exhausted the avenues of research and speculation in presenting testimony thought to bear on this question. The testimony, particularly of the experts, is conflicting. It is so voluminous that it does not admit of extended statement or discussion here. We can only refer to important features and give our conclusions.

There are no surveys or records depicting the situation in 1821; nor are there any human witnesses who knew this part of the river then. But there are inanimate witnesses, such as old trees, which tell a good deal. At that place the river makes a pronounced but gradual bend to the north and back to the south. The area in question is on the inner side of the bend. It is larger now than sixty years ago, but how much is uncertain. The enlargement is the result of intervening accretions. The

habit of the river is to erode the outer bank of a bend and to accrete to the opposite bank. Three surveys executed by Texas in 1856 and covering less than the whole area disclosed the presence at that time of over 1700 acres. On the outer part are physical evidences of the formation being comparatively recent. On the inner part are like evidences of the formation being old, among them being the presence of living trees more than a century old. One of the trees, a pecan, attained an age of 170 years. A part of the area was cultivated and the remainder used for pasturage as early as 1877. At that time there were more trees than now. Many were taken by early settlers for firewood, fencing posts and building logs, some logs being over three feet through. To overcome the inference arising from the presence of the old trees, which were well scattered, testimony was presented to show that in 1821 these trees were all on islands, which afterwards were consolidated amongst themselves and with the land on the south side. We think this testimony is essentially speculative and not a proper basis for judgment. In this area, as elsewhere in the valley, a succession of depressions is found at the foot of the bluffs, and some testimony was produced to show that in 1821 the river, or a part of it, flowed there. It may be that the river was there long ago, but the testimony that it was there in 1821 is far from convincing. Texas has been exercising jurisdiction over the area and asserting proprietorship of the soil for more than half a century and has surveyed and disposed of it all, the earliest disposals being in 1856. Some of the later surveys seem to conflict with those first made, but all name the river bank as a boundary. In those of 1856, and possibly others, it was the controlling call. See *Schnackenberg* v. *State,* 229 S. W. 934; *Cordell Petroleum Co.* v. *Michna,* 276 Fed. 483. The jurisdiction and title of Texas stood unchallenged until shortly before this suit. Our conclusion is

that the claim that the river, or any part of it, ran south of this area in 1821 is not sustained. So the boundary follows the cut bank around the northerly limit of the area.

Burke Bet Island and Goat Island, both near the Big Bend Area, are claimed by Texas on the theory that in 1821 they were part of the land on the south side. We think the evidence, all considered, falls short of establishing the claim and tends rather to show that neither island was ever part of the permanent fast land on that side. The claim is accordingly rejected.

What now appears to be an island opposite mile post 575 and near the line between Hardeman and Wilbarger Counties, in Texas, is claimed by that State to have been part of the land on the south side up to 1902 and then severed from it by avulsive action in time of flood. The evidence sustains the claim. So the boundary follows the north bank of the island.

There are instances in which the river since 1821 has in time of flood left its former channel and cut a new one through a neck of land thereby causing land theretofore on one side of the river to be on the other. Such avulsive action does not carry the boundary with it, but leaves it where it was before. There is no controversy about these cut-offs and the evidence indicates that they readily can be recognized.

The matter of running, locating and marking the boundary upon the ground in accordance with the principles stated herein will be referred to three commissioners to be appointed by the Court, their action to be subject to its approval.

The parties may submit within thirty days a form of decree to carry these conclusions into effect.

Mr. Justice McReynolds, dissenting.

The parties to the compact of 1819 (ratified 1821) distinctly avowed the purpose " to settle and terminate all

their differences and pretensions, by a Treaty, which shall designate, with precision, the limits of their respective bordering territories in North America." And when all of its provisions are given proper weight, I think, that instrument fixes the international boundary with reasonable precision at low water mark on the south side of the Red River—not at the margin of the "cut bank."

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Geofroy* v. *Riggs,* 133 U. S. 258, 271.

Under *United States* v. *Texas,* 162 U. S. 1, and *Oklahoma* v. *Texas,* 256 U. S. 70, we must interpolate "southern bank" into the description of the contested boundary and treat this as though it read, "then following the course of the [southern bank of the] Rio Roxo westward, to the degree of longitude 100 west from London," etc. Thus amended, we should now interpret the compact with a view to effectuate the intention of the parties.

A bank is the rising ground, or area, bordering a stream. To describe a boundary merely as following the course of the river bank gives it no definite location. Something more must be known before it can be laid down on the ground, e. g., that it runs with the low, ordinary or high water mark. To ascertain this something more, when the application of a treaty is involved, the purpose and all provisions of the compact, the character of the country and any other facts indicative of intention, may be considered.

The Treaty of 1819 declares—"The use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks,[1] shall be common to the respective inhabitants of both nations." Parts of these rivers are navigable. For hundreds of miles the Red River passes over a sandy waste between irregular "cut banks," sometimes a mile apart (one-third mile on the average), and the waters are mainly useful for domestic purposes, for live stock and for irrigation. During most of the year the stream is only a few yards wide and flows along shallow channels, commonly at some distance from the southern "cut bank." Manifestly, if the boundary is on the margin of that bank the Spanish inhabitants were generally cut off from the stream and could not use the waters without crossing or occupying territory of the United States. By its express terms the treaty reserved to those people the right to use and navigate the waters and I cannot think that by mere implication it imposed a very serious barrier thereto.

Again, if the boundary runs with the southern "cut bank" of the Red River, of what effect are the words, "all the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States"? That boundary being admitted, all islands would necessarily lie within the United States and their reservation was unnecessary. But if low water marks the boundary, then the reservation becomes important. Without it grave disputes might arise as to the true line where islands lie south of the main stream. See *Georgia* v. *South Carolina,* 257 U. S. 516.

With the boundary fixed at low water mark, the Spanish inhabitants obtained free access to the stream at

[1] The boundary follows only a portion of each river—the upper reaches of the Arkansas, the middle part of the Red and the lower section of the Sabine. No rights were given to Spanish subjects in respect of the waters of these rivers except along the boundary.

all seasons and could use its waters as their welfare required; the reservation of the islands to the United States is important; the parties obtained full reciprocal rights; and the unfortunate consequences incident to ownership by the United States of a long narrow barren strip between a foreign country and the stream are avoided.

"Even when a state retains its dominion over a river which constitutes the boundary between itself and another state, it would be extremely inconvenient, to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less, where the rising and falling is annual, than where it is diurnal. Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty, in attempting to draw any other line than the low-water mark." Chief Justice Marshall in *Handly's Lessee* v. *Anthony* (1820), 5 Wheat. 374, 380, 381. Note that this cause was decided before ratification of the treaty in 1821.

The point for decision in *Howard* v. *Ingersoll* (1851), 13 How. 381, 397, 411, 412, 413, concerned the boundary between Georgia and Alabama, along the Chattahoochee River. "Its determination [p. 397] depends upon what were the limits of Georgia and her ownership of the whole country within them, when that State, in compliance with the obligation imposed upon it by the revolutionary war, conveyed to the United States her unsettled territory; and upon the terms used to define the boundaries of that cession." The pertinent article of the cession is copied below.[1] The Court also said, pp. 411, 412—

[1] "The State of Georgia cedes to the United States all the right, title, and claim, which the said State has to the jurisdiction and soil of all the lands situated within the boundaries of the United States, south of the State of Tennessee, and west of a line beginning on the

"We further learn, that the adjustment with South Carolina, left in Georgia the Chattahoochee River from its source to the 31st degree of north latitude, as Georgia had claimed her limits to be, since the king's patent to Sir James Wright, in 1764.

"In other words, that the Chattahoochee, from its source to that point, was at all times after that patent within Georgia with the right of soil and jurisdiction when its unsettled territory was ceded to the United States. This fact being so, it gives us a key from the laws of nations to aid us in the interpretation of its cession as to the boundary between Georgia and Alabama, which must prevail, as it would in all other cases, where there may be a transfer by one nation of a part of its territory to another, with a river for its boundary, without an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river.

"The rule *jure gentium,* to which we refer, is not now for the first time under the consideration of this court. We are relieved, then, from its discussion, by citations from Vattel and other writers upon the laws of nations, to show what it is; but it will be found in the 22d chapter of Vattel. Among the writers after him it is not controverted by any one of them. Besides, it is according to what had been anciently the practice of nations, substantiated by an adherence to it down to our own times. In *Handly's Lessee* v. *Anthony,* 5 Wheat. 379, this court said,

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western bank of the Chattahoochee River, where the same crosses the boundary-line between the United States and Spain, running thence up the said River Chattahoochee and along the western bank thereof, to the great bend thereof, next above the place where a certain creek or river called Uchee, (being the first considerable stream on the western side above the Cussetas and Coweta towns,) empties into the said Chattahoochee River; thence in a direct line to Nicajack, on the Tennessee River; thence crossing the said last-mentioned river, and thence running up the said Tennessee River, and along the western bank thereof to the southern boundary-line of the State of Tennessee."

by its organ, Chief Justice Marshall, ' when a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention about it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants territory on the one side only, it retains the river within its domain, and the newly-created State extends to the river only. The river, however, is its boundary.

" Georgia was certainly the original proprietor of the River Chattahoochee to 31 degrees north, when her territory west of it was ceded to the United States, and that cession must be understood to have been made under the rule, unless by terms in her grant to the United States it was taken out of it, with the view to give to the new State which was to be formed out of the cession, a coequality of soil and jurisdiction in the river which was to separate them."

And applying what it deemed the applicable rule, the Court held (p. 418): The boundary in question is " a line to run up the [Chattahoochee] river on and along its western bank, and that the jurisdiction of Georgia in the soil extends over to the line which is washed by the water, wherever it covers the bed of the river within its banks. The permanent fast land bank is referred to as governing the line. From the lower edge of that bank, the bed of the river commences, and Georgia retained the bed of the river from the lower edge of the bank on the west side. And where the bank is fairly marked by the water, that water level will show at all places where the line is."

The well established rule, approved and attempted to be applied in *Howard* v. *Ingersoll,* has no application to the present controversy where independent nations undertook to settle a long standing boundary dispute. Moreover, the treaty contains important and, I think, con-

trolling provisions not found in the Georgia grant. Although much relied on, that case does not decide the point here presented—it arose out of wholly different circumstances and the opinion rests upon a rule of interpretation declared to be generally inapplicable to compacts of settlement between independent nations.

In *Handly's Lessee* v. *Anthony* (1820), *supra*, the Court ruled that under the grant by Virginia of all her right to the territory "situate, lying and being to the northwest of the river Ohio," the boundary was at low water on the north side. The considerations which led to that conclusion, I think, are sufficient to require a like result here. Moreover, the Treaty of 1819 contains provisions not found in the cession of the Northwest Territory which point to the low water mark of the Red River.

That the Spanish government wittingly assented to a boundary by which a narrow strip of foreign territory was interposed between its citizens and waters essential to their welfare seems highly improbable. The convenience of the population must have been in contemplation. Nor do I find adequate reason for thinking that the United States desired this strip of barren land—then without value to their citizens—with the consequent obligations and serious difficulties. In 1819 troublesome problems incident to marking the boundary between this country and Canada were pending. Considering them, it is easy to understand why the United States desired to fix the boundary at the low water mark of Red River, reserving the islands to themselves. But, obviously, ownership of the barren strip south of that line would entail unfortunate consequences to them and interfere with the orderly development of Spanish territory. Surely, neither government expected such a result.

"'In case of doubt,' says Vattel, 'every country, lying upon a river, is presumed to have no other limits but the river itself; because nothing is more natural, than to take

a river for a boundary, when a state is established on its borders; and wherever there is a doubt, that is always to be presumed which is most natural and most probable.' " *Handly's Lessee* v. *Anthony, supra,* 379, 380.

BANKERS TRUST COMPANY ET AL., EXECUTORS OF McMULLEN, *v.* BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT.

ERROR TO THE SUPERIOR COURT OF THE STATE OF CONNECTICUT.

No. 169. Argued January 3, 1923.—Decided January 22, 1923.

1. A state law which, in order to reach property which has escaped taxation, taxes the estates of decedents for a period anterior to date of death, but allows proportionate deductions where a personal representative shows that taxes were paid, or property was not owned, by his decedent within the period, does not deprive the creditors and distributees of the estates of their property without due process of law. P. 650. Gen. Stats. Conn. 1918, § 1190, sustained.
2. The delinquency of a decedent in not paying taxes may be penalized under the state taxing power by inflicting upon his estate a penalty measured by the discretion of the legislature. P. 651.
3. The constitutional prohibition of *ex post facto* laws is inapplicable to a retroactive tax penalty. P. 652.

96 Conn. 361, affirmed.

ERROR to a judgment of the Superior Court of Connecticut, entered upon direction of the Supreme Court of Errors, in a proceeding to review a tax assessment.

Mr. William H. Comley for plaintiffs in error.

Mr. Frank E. Healy, Attorney General of the State of Connecticut, *Mr. William E. Egan* and *Mr. Carlos S. Holcomb* appeared for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

By § 1190 of the General Statutes of the State of Connecticut, 1918, passed in 1915, it is provided that "All taxable property of any estate upon which no town or city tax has been assessed . . . or upon which no tax has been paid to the state during the year preceding the date of the death of the decedent, shall be liable to a tax of two per centum per annum on the appraised inventory value of such property for the five years next preceding the date of the death of such decedent, *provided,* the executor or administrator of any estate may, by furnishing evidence to the satisfaction of the tax commissioner that a state, town or city tax has been paid on any of such property for a portion of said five years or that the ownership of such property has not been in the decedent for a portion of said period, obtain a proportionate deduction from the tax hereby imposed, . . ."

It is further provided (§ 1192) that "Any executor, administrator or representative of such an estate aggrieved by the action of the tax commissioner in determining such tax, if unable to agree with the tax commissioner upon the amount of such tax as provided in section 1190, may, within ninety days from the time of the filing by the tax commissioner of such statement or corrected statement with the judge of probate, make application in the nature of an appeal therefrom to the superior court of the county in which such probate court is located which shall be accompanied by a citation to said tax commissioner to appear before such court."

Lena McMullen died in 1919, and the information required by an act passed in that year, amendatory of an act concerning inventories of estates,[1] having been filed by plaintiffs in error as her executors and sent, as required,

[1] Public Acts of Conn. 1919, c. 50, p. 2713.

by the Probate Judge to the Tax Commissioner, that officer filed with the State Treasurer a statement that there was due from the estate of the decedent to the State of Connecticut by virtue of its statutes, $10,286.39, and made claim for such sum.

Plaintiffs in error, within the time provided in § 1192, made, to quote from the language of the section, "application in the nature of an appeal" from the claim to the Superior Court of the county in which the Probate Court was located, in accordance with § 1192.

The Tax Commissioner, acting for the State, demurred "to the reasons of application and appeal," and the Superior Court, by consent of the parties, reserved the questions of law arising upon the demurrer "for the advice of the Supreme Court of Errors . . . as to what judgment should be rendered" on the demurrer. In fulfillment of the "reservation" the Supreme Court of Errors took the case, adjudged the statute to be valid, and advised the Superior Court "to sustain the demurrer and to dismiss the application."

The Superior Court in execution of that direction sustained the demurrer and entered judgment dismissing the "application in the nature of an appeal." To review that judgment is the purpose of this writ of error. Manifestly, however, it is the views and reasoning of the Supreme Court of Errors that must engage our attention as they constituted the foundation of the judgment of the Superior Court.

In description of the statute, the Court of Errors said, its purpose is "to compel estates to pay to the State a sum which shall approximately equal the taxes which property of the estate has escaped paying while in the hands of the decedent"; and "the single point raised by the demurrer," the court further said, "is that the statutes which authorize this action of the commissioner are unconstitutional."

The specifications of the ground of offense urged by plaintiffs in error against the Fourteenth Amendment (and with this only are we concerned) were said by the court to be that the statute deprived "creditors and distributees of this estate of their property without due process of law, (a) by exacting a penalty from them for the failure of the decedent to list his property for taxation, and (b) by creating against them a presumption of guilt for such omission." The comment of the court upon the specifications was that both "rest upon the unfounded premise that the property of this estate, upon the decease of the owner, passed to the distributees subject to the payment of the just debts of the estate." And the court further said, "The right to dispose of one's property by will, and the right to have it disposed of by law after decease, is created by statute, and therefore the State may impose such conditions upon the exercise of this right as it may determine. *Stone Appeal,* 74 Conn. 301, 302; *Hatheway* v. *Smith,* 79 Conn. 506." See also *Plummer* v. *Coler,* 178 U. S. 115, 134; *Knowlton* v. *Moore,* 178 U. S. 41.

The conclusion of the court is of such authoritative effect as not to need much comment. The attack upon it by plaintiffs in error is based upon a confusion of rights. As pointed out by the Supreme Court of Errors, executors and administrators do not own the property committed to them for administration. It goes to them subject to the liabilities and burdens upon it in the hands of its owner, and whatever interest distributees or creditors may have is subject to the same liabilities and burdens,—subject, we may say, as the court decided, to the tax which the State has imposed on its disposition or devolution. And the tax does not take on a different quality or incident because it is, or has the effect of, a penalty. And the court, construing the statute, declared it was a provision for penalizing a delinquency—the delinquency

of the decedent, and made to survive "by statutory sanction." "In effect," the court said, "this statute is a penalty imposed upon the estate because of the delinquency of the decedent, and no less permissible than the penalty tax against the decedent, kept alive by statutory sanction."

Plaintiffs in error do not contest the principle expressed but deny its application by asserting, (1) there was no debt owed by decedent, (2) no action under the statute arose against her, (3) no penalty had been incurred by her because as long as she lived the statute was inapplicable to her, (4) it is not a tax, for its primary object is punishment, not revenue.

The assertions are unjustified. There was an evasion of duty by decedent, and the obligation she incurred, and should have discharged, was imposed upon her estate, and legally imposed, for out of her estate only can it be discharged. The payment of taxes is an obvious and insistent duty, and its sanction is usually punitive. The Connecticut statute is not, therefore, in its penal effects, unique, nor are they out of relation or proportion to a decedent's delinquency.

The Court of Errors recognized that the tax of the statute "may not represent what the decedent would have been required to pay had" she "paid the state or local tax." And, as we have seen, the tax may be upon the appraised inventory value for the five years next preceding the death of the decedent with a proportionate deduction if a tax has been paid on any of the property for a portion of the five years, or if the ownership of the property has not been in the decedent for a portion of that period. The provision, however, is but a way of fixing a penalty for the delinquency, which it is competent for the State to do. We said in *Western Union Telegraph Co.* v. *Indiana,* 165 U. S. 304, 310, that the amount of a penalty is a matter for the legislature of a State to deter-

mine in its discretion, and in accordance with the principle we sustained a penalty of 50 per cent. of the taxes assessed against the Telegraph Company and unpaid by it.

Section 1190 was passed in 1915 and went into effect August 1st of that year. Decedent died in May, 1919. Plaintiffs in error contend, therefore, that in one of the years (1914) of the five of omission to pay taxes "the only penalty provided by law therefor was the addition of ten per cent. to the assessed valuation of the omitted property." Therefore, it is the further contention, the attempt of the section is "to reach into the past and to provide a 'greater punishment than the law did when the crime was committed,'" and hence incurs constitutional prohibition as an *ex post facto* law.

The contention is untenable. The penalty of the statute was not in punishment of a crime, and it is only to such that the constitutional prohibition applies. It has no relation to retrospective legislation of any other description. *Johannessen* v. *United States,* 225 U. S. 227, 242.

The final contention of plaintiffs in error is that the statute can only be sustained on the assumption that "in the last analysis the property of deceased persons belongs to the State."

The contention is extreme. The power of taxation, with its accessorial sanctions, is a power of government, and all property is subject to it. And it is a proper exercise of it to satisfy out of his estate the delinquency of a property owner. It is so complete that it does not need the assumption of universal ownership by the State to justify it.

Affirmed.

LEE *v.* CHESAPEAKE & OHIO RAILWAY COMPANY.

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

No. 422. Argued January 5, 1923.—Decided January 22, 1923.

1. A case which, by virtue of the diverse citizenship of the parties, falls within the general jurisdiction of the District Courts as conferred by Jud. Code, § 24, is within the general jurisdiction of a District Court sitting in a State of which neither party is a citizen. P. 654.
2. The clause of Jud. Code, § 51, providing that such suits shall be brought only in the District Court in the district of the residence of either the plaintiff or the defendant does not limit the general jurisdiction created by § 24, or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert or waive, at his election. P. 655.
3. Whenever such a suit is removed from a state court under Jud. Code, § 28, the removal must be to the District Court in the district where the suit is pending. *Id.*, §§ 29, 53. P. 656.
4. The right of removal under § 28 is exercisable by the defendant or defendants without regard to the assent of the plaintiff. P. 658.
5. An action, between citizens of different States begun in a court of a State of which neither is a citizen, is removable by the defendant to the District Court of the district in which the suit is pending. P. 658. *Ex parte Wisner,* 203 U. S. 449, overruled; *In re Moore,* 209 U. S. 490, qualified.
6. The purpose of the Act of August 13, 1888, c. 866, 25 Stat. 433, to contract the jurisdiction of the Circuit Courts affords no basis for subtracting from its provisions where definite and free from ambiguity. P. 660.

Affirmed.

ERROR to a judgment of the District Court sustaining its jurisdiction and dismissing the complaint, in an action for personal injuries removed from a state court.

Mr. Allan D. Cole, with whom *Mr. H. W. Cole* and *Mr. W. A. Byron* were on the brief, for plaintiff in error.

Mr. E. L. Worthington, with whom *Mr. LeWright Browning* and *Mr. Stanley Reed* were on the brief, for defendant in error.

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

This was an action to recover damages in the sum of ten thousand dollars for personal injuries alleged to have been sustained by the plaintiff while entering one of the defendant's passenger trains in Kentucky for an intrastate trip. The plaintiff was a citizen and resident of Texas and the defendant a corporate citizen and resident of Virginia. The action was begun in a state court in Bracken County, Kentucky, and, because of the diverse citizenship of the parties, was removed, at the defendant's instance, into the District Court of the United States for the Eastern District of Kentucky, which includes Bracken County. When the transcript reached the District Court, the plaintiff moved that the cause be remanded to the state court on the ground that the District Court was without jurisdiction in that neither party was a resident of that district. The motion was overruled, the plaintiff elected to stand on the motion, and judgment was given for the defendant. The plaintiff then brought the case here on a direct writ of error, Jud. Code, § 238, to obtain a review of the ruling on his motion to remand.

Under the Constitution, Art. III, § 2, the judicial power extends, among other cases, to such as arise under the Constitution, laws and treaties of the United States; and to such as are between citizens of different States.

Section 24 of the Judicial Code defines the general jurisdiction of the District Courts, the pertinent provision being as follows:

"The district courts shall have original jurisdiction . . . of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy ex-

ceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, . . ."

This grant of jurisdiction covers two distinct classes of suits. In one the citizenship of the parties is not an element, while in the other it is the distinctive feature. As to the suit before us it is very clear that the diverse citizenship of the parties and the sum involved bring it within the latter class, and therefore within the general jurisdiction of the District Courts.

Section 51 of the Code relates to the venue of suits originally begun in those courts, and provides, subject to exceptions not material here, that—

". . . no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is a necessary conclusion from repeated decisions, going back to the original Judiciary Act of 1789, that this provision does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters an appearance without claiming his privilege. *Gracie* v. *Palmer,* 8 Wheat. 699; *Toland* v. *Sprague,* 12 Pet. 300, 330; *Ex parte Schollenberger,* 96 U. S. 369, 378; *Central Trust Co.* v. *McGeorge,* 151 U. S. 129; *Interior Construction Co.* v. *Gibney,* 160 U. S. 217; *United States* v. *Hvoslef,* 237 U. S. 1, 12; *Camp* v. *Gress,* 250 U. S. 308, 311; *General Investment Co.* v. *Lake Shore & Michigan South-*

ern Ry. Co., ante, 261. The following excerpt from *Interior Construction Co.* v. *Gibney,* p. 219, is particularly apposite:

"The Circuit Courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different States. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection."

Section 28 of the Code deals with the jurisdiction of the District Courts on removals from the state courts, saying, so far as is material here,—

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the dis-

trict court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

Section 29 deals, among other things, with the venue on removals and shows that in every instance the removal must be into the district court " in the district where such suit is pending; " and this requirement is emphasized by § 53, which directs that where the district is composed of two or more distinct divisions the removal shall be into the District Court " in the division in which the county is situated from which the removal is made." Thus the words " for the proper district," in § 28, find exact definition in §§ 29 and 53; and that definition conforms to what has appeared in all removal statutes beginning with the original Judiciary Act of 1789.[1]

The several provisions of the Code before quoted were considered in the recent case of *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co., supra,* 275, where their meaning and their relation one to another were summed up as follows:

" Section 24 contains a typical grant of original jurisdiction to the District Courts in general of ' all suits ' in the classes falling within its descriptive terms, save certain suits by assignees of particular choses in action. Section 51 does not withdraw any suit from that grant, but merely regulates the place of suit, its purpose being to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found. Like similar state statutes, it accords to defendants a privilege which they may, and not infrequently do, waive.

[1] Acts September 24, 1789, c. 20, § 12, 1 Stat. 79; February 13, 1801, c. 4, § 13, 2 Stat. 92; February 4, 1815, c. 31, § 8, 3 Stat. 198; March 3, 1815, c. 94, § 6, 3 Stat. 233; March 3, 1863, c. 81, § 5, 12 Stat. 756; March 2, 1867, c. 196, 14 Stat. 558; March 3, 1875, c. 137, § 3, 18 Stat. 471; March 3, 1887, c. 373, 24 Stat. 552; August 13, 1888, c. 866, 25 Stat. 433; Judicial Code, §§ 30, 31, 33.

"Coming to the removal section (28), it is apparent that the clause, 'of which the district courts of the United States are given original jurisdiction,' refers to the jurisdiction conferred on the District Courts in general, for it speaks of them in the plural. That it does not refer to the venue provision in § 51 is apparent, first, because that provision does not except or take any suit from the general jurisdiction conferred by § 24; next, because there could be no purpose in extending to removals the personal privilege accorded to defendants by § 51, since removals are had only at the instance of defendants, and, lastly, because the venue on removal is specially dealt with and fixed by § 29."

It will be perceived that the right of removal under § 28 arises whenever a suit within the general jurisdiction of the District Courts is begun in "any" state court, and also that the party to whom the right is given is designated in direct and unequivocal terms. Where the suit arises under the Constitution, or a law or treaty, of the United States the right is given to "the defendant or defendants" without any qualification; and as to "any other suit" it is given to "the defendant or defendants", if he or they be "non-residents of that State." In neither instance is the plaintiff's assent essential in any sense to the exercise of the right. Nor is it admissible for him to urge that the removal be into the District Court for some other district, for it is his act in bringing the suit in a state court within the particular district which fixes the venue on removal.

Applying these views to the present case, we hold that it was removable, that it was duly removed into the District Court for the proper district and that the motion to remand was rightly denied—in short, that the District Court had jurisdiction to proceed to a determination of the cause.

The plaintiff's contention to the contrary is predicated largely on a decision by this Court in *Ex parte Wisner,*

203 U. S. 449, which, it must be conceded, is not in accord with the views expressed in this opinion. In that case the facts were like those here and the same statutory provisions were involved. These provisions were then part of the Act of August 13, 1888, c. 866, 25 Stat. 433, but, as respects the matter now under consideration, their meaning has not been changed by their inclusion in the Judicial Code. In that case it was ruled that the provision, now embodied in § 51, respecting the venue of actions originally begun in the Circuit (now District) Courts was strictly jurisdictional, could not be overcome even by the consent of both parties, and affected removals accordingly. The ruling proceeded on the theory that this was a right, if not a necessary, conclusion inasmuch as the general purpose of Congress in adopting the Act of 1888 was to contract the jurisdiction of the Circuit Courts. The decision was given in 1906 and was a departure from what had been said of the same provisions in prior cases, notably *Mexican National R. R. Co.* v. *Davidson,* 157 U. S. 201, 208, and *Sweeney* v. *Carter Oil Co.,* 199 U. S. 252, 259. Much that was said in the opinion was soon disapproved in *In re Moore,* 209 U. S. 490, where the Court returned to its former rulings respecting the essential distinction between the provision defining the general jurisdiction of the Circuit Courts and the one relating to the venue of suits originally begun in those courts. But as the decision was not fully and expressly overruled, it has been a source of embarrassment and confusion in other courts.[1] We had occasion to criti-

[1] See *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.,* 218 Fed. 91; *Doherty* v. *Smith,* 233 Fed. 132; *Guaranty Trust Co.* v. *McCabe,* 250 Fed. 699; *James* v. *Amarillo City Light & Water Co.,* 251 Fed. 337; *Matarazzo* v. *Hustis,* 256 Fed. 882; *Boise Commercial Club* v. *Oregon Short Line R. R. Co.,* 260 Fed. 769; *Sanders* v. *Western Union Telegraph Co.,* 261 Fed. 697; *Earles* v. *Germain Co.,* 265 Fed. 715.

cise it in *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co., supra,* and now on further consideration we feel constrained to pronounce it essentially unsound and definitely to overrule it.

In this connection it should be observed that the opinion in *In re Moore* is open to the criticism that it seemingly assumes that where neither party is a resident of the district the removal, to be effective, needs the plaintiff's assent. We find no support for such an assumption in the provisions we are considering. Under them, as before indicated, the exercise of the right of removal rests entirely with the defendant and is in no sense dependent on the will or acquiescence of the plaintiff. The opinion in *In re Moore* is qualified accordingly.

We recognize that one purpose of the Act of 1888 was to contract the jurisdiction of the Circuit Courts and that due regard should be had for this in interpreting indefinite or ambiguous provisions; but we think it affords no basis for subtracting anything from provisions which are definite and free from ambiguity. A comparison of the removal provisions in the Act of 1888 with those in the Act of March 3, 1875, c. 137, 18 Stat. 470, which it displaced, will bring out very clearly the changes intended. The Act of 1875 not only permitted the removal of all suits between citizens of different States where the amount in controversy exceeded five hundred dollars, but declared without qualification that the removal might be by "either party." The Act of 1888 confined the removal of such suits to instances where the amount in controversy exceeded two thousand dollars; withheld the right of removal from the plaintiff, who always has a choice of forums, and gave the right to the defendant only where he was a nonresident of the State in which the suit was brought. Thus, while the comparison shows that Congress intended to contract materially the jurisdiction on removal, it also shows how the contraction was to be

effected. Certainly there is nothing in this which suggests that the plain terms in the Act of 1888,—by which it declared that any suit "between citizens of different States," brought in any state court and involving the requisite amount, "may be removed by the defendant or defendants" where they are "non-residents of that State,"—should be taken otherwise than according to their natural or ordinary signification.

That provision, although much narrower than the provision in the Act of 1875, is obviously broader than the one in the original Judiciary Act of 1789, which permitted any suit brought in any state court by a citizen of that State against a citizen of another State, and involving a stated amount, to be removed by the defendant into the Circuit Court of the United States for that district. This early provision remained in force for a long period and there can be no doubt that to return to it now would materially relieve the overburdened dockets of the District Courts and at the same time maintain the constitutional principle involved; but of course a return can be effected only through legislative channels.

Judgment affirmed.

UNITED STATES *v.* LANE ET AL.

UNITED STATES *v.* GULF REFINING COMPANY OF LOUISIANA.

UNITED STATES *v.* SOUTHWESTERN GAS & ELECTRIC COMPANY ET AL.

UNITED STATES *v.* GULF REFINING COMPANY OF LOUISIANA.

UNITED STATES *v.* GREENE ET AL.

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

UNITED STATES *v.* LOUCKS ET AL.

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

Nos. 160, 163, 162, 161, 192 and 191. Argued January 2, 3, 1923.—Decided January 22, 1923.

Lots patented under the public land laws according to a plat showing them bordering on a lake, extend to the water as a boundary and embrace pieces of land found between it and the meander line of the survey, where the failure to include such pieces within the meander was not due to fraud or mistake but was consistent with a reasonably accurate survey, considering the areas included and excluded, the difficulty of surveying them when the survey was made and their value at that time. P. 664.

274 Fed. 290, and 145, affirmed.

APPEALS and certiorari to review decrees of the Circuit Court of Appeals reversing decrees of the District Court favorable to the United States in suits asserting title to several parcels of land in Louisiana.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* was on the briefs, for the United States.

Mr. S. L. Herold, with whom *Mr. J. A. Thigpen, Mr. E. P. Lee, Mr. Hampden Story, Mr. J. D. Wilkinson* and *Mr. R. L. Batts* were on the briefs, for appellees in Nos. 160, 163, 162 and 161, and respondents in No. 191.

Mr. Elias Goldstein, with whom *Mr. H. C. Walker, Jr., Mr. S. M. Cook,* and *Mr. Hampden Story* were on the brief, for appellees in No. 192.

Mr. Justice Sutherland delivered the opinion of the Court.

These suits involve claims of title on the part of the United States, hereinafter called the plaintiff, to various parcels of land lying along the border of Ferry Lake, a navigable body of water in Caddo Parish, Louisiana. Answering these claims, the defendants in the respective cases averred that plaintiff, long before the bringing of the suits, had conveyed by patents to private persons certain fractional subdivisions bordering on the lake; that these fractions were represented on the official plat of the government survey, made by one Warren in 1839 and duly approved and filed, as bounded on the lake side by the waters of the lake; that in each of the cases the land in controversy was a small tract, lying along the edge of the lake and constituting part of the particular fractional subdivision so conveyed; and that consequently, plaintiff had divested itself of whatever title it originally had.

Certain alternative defenses, based upon the alleged ownership of the lands by the State of Louisiana, were pleaded, but, in view of the conclusions we have reached, it is not necessary to consider them. The District Court entered decrees for the plaintiff which the Circuit Court of Appeals reversed (274 Fed. 145, 290), and the cases are here upon appeal except the Loucks case, which comes on certiorari. The foregoing averments of fact contained in the answers are established by the record.

In 1916–1917, nearly eighty years after the Warren survey—the lands in the meantime having become valuable for their deposits of oil and gas—a new survey was made under the direction of the General Land Office. This survey shows that the line run by Warren, purporting to meander the shore of the lake, did not in all instances coincide precisely with the water's edge. In the four cases first named in the title, the parcels of land lying between the meander line and the lake are of small extent. The meander line throughout its length approximately conforms to the sinuosities of the shore, sometimes, however, running for short distances inland and sometimes for short distances into and through the water. In the first mentioned suit the Warren survey indicates a fractional subdivision containing 26.80 acres, the new survey adds 5.67 acres. In the second suit the Warren survey indicates 23 acres, the new survey adds 12.72 acres. In the third suit the Warren survey indicates 155 acres, the new survey adds 27.87 acres. In the fourth suit the Warren survey indicates 114.80 acres, and the new survey adds 11.49 acres.

The lands in question are all in township twenty, the first mentioned being in section 3, the second in section 10, the third in section 13 and the last in section 24. Following the meander line of the Warren survey the distance from the first of these tracts to the last is about five miles. Leaving out of consideration the large tract involved in *Producers Oil Co.* v. *Hanzen,* 238 U. S. 325, and the large tract involved in *Jeems Bayou Fishing & Hunting Club* v. *United States, ante,* 561, the aggregate of the various parcels lying outside the meander line is about 70 acres, and the aggregate of the various areas of water included within the meander line is about 44 acres. The facts bring the cases fairly within the rule announced by this Court in *Mitchell* v. *Smale,* 140 U. S. 406, and not within the exception which was followed in the *Jeems*

Bayou Case. So far as the instant cases are concerned, there is nothing in the circumstances to suggest the conclusion that any fraud was committed or palpable mistake made by Warren. At the time of his survey the lands were of such little value, the locality so wild and remote, and the attendant difficulties so great that the expenditure of energy and money necessary to run the lines with minute regard to the sinuosities of the lake would have been quite out of proportion to the gain. We are of opinion that the survey of 1839, except as to the two large tracts just mentioned, is not open to challenge. The precisely accurate survey of 1916–1917 would probably never have been made but for the greatly increased value of the lands due to the discovery of oil and gas therein. It is unnecessary to do more than quote the language of this Court in *Mitchell* v. *Smale, supra,* 413:

"The pretence for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are

bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow."

While the facts are somewhat different and the extent of the omission somewhat greater, we think the general rule should, likewise, be applied in the remaining two cases. The Warren survey and plat here indicate an area of about 271 acres in the fractional subdivisions conveyed. The lands added by the new survey constitute a compact body of 97.64 acres—65.77 acres of which are involved in the Greene case and 14.13 acres in the Loucks case—having the outline of a long and rather irregular crescent, with the outer curve next to the water. The inner boundary, running between the two points of the crescent, is made up of a series of straight lines, with intervening angles conforming to the outlying curve only to a roughly approximate degree. The length of the tract is nearly 4,000 feet and the extreme width about 1,200 feet. Running back from the shore there are numerous ravines, creating, in and along the outer rim of the tract, a series of alternating points and indentations. The evidence justifies the conclusion that in 1839, and especially in time of high water reaching back into the ravines, the establishment of a line precisely coincident with the water's edge would have been a matter of expense and difficulty wholly disproportionate to the then value of the omitted acreage. As in the four cases first discussed, the Warren plat of the survey referred to in the patent represents the lake as the boundary. The survey, taken as a whole, with the exception of two large tracts already mentioned, follows with a fair degree of accuracy the contour of the lake and the evident purpose was to include in it all the land to the water's edge. Considering

the circumstances in respect of the character and value of the lands, the wildness and remoteness of the region and the difficulties surrounding the work of the surveyors, the failure to run the lines with more particularity was not unreasonable and we are constrained to agree with the lower court in holding that the waters of the lake and not the traverse line constitute the boundary.

The decrees of the Circuit Court of Appeals in all the cases are, therefore,

Affirmed.

FOLEY, ADMINISTRATRIX OF GATHMANN, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 203. Argued January 12, 1923.—Decided January 29, 1923.

1. G wrote to the Navy Department, with respect to his invention for drying materials, that, in consideration of the Department's building a testing apparatus at its own expense, he gave it the option of using the method, if it found it to its advantage, by paying so much for each pound of material so dried. The Department accepted the proposition, saying that it had ordered an experimental apparatus on G's plan, which would be tested and, if it worked satisfactorily to the Bureau of Ordnance, would pay him as proposed. After the test, the Bureau notified G that the test proved unsatisfactory and was abandoned. *Held:*

(*a*) Not a contract that the Department would use the method, but an option, or at most a conditional obligation subject to be terminated by the Department when the test proved unsatisfactory. P. 675.

(*b*) By remaining silent and inactive for five years after receiving notice from the bureau that the relations between them were terminated, G acquiesced. P. 675.

2. Patents 763,387 and 763,388, issued to Gathmann, for a method of drying materials, with the aid of a "vaporous atmosphere" were either anticipated, or not infringed, by the "closed-circuit method" used by the Government in this case for drying smokeless powder. P. 676.

56 Ct. Clms. 303, affirmed.

APPEAL from a judgment of the Court of Claims.

Mr. Charles J. Pence, with whom *Mr. L. T. Michener* and *Mr. P. G. Michener* were on the brief, for appellant.

Mr. Melville D. Church, with whom *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Lovett* were on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Appeal from judgment of the Court of Claims dismissing petition of appellant in which she prayed judgment against the United States for the sum of $236,750.

A summary of the allegations of the petition is as follows:

The Government was engaged in the manufacture of smokeless powder at its station at Indian Head, Maryland. Gathmann had under consideration, with a view to application for patents, methods of drying the materials of the powder, and in consequence of conversations with the Chief of the Bureau of Ordnance of the Navy Department, he made to the Bureau the following proposition:

"1839 Vernon Ave., N.W.,
Washington, D. C., March 24, 1903.

SIR:

The undersigned has made an invention 'Method of drying materials,' for which patent has been filed Feb. 9, 1903, Series No. 142,653.

Now, in consideration of the Navy Department building an apparatus for testing this method, without expense to me, I hereby give the Navy Department the option of using my method of drying materials, if they find it to their advantage, by paying to me, my heirs, or my legal

representatives, $0.01 (one cent) for each pound of material dried by my method.

Very respectfully,

LOUIS GATHMANN.

Admiral O'Neil,
Chief of Bureau of Ordnance."

He delivered with the proposition a plan or drawing for an experimental apparatus.

To the proposition the Chief of the Bureau of Ordnance replied as follows:

"Address Bureau of Ordnance, Navy Department, and refer to No. 3585.

Washington, D. C., March 26, 1903.

SIR:

Referring to your communication of March 24th, 1903, offering the Navy Department the option of using your method of drying materials, on payment of one cent per pound on materials so dried:

The Bureau has to inform you that it accepts your proposition, and has ordered one experimental apparatus for drying smokeless powder, constructed in accordance with plan submitted by you. This apparatus will be tested without expense to you, and, if it works satisfactorily to the Bureau, the Bureau agrees to pay you, your heirs or legal representatives, one cent for each pound of smokeless powder dried by the method covered by your application or applications filed or to be filed with the U. S. Patent Office, provided a patent or patents is or are issued to you therefor.

Respectfully,

CHARLES O'NEIL,
Chief of Bureau of Ordnance.

Mr. Louis Gathmann,
1839 Vernon Avenue,
Washington, D. C."

At the time of the conversation of Gathmann with the Chief of Ordnance and his proposition and the reply to it Gathmann contemplated applying for patents for his methods, and on February 9, 1903, and subsequent dates, he made applications for patents and patents were issued to him for his methods, and at various times from April, 1909, to April, 1915, the Government made use of the processes and methods covered by the patents in the manufacture of smokeless powder to the amount of 23,675,061 pounds thereof, and became indebted to the estate of Gathmann in the sum of the petition, to wit, $236,750.

A general traverse was filed to the claim. Upon the issues thus formed and upon considering the evidence taken, the Court of Claims made findings of fact, and from them deduced, as conclusions of law, that appellant was not entitled to recovery and dismissed her petition.

The court decided that the proposition made by Gathmann's communication and the reply thereto presented an option only, and not a contract, and that it was terminated by the Bureau by a letter addressed to Gathmann, October 14, 1904, which was as follows:

"Referring to your apparatus for drying powder, installed at the naval proving ground for trial: The bureau forwards herewith a copy of the report made by the inspector of ordnance in charge of that station for your information. After carefully considering this report the bureau is of opinion that this apparatus has failed to demonstrate anything that would warrant further experiment with it, and the bureau has instructed the inspector of ordnance in charge of the naval proving ground that, when the drier can hold no more samples the whole amount be put in the dry house until dried to the proper volatiles."

The court decided, besides, that the Government had not used Gathmann's methods. Appellant attacks both

rulings but concentrates her attention upon the first. The existence of the second, she assumes, is demonstrated by the physical laws of nature, of which the court will take judicial notice.

The specifications of error against the first ruling are as follows:

"(1) The letters made an express contract of license for the full term of the patents; (2) the license could not be renounced or ended in any manner, except by mutual consent or the fault of Mr. Gathmann; (3) he had the right after the receipt of the letter of October 14, 1904, to regard the license as still in force and to sue for the unpaid royalties, the Government having used the inventions thereafter; (4) what was said prior to the letters of March 24th and 26th, 1903, should not be considered; (5) the Court of Claims should not have considered the development and state of the art prior to the issuance of the patents; (6) the licensee is estopped from denying the validity of the patents."

To estimate these contentions, the findings of the court must be considered. A summary of them, stated narratively, is as follows:

The material of smokeless powder in its first stages is in a plastic condition, containing about 40% of moisture due to the presence of ether and alcohol, called the "solvent." To make the powder ready for use the solvent must be reduced to between 4% and 7% according to caliber. The process requires several months' time. The elements of the solvent were expensive and it became an object to the Government and its manufacture of the powder to save them for re-use.

As early as 1900 the Government had used along with other methods of drying what was known as the closed-circuit method of drying and solvent recovery. In this method there is, generally speaking, a heating chamber, a powder chamber and a condensing chamber, with the

necessary connecting pipes or conduits and means for effecting circulation of the air in the circuit, as by fan or by gravity. In operation the warm air from the heating chamber passes on to the powder chamber, where it absorbs solvent from the "green" powder, then passes on to the condensing chamber, where the solvent carried by it is condensed to liquid form, the air then passing on to the heating chamber again for reheating and repetition of the cycle.

When the powder is newly made, or "green," the solvent is given off rapidly; but as the percentage of the solvent in the mass is reduced, it volatilizes less rapidly and comes off less freely. When the solvent is reduced to about 10%, this closed-circuit process is discontinued and the drying of the powder is completed in the ordinary drying houses.

The plans of the apparatus used by the Government in 1900 were secured from the California Powder Works, of California, by whom the apparatus was understood to have been originated. It illustrates "the closed-circuit method."

Louis Gathmann was an inventor and was interested in improving the method of expediting the manufacture of smokeless powder and had discussed the question with Admiral O'Neil. The Government at times had two systems; one for merely drying by hot air, and the other for both drying and recovery of the solvent. Gathmann claimed a method that would do both in a very much shorter time and proposed that a test be made. The letters we have quoted grew out of the conferences between Gathmann and Admiral O'Neil and Gathmann's representation furnished the chief inducement to the Admiral to enter into the agreement shown by the letters.

Pursuant to the agreement or option shown by the letters, the United States under the direction and supervision of Gathmann, at its own expense, constructed and

exhaustively tested at its Indian Head (Maryland) powder plant the experimental apparatus and method so proposed by Gathmann. The apparatus and method were substantially the same as those shown and described in Gathmann's letters patent.

The tests began in October, 1903, and continued until October, 1904, during which time reports of the results obtained by the tests, comparative and otherwise, were periodically made by the officer making the tests, comparison being made with results obtained from concurrent operations under the regular Government method. In making the tests, the instructions and wishes of Gathmann were complied with except that he desired a continuous and unbroken operation, though he had acceded at first to the closing down of the operation of the Government plant on Sundays. His desire was not acceded to.

In the tests the time required for drying the powder was not reduced, nor did it appear that the former methods used and results obtained by the Government in drying and solvent recovery were otherwise improved upon, nor did Gathmann's apparatus work satisfactorily to the Bureau of Ordnance, and at the close of the tests, Gathmann was so notified by a letter from the Acting Chief of Ordnance.

No change was made in the Government's solvent recovery and drying processes as a result of the test of Gathmann's method.

On June 28, 1904, a patent, No. 763,387, in pursuance to his application of February 9, 1903, was issued to Gathmann. On the same day there was granted to Gathmann and his assignees of a fourth interest therein, United States patent No. 763,388. These patents and the applications upon which they were granted were the applications and patents in contemplation by Gathmann, and Admiral O'Neil in their respective letters of March 24th and 26th, 1903.

Beginning in 1907 the Navy Department at various times in the manufacture of smokeless powder used drying and solvent-recovery apparatuses and methods.

They are illustrated by figures attached to the findings. From August 1, 1910, to 1916, an apparatus known as the box-type method was used in which "the circulation is gravity circulation, induced wholly by the heating and the cooling of the air in the different parts of the circuit." It is not necessary to reproduce the illustrations, and the processes need but little explanation. They are all of the closed-circuit method of drying and solvent recovery. All have a heating chamber, a powder chamber and a condensing chamber with connecting pipes or conduits and means of effecting circulation of air in the circuit, as by fan or by gravity. It is not necessary to compare their mechanisms. We think that the apparatus received by the Bureau from the California Powder Works did not differ in essential structure from them and, of course, it differed from that of Gathmann's apparatus. And differed from them necessarily, otherwise Gathmann would have had no purpose in submitting a proposition to the Bureau. The difference was in the method—amount of vapor, means "provided," to quote the patent, "to produce a vapor-laden atmosphere in the drying chamber" and "so as to maintain", to quote the patent further, "a substantially vapor-saturated atmosphere in the drying chamber nearly to the end of the operation of drying . . ." In other words, the vapor from the moisture of the materials was added to "by admitting vapor as steam."

Considering the methods, their illustrations, and the letters exchanged by Gathmann with the Bureau of Ordnance, the conclusion of the Court of Claims was that a contract was not created. "At most," the conclusion was, "a mere option was granted by Gathmann to the Government to use his method if found suitable after mak-

ing a test of certain apparatus furnished by him, which he continued to improve or change." And again, "There was never any agreement between the parties to use Gathmann's method, and all we have is, as has been stated, an option granted, declined, and terminated."

This conclusion appellant resists, and insists here, as she insisted in the Court of Claims, that a contract was created with its comprehensive and determining effect, it having continued, is the contention, after the date of the letters. That a contract existed or continued we cannot concede to appellant. But whether option or contract, we think it was terminated. There was an election given to the Government to be exercised by it according to the judgment of its officers of a test of the "experimental apparatus" submitted by Gathmann. The test was made, judgment was exercised and its effect notified to Gathmann in the letter of October 14, 1904. Gathmann's letter gave "the option of using" his "method of drying materials, if they [Navy Department] find it to their advantage, by paying to" him, his heirs or legal representatives "0.01 (one cent) for each pound of material dried by" his "method."

Clearly, therefore, there was a conditional proposal and an acceptance upon the condition that the apparatus, after test, should work "satisfactorily to the Bureau." It did not so work and the Bureau so declared to Gathmann.

It is true that there was no response by Gathmann to the letter of the Bureau. His silence, however, was tantamount to acquiescence. It does not appear when that silence was broken. The original petition was filed in this case April 17, 1915, that is, more than ten years after the Bureau's action in declining the proposal. We think that he could not keep the Government in obligation, uncertainty and restraint all that time, or even until April, 1909, the first date alleged of the use by the

Government of his apparatus. He, therefore, must be considered as having accepted the decision of the Bureau and the termination of the relation created by the letters whether it was obligation or option, "right" or "privilege." Responding, therefore, to the contention of appellant that a contract (license, to use appellant's word) can "not be renounced or ended in any manner, except by mutual consent or the fault of Gathmann," we think there was such consent—that which must be considered as tantamount to consent.

We do not think it is necessary to review the claims of the patents and wherein either of them is an advance upon the uses and knowledge of the world, and, necessarily, including the methods of the Government. The Court of Claims has done this and, we think, so satisfactorily, that we content ourselves by referring to its opinion. We need only to say that Gathmann emphasized the distinction of his patents from all that preceded them as using a "vaporous or vapor-laden atmosphere," and that such necessarily existed or will occur in the methods used by the Government.

It is counsel's contention that it is "inevitable that vaporous and vapor-laden atmosphere would be created the instant the heated air came in contact with the green powder, and would continue vaporous and vapor-laden until all the alcohol and ether were extracted from the powder or the powder be removed from the drier." And of this, it is asserted, this Court takes judicial notice as "the law of physics," and the further assertion is that, "Of course this contact of the heated air with the alcohol and ether caused the air to become vapor laden whether the defendant wished it or not." The assertions prove too much. They leave the patents without basis and the distinction they express and dwell on as merely verbal. If the asserted result was inevitable in the method of the patents, it was inevitable in the method

in use prior to the patents, and, we repeat, the patents are left without justification.

The conclusion, therefore, must be that if the methods of the patents are different from the prior art by reason of the "initial vapor-laden atmosphere by admitting vapor as steam" the Government does not use it; if that be not its distinction, and the methods of the prior art inevitably have it, the patents are no advance upon that art and are invalid.

Judgment affirmed.

CONLEY *v.* BARTON.

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

No. 193. Submitted January 9, 1923.—Decided January 29, 1923.

The obligation of a mortgage contract under which the right of redemption is barred after lapse of one year from entry and taking possession by the mortgagee to foreclose, is not impaired by a state law, enacted after the date of the mortgage but before breach of condition, and requiring the mortgagee, if he would sustain such a foreclosure, to make and record, within three months after its completion, an affidavit of the facts. P. 680.

119 Me. 581, affirmed.

ERROR to a judgment of the Supreme Judicial Court of Maine, affirming a judgment for the plaintiff in a suit to redeem property from a mortgage foreclosure.

Mr. H. A. Hegarty and *Mr. J. B. Flynn* for plaintiff in error.

Mr. Frank H. Haskell for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Suit to redeem from a mortgage which was executed by defendant in error to one George W. Towle to secure his

promissory note for the payment to Towle of the sum of $2,000 and interest. The note and mortgage were dated October 14, 1905.

On February 20, 1919, a breach of the mortgage was committed and the holder of it, under the laws of the State, foreclosed it by taking possession of the mortgaged premises and duly recorded a certificate of the fact in the Registry of Deeds of the proper county.

The bill as originally drawn was based upon an alleged effort to redeem the mortgaged premises by payment of the amount due upon the note and mortgage before the time of redemption expired, in which effort, plaintiff alleges he failed by the absence of Conley from his residence and place of business.

Plaintiff (defendant in error), however, amended his bill to read as follows: "The plaintiff further alleges that more than three months have elapsed since the expiration of one year from the time when the legal representatives of the mortgagee of the mortgage described in the plaintiff's bill, took possession of the mortgaged property for the purpose of foreclosing said mortgage but neither the mortgagee nor the holder of record of said mortgage, nor the legal representative or legal representatives, of either the mortgagee or holder of record of said mortgage nor any other person, has signed and sworn to an affidavit as required in cases of foreclosure of mortgages of real estate by Section 4 of Chapter 95 of the Revised Statutes of Maine as amended by Chapter 192 of the Public Laws of A. D. 1917, and no such affidavit has been recorded in the Registry of Deeds where the certificate of said foreclosure is recorded, as required by said statute, and these facts were not known to the plaintiff at the time of filing his said bill as said three months had not elapsed at the time of filing said bill."

Plaintiff in error, answering the amendment, alleges that c. 192 of the Public Laws of 1917 "has no applica-

tion and no relevancy to the plaintiff's [defendant in error's] rights or cause of action herein," and that if it be claimed that such chapter grants any additional time beyond the one year as covenanted in the mortgage deed, the act "would be contrary to the provisions of Section 10 of the Constitution of the United States and to the covenant of the mortgage deed itself, and, therefore, void and of no effect." An estoppel was also pleaded.

The mortgage contained a provision by which the mortgagor covenanted with the mortgagee that the right to redeem the mortgaged premises should be forever foreclosed in one year next after the commencement of foreclosure by any of the methods then provided by law, and one of the methods provided was entry into possession of the mortgaged premises and holding the same by consent in writing of the mortgagor, or the person holding under him.

It is, however, provided by c. 192 of the Public Laws of 1917, that possession so obtained (or by any other of the three modes provided) "and continued for one year" will "forever foreclose the right of redemption," provided however, "that an affidavit signed and sworn to by the mortgagee or by the holder of record of the mortgage, or their legal representatives, is, within three months after the expiration of one year from the taking of such possession, recorded in the registry of deeds where the certificate of foreclosure is recorded; . . ."

On February 20, 1919, a breach of the mortgage having been committed, the holder of the mortgage assigned it to the plaintiff in error, Conley, but two years before that time the act providing for the filing of the affidavit as above stated, was passed and its effect is the principal controversy in this case. Defendant in error urges it to sustain his right to redemption; plaintiff in error asserts that it is inapplicable, and contends that if held applicable, it is invalid as impairing the obligation of his contract, the mortgage.

The trial court decided that the provision was applicable and valid. These conclusions were affirmed by the Supreme Court. 119 Me. 581. "There can be no doubt," the Supreme Court said, "that the amendment by its terms relates to all foreclosures begun after its passage including foreclosures of prior existing mortgages." In reply to the contention that the statute impairs the obligation of the contract constituted by the mortgage "by extending the foreclosure period for three months after the expiration of the year," it was said: "But the statute does not extend the foreclosure period. In effect it imposes a condition which the mortgagee must perform or be held to have waived his foreclosure. He may perform the condition at once on the expiration of the year or at his option at any time within three months. If the affidavit is seasonably recorded the foreclosure is complete at the end of the year. If not, it is invalidated."

By a rescript by one of the Justices the case is given a clearer definition. Chapter 192 of the laws, it was decided, requires a mortgagee within "thirty days" after completion of foreclosure to record in the Registry of Deeds an affidavit setting forth the facts and that the affidavit is made the condition upon which the validity of the foreclosure depends. And further, that it applied to mortgages dated before 1917 and which contain a one-year foreclosure covenant, which the court denominated "the familiar form." The conclusion was that such "foreclosure clause" was "not such a contract as is contemplated and protected by the constitution." And further that the act related to the remedy for the enforcement of rights, and that while an act may not so far affect the remedy as to impair the obligation of a contract, the test in such case "is whether the value of the contract is lessened and whether a substantial and efficacious remedy remains." It was decided that the act sustained the test.

The basic principles that determine this case are elementary. The obligation of a contract can not be im-

paired by a law passed after the contract was entered into, and the remedy for enforcement of the contract may be so far a part of it as to be within the principle that protects it. But the remedy may not have that intimacy of relation and a regulation or change of it may not impair its efficiency or lessen the obligation of the contract.

It is recognized that the legislature may modify or change existing remedies or prescribe new modes of procedure without impairing the obligation of contracts if a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract. *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437; *Barnitz* v. *Beverly,* 163 U. S. 118. These cases are complementary. In the first, an alteration of the remedy was sustained; in the second, the remedy was adjudged so intimate in its relation to the contract as to be within its obligation and immunity from change. The first is the reliance of defendant in error; the second of plaintiff in error. Our inquiry, therefore, is, which determines the case at bar?

The statute in execution of the purpose of the State, enjoins a duty upon the mortgagee, the effect of the nonperformance of which the mortgagor may avail of. In other words, the duty not performed, the attempt at foreclosure is null and void, and necessarily, therefore, it is no impediment to redemption of the mortgage by the mortgagor. It does not withhold possession of the premises for a single day, nor does it defeat the efficacy of possession as foreclosure. And we have seen, the Supreme Court of the State, passing upon it, decided that compliance with it does not involve any delay. The mortgagee may perform the condition at once or at his option any time within three months. It, therefore, only imposes a condition, easily complied with, which the law, for its purposes, requires. And the condition was required, and its purpose declared long before plaintiff in error's attempt at foreclosure.

We think it would be extreme to hold that this is outside of the power of the State over remedies; and the law of the State has precedents of justification in *Vance* v. *Vance,* 108 U. S. 514; *Curtis* v. *Whitney,* 13 Wall. 68.

Decree affirmed.

LEIGH ELLIS & COMPANY *v.* DAVIS, AS AGENT, &c.

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

No. 246. Argued January 18, 19, 1923.—Decided January 29, 1923.

1. Section 206 (a) of the Transportation Act, providing that actions against the agent designated by the President shall be brought not later than two years from the passage of the act, did not set aside a shorter limitation provided in existing bills of lading. P. 688.
2. A stipulation in a bill of lading that actions for loss, damage or delay shall be instituted only within two years and one day after delivery of the goods, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed, is reasonable and valid. P. 689.
3. A decision of the Interstate Commerce Commission that such a stipulation was unreasonable, *held* not binding in this case. P. 689.
4. The reasonableness of such a limitation is a matter of law. P. 689.
5. When not affected by statute, a limitation prescribed by contract, like the above, applies to the action which is prosecuted to judgment and is not extended by the bringing of a previous action. P. 689.
6. An agreement limiting the time for bringing actions against the carrier "for loss, damage or delay" of goods shipped, applies to claims that the goods delivered were short of the weight specified in the bills of lading. P. 689.

276 Fed. 400, affirmed.

ERROR to a judgment affirming a judgment of the District Court dismissing the petition in an action by the

transferee of bills of lading for failure to deliver the full weight of cotton covered by them.

Mr. Edgar Watkins for plaintiff in error.

The Transportation Act 1920, § 206 (a), makes the limitation in this case "within the periods of limitation now prescribed by state or federal statutes but not later than two years from the date of the passage of this Act." The only federal statute that could apply is that contained in Jud. Code, § 24, par. 20. If the federal statute does not apply, that of the State of the forum must apply both by the terms of § 206 (a) and under the decisions of this Court. *Chattanooga Foundry & Pipe Works* v. *Atlanta,* 203 U. S. 390; § 1538, Rev. Stats. The shortest applicable Georgia statute is four years. Code § 4368; *Southern Express Co.* v. *Sinclair,* 135 Ga. 155. The applicable Alabama statute prescribes a limitation of six years. Code §§ 2615, 4832, 4835 (4); *Alabama, etc., R. R. Co.* v. *Eichofer,* 100 Ala. 224. Apply any of these statutes, and the case is not barred.

Section 206 (a) of the Transportation Act supersedes all other limitations. To deprive plaintiff in error of its rights under this section by holding that the time within which it had to bring suit was governed by a clause in the bills of lading, would require this Court in effect to read into the section words which are not there.

No convincing justification can be advanced for an interpretation which ignores the express words used and deprives plaintiff in error of its rights. Bearing in mind that the purpose of the section was to afford relief to citizens for damages done them by their government, it is clear that a liberal construction is more consonant with justice and more in keeping with the purpose of Congress than an interpretation which deprives citizens of their just rights under a plain statute and defeats the expressed object of Congress.

The carriers have filed their tariffs including bills of lading with the Interstate Commerce Commission and the provisions thereof are binding on all contracts of shipments of property, whether or not a bill of lading is actually issued. *Lazarus* v. *New York Central R. R. Co.*, 271 Fed. 93; 278 Fed. 900. Therefore, if the narrow interpretation of the lower courts is affirmed, § 206 (a) can apply only to "causes of action" for personal injuries and for damages to property arising other than in transportation. Such an interpretation results in causes of action being excluded from the section although included in the express words of the statute.

Contracts made by the Director General and shippers were between the government and the shippers. *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554. The lower courts in this case have not taken this fact into consideration. *Lazarus* v. *New York Central R. R. Co.*, 271 Fed. 93; 278 Fed. 900, distinguished.

This Court judicially knows that prior to the Transportation Act, 1920, shippers with claims against the Government arising out of federal control of the railroads were uncertain how and where to bring suit against the Government, as is reflected by the conflicting decisions of the lower federal courts. At the time the original suit in this case was filed many courts had held that the statutory venue fixed by § 10 of the Federal Control Act controlled, while other courts had held that General Order No. 18 of the Director General controlled. This conflict was not finally settled by this Court until its decision in *Alabama & Vicksburg Ry. Co.* v. *Journey*, 257 U. S. 111. These facts were before Congress when it passed § 206 (a), and since Congress granted the right to sue and in the same statute prescribed a limitation period, it is a proper assumption that Congress thought a longer period of limitations on claims arising during federal control was desirable to afford all claimants an adequate opportunity to

enforce their rights. The intention of Congress was to fix a general statute of limitations applicable to all claims against the Government arising out of federal control so that equal justice might be meted out to all.

The suit here is not for a failure to deliver property received by a carrier, but for the wrong of the carrier in issuing a false bill of lading.

The words "loss" and "damage" are broad in their signification, and "damage" might itself be broad enough to include the right to recover for any breach of a legal duty. These words, however, in transportation, have a conventional meaning clearly apparent from the context, and the particular contract sued on here shows definitely such a meaning and a definite limitation.

If there be any doubt as to the construction of the limitation clause, the doubt should be resolved against the limitation. *Lynchburg Cotton Mill Co.* v. *Travelers Insurance Co.,* 140 Fed. 718; *Express Co.* v. *Caldwell,* 21 Wall. 264.

The contract provision limiting the time for suit is under the facts pleaded unreasonable and void. *Decker & Sons* v. *Director General,* 55 I. C. C. 453. The effect of the decision of the Interstate Commerce Commission is to nullify all contract limitations then and theretofore contained in the bills of lading.

It is not doubted and has frequently been held that the period of two years in which suits may be filed is ordinarily a reasonable provision, but the peculiar circumstances in this case, which are similar to the facts considered by the Commission, show that even if the contract limitation is applied, it is unreasonable. The Director General, whom the present agent of the United States succeeds, and all the railroads of the country were parties to the judgment of the Commission in the *Decker Case, supra.*

The decision of the Commission holding the particular contract limitation here relied upon to be unreasonable,

void and in violation of the Act to Regulate Commerce, becomes the law unless set aside in a direct proceeding. No such proceeding has been brought and that decision is now the law binding on all courts. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 232 U. S. 199.

The United States, the real party in interest, by act of Congress, fixed the statute of limitation and granted the right to file this suit. By that statute the United States disregarded, repealed and set aside any contract limitation. Further, the United States waived the limitation by the representations made by the Director General in *Decker* v. *Director General,* 55 I. C. C. 455, 456.

The filing of a former suit containing essentially the same allegations as this suit tolled the statute of limitations. Plaintiff filed its first suit within two years from the dates of the bills of lading. The first suit was dismissed because in fixing the venue, § 10 of the Federal Control Act was literally followed and the orders of the Director General were not. *Ellis* v. *Atlanta, B. & A. Ry. Co.,* 270 Fed. 279. The false bills of lading were issued March 25, 26, 1918. A claim for the amount sued on was filed April 23, 1918. That claim was finally denied July 28, 1919. The suit now before the Court was filed January 29, 1921. *Semmes* v. *Insurance Co.,* 13 Wall. 158; *Rogers* v. *Home Insurance Co.,* 95 Fed. 109.

If the facts found by the Commission are true,—and we think the law conclusively presumes they are,—the claimed limitation provisions are void; if the findings of the Commission are not conclusive, the issue is one for a jury.

Order bills of lading are made negotiable by act of Congress. Act of August 29, 1916, c. 415, 39 Stat. 538; Roberts, Federal Liability of Carriers, § 351; *Chicago, R. I. & P. Ry. Co.* v. *Cleveland,* 61 Okla. 64; *Wichita*

Falls Co. v. *Moody & Co.,* 154 S. W. 1032, 1044; *Thompson* v. *Hibernia Bank & Trust Co.,* 148 La. 57; *Yazoo & Mississippi Valley R. R. Co.* v. *Bent,* 94 Miss. 681; *Lloyd* v. *Kansas City, M. & B. R. R. Co.,* 88 Miss. 422; *Pollard* v. *Reardon,* 65 Fed. 848; *National Bank* v. *Kershaw Oil Mill,* 202 Fed. 90; *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97; *Atlantic Coast Line R. R. Co.* v. *Luke & Fleming,* 20 Ga. App. 761; *Louisville & Nashville R. R. Co.* v. *Pferdmenges, Preyer & Co.,* 8 Ga. App. 81; *Illinois Central R. R. Co.* v. *Doughty,* 10 Ga. App. 317; *American National Bank* v. *Georgia R. R. Co.,* 96 Ga. 665.

Sections 20 and 21 of the Bills of Lading Act, *supra,* were inapplicable to these shipments.

If the words "weight (subject to correction)" had any meaning in the bills of lading sued on, they meant only such reasonable differences in named and actual weights as would ordinarily occur in twice weighing the same commodity.

Under the facts, it was error to dismiss the case because if the law is not as contended for by plaintiff in error, the facts pleaded require submission to a jury of both issues.

Mr. Walter T. Colquitt, with whom *Mr. Morris Brandon, Mr. John A. Hynds* and *Mr. A. A. McLaughlin* were on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit upon two bills of lading for failure to deliver the full amount of cotton covered by them. The plaintiffs allege that they purchased the bills at a rate determined by the number of pounds specified in the bills but that on delivery it turned out that the weight of one hundred bales covered by one of the bills was 15,312

pounds short, and that of two hundred bales covered by the other was 11,527 pounds short. The two hundred bales were delivered to the carrier on March 25, 1918, and the one hundred on March 26, 1918, when the railroads were under federal control. A claim for this loss was made to the Atlanta, Birmingham & Atlantic Railroad, the road over which the cotton was sent, on April 25, 1918, and denied by the Road on July 28, 1919. This suit was begun on January 29, 1921, more than two years and a day after the short delivery. The bills of lading which were in the same general form provided that "suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." They also stated the weight "subject to correction." The District Court after careful consideration dismissed the petition upon demurrer, on the ground that the suit was too late under the quoted words of the contract, and also on the merits. 274 Fed. 443. The Circuit Court of Appeals affirmed the judgment, adopting the opinion below as to the time within which the suit must be brought. 276 Fed. 400.

We find it unnecessary to consider other defences besides the contract limitation, as we agree with the Courts below that that disposes of the case. The main objection urged is that the contract is overridden by § 206(a) of the Transportation Act, February 28, 1920, c. 91, 41 Stat. 456, 461, giving actions in cases like this against an agent designated by the President, and providing that they may be brought within the periods of limitation now prescribed by state or federal statutes, but not later than two years from the date of the passage of the act. The contention is supported with some ingenuity but we think it enough to observe that the general purpose was to limit not to extend rights of action and that we

cannot suppose that it was intended to invalidate existing contracts good when made. *New York Central R. R. Co.* v. *Lazarus,* 278 Fed. 900; *William F. Mosser Co.* v. *Payne* (W. Va.), 114 S. E. 365; *Northern Milling Co.* v. *Davis* (Wisc.), 190 N. W. 351. In our opinion this contract was good when made. The time allowed was reasonable. *Missouri, Kansas & Texas Ry. Co.* v. *Harriman,* 227 U. S. 657, 672. *Texas & Pacific Ry. Co.* v. *Leatherwood,* 250 U. S. 478, 481. We agree with the District Court that *Decker & Sons* v. *Director General,* 55 I. C. C. 453, should not be understood or allowed to contravene our conclusion, upon the facts here. The statutes of the States where the goods were shipped and the suit was brought do not affect the contract, and the reasonableness of the limitation is a matter of law; *Missouri, Kansas & Texas Ry. Co.* v. *Harriman,* 227 U. S. 657, 672, so that the bringing of a previous suit, alleged in the declaration, does not save the case. *Riddlesbarger* v. *Hartford Insurance Co.,* 7 Wall. 386.

The only other argument that seems to us to need notice is that the claim is not within the words of the limitation. But it is of the kind that the clause "suits for loss, damage or delay" manifestly intended to limit and we see no reason why it should not be included under the head of loss.

Judgment affirmed.

A. BOURJOIS & COMPANY, INC. *v.* KATZEL.

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

No. 190. Argued January 8, 1923.—Decided January 29, 1923.

A foreign manufacturer and vendor of face powder sold to the plaintiff its business and good will in this country, together with its trade marks, registered under the Trade Mark Act; the plaintiff

re-registered the marks and went on with the business here, under the old name, buying the powder from the original concern abroad and selling it in boxes bearing the trade mark, and so built up a profitable trade, the public associating the marks with the plaintiff's goods. The defendant bought and imported the product of the foreign concern in its genuine boxes, which bore labels closely resembling those of the plaintiff, and sold it here. *Held*, that such sales were an infringement of the plaintiff's trade marks and that a preliminary injunction was proper, under §§ 17 and 19 of the Trade Mark Act. P. 691.
275 Fed. 539, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals reversing an order of the District Court granting a preliminary injunction in a suit to restrain infringement of trade marks.

Mr. Hans v. Briesen for petitioner.

Mr. John B. Doyle, with whom *Mr. John R. Rafter* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill to restrain the infringement of the trade marks "Java" and "Bourjois" registered in the Patent Office of the United States. A preliminary injunction was granted by the District Court, 274 Fed. 856, but the order was reversed by the Circuit Court of Appeals, one Judge dissenting. 275 Fed. 539. A writ of certiorari was granted by this Court. 257 U. S. 630. In 1913 A. Bourjois & Cie., E. Wertheimer & Cie., Successeurs, doing business in France and also in the United States, sold to the plaintiff for a large sum their business in the United States, with their good will and their trade marks registered in the Patent Office. The latter related particularly to face powder, and included the above words. The plaintiff since its purchase has registered them again and goes

on with the business that it bought, using substantially the same form of box and label as its predecessors and importing its face powder from France. It uses care in selecting colors suitable for the American market, in packing and in keeping up the standard, and has spent much money in advertising, &c., so that the business has grown very great and the labels have come to be understood by the public here as meaning goods coming from the plaintiff. The boxes have upon their backs: "Trade Marks Reg. U. S. Pat. Off. Made in France—Packed in the U. S. A. by A. Bourjois & Co., Inc., of New York, Succ'rs. in the U. S. to A. Bourjois & Cie., and E. Wertheimer & Cie."

The defendant, finding that the rate of exchange enabled her to do so at a profit, bought a large quantity of the same powder in France and is selling it here in the French boxes which closely resemble those used by the plaintiff except that they have not the last quoted statement on the backs, and that the label reads "Poudre de Riz de Java," whereas the plaintiff has found it advisable to strike out the suggestion of rice powder and has "Poudre Java" instead. There is no question that the defendant infringes the plaintiff's rights unless the fact that her boxes and powder are the genuine product of the French concern gives her a right to sell them in the present form.

We are of opinion that the plaintiff's rights are infringed. After the sale the French manufacturers could not have come to the United States and have used their old marks in competition with the plaintiff. That plainly follows from the statute authorizing assignments. Act of February 20, 1905, c. 592, § 10, 33 Stat. 727. If for the purpose of evading the effect of the transfer, it had arranged with the defendant that she should sell with the old label, we suppose that no one would doubt that the contrivance must fail. There is no such conspiracy here,

but, apart from the opening of a door to one, the vendors could not convey their goods free from the restriction to which the vendors were subject. Ownership of the goods does not carry the right to sell them with a specific mark. It does not necessarily carry the right to sell them at all in a given place. If the goods were patented in the United States a dealer who lawfully bought similar goods abroad from one who had a right to make and sell them there could not sell them in the United States. *Boesch* v. *Gräff,* 133 U. S. 697. The monopoly in that case is more extensive, but we see no sufficient reason for holding that the monopoly of a trade mark, so far as it goes, is less complete. It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care. It is said that the trade mark here is that of the French house and truly indicates the origin of the goods. But that is not accurate. It is the trade mark of the plaintiff only in the United States and indicates in law, and, it is found, by public understanding, that the goods come from the plaintiff although not made by it. It was sold and could only be sold with the good will of the business that the plaintiff bought. *Eiseman* v. *Schiffer,* 157 Fed. 473. It stakes the reputation of the plaintiff upon the character of the goods. *Menendez* v. *Holt,* 128 U. S. 514. The injunction granted by the District Court was proper under §§ 17 and 19 of the Trade Mark Act. Act of February 20, 1905, c. 592, 33 Stat. 724, 728, 729.

Decree of Circuit Court of Appeals reversed.

DECISIONS PER CURIAM, FROM OCTOBER 2, 1922, TO AND INCLUDING JANUARY 29, 1923, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 183. SETH GETTYS ET AL., ETC., *v.* SILVAN NEWBURGER ET AL. Error to the Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted October 3, 1922. Decided October 9, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Spencer* v. *Duplan Silk Co.,* 191 U. S. 526, 530; *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. W. A. Ledbetter, Mr. H. L. Stuart* and *Mr. R. R. Bell* for plaintiffs in error. *Mr. Henry G. Snyder, Mr. Henry E. Asp* and *Mr. Bernard Titche* for defendants in error.

No. 312. ALTITUDE OIL COMPANY *v.* PEOPLE OF THE STATE OF COLORADO. Error to the Supreme Court of the State of Colorado. Motion to dismiss or affirm submitted October 3, 1922. Decided October 9, 1922. Dismissed for want of jurisdiction upon the authority of: (1) *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.,* 228 U. S. 596, 600; *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20, 24; (2) *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114; *Singer Sewing Machine Co.* v. *Brickell,* 233 U. S. 304, 315; *Lake Shore & Michigan Southern Ry. Co.* v. *Clough,* 242 U. S. 375, 385. *Mr. Norton Montgomery* for plaintiff in error. *Mr. Victor E. Keyes* and *Mr. J. J. Laton* for defendant in error.

No. 323. TRUSTEES OF THE UNITED STATES-MEXICO OIL COMPANY *v.* T. W. HARRIS. Error to the Supreme Court of the State of Kansas. Motion to dismiss submitted October 3, 1922. Decided October 9, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 303; *Municipal Securities Corporation* v. *Kansas City*, 246 U. S. 63, 69; *Bilby* v. *Stewart*, 246 U. S. 255, 257; *Farson, Son & Co.* v. *Bird*, 248 U. S. 268, 271. *Mr. William W. Fry* for plaintiffs in error. *Mr. Charles F. Newman* for defendant in error. [See *post*, 720.]

No. 386. MILDRED MCINTOSH *v.* W. H. DILL ET AL. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted October 3, 1922. Decided October 9, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1, 5–6. *Mr. Thomas H. Owen* and *Mr. George C. Crump* for plaintiff in error. *Mr. Nathan A. Gibson* and *Mr. Joseph L. Hull* for defendants in error. [See *post*, 721.]

No. 376. HENRY F. MUELLER ET AL. *v.* SAMUEL W. ADLER ET AL. Appeal from the District Court of the United States for the Eastern District of Missouri. Motion to dismiss submitted October 3, 1922. Decided October 9, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Bogart* v. *Southern Pacific Co.*, 228 U. S. 137, 144; *Apapas* v. *United States*, 233 U. S. 587, 589; (2) *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 234 U. S. 369, 372; *Public Service Co.* v. *Corboy*, 250 U. S. 153,

162; *De Rees* v. *Costaguta,* 254 U. S. 166, 173. *Mr. William J. Hughes* and *Mr. Ephrim Caplan* for appellants. *Mr. Edward W. Foristel* for appellees.

No. 304. Peoples Development Company *v.* Southern Pacific Company et al. Appeal from the Circuit Court of Appeals for the Ninth Circuit. Motion to affirm submitted October 3, 1922. Decided October 9, 1922. *Per Curiam.* Affirmed upon the authority of *Burke* v. *Southern Pacific R. R. Co.,* 234 U. S. 669. *Mr. T. C. West* and *Mr. H. A. Powell* for appellant. *Mr. Frank Thunen* and *Mr. C. F. R. Ogilby* for appellees.

No. 6. John Connors *v.* People of the State of Illinois;

No. 7. Edward O'Donnell *v.* People of the State of Illinois;

No. 8. Leonard Banks et al. *v.* People of the State of Illinois;

No. 9. Frank Bender *v.* People of the State of Illinois;

No. 10. John Boone *v.* People of the State of Illinois;

No. 11. William Taglia *v.* People of the State of Illinois;

No. 23. Abe Schaffner *v.* People of the State of Illinois; and

No. 57. George Moran *v.* People of the State of Illinois. Error to the Supreme Court of the State of Illinois. Motion to dismiss submitted October 3, 1922. Decided October 9, 1922. *Per Curiam.* Affirmed upon the authority of *Dreyer* v. *Illinois,* 187 U. S. 71; *Ughbanks* v. *Armstrong,* 208 U. S. 481, 485. *Mr. Charles P. R. Macaulay* and *Mr. Rush B. Johnson* for plaintiffs in error. *Mr. Edward J. Brundage* for defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF BACON BROTHERS COMPANY, PETITIONER. Submitted October 3, 1922. Decided October 9, 1922. Motion for leave to file petition for writ of mandamus or writ of prohibition herein denied. *Mr. George D. Welles* for petitioner.

No. 557. DEPARTMENT OF TRADE & COMMERCE OF THE STATE OF NEBRASKA ET AL. *v.* A. J. HERTZ ET AL., RECEIVERS, ETC., ET AL. Appeal from the District Court of the United States for the District of Nebraska. Motion to dismiss or affirm submitted October 3, 1922. Decided October 16, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Louisville Trust Co.* v. *Knott,* 191 U. S. 225; *Bogart* v. *Southern Pacific Co.,* 228 U. S. 137, 144; *De Rees* v. *Costaguta,* 254 U. S. 166, 173; (2) *Aspen Mining & Smelting Co.* v. *Billings,* 150 U. S. 31, 37; *Brown* v. *Alton Water Co.,* 222 U. S. 325, 332–334; *Metropolitan Water Co.* v. *Kaw Valley District,* 223 U. S. 519, 521–522; *Shapiro* v. *United States,* 235 U. S. 412, 415–416. *Mr. John F. Stout, Mr. Halleck F. Rose* and *Mr. Arthur R. Wells* for appellants. *Mr. Bruce W. Sanborn* for appellees.

No. 41. PEOPLE OF THE STATE OF NEW YORK EX REL. PIERCE-ARROW MOTOR CAR COMPANY *v.* WALTER H. KNAPP ET AL., ETC. Error to the Supreme Court of the State of New York. Argued October 9, 1922. Decided October 16, 1922. *Per Curiam.* Affirmed upon the authority of *Kansas City, etc., R. R. Co.* v. *Stiles,* 242 U. S. 111, 118; *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147, 157; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132, 139. *Mr. Charles P. Spooner* and *Mr. Ansley W. Sawyer,* with whom *Mr. Joseph G. Dudley* was on the brief, for plaintiff in error. *Mr. Claude T. Dawes,* for defendants in error, submitted.

No. 48. IRA B. MILLS ET AL. *v.* NORTHERN PACIFIC RAILWAY COMPANY ET AL.;

No. 49. RAILROAD & WAREHOUSE COMMISSION OF MINNESOTA ET AL. *v.* CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; and

No. 50. RAILROAD & WAREHOUSE COMMISSION OF MINNESOTA ET AL. *v.* CHICAGO & NORTHWESTERN RAILWAY COMPANY. Appeals from the District Court of the United States for the District of Minnesota. Submitted October 10, 1922. Decided October 16, 1922. *Per Curiam.* Affirmed upon the authority of *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563. *Mr. Clifford L. Hilton* and *Mr. Henry C. Flannery* for appellants. *Mr. Charles W. Bunn, Mr. Dennis F. Lyons* and *Mr. Benjamin W. Scandrett* for appellees in No. 48. *Mr. Richard L. Kennedy, Mr. R. N. Van Doren, Mr. James B. Sheean* and *Mr. F. W. Sargent* for appellees in Nos. 49 and 50.

No. 55. SARAH F. DONLEY *v.* ERWIN RAY VAN HORN; and

No. 56. SARAH F. DONLEY *v.* PRESCOTT WEST. Error to the District Court of Appeal, Second Appellate District, of the State of California. Submitted October 11, 1922. Decided October 16, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Schlosser* v. *Hemphill*, 198 U. S. 173, 175; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99, 101; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 418; *Bruce* v. *Tobin*, 245 U. S. 18, 19. *Mr. A. Haines* for plaintiff in error. *Mr. Charles R. Pierce* and *Mr. John M. Sutton* for defendants in error.

No. 76. UNITED STATES *v.* WESLEY L. SISCHO. On writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Argued October 10, 11, 1922. Decided October

16, 1922. Judgment affirmed with costs by an equally divided court. *Mr. Assistant Attorney General Wheat,* with whom *Mr. Solicitor General Beck* was on the brief, for the United States. *Mr. Cletus Keating,* as *amicus curiae,* submitted. No appearance for respondent. [See *post,* 701.]

No. —, Original. *Ex parte:* IN THE MATTER OF HUEY P. LONG ET AL., ETC., PETITIONERS, and

No. 650. CUMBERLAND TELEPHONE & TELEGRAPH COMPANY *v.* LOUISIANA PUBLIC SERVICE COMMISSION ET AL. Appeal from the District Court of the United States for the Eastern District of Louisiana. Motion for leave to file petition for a writ of mandamus submitted October 3, 1922. Order entered October 23, 1922. The mandamus asked in this motion relates to the granting of a supersedeas by the judge of the District Court of the United States for the Eastern District of Louisiana in case No. 650 on the docket of this Court. The Court considers the application for mandamus as a motion to set aside the supersedeas and injunction granted by the district judge in this case, and a rule will issue to the appellants in case No. 650 to show cause on Monday, November 13 next, why the supersedeas and injunction should not be set aside and the injunction dissolved. *Mr. Huey P. Long* and *Mr. W. M. Barrow* for petitioners. [See *ante,* 212; *post,* 759.]

No. 18. CORONA COAL COMPANY *v.* SOUTHERN RAILWAY COMPANY. Appeal from the District Court of the United States for the Northern District of Alabama. Submitted October 5, 1922. Decided October 23, 1922. *Per Curiam.* Affirmed on authority of *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.,* 258 U. S. 377. *Mr. Forney Johnston* for appellant. *Mr. S. R. Prince* and *Mr. L. E. Jeffries* for appellee.

No. 60. SOUTHERN LIGHTERAGE & WRECKING COMPANY *v.* UNITED STATES. Appeal from the District Court of the United States for the Eastern District of Louisiana. Argued October 13, 1922. Decided October 23, 1922. Affirmed by an equally divided court. *Mr. E. Howard McCaleb,* for appellant, submitted. *Mr. Joseph M. Rault,* with whom *Mr. George H. Terriberry* was on the brief, for the United States.

No. 180. WEST SIDE IRRIGATING COMPANY *v.* MARVIN CHASE, AS HYDRAULIC ENGINEER OF THE STATE OF WASHINGTON, ET AL. Error to the Supreme Court of the State of Washington. Motion to dismiss submitted October 16, 1922. Decided October 23, 1922. *Per Curiam.* Dismissed for 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. John P. Hartman* and *Mr. Carroll B. Graves* for plaintiff in error. *Mr. L. L. Thompson* for defendants in error.

No. 43. CAPITOL LIFE INSURANCE COMPANY *v.* MARY C. ROSS. Error to the Kansas City Court of Appeals of the State of Missouri. Submitted October 9, 1922. Decided October 23, 1922. *Per Curiam.* Affirmed upon the authority of *Mutual Life Ins. Co.* v. *Liebing,* 259 U. S. 209. *Mr. Jules C. Rosenberger, Mr. James C. Jones, Mr. Frank H. Sullivan* and *Mr. James C. Jones, Jr.,* for plaintiff in error. *Mr. James M. Johnson* for defendant in error.

No. 66. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC., *v.* CENA I. BAECHTEL ET AL. Error to the Court of Appeals of the State of Maryland. Submitted

October 16, 1922. Decided October 23, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Johnson* v. *New York Life Ins. Co.,* 187 U. S. 491, 496; *Ireland* v. *Woods,* 246 U. S. 323, 330; *Erie R. R. Co.* v. *Hamilton,* 248 U. S. 369, 371–372. *Mr. Henry H. Keedy, Jr., Mr. Frederic D. McKenney* and *Mr. John S. Flannery* for plaintiff in error. *Mr. Elias B. Hartle* for defendants in error.

No. 70. Porto Rico Railway, Light & Power Company *v.* Manuel Camunas et al., etc., et al. Appeal from the Circuit Court of Appeals for the First Circuit. Argued October 17, 18, 1922. Decided October 23, 1922. *Per Curiam.* Dismissed for want of jurisdiction. *El Banco Popular* v. *Wilcox,* 255 U. S. 72; *Inter-Island Steam Navigation Co.* v. *Ward,* 242 U. S. 1. *Mr. Carroll G. Walter* for appellant. *Mr. Grant T. Trent* and *Mr. Logan N. Rock* for appellees.

No. 73. Thomas Hunt et al., etc., *v.* City of New Orleans et al. Error to the Supreme Court of the State of Louisiana. Argued October 18, 1922. Decided October 23, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Lehigh Water Co.* v. *Easton,* 121 U. S. 388, 392; *New Orleans Waterworks Co.* v. *Louisiana,* 185 U. S. 336, 350–351; *Hubert* v. *New Orleans,* 215 U. S. 170, 175; *Cross Lake Shooting & Fishing Club* v. *Louisiana,* 224 U. S. 632, 639. *Mr. Charles Louque* for plaintiffs in error. *Mr. Gustave Lemle* for the Illinois Central Railroad Company; *Mr. Ivy G. Kittredge* for the City of New Orleans; *Mr. Henry H. Chaffe* for the Louisville & Nashville Railroad Company et al., defendants in error. *Mr. Michel Provosty, Mr. George Denegre, Mr. Victor Leovy, Mr. W. H. Horton, Mr. R. V. Fletcher* and *Mr. Hunter C. Leake* were also on the briefs.

No. 76. UNITED STATES *v.* WESLEY L. SISCHO. On writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. November 13, 1922. Petition for rehearing in this cause granted, and cause restored to the docket for hearing before a full bench. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. John C. Hayes,* for the United States, in support of the petition for rehearing. [See *ante,* 697.]

No. 601. BORDER NATIONAL BANK OF EAGLE PASS, TEXAS, *v.* AMERICAN NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA. Error to the Circuit Court of Appeals for the Fifth Circuit. Motion to dismiss and petition for a writ of certiorari submitted October 23, 1922. Decided November 13, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Spencer* v. *Duplan Silk Co.,* 191 U. S. 526, 530; *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *St. Anthony Church* v. *Pennsylvania R. R. Co.,* 237 U. S. 575, 577. The petition for a writ of certiorari herein is denied. *Mr. William M. Pardue, Mr. H. Ralph Burton* and *Mr. Tench T. Marye* for plaintiff in error. *Mr. S. J. Brooks* and *Mr. Walter P. Napier* for defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF ROSE WEISS, AS NEXT FRIEND, ETC., PETITIONER. Submitted November 13, 1922. Decided November 20, 1922. Motion for leave to file petition for writ of habeas corpus herein denied, without prejudice to the right of the petitioner to apply for a writ of habeas corpus to the District Court of the United States for the Western District of Washington directed to the officers in charge of the McNeil Island Penitentiary. *Miss Rose Weiss* for petitioner.

No. 133. BILL MOORE *v.* STATE OF GEORGIA. Error to the Supreme Court of the State of Georgia. Argued November 14, 1922. Decided November 20, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Hulbert* v. *Chicago,* 202 U. S. 275, 280; *Cleveland & Pittsburgh R. R. Co.* v. *Cleveland,* 235 U. S. 50, 53; *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.,* 252 U. S. 341, 344. *Mr. Max Isaac* for plaintiff in error. *Mr. George M. Napier,* for defendant in error, submitted.

No. 30. PEOPLES NATIONAL BANK OF KINGFISHER, OKLAHOMA, ET AL. *v.* BOARD OF EQUALIZATION OF KINGFISHER COUNTY, OKLAHOMA. Error to the Supreme Court of the State of Oklahoma. Submitted November 17, 1922. Decided November 20, 1922. *Per Curiam.* Affirmed upon the authority of *Van Allen* v. *The Assessors,* 3 Wall. 573; *National Bank* v. *Commonwealth,* 9 Wall. 353, 359. *Mr. Horace G. McKeever* and *Mr. J. C. Roberts* for plaintiffs in error. *Mr. George H. Short* and *Mr. William H. Zwick* for defendant in error.

No. 593. CHARLES L. HARRIS, AS TRUSTEE, ETC., *v.* MORELAND TRUCK COMPANY ET AL. Error to the Circuit Court of Appeals for the Ninth Circuit. Motion to dismiss submitted November 13, 1922. Decided November 27, 1922. *Per Curiam.* Dismissed for want of jurisdiction. Section 3, Act of September 6, 1916, c. 448, 39 Stat. 726, 727; *Central Trust Co.* v. *Lueders,* 239 U. S. 11; *Staats Co.* v. *Security Trust & Savings Bank,* 243 U. S. 121, 124. *Mr. Fabius M. Clarke* and *Mr. John E. Bennett* for plaintiff in error. *Mr. Bert Schlesinger, Mr. Ellwood P. Morey* and *Mr. S. C. Wright* for defendants in error.

No. 185. MICHAEL HEITLER *v.* UNITED STATES;
No. 186. NATHANIEL PERLMAN *v.* UNITED STATES;
No. 187. MANDEL GREENBERG *v.* UNITED STATES;
No. 188. FRANK MCCANN *v.* UNITED STATES; and
No. 189. GEORGE F. QUINN *v.* UNITED STATES. Error to the District Court of the United States for the Northern District of Illinois. Motion to dismiss submitted November 20, 1922. Decided November 27, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Sugarman* v. *United States,* 249 U. S. 182, 184; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195; (2) *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Blair* v. *United States,* 250 U. S. 273, 279; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 289; (3) *National Prohibition Cases,* 253 U. S. 350. *Mr. Weymouth Kirkland* for plaintiffs in error. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States. [See *ante,* 438.]

No. —, Original. BENJAMIN GITLOW *v.* PEOPLE OF THE STATE OF NEW YORK. Submitted November 20, 1922. Decided November 27, 1922. Petition for a writ of error to the Supreme Court of the State of New York, in this cause, submitted to the whole court, granted. *Mr. Joseph R. Brodsky* for plaintiff in error. *Mr. Samuel A. Berger* for defendant in error.

No. 157, October Term, 1921. JOHN S. KENDALL, ADMINISTRATOR, ETC., ET AL. *v.* PAUL A. EWERT. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Motion by appellee to withdraw original papers, submitted November 22, 1922. Decided November 27, 1922. Motion as to (1) withdrawal of original paper of notice

of dismissal of counsel, dated December 31, 1921, denied. Motion as to (2) original deed of July 5, 1918, from George Redeagle to Paul A. Ewert and as to (3) original deeds of November 19, November 21, and December 21, 1921, from the heirs of George Redeagle to Paul A. Ewert, granted, the copies of said deeds on file to remain with the Clerk. *Mr. Arthur S. Thompson* for appellants. *Mr. William R. Andrews, Mr. Henry C. Lewis* and *Mr. Paul A. Ewert* for appellee. [See 259 U. S. 139.]

No. 701. BOARD OF TRADE OF THE CITY OF CHICAGO ET AL. *v.* CHARLES F. CLYNE, UNITED STATES DISTRICT ATTORNEY, ETC., ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. Motion to advance and for order maintaining status quo submitted November 27, 1922. Order entered December 4, 1922.

ORDER.—It is ordered by this Court, the defendants not objecting, that the status quo be preserved while this cause is pending in this Court and for twenty days thereafter by restraining and enjoining the appellee, Charles F. Clyne, as United States District Attorney for the Northern District of Illinois, from attempting to enforce the act of Congress entitled the "Grain Futures Act" during the pendency of this cause in this Court and for twenty days thereafter, and also from at any time prosecuting criminally, or otherwise, under said act any member of the Board of Trade of the City of Chicago, or any customer of any such member, for, or by reason of, any violation by him or them of any provision of said act committed during the pendency of this cause in this Court or twenty days thereafter, and that appellee, Arthur C. Lueder, as postmaster of the City of Chicago, be also restrained and enjoined from interfering with any of the mail passing between members of said Board of

Trade and customers of said members during the pendency of this cause in this Court and twenty days thereafter: *Provided, however,* That nothing herein shall relieve the members of said Board of Trade from severally keeping and preserving, as required by the Grain Futures Act, their records of their contracts for future delivery during the pendency of this stay. *Mr. Henry S. Robbins* for appellants. *Mr. Solicitor General Beck* and *Mr. Fred Lees* for appellees.

No. 674. EDWARD N. MITTLE *v.* STATE OF SOUTH CAROLINA. Error to the Supreme Court of the State of South Carolina. Motion to dismiss submitted November 27, 1922. Decided December 4, 1922. *Per Curiam.* Dismissed for want of jurisdiction. Section 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. Charles A. Douglas, Mr. Hugh H. Obear* and *Mr. Cole L. Blease* for plaintiff in error. *Mr. Samuel M. Wolfe* for defendant in error. [See *post,* 744.]

No. 18, Original. STATE OF OKLAHOMA *v.* STATE OF TEXAS. December 11, 1922. Order entered authorizing payments to counsel and to the receiver, and to charge the same as expenses of the receivership.

No. 153. JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS, ETC., *v.* A. E. STEVENS ET AL. Error to the Supreme Court of the State of Mississippi. Submitted December 5, 1922. Decided December 11, 1922. *Per Curiam.* Dismissed for want of jurisdiction. Act of February 8, 1899, c. 121, 30 Stat. 822; *Le Crone* v. *McAdoo,* 253 U. S. 217, 219. *Mr. Gregory L. Smith* for plaintiff in error. *Mr. J. B. Harris* for defendants in error.

No. 151. UNITED STATES *v.* ARTHUR JOHN BANCROFT. Appeal from the Court of Claims. Argued December 5, 1922. Decided December 11, 1922. *Per Curiam.* Affirmed upon the authority of *Glavey* v. *United States,* 182 U. S. 595; *United States* v. *Andrews,* 240 U. S. 90, 94; *McMath* v. *United States,* 248 U. S. 151, 152. *Mr. Assistant to the Attorney General Seymour,* with whom *Mr. Solicitor General Beck* was on the brief, for the United States. *Mr. George A. King,* with whom *Mr. William B. King* and *Mr. George R. Shields* were on the brief, for appellee.

No. 139. UNITED STATES EX REL. AARON SUHONEN *v.* FREDERICK A. WALLIS, COMMISSIONER OF IMMIGRATION, ETC. Appeal from the District Court of the United States for the Southern District of New York. Submitted December 4, 1922. Decided December 11, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.,* 228 U. S. 596, 600; *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20, 24; (2) *Fong Yue Ting* v. *United States,* 149 U. S. 698, 707, 728, 730; *Zakonaite* v. *Wolf,* 226 U. S. 272, 275; *Bugajewitz* v. *Adams,* 228 U. S. 585, 591; *Lewis* v. *Frick,* 233 U. S. 291, 302; *Ng Fung Ho* v. *White,* 259 U. S. 276. *Mr. Charles Recht* for appellant. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for appellee.

No. 94. JOHN SIMON *v.* AMERICAN EXCHANGE NATIONAL BANK ET AL. Appeal from the Circuit Court of Appeals for the Second Circuit. Argued December 7, 1922. Decided December 11, 1922. *Per Curiam.* Affirmed upon the authority of *Central Union Trust Co.* v.

Garvan, 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239. *Mr. Henry A. Wise* for appellant. *Mr. James A. Fowler,* with whom *Mr. Solicitor General Beck, Mr. Assistant to the Attorney General Seymour, Mr. Guy D. Goff, Mr. Adna R. Johnson, Jr.,* and *Mr. Dean Hill Stanley,* Special Assistants to the Attorney General, were on the brief, for appellees.

No. 123. Southern Express Company *v.* Terry Packing Company. Error to the Supreme Court of the State of South Carolina. Argued November 24, 1922. Decided December 11, 1922. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Norfolk & Suburban Turnpike Co.* v. *Virginia,* 225 U. S. 264, 268; *Louisiana Navigation Co.* v. *Oyster Commission,* 226 U. S. 99, 101; *Schlosser* v. *Hemphill,* 198 U. S. 173, 176; *Missouri & Kansas Interurban Ry. Co.* v. *Olathe,* 222 U. S. 185, 186. *Mr. J. Nelson Frierson,* with whom *Mr. Douglas McKay* was on the brief, for plaintiff in error. *Mr. Edward L. Craig* for defendant in error.

No. 109. Colonial Beach Company, Owner and Claimant of the Steamer St. Johns, *v.* Quemahoning Coal Company et al. On writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit. Argued December 5, 6, 1922. Decided January 2, 1923. *Per Curiam.* Reversed with costs, and cause remanded to the District Court of the United States for the Eastern District of Virginia. *United States* v. *Carver, ante,* 482; *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1. *Mr. Hugh H. Obear,* with whom *Mr. Paul Dulaney* was on the brief, for petitioner. *Mr. Richard E. Preece* and *Mr. John Vance Hewitt* for respondents.

No. 196. GORHAM MANUFACTURING COMPANY *v.* JAMES A. WENDELL, INDIVIDUALLY, ETC., ET AL. Appeal from the District Court of the United States for the Southern District of New York. Motion for substitution submitted December 11, 1922. Order entered January 2, 1923. ORDER: On consideration of the motion to substitute parties appellees, It is ordered that a rule to show cause why the case as to the Comptroller should not be dismissed, in view of *Irwin v. Wright,* 258 U. S. 219, and *United States* v. *Butterworth,* 169 U. S. 600, shall issue. *Mr. George Carlton Comstock* and *Mr. Robert C. Beatty* for appellant. *Mr. Claude T. Dawes* for appellees.

Nos. 173 and 174. CLYDE CHANDLER *v.* STATE OF TEXAS;

Nos. 175 and 176. JOHN CHANDLER *v.* STATE OF TEXAS. Error to the Court of Criminal Appeals of the State of Texas. Submitted January 5, 1923. Decided January 8, 1923. *Per Curiam.* Affirmed upon the authority of *Vigliotti* v. *Pennsylvania,* 258 U. S. 403; *United States* v. *Lanza,* 260 U. S. 377. *Mr. J. M. Edwards* and *Mr. E. P. Miller* for plaintiffs in error. *Mr. W. A. Keeling* for defendant in error.

No. 157. UNITED STATES *v.* RAY JANES ET AL. Error to the District Court of the United States for the District of Colorado. Argued January 11, 1923. Decided January 15, 1923. *Per Curiam.* Judgment reversed, and cause remanded for further proceedings. *McKelvey* v. *United States,* 260 U. S. 353. *Mr. H. L. Underwood,* with whom *Mr. Solicitor General Beck* and *Mr. Assistant to the Attorney General Seymour* were on the brief, for the United States. *Mr. N. Walter Dixon,* with whom *Mr. John R. Clark* and *Mr. William H. Dickson* were on the brief, for defendants in error.

No. 319. HENRY P. REED ET AL. *v.* VILLAGE OF HIBBING ET AL. Error to the Supreme Court of the State of Minnesota. Motion to dismiss or affirm submitted January 15, 1923. Decided January 22, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. H. V. Mercer* for plaintiffs in error. *Mr. C. A. Severance, Mr. H. B. Fryberger, Mr. George W. Morgan,* and *Mr. Oscar Mitchell* for defendants in error. [See *post,* 725.]

No. 222. JOHN J. MCGRATH ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the Southern District of New York. Submitted January 15, 1923. Decided January 22, 1923. *Per Curiam.* Dismissed for 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. Elijah N. Zoline* for appellants. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

No. 227. PETERS TRUST COMPANY *v.* COUNTY OF DOUGLAS IN THE STATE OF NEBRASKA. Error to the Supreme Court of the State of Nebraska. Submitted January 16, 1923. Decided January 22, 1923. *Per Curiam.* Affirmed upon the authority of *Van Allen* v. *The Assessors,* 3 Wall. 573; *National Bank* v. *Commonwealth,* 9 Wall. 353, 359; See *Peoples National Bank* v. *Board of Equalization, ante,* 702. *Mr. John F. Stout, Mr. Halleck F. Rose, Mr. Arthur R. Wells* and *Mr. Paul L. Martin* for plaintiff in error. *Mr. William C. Lambert* for defendant in error.

No. 214. HATTIESBURG GROCERY COMPANY *v.* STOKES V. ROBERTSON, STATE REVENUE AGENT OF THE STATE OF MISSISSIPPI. Error to the Supreme Court of the State of Mississippi. Argued January 16, 1923. Decided January 22, 1923. *Per Curiam.* Dismissed for 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. Marcellus Green* and *Mr. Garner W. Green,* for plaintiff in error, submitted. *Mr. J. Morgan Stevens,* with whom *Mr. W. Calvin Wells* was on the brief, for defendant in error.

No. 260. CHARLES KELLER ET AL. *v.* POTOMAC ELECTRIC POWER COMPANY. Appeal from the Court of Appeals of the District of Columbia. January 24, 1923. Argument commenced by *Mr. Conrad H. Syme* for appellants. *Ordered:* This case is passed for the purpose of having presented and argued to the Court three questions: First, whether Congress can vest in this Court under the restrictions upon its appellate jurisdiction under the Constitution the character of review of the proceedings of the Public Utilities Commission contemplated by the act creating it; and, second, whether an appeal can be taken to this Court until a final judgment has been pronounced in the District Court of Appeals; and, third, whether such judgment is final.

These questions will be set for argument on February 19 next, after the cases specially set for that day, and will be considered and decided by this Court before proceeding to hear the case on its merits in the event that the Court finds it has jurisdiction to do so.

Mr. Conrad H. Syme, Mr. F. H. Stephens and *Mr. George P. Barse* for appellants. *Mr. S. R. Bowen, Mr. John A. Garver* and *Mr. John S. Barbour* for appellee.

No. 18, Original. STATE OF OKLAHOMA *v.* STATE OF TEXAS. Submitted January 22, 1923. Decided January 29, 1923. *Per Curiam.* Application of Red River Syndicate, claimants, for a modification of the opinion delivered in this cause on May 1, 1922, 258 U. S. 574, is denied. *Mr. Charles West* for claimants.

No. 201. DAVID LAMAR *v.* UNITED STATES. Appeal from the District Court of the United States for the Southern District of New York. Submitted January 24, 1923. Decided January 29, 1923. *Per Curiam.* This is a habeas corpus proceeding designed to retard petitioner's incarceration in Mercer County jail after trial and conviction on charge of conspiracy to restrain foreign trade and commerce by instigating strikes, etc., intended to prevent the manufacture and transportation of war supplies.

The points relied upon are without merit, and the judgment dismissing the writ (274 Fed. 160) is affirmed.

The Clerk is instructed to issue the mandate at once.

Mr. Elijah N. Zoline and *Mr. Thomas B. Felder* for appellant. *Mr. Solicitor General Beck* and *Mr. Alfred A. Wheat* for the United States.

PETITIONS FOR CERTIORARI GRANTED, FROM OCTOBER 2, 1922, TO AND INCLUDING JANUARY 29, 1923.

No. 423. W. TRINIDAD, AS INSULAR COLLECTOR OF INTERNAL REVENUE OF THE PHILIPPINE ISLANDS, *v.* SAGRADA ORDEN DE PREDICATORES DE LA PROVINCIA DEL SANTISSIMO ROSARIO DE FILIPINAS. October 9, 1922. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted. *Mr. Grant T. Trent, Mr. Logan N. Rock* and *Mr. Carl A. Mapes* for petitioner. *Mr. Gabriel La O* for respondent.

No. 424. AMERICAN RAILWAY EXPRESS COMPANY *v.* LUCIUS P. LEVEE. October 9, 1922. Petition for a writ of certiorari to the Court of Appeal, First Circuit, of the State of Louisiana, granted. *Mr. Hunter C. Leake, Mr. A. M. Hartung* and *Mr. H. Garland Dupré* for petitioner. *Mr. Charles T. Wortham* for respondent.

No. 431. PUSEY & JONES COMPANY *v.* HANS KARLUF HANSSEN. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Lindley M. Garrison* for petitioner. *Mr. William H. Button, Mr. John P. Nields* and *Mr. William G. Mahaffey* for respondent.

No. 443. C. B. GILES ET AL. *v.* HENRY VETTE ET AL. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. William Burry* and *Mr. Lewis F. Jacobson* for petitioners. *Mr. Horace Kent Tenney, Mr. Harry A. Parkin, Mr. Carl Meyer* and *Mr. Henry R. Platt* for respondents.

No. 454. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* HURNI PACKING COMPANY. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Frederick L. Allen* for petitioner. *Mr. Charles M. Stilwill* for respondent.

No. 457. UNITED STATES *v.* FREDERICK L. MERRIAM. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Solicitor General Beck* for the United States. *Mr. Roy C. Gasser* for respondent.

No. 458. UNITED STATES *v.* HENRY B. ANDERSON. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Solicitor General Beck* for the United States. *Mr. Roy C. Gasser* for respondent.

No. 462. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC., *v.* GEORGE WECHSLER. October 16, 1922. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri granted. *Mr. H. M. Langworthy, Mr. O. H. Dean* and *Mr. Roy B. Thomson* for petitioner. *Mr. William S. Hogsett* and *Mr. Mont T. Prewitt* for respondent.

No. 467. DEPARTMENT OF TRADE & COMMERCE OF THE STATE OF NEBRASKA ET AL. *v.* A. J. HERTZ ET AL., RECEIVERS, ETC. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Halleck F. Rose* and *Mr. Arthur R. Wells* for petitioners. *Mr. Bruce W. Sanborn* for respondents.

No. 574. LION BONDING & SURETY COMPANY *v.* A. H. KARATZ. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Halleck F. Rose* and *Mr. Arthur R. Wells* for petitioner. *Mr. Bruce W. Sanborn* for respondent.

No. 468. JAMES C. DAVIS, AS AGENT, ETC., *v.* LEE A. WOLFE. October 16, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted. *Mr. Thomas P. Littlepage, Mr. James C. Jones, Mr. Lon O. Hocker* and *Mr. Frank H. Sullivan* for petitioner. *Mr. P. H. Cullen* and *Mr. Sidney T. Able* for respondent.

No. 471. CANUTE STEAMSHIP COMPANY, LIMITED, ET AL. *v.* PITTSBURGH & WEST VIRGINIA COAL COMPANY ET AL. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Charles R. Hickox* and *Mr. Delbert M. Tibbetts* for petitioners. *Mr. John W. Davis, Mr. Theodore Kiendl, Mr. Tracy L. Jeffords, Mr. R. R. Bennett* and *Mr. Thomas F. Barrett* for respondents.

No. 474. SALEM TRUST COMPANY *v.* MANUFACTURERS' FINANCE COMPANY ET AL. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Alexander Whiteside* for petitioner. *Mr. Robert G. Dodge* for respondents.

No. 476. THEODORE A. HEYER, DOING BUSINESS AS T. A. HEYER DUPLICATOR COMPANY, *v.* DUPLICATOR MANUFACTURING COMPANY. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Samuel Walker Banning* and *Mr. Thomas A. Banning* for petitioner. *Mr. George L. Wilkinson* for respondent.

No. 488. CHARLES L. CRAIG *v.* WILLIAM C. HECHT, U. S. MARSHAL. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. John P. O'Brien* and *Mr. Edmund L. Mooney* for petitioner. *Mr. Solicitor General Beck* and *Mr. William Haywood* for respondent.

No. 494. MATTHEW ADDY COMPANY *v.* UNITED STATES. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Nelson B. Cramer* for petitioner. No brief filed for the United States.

No. 495. BENJAMIN N. FORD *v.* UNITED STATES. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Nelson B. Cramer* for petitioner. No brief filed for the United States.

No. 512. SAMUEL A. MYERS ET AL. *v.* INTERNATIONAL TRUST COMPANY. October 23, 1922. Petition for a writ of certiorari to the Superior Court of Suffolk County, State of Massachusetts, granted. *Mr. Edward F. McClennen* for petitioners. *Mr. John R. Lazenby* for respondent.

No. 513. BOARD OF TRADE OF THE CITY OF CHICAGO ET AL. *v.* E. H. JOHNSON, TRUSTEE, ETC. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Henry S. Robbins* for petitioners. *Mr. Robert N. Erskine* for respondent.

No. 520. WEBSTER ELECTRIC COMPANY *v.* SPLITDORF ELECTRICAL COMPANY. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Herbert B. Moses* and *Mr. Wm. B. Kerkam* for petitioner. *Mr. Edward Rector* and *Mr. Eugene G. Mason* for respondent.

No. 532. SIMON HECHT ET AL., TRUSTEES, *v.* JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE;

No. 533. ARTHUR L. HOWARD ET AL., TRUSTEES, *v.* JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE; and

No. 534. ARTHUR L. HOWARD ET AL., TRUSTEES, *v.* ANDREW J. CASEY, FORMER ACTING COLLECTOR OF INTERNAL REVENUE. October 23, 1922. Petition for writs of cer-

tiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Edward F. McClennen, Mr. William H. Dunbar* and *Mr. Allison L. Newton* for petitioners. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. Harvey B. Cox* for respondents.

No. 535. Federal Trade Commission *v.* Raymond Bros.-Clark Company. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Solicitor General Beck, Mr. W. H. Fuller* and *Mr. Adrien F. Busick* for petitioner. *Mr. Emmet Tinley* for respondent.

No. 328. Eli Bunch *v.* J. B. Cole et al. Error to the Supreme Court of the State of Oklahoma. November 13, 1922. Petition for a writ of certiorari herein granted. *Mr. Streeter B. Flynn* and *Mr. Dennis T. Flynn,* for plaintiff in error, in support of the petition. *Mr. Benjamin Martin, Jr.,* for defendants in error, in opposition to the petition.

No. 554. Southern Power Company *v.* North Carolina Public Service Company et al. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. William P. Bynum, Mr. R. V. Lindabury* and *Mr. R. C. Strudwick* for petitioner. *Mr. John W. Davis* and *Mr. Aubrey L. Brooks* for respondents.

No. 568. Red Cross Line *v.* Atlantic Fruit Company. November 13, 1922. Petition for a writ of certiorari to the Supreme Court of the State of New York granted. *Mr. Homer L. Loomis* for petitioner. *Mr. John W. Crandall* for respondent.

No. 573. JAMES C. DAVIS, AS AGENT, ETC., *v.* PORTLAND SEED COMPANY. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Arthur C. Spencer, Mr. Charles E. Cochran* and *Mr. John F. Finerty* for petitioner. *Mr. James G. Wilson* for respondent.

No. 577. BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY *v.* GUERNEY O. BURTCH. November 13, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Indiana granted. *Mr. Morrison R. Waite* for petitioner. *Mr. Merrill Moores* for respondent.

No. 579. QUEEN INSURANCE COMPANY OF AMERICA *v.* GLOBE & RUTGERS FIRE INSURANCE COMPANY. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. D. Roger Englar* and *Mr. Oscar R. Houston* for petitioner. *Mr. Charles C. Burlingham* and *Mr. Van Vechten Veeder* for respondent.

No. 583. JAMES C. DAVIS, AS AGENT, ETC., *v.* E. M. MATTHEWS, ADMINISTRATOR, ETC. November 13, 1922. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina granted. *Mr. Henry E. Davis* for petitioner. *Mr. Felix E. Alley* for respondent.

No. 587. ALVAH CROCKER ET AL., TRUSTEES, *v.* JOHN F. MALLEY, COLLECTOR, ETC. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Felix Rackemann* for petitioners. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. Charles H. Weston* for respondent.

No. 589. THOMSON SPOT WELDER COMPANY *v.* FORD MOTOR COMPANY. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Frederick P. Fish* for petitioner. No appearance for respondent.

No. 637. FEDERAL TRADE COMMISSION *v.* STANDARD OIL COMPANY (NEW JERSEY);

No. 638. FEDERAL TRADE COMMISSION *v.* GULF REFINING COMPANY; and

No. 639. FEDERAL TRADE COMMISSION *v.* MALONEY OIL MANUFACTURING COMPANY. November 13, 1922. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Solicitor General Beck, Mr. Blackburn Esterline,* Assistant to the Solicitor General, *Mr. W. H. Fuller, Mr. Adrien F. Busick* and *Mr. Eugene W. Burr* for petitioner. *Mr. C. D. Chamberlin, Mr. Hubert B. Fuller, Mr. Chester O. Swain* and *Mr. James H. Hayes* for respondents.

No. 585. PENNSYLVANIA RAILROAD COMPANY *v.* UNITED STATES RAILROAD LABOR BOARD ET AL. Appeal from the Circuit Court of Appeals for the Seventh Circuit. November 20, 1922. Petition for a writ of certiorari herein granted. *Mr. Timothy J. Scofield, Mr. Frank J. Loesch, Mr. Charles F. Loesch* and *Mr. Robert W. Richards,* for appellant, in support of the petition. *Mr. Solicitor General Beck* and *Mr. Blackburn Esterline,* Assistant to the Solicitor General, for appellees, in opposition to the petition.

No. 655. MARGARET C. LYNCH, EXECUTRIX OF E. J. LYNCH, COLLECTOR, ETC., *v.* TILDEN PRODUCE COMPANY. November 20, 1922. Petition for a writ of certiorari to

the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. G. Noble Jones* for petitioner. No appearance for respondent.

No. 692. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC., *v.* SAMUEL WECHSLER. November 27, 1922. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri granted. *Mr. O. H. Dean, Mr. H. M. Langworthy* and *Mr. Roy B. Thomson* for petitioner. *Mr. William S. Hogsett, Mr. Murat Boyle* and *Mr. Mont T. Prewitt* for respondent.

No. 718. STANDARD PARTS COMPANY *v.* WILLIAM J. BECK. January 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. John M. Garfield, Mr. A. V. Cannon* and *Mr. James P. Wood* for petitioner. *Mr. George L. Wilkinson* for respondent.

No. 749. CENTRAL COAL & COKE COMPANY *v.* JACOB OCEPEK. January 22, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas granted. *Mr. L. C. Boyle* for petitioner. No appearance for respondent.

No. 781. TAUBEL-SCOTT-KITZMILLER COMPANY, INC., *v.* DAVID J. FOX ET AL., TRUSTEES, ETC. January 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Frank J. Hogan* for petitioner. *Mr. Irving L. Ernst* for respondents.

No. 793. PRESTONETTES, INC., *v.* FRANCOIS JOSEPH DE SPOTURNO COTY. January 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Charles H. Tuttle* and *Mr. William J. Hughes* for petitioner. *Mr. Hugo Mock* and *Mr. Asher Blum* for respondent.

No. 774. JOHN E. THROPP'S SONS COMPANY *v.* FRANK A. SEIBERLING. January 29, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Livingston Gifford* and *Mr. Thomas G. Haight* for petitioner. *Mr. Robert Fletcher Rogers* for respondent.

No. 777. SAMUEL D. WHITE, AS TRUSTEE, ETC., *v.* VETA STUMP. January 29, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. James E. Babb* for petitioner. *Mr. Harve H. Phipps* for respondent.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED AS TARDY, ETC., FROM OCTOBER 2, 1922, TO AND INCLUDING JANUARY 29, 1923.

No. 323. TRUSTEES OF THE UNITED STATES-MEXICO OIL COMPANY *v.* T. W. HARRIS. Error to the Supreme Court of the State of Kansas. October 9, 1922. Petition for a writ of certiorari herein denied. *Mr. William W. Fry,* for plaintiffs in error, in support of the petition. *Mr. Charles F. Newman,* for defendant in error, in opposition to the petition. [See *ante,* 694.]

No. 386. MILDRED MCINTOSH *v.* W. H. DILL ET AL. Error to the Supreme Court of the State of Oklahoma. October 9, 1922. Petition for a writ of certiorari herein denied. *Mr. Thomas H. Owen* and *Mr. George C. Crump,* for plaintiff in error, in support of the petition. *Mr. Nathan A. Gibson* and *Mr. Joseph L. Hull,* for defendants in error, in opposition to the petition. [See *ante,* 694.]

No. 397. LUDWIG WOLFGRAM *v.* RITCHIE T. MARSH, TRUSTEE, ETC. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Lowrie C. Barton* for petitioner. No appearance for respondent.

No. 398. ALBERT ROWAN ET AL. *v.* UNITED STATES. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Jed C. Adams* for petitioners. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Harry S. Ridgely* for the United States.

No. 399. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, *v.* WILLIAM R. COYLE, TRUSTEE, ETC. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John F. Finerty* for petitioner. *Mr. Emory R. Buckner* for respondent.

No. 401. WILLIAM S. LIVEZEY *v.* UNITED STATES. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Jed C. Adams* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Harry S. Ridgely* for the United States.

No. 405. MORRIS REINSTEIN ET AL. *v.* UNITED STATES. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Elijah N. Zoline* for petitioners. *Mr. Solicitor General Beck* and *Mr. William C. Herron* for the United States.

No. 411. AMERICAN CAN COMPANY *v.* FRANK FUNKHOUSER;

No. 412. AMERICAN CAN COMPANY *v.* M. T. MCGOLDRICK;

No. 413. AMERICAN CAN COMPANY *v.* SAMUEL J. WILSON;

No. 414. AMERICAN CAN COMPANY *v.* R. B. RICE ET AL.;

No. 415. AMERICAN CAN COMPANY *v.* P. J. GARNETT;

No. 416. AMERICAN CAN COMPANY *v.* RALPH ROBINSON; and

No. 417. AMERICAN CAN COMPANY *v.* J. W. BURGAN. October 9, 1922. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Horace Kent Tenney, Mr. Andrew D. Collins, Mr. Allen L. Chickering* and *Mr. Warren Gregory* for petitioner. *Mr. William G. Graves* for respondent in No. 415.

No. 420. R. D. JAMES *v.* UNITED STATES. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. S. Baskett* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

No. 425. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* ELLIS R. HYDE. October 9, 1922. Petition

for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Thomas P. Littlepage, Mr. Sidney F. Taliaferro, Mr. C. O. Blake* and *Mr. W. R. Bleakmore* for petitioner. *Mr. W. A. Ledbetter, Mr. H. L. Stuart* and *Mr. R. R. Bell* for respondent.

No. 427. WESTERN MACHINERY COMPANY ET AL. *v.* RICHFIELD OIL COMPANY. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Nathan Newby* for petitioners. *Mr. Troy Pace* for respondent.

No. 434. KING LUMBER COMPANY *v.* P. H. FAULCONER. October 9, 1922. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Mr. George E. Walker* for petitioner. *Mr. R. T. W. Duke, Jr., Mr. G. W. McNutt* and *Mr. H. W. Walsh* for respondent.

No. 437. PHILADELPHIA & READING RAILWAY COMPANY *v.* SAMUEL D. EISENHART. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William Clarke Mason* for petitioner. *Mr. Frank F. Davis* for respondent.

No. 438. ALBERT HIRSHHEIMER *v.* RALPH B. HARTSOUGH ET AL.; and

No. 439. BENJAMIN F. HAMEY *v.* RALPH B. HARTSOUGH ET AL. October 9, 1922. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles H. Aldrich* and *Mr. Frank M. Hoyt* for petitioners. *Mr. Amasa C. Paul, Mr. Harry L. Butler* and *Mr. Frank J. Morley* for respondents.

No. 441. H. P. CONVERSE ET AL. *v.* PORTSMOUTH COTTON OIL REFINING CORPORATION. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Edward R. Baird, Jr., Mr. George M. Lanning, Mr. Clarence W. De Knight* and *Mr. Rufus S. Day* for petitioners. *Mr. Thomas H. Willcox* and *Mr. J. Westmore Willcox* for respondent.

No. 445. CHAMPION FIBRE COMPANY *v.* PIGEON RIVER RAILWAY COMPANY ET AL. October 9, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Julius C. Martin, Mr. Thomas S. Rollins* and *Mr. George H. Wright* for petitioner. *Mr. William P. Bynum* for respondents.

No. 446. J. L. ALBRIGHT *v.* JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT, ETC. October 9, 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. S. P. Jones* for petitioner. *Mr. Ras Young* for respondent.

No. 337. MRS. EUGENIA BROOKS, ADMINISTRATRIX, ETC. *v.* SEABOARD AIR LINE COMPANY. October 9, 1922. Petition for a writ of certiorari to the Court of Appeals of the State of Georgia denied because of failure to submit the petition within the time prescribed by the rule. *Mr. George Westmoreland* for petitioner. *Mr. Hollis N. Randolph* and *Mr. Robert S. Parker* for respondent.

No. 433. NEW YORK CENTRAL RAILROAD COMPANY *v.* MIDDLEPORT GAS & ELECTRIC LIGHT COMPANY. October 9, 1922. Petition for a writ of certiorari to the Supreme

Court of the State of New York denied because of failure to file the petition within the time prescribed by the statute. *Mr. Maurice C. Spratt* for petitioner. *Mr. Edward H. Letchworth* for respondent. [See *post*, 739.]

No. 319. HENRY P. REED ET AL. *v.* VILLAGE OF HIBBING ET AL. Error to the Supreme Court of the State of Minnesota. October 16, 1922. Petition for a writ of certiorari herein denied. *Mr. H. V. Mercer,* for plaintiffs in error, in support of the petition. *Mr. C. A. Severance, Mr. George W. Morgan* and *Mr. H. B. Fryberger,* for defendants in error, in opposition to the petition. [See *ante*, 709.]

No. 449. CHARLES G. BINDERUP *v.* PATHE EXCHANGE, INC., ET AL. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Irving F. Baxter* and *Mr. Norris Brown* for petitioner. *Mr. William M. Seabury* and *Mr. Saul E. Rogers* for respondents.

No. 455. GUISEPPE MORETTI *v.* JOHN WILEY ET AL. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Malcolm S. McN. Watts* for petitioner. No appearance for respondents.

No. 460. SHENANGO FURNACE COMPANY ET AL. *v.* VILLAGE OF BUHL, ET AL. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William D. Bailey* and *Mr. Alfred Jaques* for petitioners. *Mr. William E. Culkin* for respondents.

No. 465. MOBILE SHIPBUILDING COMPANY *v.* FEDERAL BRIDGE & STRUCTURAL COMPANY. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Solicitor General Beck, Mr. Elmer Schlesinger, Mr. Chauncey G. Parker* and *Mr. Henry M. Ward* for petitioner. *Mr. Amos C. Miller* and *Mr. William E. Black* for respondent.

No. 466. RANGER REFINING & PIPE LINE COMPANY ET AL. *v.* J. E. DRYDEN ET AL. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bernard Titche* and *Mr. Francis C. Downey* for petitioners. *Mr. Joseph Manson McCormick* and *Mr. Francis M. Etheridge* for respondents.

No. 470. JESS SHIPLEY ET AL. *v.* UNITED STATES. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Waters Davis* for petitioners. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. George E. Boren* for the United States.

No. 475. VICTOR TALKING MACHINE COMPANY *v.* STARR PIANO COMPANY. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William Houston Kenyon* and *Mr. John D. Myers* for petitioner. *Mr. Parker W. Page* and *Mr. Drury W. Cooper* for respondent.

No. 479. ALABAMA & VICKSBURG RAILWAY COMPANY ET AL. *v.* LOUIS F. DENNIS. Error to the Supreme Court of the State of Mississippi. October 16, 1922. Petition

for a writ of certiorari herein denied. *Mr. J. Blanc Monroe, Mr. Monte M. Lemann, Mr. R. H. Thompson, Mr. S. L. McLaurin* and *Mr. Walter J. Suthon, Jr.*, for plaintiffs in error, in support of the petition. *Mr. William H. Watkins* for defendant in error, in opposition to the petition. [See *post*, 755.]

No. 481. UNION ELECTRIC WELDING COMPANY *v.* JOHN P. CURRY ET AL. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas H. Tracy, Mr. George D. Welles* and *Mr. Charles E. Brock* for petitioner. *Mr. Samuel Owen Edmonds* and *Mr. Wilbur Owen* for respondents.

No. 486. FOCSANEANU ALEXANDER ET AL. *v.* GENERAL ELECTRIC COMPANY. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Patrick P. Curran* and *Mr. Charles J. Holland* for petitioners. *Mr. Frederick P. Fish* and *Mr. Hubert Howson* for respondent.

No. 489. PRODUCERS WAREHOUSE ASSOCIATION *v.* PHILIPPINE NATIONAL BANK. October 16, 1922. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Henry Breckinridge, Mr. Clement L. Bouvé* and *Mr. A. Warner Parker* for petitioner. No appearance for respondent.

No. 490. J. H. RILEY *v.* O. C. MCRANEY. October 16, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Mr. W. H. Watkins* for petitioner. *Mr. Robert H. Thompson* for respondent.

No. 493. BEER, SONDHEIMER & COMPANY, INC., *v.* AMERICAN & CUBAN STEAMSHIP LINE, INC. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Roger Englar* for petitioner. *Mr. Frank V. Barnes* for respondent.

No. 496. GEORGE M. EMBIRICOS *v.* STUYVESANT INSURANCE COMPANY. October 16, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert S. Erskine* and *Mr. D. M. Tibbetts* for petitioner. *Mr. Ezra P. Prentice* for respondent.

No. 499. AUTOMATIC PENCIL SHARPENER COMPANY *v.* BOSTON PENCIL POINTER COMPANY. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. George L. Wilkinson* and *Mr. Edward O. Proctor* for petitioner. *Mr. Asa P. French* for respondent.

No. 501. HARRY GOLDBERG ET AL. *v.* UNITED STATES. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Neyle Colquitt* and *Mr. Alex. A. Lawrence* for petitioners. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. George E. Bowen* for the United States.

No. 502. ANDREW JERGENS COMPANY *v.* WILLIAM A. WOODBURY DISTRIBUTORS, INC., ET AL. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Walter A. de Camp, Mr. Keyes Winter* and *Mr. Edward S. Rogers* for petitioner. *Mr. Thomas B. Felder* for respondents.

No. 503. MRS. ESSIE LEE JONES, ADMINISTRATRIX, ETC., *v.* CENTRAL OF GEORGIA RAILWAY COMPANY. October 23, 1922. Petition for a writ of certiorari to the Court of Appeals of the State of Georgia denied. *Mr. Emmett Houser* and *Mr. Thomas Swift Felder* for petitioner. *Mr. T. M. Cunningham, Jr.,* and *Mr. Richard C. Jordon* for respondent.

No. 504. JAMES C. DAVIS, FEDERAL AGENT OF RAILWAYS, ET AL., ETC., *v.* MRS. WALTER MORGAN, ADMINISTRATRIX, ETC. October 23, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied. *Mr. Frank C. Dillard* and *Mr. George Thompson* for petitioners. *Mr. S. P. Jones* for respondent.

No. 505. IPONMATSU UKICHI ET AL. *v.* UNITED STATES. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. E. A. Douthitt* and *Mr. Charles S. Davis* for petitioners. *Mr. Solicitor General Beck* and *Mr. William C. Herron* for the United States.

No. 506. WILLIAM T. PRICE ET AL. *v.* MAGNOLIA PETROLEUM COMPANY ET AL. October 23, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. E. E. Blake, Mr. A. T. Boys, Mr. C. B. Stuart, Mr. J. F. Sharpe, Mr. M. K. Cruce* and *Mr. Walter C. Stevens* for petitioners. *Mr. George F. Short, Mr. C. W. King, Mr. W. H. Francis* and *Mr. B. B. Blakeney* for respondents.

No. 507. MORGENSTERN & COMPANY, INC., *v.* HOFFMAN-LA ROCHE CHEMICAL WORKS, INC. October 23, 1922. Petition for a writ of certiorari to the Circuit

Court of Appeals for the Second Circuit denied. *Mr. C. A. L. Massie* for petitioner. *Mr. Hans v. Briesen* for respondent.

No. 508. ERNEST W. KOKENOR *v.* UNITED STATES. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. S. Herbert* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

No. 514. FARISH COMPANY *v.* SOUTH SIDE TRUST COMPANY. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Henson M. Stephens* for petitioner. *Mr. Wm. M. Robinson* and *Mr. H. V. Blaxter* for respondent.

No. 516. ELLA HOWEY *v.* WILLIAM J. HOWEY. October 23, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. C. W. Prince* for petitioner. *Mr. Henry S. Conrad* for respondent.

No. 517. SYLVESTER CAROLLO *v.* UNITED STATES. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. Howard McCaleb* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

No. 519. CLAIR D. JONES *v.* INTER-MOUNTAIN LIFE INSURANCE COMPANY ET AL. October 23, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Utah denied. *Mr. Frank K. Nebeker* for petitioner. No appearance for respondents.

No. 521. WOOLWINE METAL PRODUCTS COMPANY *v.* WILLIS J. BOYLE, SR. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frederick S. Lyon* for petitioner. *Mr. John H. Miller* for respondent.

No. 523. MANUEL BISKIND *v.* UNITED STATES. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ben B. Wickham* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

No. 524. SAMUEL REMBRANDT *v.* UNITED STATES. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ben B. Wickham* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. F. G. Wixson* for the United States.

No. 527. WHITING MANUFACTURING COMPANY *v.* ALVIN SILVER COMPANY, INC. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Livingston Gifford, Mr. Robert C. Beatty* and *Mr. Hugo Mock* for petitioner. *Mr. Charles Neave* for respondent. *Mr. Harry D. Nims* and *Mr. Robert Ramsey,* by leave of court, as *amici curiae. Mr. William J. Hughes, Mr. Otto A. Schlobohm* and *Mr. William J. Hughes, Jr.,* by leave of court, as *amici curiae.*

No. 531. HARRY O. PHILLIPS *v.* PENNSYLVANIA RAILROAD COMPANY. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh

Circuit denied. *Mr. John H. Kay, Mr. Charles W. Miller* and *Mr. Walter D. Corrigan* for petitioner. No appearance for respondent.

No. 538. FRANK P. HELM *v.* AMERICAN HAWAIIAN STEAMSHIP COMPANY. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Nathan H. Frank* and *Mr. Irving H. Frank* for petitioner. *Mr. Stanley Moore* for respondent.

No. 539. JOHN G. CROSLAND *v.* BENJAMIN E. DYSON, U. S. MARSHAL, ETC. October 23, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bart A. Riley* for petitioner. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. George E. Boren* for respondent.

No. 601. BORDER NATIONAL BANK OF EAGLE PASS, TEXAS, *v.* AMERICAN NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA. [See *ante,* 701.]

No. 473. ISADORE GLANS ET AL. *v.* UNITED STATES. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edmund K. Trent, Mr. Joseph P. Tumulty* and *Mr. Charles H. Baker* for petitioners. No brief filed for the United States.

No. 540. R. C. WOOD ET AL. *v.* F. G. NOYES, AS RECEIVER, ETC. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. H. Metson, Mr. Robert W. Jennings* and *Mr. Louis P. Shackleford* for petitioners. *Mr. John E. Alexander* for respondent.

No. 544. STANDARD OIL COMPANY (INDIANA) *v.* JAMES R. HENRY. November 13, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Indiana denied. *Mr. Samuel D. Miller, Mr. Frank C. Dailey, Mr. William H. Thompson* and *Mr. C. C. LeForgee* for petitioner. *Mr. Edward M. White* for respondent.

No. 547. CUDAHY PACKING COMPANY OF NEBRASKA *v.* MARY ANN PARRAMORE, AS WIDOW, ETC., ET AL. November 13, 1922. Error to the Supreme Court of the State of Utah. Petition for a writ of certiorari herein denied. *Mr. George T. Buckingham,* for plaintiff in error, in support of the petition. *Mr. William A. Hilton,* for defendants in error, in opposition to the petition.

No. 548. STANDARD OIL COMPANY OF LOUISIANA *v.* RAY P. PARHAM. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hunter C. Leake, Mr. Marcellus Green, Mr. Garner W. Green* and *Mr. C. O. Swain* for petitioner. *Mr. William D. Anderson* for respondent.

No. 553. B. F. TRAPPEY & SONS *v.* MCILHENNY COMPANY. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William L. Symons* for petitioner. *Mr. Joseph S. Clark* and *Mr. Edward S. Rogers* for respondent.

No. 558. FARM MORTGAGE & LOAN COMPANY *v.* JOHN R. HAZEL, JUDGE, ETC. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank Gibbons* for petitioner. *Mr. Frederic H. Cowden* for respondent.

No. 559. SAMUEL M. GROSSMAN *v.* UNITED STATES. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Benjamin C. Bachrach* and *Mr. David D. Stansbury* for petitioner. *Mr. Solicitor General Beck, Mr. Robert P. Reeder* and *Mr. W. Marvin Smith* for the United States.

No. 567. W. H. GOFF COMPANY *v.* LAMBORN & COMPANY. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frederick T. Saussy* and *Mr. Edgar Watkins* for petitioner. *Mr. Robert M. Hitch* and *Mr. A. B. Lovett* for respondent.

No. 580. AXEL MATSON *v.* WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS. November 13, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Montana denied. *Mr. H. Lowndes Maury* for petitioner. No appearance for respondent.

No. 582. MARY JEANNETTE MCNAMARA ET AL. *v.* JOHN HAMILTON MCNAMARA, A MINOR, ETC., ET AL. November 13, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Mary J. McNamara* and *Margaret J. Thomas* pro se. *Mr. Robert P. Eckert* and *Mr. John G. Drennan* for respondents.

No. 584. BEN RUDNER ET AL. *v.* UNITED STATES. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edmond H. Moore* for petitioners. No brief filed for the United States.

No. 586. BACON BROTHERS COMPANY *v.* E. FRANK GRABLE, INDIVIDUALLY, ETC. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George D. Welles* and *Mr. Thomas H. Tracy* for petitioner. *Mr. George E. Brand, Mr. Harold W. Fraser* and *Mr. U. S. Bratton* for respondent.

No. 592. SULZBERGER & SONS COMPANY *v.* STEAMSHIP HELLIG OLAV ET AL. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles R. Hickox* for petitioner. *Mr. Van Vechten Veeder* and *Mr. Roscoe H. Hupper* for respondents.

No. 596. BENJAMIN B. KAUFMANN ET AL. *v.* UNITED STATES. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Elijah N. Zoline* for petitioners. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

No. 597. GRACIANO L. CABRERA ET AL. *v.* PEOPLE OF THE PHILIPPINE ISLANDS. November 13, 1922. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Adam C. Carson* for petitioners. *Mr. Grant T. Trent* and *Mr. Logan N. Rock* for respondent.

No. 598. TEXAS COMPANY ET AL. *v.* STEAMSHIP SANTA RITA, ETC., ET AL. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John D. Grace* for petitioners. *Mr. John C. Prizer* for respondents.

No. 599. FRED M. HARDEN *v.* MANUEL ARIAS RODRIGUEZ ET AL. November 13, 1922. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Clement L. Bouvé* for petitioner. *Mr. Alexander Britton* and *Mr. Lawrence H. Cake* for respondents.

No. 600. PYLE-NATIONAL COMPANY *v.* OLIVER ELECTRIC MANUFACTURING COMPANY. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John J. Healy* and *Mr. Francis W. Parker, Jr.,* for petitioner. *Mr. Edwin E. Huffman* for respondent.

No. 604. ST. LOUIS ELECTRICAL WORKS ET AL. *v.* FORE ELECTRICAL MANUFACTURING COMPANY ET AL. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John H. Bruninga* for petitioners. No appearance for respondents.

No. 605. MARY BANKS *v.* STATE OF ALABAMA. November 13, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Alabama denied. *Mr. H. H. Swift* for petitioner. *Mr. Hartwell G. Davis* for respondent.

No. 608. PENNSYLVANIA RAILROAD COMPANY *v.* UNITED STATES. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Shirley Carter* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 609. AMERICAN MERCHANT MARINE INSURANCE COMPANY OF NEW YORK *v.* LIBERTY SAND & GRAVEL COMPANY, INC. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. T. Catesby Jones, Mr. D. Roger Englar* and *Mr. James D. Carpenter* for petitioner. *Mr. Robert S. Erskine* for respondent.

No. 613. AKTIESELSKABET FIDO *v.* LLOYD BRAZILIERO ET AL.;

No. 614. AKTIESELSKABET FIDO *v.* GANO, MOORE & COMPANY, INC;

No. 615. AKTIESELSKABET CHRISTIANSSAND *v.* CIA COMMERCIO E NAVEGACAO COMPANY ET AL.;

No. 616. AKTIESELSKABET CHRISTIANSSAND *v.* GANO, MOORE & COMPANY, INC;

No. 617. SKIBSAKTIES GLOMMEN *v.* CHESAPEAKE & OHIO COAL & COKE COMPANY ET AL.;

No. 618. SKIBSAKTIES GLOMMEN *v.* CHESAPEAKE & OHIO COAL & COKE COMPANY;

No. 619. SKIBSAKTIES CLYDE *v.* JOHN S. SORENSON ET AL.;

No. 620. SKIBSAKTIES CLYDE *v.* JOHN S. SORENSON ET AL.;

No. 621. BECHS REDERI AKTIES *v.* AMERICAN COAL EXPORTING COMPANY ET AL.;

No. 622. BECHS REDERI AKTIES *v.* AMERICAN COAL EXPORTING COMPANY;

No. 623. CHRISTIANSSAND SHIPPING COMPANY, LIMITED, *v.* AMERICAN COAL EXPORTING COMPANY ET AL.;

No. 624. CHRISTIANSSAND SHIPPING COMPANY, LIMITED, *v.* AMERICAN COAL EXPORTING COMPANY;

No. 625. AKTIESELSKABET CHRISTIANSSAND *v.* BERWIND-WHITE COAL MINING COMPANY; and

No. 626. AKTIESELSKABET CHRISTIANSSAND *v.* BERWIND-WHITE COAL MINING COMPANY. November 13,

1922. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles S. Haight, Mr. John W. Griffin* and *Mr. Wharton Poor* for petitioners. *Mr. John M. Woolsey, Mr. Delbert M. Tibbetts, Mr. Charles C. Burlingham* and *Mr. Roscoe H. Hupper* for respondents.

No. 631. TRUSTS & GUARANTEE COMPANY, LIMITED, EXECUTOR, ETC., *v.* HOOSIER VENEER COMPANY. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George T. Buckingham* and *Mr. Marquis Eaton* for petitioner. *Mr. H. P. Young* for respondent.

No. 647. HANNAH CANARD BARNETT ET AL. *v.* W. A. KUNKEL ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. November 13, 1922. Petition for a writ of certiorari herein denied. *Mr. Lewis C. Lawson, Mr. Francis Stewart, Mr. Malcolm E. Rosser, Mr. Joseph C. Stone* and *Mr. Charles A. Moon,* for appellants, in support of the petition. No appearance for appellees.

No. 551. HENRY E. DEKAY *v.* UNITED STATES. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied because of failure to file the petition within the time prescribed by the statute. *Mr. William L. Wemple* for petitioner. No brief filed for the United States.

No. 571. HARRY MICHELSOHN *v.* CHARLES F. DITTMAR, AS TRUSTEE, ETC. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the

Third Circuit denied because of failure to file the petition within the time prescribed by the statute. *Mr. David H. Bilder* for petitioner. *Mr. James D. Carpenter, Jr.,* and *Mr. John M. Enright* for respondent.

No. 578. UNITED STATES *v.* LIPPMANN, SPIER & HAHN. November 13, 1922. Petition for a writ of certiorari to the United States Court of Customs Appeals denied because of failure to file the petition within the time prescribed by the statute. *Mr. Solicitor General Beck* and *Mr. William C. Herron* for the United States. *Mr. George J. Puckhafer* for respondent. [See *post,* 742.]

No. 611. SIMMONS HARDWARE COMPANY *v.* SOUTHERN RAILWAY COMPANY. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied because of failure to file the petition within the time prescribed by the statute. *Mr. L. L. Leonard* and *Mr. Shepard Barclay* for petitioner. *Mr. Edward C. Kramer, Mr. Bruce A. Campbell, Mr. Alex. P. Humphrey* and *Mr. Edward P. Humphrey* for respondent.

No. 641. LOUIS WEISS *v.* UNITED STATES. November 13, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied because of failure to file the petition within the time prescribed by the statute. *Mr. Solomon P. Roderick* for petitioner. No brief filed for the United States.

No. 433. NEW YORK CENTRAL RAILROAD COMPANY *v.* MIDDLEPORT GAS & ELECTRIC LIGHT COMPANY. Petition for a writ of certiorari to the Supreme Court of the State of New York. November 20, 1922. The petition for cer-

tiorari in this case was denied on the ground that it was not filed in time. Petitioner now moves for a rehearing on the ground that its petition arrived in the Clerk's office on the afternoon of the day before it was filed, in seasonable time. Without considering or deciding this question the Court has examined the petition on its merits and denies it. *Mr. Maurice C. Spratt* for petitioner. *Mr. Edward H. Letchworth* for respondent. [See *ante*, 724.]

No. 636. THEODORE ARENZ, BANKRUPT, *v.* ASTORIA SAVINGS BANK. November 20, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Alfred A. Hampson* for petitioner. No appearance for respondent.

No. 643. J. H. REEVES, TRUSTEE, ETC., *v.* MCWILLIAMS COMPANY ET AL. November 20, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. F. E. Mullinix* for petitioner. *Mr. L. C. Going* for respondents.

No. 644. OLIVER J. OLSEN ET AL. *v.* FRANK CAMPBELL ET AL. November 20, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William F. Sullivan* for petitioners. *Mr. H. W. Hutton* for respondents.

No. 645. SUE M. JERNIGAN, ADMINISTRATRIX, ETC., *v.* JAMES C. DAVIS, FEDERAL AGENT. November 20, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. Arthur Crownover* and *Mr. Floyd Estill* for petitioner. *Mr. Fitzgerald Hall* for respondent.

No. 649. JOSEPH FEIGIN *v.* UNITED STATES. November 20, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles T. Hughes* for petitioner. *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 654. ADAMS-FLANIGAN COMPANY *v.* CHARLES KLING ET AL. November 20, 1922. Petition for a writ of certiorari to the Municipal Court, City of New York, Borough of Bronx, Second District, of the State of New York, denied. *Mr. Henry E. Davis* for petitioner. *Mr. William A. Barber* for respondents.

No. 671. DON J. CASEY *v.* UNITED STATES. November 20, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Allyn Smith* for petitioner. No brief filed for the United States.

No. 675. CLARENCE E. REED ET AL. *v.* HUGHES TOOL COMPANY. November 20, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edward Rector* for petitioners. *Mr. Melville Church* for respondent.

No. 681. HON. GEORGE P. HARVEY, AS JUDGE, ETC., ET AL. *v.* S. SHIOJI. November 20, 1922. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands, denied. *Mr. L. Russell Alden* for petitioners. No appearance for respondent.

No. 689. JOHN HALL JONES ET AL. *v.* ELLEN H. PHINNEY TAYLOR. November 20, 1922. Petition for a writ of certiorari to the Probate Court for Plymouth County, State of Massachusetts, denied. *Mr. Robert G. Dodge* and *Mr. Harold S. Davis* for petitioners. *Mr. Roland Gray* for respondent.

No. 409. UNION STOCK YARDS COMPANY OF OMAHA, LTD., *v.* MAYHALL & NEIBLE, A COPARTNERSHIP, ET AL., ETC. Error to the Supreme Court of the State of Nebraska. November 20, 1922. Petition for a writ of certiorari herein denied, because of failure to file the petition within the time prescribed by the statute. *Mr. Norris Brown* and *Mr. Irving F. Baxter,* for plaintiff in error, in support of the petition. *Mr. Francis A. Brogan, Mr. Alfred G. Ellick* and *Mr. Anon Raymond,* for defendants in error, in opposition to the petition.

No. 590. ONEPIECE BIFOCAL LENS COMPANY *v.* HAROLD J. STEAD, DOING BUSINESS AS H. J. STEAD OPTICAL COMPANY. November 20, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied, because of failure to file the petition within the time prescribed by the statute. *Mr. V. H. Lockwood* for petitioner. *Mr. Harold P. Denison* for respondent.

No. 578. UNITED STATES *v.* LIPPMANN, SPIER & HAHN. Application for reconsideration of order denying petition for writ of certiorari to the United States Court of Customs Appeals. November 27, 1922. *Per Curiam.* The application is denied for the reason that the provision of § 195 of the Judicial Code, as amended by the Act of August 22, 1914, c. 267, 38 Stat. 703, which prescribes the

time within which application may be made to this Court for a writ of certiorari, has been amended and limited by § 6 of the Act of September 6, 1916, c. 448, 39 Stat. 726, 727. *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Hoppin* for the United States. *Mr. George J. Puckhafer* for respondent. [See *ante*, 739.]

No. 630. Robert Abeles et al. *v.* St. Louis, Iron Mountain & Southern Railway Company et al. November 27, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Clifford B. Allen* for petitioners. *Mr. Paul D. Cravath, Mr. Perry D. Trafford, Mr. Robert H. Neilson* and *Mr. Carl A. de Gersdorff* for respondents. *Mr. Jesse W. Barrett* and *Mr. Lee B. Ewing*, by leave of court, as *amici curiae*.

No. 632. P. R. Walsh Tie and Timber Company et al. *v.* Missouri Pacific Railway Company et al. November 27, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Clifford B. Allen* for petitioners. *Mr. Allen C. Orrick, Mr. Paul D. Cravath* and *Mr. Robert H. Neilson* for respondents. *Mr. Jesse W. Barrett* and *Mr. Lee B. Ewing*, by leave of court, as *amici curiae*.

No. 658. Fred Wolf et al. *v.* United States. November 27, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Donald W. Johnson* and *Mr. James M. Johnson* for petitioners. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Franklin G. Wixson* for the United States.

No. 695. ARMOUR & COMPANY *v.* LOUISVILLE PROVISION COMPANY. November 27, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George P. Fisher* and *Mr. Helm Bruce* for petitioner. *Mr. Edward P. Humphrey, Mr. Alexander P. Humphrey* and *Mr. William W. Crawford* for respondent.

No. 674. EDWARD N. MITTLE *v.* STATE OF SOUTH CAROLINA. Error to the Supreme Court of the State of South Carolina. December 4, 1922. Petition for a writ of certiorari herein denied. *Mr. Charles A. Douglas, Mr. Hugh H. Obear* and *Mr. Cole L. Blease,* for plaintiff in error, in support of the petition. *Mr. Samuel M. Wolfe,* for defendant in error, in opposition to the petition. [See *ante,* 705.]

No. 682. WAGNER ELECTRIC MANUFACTURING COMPANY *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY. December 11, 1922. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Melville Church* and *Mr. Edwin E. Huffman* for petitioner. *Mr. Paul Bakewell* and *Mr. John C. Kerr* for respondent.

No. 708. TOM REED GOLD MINES COMPANY *v.* UNITED EASTERN MINING COMPANY. December 11, 1922. Petition for a writ of certiorari to the Supreme Court of the State of Arizona denied. *Mr. William E. Colby* for petitioner. *Mr. John P. Gray* for respondent.

No. 709. UNION TRUST & SAVINGS BANK, AS TRUSTEE, ETC., ET AL. *v.* SOUTHERN TRACTION COMPANY OF ILLINOIS ET AL. December 11, 1922. Petition for a writ of cer-

tiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Hiram T. Gilbert, Mr. John C. Slade* and *Mr. Walter Bachrach* for petitioners. *Mr. William Beye, Mr. Edward C. Kramer, Mr. Bruce A. Campbell* and *Mr. George B. Logan* for respondents.

No. 603. Board of Levee Commissioners of the Orleans Levee District *v.* William H. Ward. January 2, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. Julius Henry Cohen* and *Mr. Arthur McGuirk* for petitioner. *Mr. Benjamin T. Waldo* and *Mr. Walter L. Gleason* for respondent.

No. 676. Fred P. Violette *v.* James A. Walsh, Collector, etc. Appeal from the Circuit Court of Appeals for the Ninth Circuit. January 2, 1923. Petition for a writ of certiorari herein denied. *Mr. Joseph W. Cox* and *Mr. Charles A. Russell,* for appellant, in support of the petition. *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for appellee, in opposition to the petition.

No. 691. Eddie Harrison et al. *v.* Dick Harrison. January 2, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Wesley E. Disney* and *Mr. John M. Wheeler* for petitioners. No appearance for respondent.

No. 712. Edgar-Morgan Company *v.* Alfocorn Milling Company. January 2, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Max W. Zabel, Mr. Arthur E. Wallace* and *Mr. Joseph H. Milans* for petitioner. *Mr. H. G. Cook* for respondent.

No. 719. K. W. IGNITION COMPANY ET AL. *v.* TEMCO ELECTRIC MOTOR COMPANY. January 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Walter F. Murray* for petitioners. *Mr. H. A. Toulmin* and *Mr. H. A. Toulmin, Jr.*, for respondent.

No. 721. EDWARD J. ADER *v.* UNITED STATES. January 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James Hamilton Lewis, Mr. Thomas B. Felder, Mr. Edward Maher* and *Mr. Jacob G. Grossberg* for petitioner. No brief filed for the United States.

No. 722. GOLDIE A. SKOLNIK *v.* UNITED STATES. January 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James Hamilton Lewis, Mr. Thomas B. Felder, Mr. Edward Maher* and *Mr. Jacob G. Grossberg* for petitioner. No brief filed for the United States.

No. 723. VIRGINIA RAILWAY & POWER COMPANY ET AL. *v.* CHARLES HALL DAVIS. January 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Samuel Seabury, Mr. E. Randolph Williams* and *Mr. Thomas B. Gay* for petitioners. *Mr. James Mann* for respondent.

No. 726. L. V. ORSINGER *v.* CONSOLIDATED FLOUR MILLS COMPANY. January 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Michael F. Gallagher* for petitioner. *Mr. Edward Osgood Brown, Mr. George Packard* and *Mr. Cecil Barnes* for respondent.

No. 735. SECURITY AUTO LOCK COMPANY ET AL. *v.* PERRY AUTO LOCK COMPANY. January 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles C. Bulkley* for petitioners. *Mr. Edward Rector* and *Mr. Glen E. Smith* for respondent.

No. 745. ATLANTIC TRANSPORT COMPANY, LIMITED, *v.* H. C. JONES & COMPANY, INC. January 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Van Vechten Veeder* and *Mr. Roscoe H. Hupper* for petitioner. No appearance for respondent.

No. 766. ANTONIO ABELLA ET AL. *v.* PEDRO UNSON. January 8, 1923. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Gabriel La O* for petitioners. *Mr. Adam C. Carson* for respondent.

No. 768. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* MCWILLIAMS BROS., INC. January 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. A. Howard Neely* and *Mr. Chauncey I. Clark* for petitioner. *Mr. Leo J. Curren, Mr. Henry M. Earle* and *Mr. Joseph P. Nolan* for respondent.

No. 705. UNITED STATES RAILWAY ADMINISTRATION ET AL. *v.* FANNIE SLATINKA, ADMINISTRATRIX, ETC. January 8, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied because the case abates for failure to substitute successor of petitioner

within one year after petitioner vacated office. *Mr. Thomas P. Littlepage* and *Mr. J. G. Gamble* for petitioners. *Mr. William Chamberlain* for respondent.

No. 730. W. K. Ephraim et al. *v.* Nevada and California Land and Live Stock Company et al. January 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied for failure to file the petition within the time prescribed by the statute. *Mr. Charles J. Kappler* for petitioners. *Mr. Edward Hohfeld* for respondents.

No. 720. Mishawaka Woolen Manufacturing Company *v.* Federal Trade Commission. January 8, 1923. *Per Curiam.* The petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit is denied. The Solicitor General, in his brief for the Federal Trade Commission, concedes that the order affirmed by the Circuit Court of Appeals is broader than the decision in *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 455, which the Circuit Court of Appeals followed in dismissing the petition for the Woolen Manufacturing Co. The Court denies the application for writ of certiorari herein, assuming that the Federal Trade Commission will modify its order accordingly, and without prejudice to an application for that purpose by the petitioner. *Mr. Henry E. Bodman* for petitioner. *Mr. Solicitor General Beck* and *Mr. W. H. Fuller* for respondent.

No. 746. F. E. Markell *v.* D. M. Hertzog et al. January 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank Davis, Jr.*, and *Mr. E. C. Higbee* for petitioner. *Mr. A. Leo Weil* for respondents.

No. 748. G. R. Baker et al. *v.* United States. January 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. L. Miller* for petitioners. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Harry S. Ridgely* for the United States.

No. 752. Marlboro Cotton Mills *v.* Firestone Tire & Rubber Company et al. January 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry E. Davis* for petitioner. *Mr. D. W. Robinson* and *Mr. Amos C. Miller* for respondents.

No. 753. M. D. Wandell *v.* New Haven Trap Rock Company. January 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. T. Catesby Jones* and *Mr. C. Andrade, Jr.*, for petitioner. *Mr. Pierre M. Brown* and *Mr. George E. Hall* for respondent.

No. 757. Pangborn Corporation *v.* W. W. Sly Manufacturing Company. January 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. William F. Hall* and *Mr. Melville Church* for petitioner. *Mr. Charles E. Brock* for respondent.

No. 761. Addie B. Myers *v.* Lena M. Vayette et al. January 15, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Mr. Morse Ives* for petitioner. *Mr. Lester H. Strawn* for respondents.

No. 780. ALEXANDER MCDOUGALL *v.* OLIVER IRON MINING COMPANY. January 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Merritt Starr* and *Mr. Horace G. Stone* for petitioner. *Mr. Frederick P. Fish, Mr. D. Anthony Usina* and *Mr. Henry M. Huxley* for respondent.

No. 700. JOHN ENDICOTT ET AL. *v.* BOARD OF ASSESSORS OF THE CITY OF DETROIT ET AL. January 22, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. P. J. M. Hally* for petitioners. *Mr. Walter Barlow* and *Mr. Clarence E. Wilcox* for respondents.

No. 733. WILLIAM FILENE'S SONS COMPANY *v.* GILCHRIST COMPANY. January 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. George R. Nutter* and *Mr. Jacob J. Kaplan* for petitioner. *Mr. Alexander Lincoln* and *Mr. Sherman L. Whipple* for respondent.

No. 765. NEHALEM STEAMSHIP COMPANY, CLAIMANT, ETC., ET AL. *v.* AKTIESELSKABET AGGI ET AL. January 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George W. Wickersham, Mr. Ira A. Campbell, Mr. Edward J. McCutchen, Mr. W. S. Barrett* and *Mr. Farnham P. Griffiths* for petitioners. *Mr. E. B. McClanahan, Mr. S. Hasket Derby* and *Mr. William Denman* for principal respondents. *Mr. Louis T. Hengstler, Mr. Stanley Moore* and *Mr. F. W. Dorr* for W. R. Grace & Co., third party respondent.

No. 773. DOLLY MCCALMONT, ADMINISTRATRIX, ETC., *v.* PENNSYLVANIA RAILROAD COMPANY. January 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. David F. Anderson* for petitioner. *Mr. William B. Sanders* and *Mr. Thomas M. Kirby* for respondent

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No. 778. S. H. BENJAMIN FUEL & SUPPLY COMPANY *v.* BELL UNION COAL & MINING COMPANY. January 29, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. F. Bullitt* for petitioner. No appearance for respondent.

No. 790. EDWARD J. DONEGAN *v.* UNITED STATES. January 29, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Elijah N. Zoline* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 2, 1922, TO AND INCLUDING JANUARY 29, 1923.

Nos. 90 and 91. EDWARD J. BRUNDAGE, ATTORNEY GENERAL OF ILLINOIS, *v.* UNITED STATES ET AL. Appeals from the District Court of the United States for the Northern District of Illinois. October 3, 1922. Dismissed, per stipulation. *Mr. Edward J. Brundage, Mr. James H. Wilkinson* and *Mr. Garfield Charles* for appellant. *Mr. Solicitor General Beck* and *Mr. P. J. Farrell* for appellees.

No. 211. E. C. EDDY, AS TREASURER, ETC., ET AL. *v.* FIRST NATIONAL BANK OF FARGO. Appeal from the Circuit Court of Appeals for the Eighth Circuit. October 3, 1922. Dismissed with costs, per stipulation. *Mr. Geo. E. Wallace* and *Mr. C. L. Young* for appellants. *Mr. John F. Callahan* for appellee.

No. 254. WORLD PUBLISHING COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. October 3, 1922. Dismissed, per stipulation. *Mr. Karl K. Gartner* for appellant. *The Attorney General* for the United States.

No. 390. NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY ET AL. *v.* THOMAS E. BEARD. On petition for a writ of certiorari to the Supreme Court of the State of Mississippi. October 3, 1922. Dismissed, on motion of counsel for petitioners. *Mr. H. O'B. Cooper* for petitioners. *Mr. N. T. Currie* and *Mr. J. W. Cassedy* for respondent.

No. 525. WILLIAM S. FLEMING *v.* UNITED STATES. On petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. October 3, 1922. Dismissed, on motion of counsel for petitioner. *Mr. Andrew F. Burke* for petitioner. *The Attorney General* for the United States.

No. 28. ROYAL BAKING POWDER COMPANY *v.* GEORGE W. EMERSON, PROSECUTING ATTORNEY, ETC. Appeal from the Circuit Court of Appeals for the Eighth Circuit. October 6, 1922. Dismissed with costs, on motion of counsel for appellant. *Mr. Samuel W. Fordyce, Mr. Bennett C. Clark* and *Mr. Archibald Cox* for appellant. *Mr. James L. Hopkins* for appellee.

No. 42. GEORGE F. PONDER *v.* STATE OF GEORGIA. Error to the Court of Appeals of the State of Georgia. October 9, 1922. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Max Isaac* for plaintiff in error. *Mr. George M. Napier* for defendant in error.

No. 448. JAMES C. DAVIS, AGENT AND DIRECTOR GENERAL OF RAILROADS, *v.* HAROLD PRESTON. On petition for a writ of certiorari to the Circuit Court of Jackson County, State of Missouri. October 10, 1922. Petition dismissed with costs, on motion of counsel for petitioner. *Mr. Arthur A. Moreno* and *Mr. A. A. McLaughlin* for petitioner. *Mr. Oscar S. Hill* for respondent.

No. 53. COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA ET AL. *v.* UNITED STATES. Appeal from the Circuit Court of Appeals for the Eighth Circuit. October 12, 1922. Dismissed with costs, for want of prosecution. *Mr. S. P. Freeling, Mr. W. A. Ledbetter, Mr. H. L. Stuart, Mr. Henry E. Asp* and *Mr. Henry G. Snyder* for appellants. *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Riter* for the United States.

No. 286. STATE OF LOUISIANA ET AL *v.* J. D. O'KEEFE, RECEIVER OF THE NEW ORLEANS RAILWAY & LIGHT COMPANY ET AL. Appeal from the District Court of the United States for the Eastern District of Louisiana. October 16, 1922. Dismissed with costs, on motion of counsel for appellants. *Mr. Paul A. Sompayrac* for appellants. No appearance for appellees.

No. 65. ROBERT J. GAFFNEY ET AL. *v.* JAMES M. HOYT ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. October 16, 1922. Dismissed with costs, pursuant to the 16th Rule. *Mr. James W. Cutshaw* for appellants. *Mr. Lewis A. Stebbins, Mr. Eugene L. Tarey* and *Mr. Paul C. L'Amoreaux* for appellees.

No. 79. FRANK BRUNO *v.* GEORGE E. WILLIAMS, CRIMINAL SHERIFF, ETC. Appeal from the District Court of the United States for the Eastern District of Louisiana. October 19, 1922. Dismissed with costs, pursuant to the 18th Rule. *Mr. Donelson Caffery* for appellant. *Mr. A. V. Coco* for appellee.

No. 47. UNITED STATES *v.* WESTERN UNION TELEGRAPH COMPANY. Appeal from the Circuit Court of Appeals for the Second Circuit. October 23, 1922. Decree of Circuit Court of Appeals reversed in accordance with the stipulation filed herein; and cause remanded to the District Court of the United States for the Southern District of New York with directions to enter a decree dismissing the bill without prejudice and without costs to either party. *Mr. Solicitor General Beck* for the United States. *Mr. John Bassett Moore, Mr. Rush Taggart, Mr. Francis Raymond Stark* and *Mr. Joseph P. Cotton* for appellee.

No. 127. UNITED STATES *v.* SAMUEL KROHNBERG ET AL. Error to the District Court of the United States for the Southern District of New York. November 13, 1922. Dismissed, on motion of *Mr. Solicitor General Beck* for the United States. *Mr. John J. Curtin* for defendants in error.

No. 140. UNITED STATES *v.* CHARLES MILANESE. Error to the District Court of the United States for the Southern District of New York. November 13, 1922. Dismissed, on motion of *Mr. Solicitor General Beck* for the United States. No appearance for defendant in error.

No. 170. SALMON RIVER CANAL COMPANY, LIMITED, *v.* THOMAS SANDERSON. Error to the Supreme Court of the State of Idaho. November 13, 1922. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. James H. Richards* and *Mr. Oliver O. Haga* for plaintiff in error. *Mr. E. M. Wolfe* for defendant in error.

No. 461. CENTRAL POWER & LIGHT COMPANY *v.* TOWN OF POCAHONTAS ET AL. On petition for a writ of certiorari to the Supreme Court of the State of Arkansas. November 13, 1922. Dismissed with costs, on motion of counsel for petitioner. *Mr. Joe T. Robinson, Mr. Joseph W. House, Jr., Mr. Charles T. Coleman* and *Mr. H. L. Ponder* for petitioner. No appearance for respondents.

No. 479. ALABAMA & VICKSBURG RAILWAY COMPANY ET AL. *v.* LOUIS F. DENNIS. Error to the Supreme Court of the State of Mississippi. November 13, 1922. Dismissed, per stipulation. *Mr. J. Blanc Monroe, Mr. Monte M. Lemann, Mr. R. H. Thompson, Mr. S. L. McLaurin* and *Mr. Walter J. Suthon, Jr.,* for plaintiffs in error. *Mr. William H. Watkins* and *Mr. Marion W. Reily* for defendant in error. [See *ante,* 726.]

No. 131. AMERICAN RAILWAY EXPRESS COMPANY *v.* HANNA R. KRISTIANSON, ETC. Error to the Supreme Court of the State of South Carolina. November 24, 1922. Dismissed, per stipulation. *Mr. Robert C. Alston, Mr. Blair Foster* and *Mr. Mark Reynolds* for plaintiff in error. *Mr. L. D. Jennings* and *Mr. A. S. Harby* for defendant in error.

No. 289. ELBERT R. ROBINSON *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. November 27, 1922. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Andrew Jackson* for plaintiff in error. No appearance for defendant in error.

No. 378. UNITED STATES EX REL. WESTERN UNION TELEGRAPH COMPANY *v.* INTERSTATE COMMERCE COMMISSION. Error to the Court of Appeals of the District of Columbia. November 27, 1922. Dismissed, per stipulation. *Mr. Rush Taggart, Mr. Paul E. Lesh, Mr. Walker D. Hines* and *Mr. Francis R. Stark* for plaintiff in error. *Mr. Charles W. Needham* and *Mr. P. J. Farrell* for defendant in error.

No. 72. I. W. GEER ET AL. *v.* UNITED STATES. On a certificate from the Circuit Court of Appeals for the Third Circuit. December 11, 1922. Certificate dismissed, on motion of *Mr. Solicitor General Beck* for the United States. *Mr. W. S. Dalzell* for Geer et al.

No. 54. WEST SIDE IRRIGATING COMPANY *v.* UNITED STATES. Appeal from the Circuit Court of Appeals for the Ninth Circuit. January 2, 1923. Dismissed, per stipulation. *Mr. John P. Hartman* and *Mr. Carroll P. Graves* for appellant. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Riter* and *Mr. W. W. Dyar* for the United States.

No. 775. UNITED STATES *v.* MARK BOASBERG, ALIAS "JACK SHEEHAN." Error to the District Court of the United States for the Eastern District of Louisiana. January 2, 1923. Docketed and dismissed, on motion of counsel for defendant in error. *The Attorney General* for the United States. *Mr. H. Garland Dupre* and *Mr. D. B. H. Chaffe* for defendant in error.

No. 166. H. G. KOLLER *v.* UNITED STATES. Appeal from the District Court of the United States for the Western District of Washington. January 3, 1923. Dismissed, pursuant to the 16th Rule, on motion of *Mr. Solicitor General Beck* for the United States. *Mr. Dal V. Halverstadt* and *Mr. E. M. Farmer* for appellant.

No. 171. UNITED STATES EX REL. WORKINGMEN'S CO-OPERATIVE PUBLISHING ASSOCIATION *v.* HUBERT WORK, POSTMASTER GENERAL, ETC. Error to the Court of Appeals of the District of Columbia. January 3, 1923. Dismissed, per stipulation. *Mr. S. John Block* for plaintiff in error. *The Attorney General* for defendant in error.

No. 236. CHARLES M. WATERS *v.* HENRY W. PHILLIPS ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. January 8, 1923. Dismissed with costs, on motion of *Mr. Solicitor General Beck* for appellant. No appearance for appellees.

No. 12. EXCHANGE OIL COMPANY *v.* F. C. CARTER, AS STATE AUDITOR, ETC., ET AL. Appeal from the District Court of the United States for the Western District of Oklahoma;

No. 13. EXCHANGE OIL COMPANY *v.* F. C. CARTER, AS STATE AUDITOR, ETC.;

No. 14. EXCHANGE OIL COMPANY *v.* F. C. CARTER, AS STATE AUDITOR, ETC.; and

No. 15. EXCHANGE OIL COMPANY *v.* F. C. CARTER, AS STATE AUDITOR, ETC. Error to the District Court of the United States for the Western District of Oklahoma. January 8, 1923. Dismissed with costs, per stipulation. *Mr. William O. Beall* and *Mr. J. S. Ross* for appellant and plaintiff in error. *Mr. George F. Short* and *Mr. S. P. Freeling* for appellees and defendant in error.

No. 206. CORVALLIS CREAMERY COMPANY *v.* I. H. VAN WINKLE, ATTORNEY GENERAL, ETC., ET AL. Appeal from the District Court of the United States for the District of Oregon. January 8, 1923. Dismissed without costs to any party, per stipulation. *Mr. Thos. E. Haven* for appellant. *Mr. James G. Wilson* for appellees.

No. 612. KANSAS CITY BRIDGE COMPANY *v.* FRANK BLAKEMORE. Appeal from the District Court of the United States for the Western District of Missouri. January 8, 1923. Dismissed with costs, on motion of *Mr. Cyrus Crane* for appellant. *Mr. Oscar S. Hill* and *Mr. John H. Atwood* for appellee.

No. 215. C. E. ROY ET AL., ETC. *v.* E. F. GANAHL. Error to the District Court of the United States for the Northern District of California. January 16, 1923. Dismissed with costs, pursuant to the 16th Rule, on motion of counsel for defendant in error. *Mr. Frank D. Madison* for plaintiffs in error. *Mr. Alexander T. Vogelsang* and *Mr. Louis S. Beedy* for defendant in error.

No. 230. ABE RASKIN *v.* MERRITT W. DIXON, SHERIFF, ETC. Error to the Supreme Court of the State of Georgia. January 17, 1923. Dismissed with costs, pursuant to the 18th Rule. *Mr. A. A. Lawrence* and *Mr. Robert L. Colding* for plaintiff in error. *Mr. George M. Napier* for defendant in error.

No. 241. DAVID H. CONRAD *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. January 18, 1923. Dismissed with costs, pursuant to the 18th Rule. *Mr. Rush B. Johnson* for plaintiff in error. No appearance for defendant in error.

No. 244. SAM WINOKUR *v.* H. I. HARN, SHERIFF, ETC. Error to the Supreme Court of the State of Georgia. January 18, 1923. Dismissed with costs, pursuant to the 10th Rule. *Mr. A. A. Lawrence* for plaintiff in error. *Mr. George M. Napier* for defendant in error.

No. 247. ELMER F. ADAMS *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. January 18, 1923. Dismissed with costs, pursuant to the 10th Rule. *Mr. James J. Barbour* for plaintiff in error. No appearance for defendant in error.

No. 650. CUMBERLAND TELEPHONE & TELEGRAPH COMPANY *v.* LOUISIANA PUBLIC SERVICE COMMISSION ET AL. Appeal from the District Court of the United States for the Eastern District of Louisiana. January 19, 1923. Dismissed with costs, on motion of counsel for appellant. *Mr. J. Blanc Monroe, Mr. Monte M. Lemann, Mr. J. C. Henriques, Mr. Hunt Chipley* and *Mr. C. M. Bracelen* for appellant. *Mr. Huey P. Long* and *Mr. W. M. Barrow* for appellees. [See *ante*, pp. 212, 698.]

No. 261. JOAQUIN RAMOS FERRO ET AL. *v.* FELIX FABIAN ET AL.; and

No. 262. J. OCHOA Y HERMANO *v.* MIGUEL, LUIS, GERARDO, TERESO AND ANTONIO MARTORELL Y TORRENS. On writ of certiorari to the Circuit Court of Appeals for the First Circuit. January 22, 1923. Dismissed without costs to either party, per stipulation, on motion of counsel for petitioners. *Mr. Jose R. F. Savage* for petitioners. *Mr. George B. Hayes, Mr. Frank Antonsanti* and *Mr. Frederick S. Tyler* for respondents.

No. 272. WILLIAM F. KRELL *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. January 24, 1923. Dismissed with costs, pursuant to the 10th Rule. *Mr. Rush B. Johnson* for plaintiff in error. No appearance for defendant in error.

No. 294. REUBEN COOLEY *v.* STATE OF GEORGIA. Error to the Supreme Court of the State of Georgia. January 26, 1923. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Alex. A. Lawrence* for plaintiff in error. *Mr. George M. Napier* for defendant in error.

No. 234. WASHINGTON TERMINAL COMPANY *v.* EMMA G. CALLAHAN, ADMINISTRATRIX, ETC. Error to the Court of Appeals of the District of Columbia. January 29, 1923. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Geo. E. Hamilton* and *Mr. John J. Hamilton* for plaintiff in error. *Mr. Raymond B. Dickey* and *Mr. Daniel Thew Wright* for defendant in error.

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No. 336. THOMAS K. GLENN *v.* CITY OF ATLANTA; and

No. 340. EMPIRE COTTON OIL COMPANY *v.* CITY OF ATLANTA. Error to the Supreme Court of the State of Georgia. August 26, 1922. Dismissed pursuant to the 28th Rule. *Mr. L. Z. Rosser, Mr. Clifford L. Anderson, Mr. L. C. Hopkins, Mr. Harold Hirsch, Mr. W. D. Thomson, Mr. Jack J. Spalding* and *Mr. Hughes Spalding* for plaintiffs in error. *Mr. George M. Napier* and *Mr. Jesse M. Wood* for defendant in error.

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2. *Id. Boundary Intended,* is on and along this bank at the average level attained by waters in periods when they reach bank without overflowing it. *Id.*

3. *Id. River or Bank as Boundary.* There is a material difference between taking bank of river as boundary and taking river itself. *Id.*

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4. *Id. River Bed Includes* area kept bare of vegetation by wash of waters, though parts of it are left dry for years, but excludes lateral valleys having characteristics of relatively fast land and usually covered by upland vegetation, although temporarily overflowed by flood. *Id.*

5. *Id. Access to River; Treaty Rights.* Rights of inhabitants of Spain and United States include right of access to water at all stages, but afford no reason for regarding boundary as below bank or within river bed. *Id.*

6. *Id. Boundary Located* along southerly of two water-worn banks designated as "cut banks," which separate sand bed of river from land in its valley, on either side, overflowed at times, but having physical characteristics of upland and which has heretofore been dealt with as such by United States and Texas. *Id.*

7. *Id. Erosion, Accretion, and Avulsion.* Doctrine applies to boundary rivers, including Red River, which changes rapidly and materially in flood. *Id.*

8. *Id. Burden of Proof.* Party asserting course has changed by avulsion has burden of proving it. *Id.*

9. *Id. Evidence of Avulsive Change,* held insufficient in some instances and sufficient in others. *Id.*

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2. *Id. Hedging,*—whereby manufacturers who have to make contracts of purchase and sale in advance, secure themselves against fluctuations of market by counter contracts,—is *prima facie* lawful. *Id.*

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3. *Id. Federal Cotton Futures Act*, § 4, read in light of construction of similar language of Statute of Frauds; does not require that bought and sold notes should name principals and be signed by both brokers. *Id.*

4. *Id. Stop Orders. Evidence* of understanding between parties, *held* to justify interpreting customer's telegraphic stop order as directing sale at prices specified in order, or at next best price possible. *Id.*

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4. *Id. Freight Claims; Adjustment; Penalties.* State law requiring action on claims for loss or damage to freight within 90 days of presentation, under penalty that, otherwise, claims shall stand as liabilities in full amount and recoverable in court, sustained. *Southern Ry.* v. *Clift*..... 316

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6. *Id. Excessive Penalty.* Attorney's fee for service in trial court, and 7% interest on amount ultimately recovered, not excessive; additional fee, for service in resisting appeal by which carrier obtained reduction of excessive judgment, is unconstitutional. *Id.*

7. *Id. Initial and Connecting Carriers; Subrogation.* State law making initial liable for default of connecting carrier, is valid if former is allowed subrogation against latter, whether subrogation founded on statute, common law, or equitable considerations. *Id.*

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12. *Id. Actions Affected by Limitation.* When not affected by statute, limitation prescribed by contract applies to action which is prosecuted to judgment and is not extended by bringing of previous action. *Id.*

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5. *Id. Fraud on Commerce Clause.* Imposition of tax when coal is ready for market does not prove it an intentional fraud on commerce clause. *Id.*
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4. *Id. Rights of Public in Streets,* purchased or laid out by eminent domain, are those it has paid for. *Id.*

5. *Id. Coal Mining; Right to Remove Deposits.* Where landowner deeded surface reserving right to remove coal, subsequent state law forbidding mining so as to cause subsidence of surface, *held* to exceed police power and contrary to due process clause. *Id.*

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9. *Id. Hail Insurance; Fixing Date of.* State law binding company after 24 hours from taking of application by local agent, and requiring company, if it would decline insurance upon receipt of application, to notify applicant by telegram, does not deprive of liberty of contract or deny equal protection. *National Union Fire Ins. Co.* v. *Wanberg*..... 71

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10. *Carriers; Adjustment of Claims; Penalties.* State law requiring payment or rejection of freight claims within 90 days of presentation, under penalty that, otherwise, claims shall stand as liabilities in full amount and recoverable in court, does not violate due process. *Southern Ry.* v. *Clift*. 316

11. *Id. Attorney's Fees.* Statute requiring prompt settlement, under penalty of 7% on recovery and reasonable attorney's fee, where judgment recovered for more than amount tendered by carrier, does not deny equal protection or due process. *Chicago & N. W. Ry.* v. *Nye Schneider Fowler Co*..... 35

12. *Id.* Such statutes are judged by their application in particular case; where result is fair and reasonable, they will be sustained; *aliter* where it is arbitrary, unequal and oppressive. *Id.*

13. *Id. Excessive Penalty.* Attorney's fee for service in trial court and 7% interest on amount recovered, *held* not excessive; imposition of additional fee, for service in resisting appeal by which carrier obtained reduction of excessive judgment, *held* unconstitutional. *Id.*

14. *Id. Initial and Connecting; Subrogation.* State law making initial liable for default of connecting carrier, does not lack due process if former allowed subrogation against latter, whether subrogation founded on statute, common law, or equitable considerations. *Id.*

15. *Id. Passenger Fares; Increases.* Where vendee in consideration of sale of electric road covenanted to operate at certain fare, change in fare made by state authority in public interest under laws existing when covenant made, does not deprive vendor of property. *Ortega Co.* v. *Triay*. 103

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(4) *Equal Protection of the Laws.* See XI, 7, 9, 11–13, *supra.*

25. *Taxation; Inequality. Arbitrary Assessment* of property at true value, while other like property is assessed lower, denies equal protection. *Sioux City Bridge Co.* v. *Dakota Co.*..... 441

26. *Id. Remedies.* Assessment should be reduced to common level, since by no judicial proceeding can aggrieved owner compel reassessment of great mass of such property at true value. *Id.*

27. *Id. What Constitutes Discrimination.* Errors of judgment in fixing assessment do not support claim of discrimination; there must be intentional violation of principle of practical uniformity. *Id.*

28. *Id. Classification; Coal.* Differences between anthracite and bituminous coals in properties and uses justify state tax on one but not other. *Heisler* v. *Thomas Colliery Co.*. 245

29. *Id.* That useful products are obtained from bituminous which are not produced from anthracite, justifies policy favoring former. *Id.*

30. *Id. Commercial Competition* between these products is no reason against classifying them separately. *Id.*

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31. *Id. Railroads.* Equality clause does not require that methods of assessing and equalizing state taxes shall be same as applied to other classes of property. *Southern Ry.* v. *Watts* 519

32. *Id. Undervaluation,* as compared with valuation of other property of same class, is valid if not intentional and systematic. *Id.*

33. *Id. North Carolina Franchise Tax,* equal to 1/10% of value of each company's property within State, is not an additional property tax, and does not violate equality clause. *Id.*

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2. *United States; Taking of Private Property; Tort; Implied Contract.* Unintentional injury to bridge pier in improving navigation, *held* at most in nature of a tort, and not a taking for which damages might be recovered on theory of contract. *Keokuk Bridge Co.* v. *United States*.. 125

3. *Id.* Where taking alleged as conclusion of fact from fact that United States, after having in past discharged battery over petitioner's land, reinstalled guns with intention of so firing them, established fire control upon land and again discharged guns across it, the taking of a servitude, and an implied contract to pay, might be inferred; demurrer to petition should not have been sustained. *Portsmouth Co.* v. *United States*..... 327

4. *Id.* Where acts amount to taking, without assertion of adverse right, contract to pay implied whether thought of or not. *Id.*

5. *Id. Inventions; Contract or Option.* Proposal that, in consideration of Navy Department's building testing apparatus, claimant would give option of using method, if found advantageous, by paying so much for each pound of material dried, which was accepted and after test found unsatisfactory, *held* not a contract that Department would use method, but an option or conditional obligation subject to termination when test proved unsatisfactory. *Foley* v. *United States* 667

6. *Id. Acquiescence.* Silence and inactivity for 5 years after receiving notice that relations between parties were terminated. *Id.*

7. *Id. Modifying Obligation.* Provisions authorizing Government to change obligations of other party do not permit officials to remould contract at will, but are confined to what was fairly within contemplation of parties when contract made. *Freund* v. *United States*..... 60

8. *Id. Mail Carriage; Increased Service.* Stipulation authorizing Postmaster General to establish service to and from like offices and stations to those named in contract, to be paid for at contract rate per mile of travel, does not authorize substitution of heavier and more expensive service. *Id.*

9. *Id. Acquiescence.* Contractors performing new service under protest, *held* not to have acquiesced in change. *Id.*

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10. *Id. Quantum Meruit.* Contractor who, under duress, performs service not called for by contract, may recover reasonable value of such service and fair profit. *Id.*

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13. *Id. Delay; Misrepresentation.* Delay of Government in furnishing specifications for air-plane motors of foreign model, due to honest but mistaken belief, shared by contractor, that model was perfected and adequate specifications in existence, *held* not an actionable breach of representation. *Id.*

14. *Id. Time,* held of the essence for Government, but not for contractor. *Id.*

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2. *Id. Shareholder's Bill.* When holder of minute interest seeks to enjoin consolidation with other railroads as contrary to state law, but allegations show control complained of existed through stock ownership, and exhibit no objection by State or other shareholders, bill must show in what respects law is to be violated and that injury will result to private rights. *Id.*

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Conspiracy. See **Anti-Trust Acts**, 4–8.
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Penalty or tax; injunction. See **Equity**, 13.
Penal statutes; construction. See **Statutes**, 4, 5.

1. *Offenses Against Government; Locus; High Seas; Foreign Country; Jurisdiction.* Criminal statute dealing with acts injurious to United States and capable of perpetration without regard to locality, applies to citizens upon high seas or in foreign country. *United States* v. *Bowman*..... 94

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2. *Id. Conspiracy to Defraud; Emergency Fleet Corporation. Crim. Code,* § *35,* applies to citizens who, on high seas or in foreign country, conspired to defraud Fleet Corporation by obtaining allowance of false claim. *Id.*

3. *Id. Venue; Jud. Code,* § *41.* Citizens while in foreign country are subject to penal laws of United States passed to protect itself and its property; for infractions abroad, are triable in district where first brought. *Id.*

4. *Retroactive Penal Law.* Act of Congress cannot make past conduct criminal by purporting to construe former act as having been in force at time when this Court held it was repealed. *United States* v. *Stafoff*..... 477

5. *Id. Indictment; Effect of Repeal.* Conviction upon indictment under R. S. §§ 3258, 3281, 3282, repealed, cannot be sustained under Prohibition Act by spelling out acts violative of that statute from the indictment. *Id.*

See also **Intoxicating Liquors,** 1–3.

6. *Indictment; Exceptions.* Indictment based on general statutory provision defining offense need not negative matter of an exception made by proviso or other distinct clause, whether in same section of elsewhere. *McKelvey* v. *United States*..... 353

7. *Public Lands; Obstructing Free Passage.* Act of Feb. 25, 1885, § 3, applies to transient acts of force and intimidation as well as to continuing obstacles such as a fence or armed patrol. *Id.*

8. *Id. Agents.* Punishment for offenses defined by act not confined by § 4 to persons acting as owner or agent. *Id.*

9. *Id. Power of Congress* to punish intentional obstruction to free passage over public lands within State, accomplished by acts of violence, without interfering with State power to punish acts of violence as such. *Id.*

10. *Narcotics; Revenue Act 1919.* Criminal liability as purchaser, not confined to class who must register and pay special tax; so construed, act is within revenue power. *United States* v. *Wong Sing*..... 18

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Conversion; Good Faith; Mistake of Law. Damages, recoverable by land owner, for mussels taken by trespass but in belief of right due to mistaken interpretation of state game laws, limited to value at time of conversion. *McKee* v. *Gratz*..... 127

DEEDS. See **Mines and Mining**, 5; **Public Lands**, VI; **Taxation**, I, 6, 7; **Waters**, 8–14.

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DIVERSE CITIZENSHIP. See **Constitutional Law**, IV; **Jurisdiction**, I, 5; V, 3–15.

DRUGS. See **Criminal Law**, 10.

DUE PROCESS. See **Constitutional Law.**

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United States; Land Patents; Fraud; Cancelation; Damages. Where Government sues to annul patents for fraud, and persists in suit after defendant has pleaded statute of limitations, and plea sustained and bill dismissed, it cannot afterwards sue at law for damages for fraud. *United States* v. *Oregon Lumber Co*..... 290

EMERGENCY FLEET CORPORATION. See **Criminal Law,** 2.

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1. *Municipalities; Contract Impeding Exercise.* Power of eminent domain cannot be contracted away; contract of that kind not within protection of Federal Constitution. *Galveston Wharf Co.* v. *Galveston*..... 473

See also **Jurisdiction,** III, 5.

2. *Public Streets; Rights Acquired.* Rights of public in street, purchased or laid out by eminent domain, are those it has paid for. *Pennsylvania Coal Co.* v. *Mahon*..... 393

3. *Railroads; Federal Control Act.* Government operates leased railroad not as lessee, but under right in nature of eminent domain. *North Carolina R. R.* v. *Lee*..... 16

EMPLOYER AND EMPLOYEE. See **Employers' Liability Act; Officers.**

EMPLOYERS' LIABILITY ACT:

1. *Limitations; New Action; Amendment.* Where facts alleged constitute wrong either under state law or federal act, according to nature of employment, an amendment alleging interstate employment does not introduce new action, and is allowable after 2 year limitation of federal act has run. *New York Cent. R. R.* v. *Kinney*..... 340

2. *Injury by Co-Employee.* Railroad not liable for injury from wanton, wilful act of employee, out of course of employment. *Davis* v. *Green*..... 349

3. *Id. Interstate Commerce; Evidence.* Where case tried upon warranted assumption that parties were engaged in interstate commerce, defendant cannot be deprived on review of rights under federal act, upon ground that such employment not adequately proved. *Id.*

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** XI (4).

EQUITY. See **Judgments**, 4, 6. Page.
Pleading; construction by state court. See **Jurisdiction**, III, 19.
Equitable and legal remedies. See **Election of Remedies.**
Injunction. See 13–17, *infra;* **Anti-Trust Acts**, 1; **Jurisdiction**, I, 3–5, 9; III, 19; **Waters**, 2.
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1. *Master. Findings* of fact, made after seeing and hearing witnesses, and supported by evidence, accepted by this court. *Mason* v. *United States*..... 545

2. *Actions at Law; Equitable Defenses; Jud. Code, § 274b; Interpleader.* Where defendant, sued in District Court for money had and received, answers it is stakeholder, offers to pay into court, and prays other claimants be made parties, and that defendant be discharged, proceeding becomes an equitable one—an interpleader. *Liberty Oil Co.* v. *Condon Natl. Bank* 235

3. *Id. Transfer to Equity Side.* While not expressly required by Equity Rule 22 or by statute, there is authority (Jud. Code, §§ 274b, 274a) to transfer such case to equity side; failure to order transfer does not deprive suit of equitable character. *Id.*

4. *Id. Review; Appeal or Error.* Jud. Code, §§ 274b and 274a, although not creating one form of civil action, permit changes from law to equity, and *vice versa. Id.*

5. *Id.* Where action at law is converted into interpleader, it is to be treated, by trial and appellate courts, as proceeding in equity; issue is triable by court; judgment reviewable as in equity. *Id.*

6. *Id. Judgment of Appellate Court; Jud. Code, § 274b.* Whether review sought by writ of error or appeal; appellate court may render such judgment upon record as law and justice require. *Id.*

7. *Id. Trial of Equitable Issues First; Jury.* Where equitable defense is interposed to action at law, equitable issue should first be disposed of; if issue at law remains, it is triable to jury. *Id.*

See also **Constitutional Law**, X.

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8. *Reversal of Judgment on Pleadings; Hearing on Issues in Lower Court.* Where plaintiff in equity successfully moves for judgment on pleadings, reserving right to adduce evidence on issues of mixed law and fact, decree of reversal should accord plaintiff that opportunity and not dismiss bill. *Wichita R. R.* v. *Public Util. Comm*..... 48

9. *Supplemental Bill.* Office is to introduce matters occurring after filing of original bill, or not then known to plaintiff (Equity Rule 34); but not to shift right in which plaintiff sues or change character of suit. *General Inv. Co.* v. *Lake Shore Ry*..... 261

10. *Id. Leave to File,* addressed to sound discretion of court. *Id.*

11. *Cancelation; Guaranty; Adequate Legal Remedy.* In suit to cancel written guaranty for fraud, defense that plaintiff has adequate remedy at law by defending actions by defendant on guaranty, is waived by defendant where, without insisting upon it, he introduces proof, under counterclaim for amount of guaranty, putting instrument in evidence. *American Mills Co.* v. *American Surety Co*..... 360

12. *Answer; Counterclaim. Equity Rule 30,* requiring answer to state any counterclaim arising out of transaction which is subject matter of suit, applies only to equitable, not legal, claims. *Id.*

13. *Injunction; Unconstitutional Tax; R. S. § 3224.* Penalties and so-called taxes for violations of Prohibition Act cannot be imposed and summarily enforced by distraint of property, without notice and hearing; § 3224 does not preclude injunctive relief against such unlawful action. *Regal Drug Co.* v. *Wardell*..... 386

14. *Id. Corporate Consolidation; Indispensable Parties.* In suit by shareholder to enjoin execution of consolidation agreement alleged to be unlawful, which was subject to ratification by shareholders, one of corporations which held shares of other is indispensable party to so much of bill as sought to enjoin it from voting them and to enjoin other from permitting it to do so, but not as to so much as sought to enjoin other from consummating consolidation. *General Inv. Co.* v. *Lake Shore Ry*..... 261

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15. *Id. Bill by Shareholder.* When holder of minute interest seeks to enjoin consolidation with other railroads as contrary to state law, but allegations show control complained of existed throrgh stock ownership, and exhibit no objection by State or other shareholders, bill must show in what respects law is about to be violated and that injury will result to his private rights. *Id.*

16. *Id. Trespass. Local Rule of Damages,* in cases of conversion, is binding on federal courts, sitting in State, in suits in equity involving title to land there situate and seeking to restrain continuing trespasses upon it, in which damages for conversion are claimed as incident to equitable relief. *Mason* v. *United States*..... 545

17. *Id. Federal Equity Jurisdiction,* when not impaired by enforcing state statutory rule of damages in federal court. *Id.*

18. *Conformity Acts.* Provision that laws of States shall be rules of decision in trials at common law in federal courts, does not by implication exclude such laws as rules of decision in equity suits. *Id.*

EQUITY RULES. See **Equity**, 3, 9, 12; **Jurisdiction**, V, 18.

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ESTOPPEL. See **Election of Remedies**; **Interstate Commerce Acts**, I, 6.

1. *Assertion of Constitutional Right; Sewer Districts; Benefits.* Property owner who accepts benefits is estopped from maintaining suit in which, upon ground that manner of constituting district and apportioning cost infringed constitutional rights, he seeks to cancel tax bill issued against his property. *St. Louis Co.* v. *Prendergast Co*..... 469

2. *United States; Existence of Survey.* United States not estopped to question existence of survey by statements in correspondence by officials of Land Department. *Jeems Bayou Club* v. *United States*..... 561

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1. *Burden of Proof,* is one thing, and necessity of producing evidence to meet that already produced another. *Hill* v. *Smith* 592

2. *Id. Federal Question.* Question of burden of proof may amount to federal question, when intimately involving substantive rights under federal statute. *Id.*

3. *Id. Avulsion.* Party asserting course of river has changed by avulsion, has burden of proving it. *Oklahoma* v. *Texas* 606

4. *Sufficiency.* Evidence of avulsive change *held* insufficient in some instances and sufficient in others. *Id.*

5. *Proof under Counterclaim; Waiver of Defense of Adequate Legal Remedy.* In suit to cancel written guaranty for fraud, defense that plaintiff has adequate remedy at law by defending actions by defendant on guaranty, is waived by defendant where, without insisting upon it, he introduces proof, under counterclaim for amount of guaranty, putting instrument in evidence. *American Mills Co.* v. *American Surety Co* 360

6. *Evidence of Understanding Between Broker and Customer, held* to justify interpreting customer's telegraphic stop order as directing sale at prices specified in order, or at next best price possible. *Browne* v. *Thorn*. 137

EXCESS PROFITS. See **Taxation**, I, 5.

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Injunction; state water appropriation. See **Waters**, 2.
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Id. Court of Claims. See *id.*, 7.
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GAME:

1. *Title; State Regulation.* Missouri law declaring title to birds, game and fish shall be in the State, speaks only in aid of State's power of regulation, leaving land owner's property in them otherwise unaffected. *McKee* v. *Gratz*..... 127

2. *Id. Live Mussels,* having fixed habitat in bottom of stream, are in possession of owner of land, as are mussel shells piled on bank. *Id.*

3. *Id.* Live mussels in stream are not part of realty, within Missouri statute allowing triple damages for digging and carrying away part of realty. *Id.*

4. *Id. Conversion.* Such possession will support recovery of damages for conversion by trespasser. *Id.*

5. *Id. Implied License; Custom.* License to take mussels from uninclosed places implied from custom,—more readily where statutory prohibitions are limited to enclosed land, private ponds, etc. *Id.*

6. *Id. Questions for Jury. Existence of Custom and License,* and whether it extends beyond occasional uses to systematic extraction of mussels in large quantities for commercial use, *held* for jury. *Id.*

7. *Id. Damages,* by land owner, for mussels taken by trespass but in belief of right due to mistaken interpretation of state game laws, limited to value at time of conversion. *Id.*

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1. *Rate Increases; Administrative Findings; Kansas Utility Law.* Increase over lower contract rates not permissible in absence of finding by Commission, after hearing and investigation, that existing rates are unreasonable. *Wichita R. R.* v. *Public Util. Comm*..... 48

2. *Id. Presumption.* Such finding not supplied by inference and reference to averments of petition invoking action of Commission. *Id.*

GRAZING. See **Lease.**

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INDIANS. See **Lease.**

1. *Dawes Commission. Enrollment,* of one as Creek Indian alive on Apr. 1, 1899, amounts, when approved by Secretary of Interior, to judgment in adversary proceeding, establishing existence of individual and right to membership. *United States* v. *Atkins*..... 220

2. *Id. Fraud and Mistake; Cancelation; Collateral Attack.* Action of Commission not subject to attack by United States alleging person enrolled never existed and that enrollment was procured by fraud and resulted from mistake of law and fact. *Id.*

3. *Osage Reservation; Boundary; Arkansas River.* Where act of Congress establishing reservation described west boundary as "the main channel," and deed to United States for Osages by Cherokees described land by townships "on the left bank," deed is to be interpreted in conformity with act; act carried title to land in river bed out to main channel. *Brewer Oil Co.* v. *United States*..... 77

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4. *Id. Evidence; Navigability.* Findings of lower courts that Arkansas River along Osage Reservation in Oklahoma is not navigable, accepted. *Id.*

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Proceedings in state courts. See **Jurisdiction**, I, 3–5.

Unconstitutional tax. See **Equity**, 13.

Preliminary injunction. See **Jurisdiction**, III, 7, 8; V, 17–19; **Trade-Marks.**

INSURANCE. See **Taxation**, II, 28.

1. *Hail; When Policy in Force.* North Dakota law binding company after 24 hours from taking of application by local agent, and requiring company, if it would decline insurance upon receipt of application, to notify applicant by telegram, does not deprive of liberty of contract or deny equal protection. *National Union Fire Ins. Co.* v. *Wanberg*..... 71

2. *Id. Classification; Reasons.* Public interest arising from sudden and localized losses by hail, high premium rate, etc., justify special legislative treatment; foreign corporation may not complain that time requirements bear more heavily upon foreign than local companies. *Id.*

3. *Id.* Statute being valid, applicant's agreement that his application shall not take effect until received and accepted at company's agency, is void. *Id.*

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Logging; Temporary Interruption of Interstate Journey. Floating logs, under owner's control, which, in course of continuous interstate journey, are temporarily detained because of high water, *held* in interstate commerce. *Champlain Realty Co.* v. *Brattleboro*..... 366

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I. Shipper, Passenger and Carrier. See II, 2–5, *infra.*
1. *Hepburn Act; Free Passes.* Congress took over subject to exclusion of state laws, not only as to what passes may be issued and used, but also as to their limitations, conditions and effect upon rights and responsibilities of passenger and carrier. *Kansas City So. Ry.* v. *Van Zant*..... 459

2. *Id. Assumption of Risk.* Condition in pass issued under Hepburn Act that user assumes all risk of personal injury, is valid. *Id.*

3. *Express Receipts.* Stipulation not rendered unlawful by presence of others which are so, but which are separable and inapplicable to shipment in question. *American Ry. Express Co.* v. *Lindenberg*..... 584

4. *Id. Declared Value; Signature of Shipper.* Cummins Amendment, allowing carrier, when authorized, to establish rates dependent upon value declared in writing by shipper or agreed upon in writing as released value, does not require signature of shipper. *Id.*

5. *Id.* Shipper, by receiving and acting upon receipt, for interstate shipment, signed only by carrier, assents to its terms, and it thereby becomes written agreement of parties. *Id.*

6. *Id. Limitation of Liability; Estoppel.* Where terms of receipt and carrier's schedules show charge was based upon specified valuation, by which carrier's liability was to be limited, shipper is presumed to have known this, and is estopped from asserting higher value. *Id.*

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7. *Interstate Character of Shipment.* Depends upon essential character of movement; not necessarily determined by contract between shipper and carrier. *Balt. & Ohio S. W. R. R.* v. *Settle* 166

8. *Id.* Neither through billing, uninterrupted movement, continuous possession by carrier nor unbroken bulk, (though common incidents) is essential of interstate shipment; their presence or absence may be evidence of intention. *Id.*

9. *Id. Combination of Interstate and Local Rates.* Where shipper bills goods from one State to point in another and after delivery reships to another point in second State on local bills, intending throughout to move them to this destination and interrupting movement only to take advantage of local rate, his intention determines, as matter of law, essential nature of entire movement as one in interstate commerce. *Id.*

10. *Id. Discrimination.* In such case, through interstate rate is the only lawful rate; misuse of intermediate rates is contrary to Commerce Act. *Id.*

11. *Anti-Trust Act; Rates.* Legality determined by Commerce Act; fact that rate results from conspiracy in violation of Anti-Trust Act does not necessarily render it illegal. *Keogh* v. *Chicago & N. W. Ry* 156

12. *Id. Combination of Carriers to Fix Rates,* may be illegal under Anti-Trust Act, even though rates are reasonable and approved by Commission. *Id.*

13. *Id. Remedies of Private Shipper. Triple Damages* § 7. Not recoverable by shipper, on ground that he lost benefit of rates still lower which, but for conspiracy, he would have enjoyed. *Id.*

14. *Id. Commerce Act,* gives remedy against discriminatory rates; Congress did not intend further remedy under § 7, Sherman Act, and *a fortiori* none where rates fixed by conspiracy were found legal by Commission. *Id.*

15. *Id. Illegal Preference.* Legal right of shipper respecting rates is measured by published tariff; to permit higher recovery under § 7 would give shipper illegal preference. *Id.*

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16. *Id. Evidence of Non-Discriminatory Character.* Recovery would depend on shipper's proving lower rates would have been non-discriminatory—a question which must first be submitted to Commission, yet which is not within its cognizance, because hypothetical. *Id.*

17. *Id. Damages* to shipper from higher rates could not be proved by facts from which their existence and amount were logically and legally inferable, but are purely speculative. *Id.*

II. **Proceedings and Powers of Commission.** See I, 12–16, *supra.*

1. *Judicial Review; Decision of Merits. Mandamus* will not lie to compel Commission to set aside decision upon merits and decide matter in another, specified way. *Interstate Com. Comm.* v. *Waste Merchants Assn*..... 32

2. *Approval of Rates; Effect.* Commission's approval of rates as reasonable and non-discriminatory fixes their character as such in relation to shipper who took part in proceedings. *Keogh* v. *Chicago & N. W. Ry*..... 156

3. *Cummins Amendment; Rates; Declared Value.* Where Commission authorized companies to maintain express rates depending upon declared or agreed values and authorized new form of receipt, and thereafter a company not party to proceeding published and filed tariff containing the new receipt and put tariff in effect, presumed that action of company was authorized by Commission. *American Ry. Express Co.* v. *Lindenberg*..... 584

4. *Id. Signature of Shipper.* Amendment allowing carriers, when authorized, to establish rates dependent upon value declared in writing by shipper or agreed upon in writing as released value, does not require signature of shipper. *Id.*

5. *Limitations; Bill of Lading. Finding of Commission* that stipulation that actions for loss, damage or delay be instituted within 2 years is unreasonable, *held* not binding in particular case. *Leigh Ellis & Co.* v. *Davis*..... 682

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1. *Power of Congress,* to tax prohibited beverages. *United States* v. *Stafoff* 477

2. *Prohibition Act; Revenue Laws; Penal Provisions; Repeal.* As applied to criminal prosecutions for carrying on business without having paid special tax, for keeping unregistered still, for distilling without having given bond, and for making mash in unauthorized distillery—R. S. §§ 3242, 3258, 3281, 3283, respectively, were repealed by Prohibition Act; these laws were revived by Act of 1921 as to conduct subsequent to its enactment. *Id.*

3. *Id. Indictment; Effect of Repeal.* Conviction upon indictment under R. S. §§ 3258, 3281, 3282, repealed, cannot be sustained under Prohibition Act by spelling out acts violative of that statute from the indictment. *Id.*

See also **Criminal Law**, 4, 5.

4. *Id. Penalties* and so-called taxes for violations cannot be imposed and summarily enforced by distraint of property, without notice and hearing. *Regal Drug Co.* v. *Wardell* 386

5. *Id. Injunction, R. S. § 3224,* does not preclude injunctive relief against such unlawful action. *Id.*

6. *Id. Manufacture; Transporting and Selling; Prosecution Under State and Federal Law.* Conviction in state court under state law, does not bar prosecution in federal court under National Prohibition Law for same acts. *United States* v. *Lanza* 377

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8. *Id. Clayton Act, § 12,* respecting venue in suits under Anti-Trust Acts, like Jud. Code, § 51, does not affect original jurisdiction or District Courts, but allows defendant personal privilege which he may waive. *Id.*

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Damages. See **Admiralty,** 3, 4; **Anti-Trust Acts,** 5, 8–11; **Carriers,** 4, 11, 13; **Contracts,** 2, 10, 12; **Election of Remedies; Game; Interstate Commerce Acts,** I, 4–6, 13–17; **Lease,** 2; **Mines and Mining,** 2–4; **Party Walls,** 5.
Equitable defenses; trial of, in actions at law. See **Equity,** 2–7; also **Constitutional Law,** X.
Federal question. See **Estoppel,** 1; **Jurisdiction,** III, 4, 5, 12–17; V, 3; VI, 1.
Final judgment. See **Jurisdiction,** III, 1, 6, 21.

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Injunction. See **Anti-Trust Acts**, 1; **Equity**, 13–17; **Jurisdiction**, I, 3–5, 9; III, 7, 8, 19; V, 17–19; **Trade-Marks**; **Waters**, 2.

Interpleader. See **Equity**, 2–7.

Intervention. See **Jurisdiction**, V, 4.

Local law. See **Carriers**, 9; **Constitutional Law**, XI, 1; **Jurisdiction**, II, 5; III (4); V, 3; **Mines and Mining**, 3; **Procedure**, II; **Waters**, 3, 13, 14.

Presumption. See **Admiralty**, 5, 6; **Gas Companies**, 2; **Interstate Commerce Acts**, I, 6; **Party Walls**, 3.

Removal. See **Jurisdiction**, II, 1, 2; V, 9–15.

Rules. See **Equity**, 3, 9, 12; **Jurisdiction**, V, 18; and VI, 4, *infra*.

Substitution. See **Parties**, 2.

Supersedeas. See **Jurisdiction**, III, 7, 8.

Venue. See *id.*, V, 6–16.

Waiver. See *id.*, II, 2; V, 6–8; **Constitutional Law**, VIII, 2; **Equity**, 11.

I. **Original Cases.**

Injunction. Modified Final Decree enjoining Colorado and its officers from taking under irrigation appropriation more than specified amount of water. *Wyoming* v. *Colorado*.... 1

II. **Conformity Acts.**

1. *Application in Equity.* Provision that laws of States shall be rules of decision in trials at common law in federal courts, does not by implication exclude such laws as rules of decision in equity suits. *Mason* v. *United States*..... 545

2. *Local Rule of Damages,* in cases of conversion, is binding on federal courts, sitting in State, in suits in equity involving title to land there situate and seeking to restrain continuing trespasses upon it, in which damages for conversion are claimed as incident to equitable relief. *Id.*

3. *Id. Enforcement* of such statute in equity suits does not impair equity jurisdiction of federal courts. *Id.*

III. **Moot Case.**

Following State Construction. Where state court construed bill as standing for further relief after particular tax, sought to be enjoined, had been paid, this Court will accept its view that payment did not render litigation moot. *Boston* v. *Jackson* 309

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IV. **Rehearing.**

Effect on Finality of Judgment. State law declaring "either party" may file petition for rehearing within stated time after judgment does not refer to successful party and does not defer finality of judgment for purposes of review by adversary. *Southern Ry.* v. *Clift*..... 316

V. **Transfer of Causes.**

Erroneous Appeal; Act Sept. 14, 1922. Case brought up from District Court upon mistaken assumption that it presents substantial constitutional question, but which involves other questions within jurisdiction of Court of Appeals, transferred to latter court; act construed liberally. *Heitler* v. *United States*..... 438

See **Statutes**, 8.

VI. **Scope of Review and Disposition of Case.** See III, *supra.* Federal Trade Commission; findings, review of. See **Unfair Competition**, 1–3.

1. *Deciding All Questions,* state and federal, where jurisdiction of District Court arises from diverse citizenship. *Wichita R. R.* v. *Public Util. Comm*..... 48

2. *Appellate Court; Disregarding Technical Errors; Jud. Code, § 269.* Appellate courts are to give judgment without regard to technical errors, defects, or exceptions, not affecting substantial rights of parties. *Liberty Oil Co.* v. *Condon Natl. Bank*..... 235

3. *Id. Jud. Code, § 274b.* Whether review sought by writ of error or appeal, appellate court may render such judgment upon record as law and justice require. *Id.*

4. *Motion to Affirm; Frivolous Questions; Rule 6, Par. 5.* Judgment affirmed on motion when, in view of previous decisions, questions presented are wanting in substance. *Boston* v. *Jackson*..... 309

5. *Decree of Dismissal* of bill for want of jurisdiction should be without prejudice. *General Inv. Co.* v. *Lake Shore Ry.*. 261

6. *Findings; Lower Courts; Navigability.* Findings of lower courts that Arkansas River, along Osage Reservation in Oklahoma, is not and never has been navigable, accepted. *Brewer Oil Co.* v. *United States*..... 77

7. *Id. Court of Claims* upon evidence, not reëxamined by this Court. *Keokuk Bridge Co.* v. *United States*..... 125

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8. *Id. Master.* Specific finding of fact, after seeing and hearing witnesses, and supported by evidence, accepted by this Court. *Mason* v. *United States*..... 545

9. *Reversal of Judgment on Pleadings; Hearing on Issues by Lower Court.* Where plaintiff in equity successfully moves District Court for judgment on pleadings, reserving right to adduce evidence on issues of mixed law and fact, decree of reversal by Court of Appeals should accord plaintiff that opportunity and not dismiss bill. *Wichita R. R.* v. *Pub. Util. Comm*..... 48

10. *Effect of Decision on First Appeal.* Where decree of District Court dismissing bill was affirmed by Court of Appeals as to part of bill but as to remainder was reversed upon ground that, as to that part, dismissal was erroneously based on defect of parties, upon return of case, other objections to part not considered on appeal, could be considered by District Court, and by Court of Appeals on second appeal. *General Inv. Co.* v. *Lake Shore Ry*..... 261

11. *Local Law; State Construction; Substitution of Parties.* Order of State Supreme Court substituting successor of state official, accepted as conclusive determination that state law authorized substitution. *Boston* v. *Jackson*..... 309

PROHIBITION ACT. See **Constitutional Law,** XII; **Intoxicating Liquors.**

PUBLIC LANDS. See **Constitutional Law,** VI; **Mines and Mining; Waters,** 3, 8–14.

I. Obstructing Passage Over.

1. *Act Feb. 25, 1885,* § *3,* applies to transient acts of force and intimidation as well as continuing obstacles such as a fence or armed patrol. *McKelvey* v. *United States*..... 353

2. *Id. Agent or Owner.* Punishment for offenses defined by act is not confined by § 4 to persons acting as owner or agent. *Id.*

3. *Id. Power of Congress* to punish intentional obstruction to free passage over public lands within State, accomplished by acts of violence, without interfering with State power to punish acts of violence as such. *Id.*

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II. **Homesteads.**

1. *Patent; When Issued; Act Mar. 3, 1891.* Limitation in § 7, entitling to patent 2 years after issuance of receiver's receipt upon final entry, begins to run when homesteader submits final proofs, pays fees and obtains receiver's receipt, although proofs not passed upon and no register's certificate issued. *Stockley* v. *United States*..... 532

2. *Id. Departmental Practice.* Meaning of statute not altered to suit practice of Land Department whereby examination of proofs and issuance of register's certificate are postponed when receiver's receipt issues. *Id.*

3. *Id. Irregularities.* Statute applies even though receipt issued contrary to instructions of Department. *Id.*

4. *Id. Mineral Character.* Question foreclosed when period of statute has run in favor of homestead entry. *Id.*

5. *Withdrawal; Exception of Existing Claims.* Where order of President withdrew lands from appropriation, subject to existing valid claims, an existing preliminary homestead entry, attended by compliance with requirements of homestead law up to time of order, was within exception, and when followed, after withdrawal, by issuance of receiver's receipt upon final entry and lapse of 2 years thereafter, was protected under Act of 1891 from attack under subsequent protest alleging that land was mineral. *Id.*

III. **Mining Locations.** See II, 4, *supra;* VI, 4, *infra.*

1. *Withdrawal.* Order of Dec. 1908, whereby lands in Louisiana were withdrawn from entry "or other form of appropriation," *held* within power of Executive. *Mason* v. *United States* 545

2. *Id.* "Other form of appropriation," includes appropriation by mining locations. *Id.*

3. *Id. Trespass and Conversion; Damages.* Defendants who entered withdrawn lands under mining locations and extracted oil, in honest belief that withdrawal was void, *held* liable in damages, under Louisiana law, for value of oil taken after deducting cost of drilling and operating wells. *Id.*

4. *Id. Fraudulent Location.* Location of 160 acres of oil land by association of 8 persons and lease of tract on same day to corporation, pursuant to prior understanding, is not fraudulent under federal mining laws. *Id.*

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IV. **Desert Land Law.**

1. *Possession.* What constitutes possession depends upon character and condition and use to which land is adapted; enclosure, or physical occupancy of every part, is not necessary. *Cox* v. *Hart* 427

2. *Id. Adverse Claims.* Acts *held* to constitute possession of entire tract and commencement of reclamation, within Act Mar. 28, 1908, amending Desert Land Law, as against adverse claimant who occupied part of tract subsequently, with notice. *Id.*

3. *Id. Surveyed Lands; Exceptions; Preference Right.* Act of 1908 restricted right to enter desert land to surveyed land, but contains proviso that individual who prior to survey has taken possession of unsurveyed tract and commenced work of reclaiming it, shall have preference right to make entry within 90 days after filing of approved plat of survey. *Held,* that proviso includes case in which possession and work began before date of the act no less than case in which they were subsequent. *Id.*

4. *Id. Status as Surveyed or Unsurveyed Lands.* Public lands lose status and become "unsurveyed" when lines and marks of original survey have become obliterated for practical purposes and when, for that reason, a resurvey has been directed by act of Congress. *Id.*

See VI, *infra.*

V. **Timber and Stone Act.**

Fraud; Election of Remedies; United States. Where Government sues to annul patents for fraud, and persists in suit after defendant has pleaded statute of limitations, and plea sustained and bill dismissed, it cannot afterwards sue at law for damages for fraud. *United States* v. *Oregon Lumber Co* 290

VI. **Surveys.** See IV, 3, 4, *supra.*

1. *Water Boundaries; Survey.* Lots patented according to plat showing them bordering lake, extend to water as boundary and embrace pieces between it and meander line of survey, where failure to include such pieces within meander not due to fraud or mistake but was consistent with a reasonably accurate survey, considering areas included and excluded, difficulty of surveying when survey was made, and their value at that time. *United States* v. *Lane* 662

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2. *Id.* Rule that where lands are patented according to official plat, showing meander lines along body of water, the plat is treated as part of conveyance and water itself constitutes boundary, is inapplicable where shown that no body of water existed near place indicated or where no attempt to survey tracts lying beyond meander line was actually made. *Jeems Bayou Club* v. *United States*..... 561

3. *Id. Estoppel; Action of Land Officers.* United States not estopped to question existence of survey by statements in correspondence by officials of Land Department. *Id.*

4. *Id. Erroneous Patent; Trespass; Damages.* Defendants who took possession and extracted oil, in good faith, under patent which had long been erroneously treated by government as conveying tract, are liable for value of oil after deducting mining costs. *Id.*

RAILROADS. See **Anti-Trust Acts**, 6–11; **Carriers**; **Employers' Liability Act**; **Interstate Commerce Acts**; **Negligence**; **Taxation**, II, 10–22; **Waters**, 5–7.
Federal control. See **Carriers**, 8–10.
Free passes. See **Interstate Commerce Acts**, I, 1, 2.
Service of process. See **Jurisdiction**, II, 4, 5.

RATES. See **Anti-Trust Acts**, 6–11; **Carriers**, 1–3; **Gas Companies**; **Interstate Commerce Acts.**

RECLAMATION. See **Public Lands**, IV.

RECORDATION. See **Mortgage.**

REHEARING. See **Procedure**, IV.

REMEDIES. See **Election of Remedies.**

REMOVAL. See **Jurisdiction**, II, 1, 2; V, 9–15.

REPEAL. See **Intoxicating Liquors**, 2, 3.

RESCISSION. See **Contracts**, 1.

RESIDENCE. See **Jurisdiction**, V, 5–15.

RES JUDICATA. See **Judgments**, 3.

RETROACTIVE LAWS. See **Constitutional Law**, III, 3; VII; XI, 21; **Statutes**, 5.

ROAD DISTRICTS. See **Taxation**, II, 26.

ROYALTIES. See **Mines and Mining**, 2–4.

RULES. See **Equity**, 3, 9, 12; **Jurisdiction**, V, 18; **Procedure**, VI, 4.

SALES. See **Brokers**; **Contracts**, 1; **Criminal Law**, 10; **Trade-Marks.**

SCHOOLS:
Vaccination. See **Constitutional Law**, XI, 7.

SECRETARY OF THE INTERIOR. See **Indians**, 1; **Public Lands**, II, 2, 3; VI, 3, 4.

SECRETARY OF THE TREASURY. See **Officers.**

SECRETARY OF WAR. See **Waters**, 4–7.

SERVICE OF PROCESS. See **Jurisdiction**, II.

SEVENTH AMENDMENT. See **Constitutional Law**, X.

SEWER DISTRICTS. See **Taxation**, II, 27.

SHERMAN ACT. See **Anti-Trust Acts.**

SHIP MORTGAGE ACT. See **Admiralty**, 7.

SIXTH AMENDMENT. See **Constitutional Law**, IX.

SPAIN.
Treaty 1819. See **Boundaries.**

STAMP TAX. See **Taxation**, I, 6, 7.

STATES. See **Boundaries**; **Constitutional Law**; **Taxation**, II; **Waters.**
Courts. See **Jurisdiction**, I, 3–5; II, 1, 2; III (4); V, 9–15; VI.
Id. Enjoining proceedings in. See *id.*, I, 3–5.
Citizenship. See **Constitutional Law**, IV; **Jurisdiction**, I, 5; V, 3–15.
Employers' Liability Acts. See **Employers' Liability Act.**
Game laws. See **Game.**
Local law. See **Carriers**, 9; **Constitutional Law**, XI, 1; **Jurisdiction**, II, 5; III (4); V, 3; **Mines and Mining**, 3; **Procedure**, II; **Waters**, 3, 13, 14.
Railroad fares. See **Carriers**, 1–3.
Water appropriations; injunction. See **Waters**, 2.

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STATUTES. See **Admiralty**, 2, 7; **Anti-Trust Acts**; **Bankruptcy Act**; **Brokers**, 3; **Carriers**; **Constitutional Law**; **Criminal Law**; **Employers' Liability Act**; **Equity**, 2–6; **Game**; **Gas Companies**; **Indians**; **Insurance**; **Interstate Commerce Acts**; **Intoxicating Liquors**; **Jurisdiction**; **Limitations**; **Mines and Mining**; **Mortgage**; **Naturalization**; **Officers**; **Public Lands**; **Taxation**; **Trade-Marks**; **Unfair Competition**; **Waters.**

Retroactive laws. See **Constitutional Law**, III, 3; VII; XI, 21; and 5, *infra.*

Treaties. See **Boundaries**; **Constitutional Law**, VI, 1, 2.

Exceptions; when indictment need not negative. See **Criminal Law**, 6.

1. *Natural Meaning; Policy and Legislative History.* Legislative intent ascertained by giving words natural significance; if result is unreasonable and at variance with policy of legislation, court will look to reason of enactment and give it effect in accordance with its purpose. *Ozawa* v. *United States* 178

2. *Ejusdem Generis.* Rule resorted to only as aid in ascertaining meaning of doubtful words; not so employed as to render general words meaningless by assigning them to a genus fully occupied by specific terms employed. *Mason* v. *United States*..... 545

3. *Proviso. Function,* is to except something from operative effect, or to qualify or restrain generality, of substantive enactment to which it is attached. *Cox* v. *Hart*..... 427

4. *Penal Statutes.* Fairly construed, according to legislative intent. *United States* v. *Bowman*..... 94

5. *Id. Retroactive Penal Law.* Act of Congress cannot make past conduct criminal by purporting to construe former act as having been in force at time when this Court has held it was repealed. *United States* v. *Stafoff*..... 477

6. *Judiciary Acts; Codification.* No change in meaning of Act 1888 was intended by rearrangement in Jud. Code. *General Inv. Co.* v. *Lake Shore Ry*..... 261

7. *Id. Contracting General Jurisdiction; Judiciary Act 1888.* Purpose to contract jurisdiction of Circuit Courts affords no basis for subtracting from provisions of act where definite and free from ambiguity. *Lee* v. *Ches. & Ohio Ry*.. 653

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8. *Id. Liberal Construction,* of Act Sept. 14, 1922, providing for transfer of case to proper court where appeal erroneously taken to this Court. *Heitler* v. *United States*..... 438

9. *Constitutionality Favored.* Statute construed, if possible, to avoid not only conclusion that it is unconstitutional, but also grave doubts upon that score. *Bratton* v. *Chandler*.... 110

10. *Id. State Construction Not Conclusive.* As to exaction made under state statute in guise of taxation, this Court is not bound by characterization of exaction by State Supreme Court as an occupation tax. *St. Louis Compress Co.* v. *Arkansas* 346

STATUTE OF FRAUDS. See **Brokers**, 3.

STOCKHOLDERS. See **Corporations.**

Defrauding corporation of which United States is stockholder. See **Criminal Law**, 2.

STREETS AND HIGHWAYS. See **Eminent Domain**, 2; **Mines and Mining**, 5; **Taxation**, II, 26.

SUBSTITUTION. See **Parties**, 2.

SUITS IN ADMIRALTY ACT. See **Admiralty**, 2.

SUPERSEDEAS. See **Jurisdiction**, III, 7, 8.

SUPPLEMENTAL BILL. See **Equity**, 9, 10.

SURVEY. See **Public Lands**, IV, 3, 4; VI.

TAXATION. See **Jurisdiction**, III, 3, 19.

I. **Federal Taxation.**

1. *Revenue Laws; Prohibition Act.* Congress may tax what it also forbids. *United States* v. *Stafoff*..... 477

2. *Id. Penalties* and so-called taxes for violations cannot be imposed and summarily enforced by distraint of property, without notice and hearing. *Regal Drug Co.* v. *Wardell*... 386

3. *Id. Injunction.* R. S. § 3224, does not preclude injunctive relief against such unlawful action. *Id.*

4. *Income Tax; Trust Estates; Charitable Corporations; Exemption; Act of 1916,* §§ *2* (*b*), *11* (*a*). Where fund was held in trust for hospital, subject to annuity, and trustee

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lent money to hospital upon mortgage receiving back only interest sufficient to satisfy administrative charges and annuity, *held* that remaining income, retained by hospital, was not taxable. *Lederer* v. *Stockton*..... 3

5. *Excess Profits; Act Oct. 3, 1917.* In computing tax, exaction prescribed by § 201 is to be imposed, in its successive stages, upon entire net income, except that, from part of net income prescribed for first stage, allowances made by § 203 are to be deducted. So *held* where allowances were less than 15% of invested capital. *Greenport Co.* v. *United States*.. 512

6. *Stamp Taxes; Act May 12, 1900; Refund.* Action for refund not maintainable if no claim made to Commissioner of Internal Revenue within 2 years. *Balt. & Ohio R. R.* v. *United States*..... 565

7. *Id. What Is Claim.* Request to Commissioner for informal ruling on taxability of deeds, after which stamps were affixed in accordance with ruling and without protest, is not a claim for abatement. *Id.*

8. *Narcotic drugs;* criminal liability as purchaser; special taxes. See **Criminal Law, 10.**

II. **State Taxation.**

1. *Interstate Shipments; Temporary Detention in State.* Floating logs, under owner's control, which, in course of continuous interstate journey, are temporarily detained because of high water, are not subject to state taxation. *Champlain Realty Co.* v. *Brattleboro*..... 366

2. *Classification; Coal.* Differences between anthracite and bituminous coals in properties and uses justify state tax on one not imposed on other. *Heisler* v. *Thomas Colliery Co*.. 245

3. *Id.* That useful products are obtained from bituminous which are not produced from anthracite, justifies policy favoring former. *Id.*

4. *Id. Commercial Competition* between these products is no reason against classifying them separately. *Id.*

5. *Id. Burdens on Interstate Commerce.* Determination depends upon state statute or action, not upon what was said about it or motive that impelled it. *Id.*

6. *Id. Consumption in Other States.* So *held,* where it was argued that product being confined in production to Pennsylvania but largely consumed in other States, the tax was

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advocated as a means of levying tribute on other-state consumption. *Id.*

7. *Id. Anthracite.* State tax on coal when prepared and ready for market, as applied to coal destined to market in other States but not yet moved from place of production or preparation, sustained. *Id.*

8. *Id. Fraud on Commerce Clause.* Imposition of tax when coal is ready for market does not prove it an intentional fraud on commerce clause. *Id.*

9. *Public Purpose; General and Special Taxes; Benefits; Income Tax.* Objection that tax on special class of persons and property for public purpose by which they are not benefited denies due process, does not apply to Massachusetts general income tax and use of funds to reimburse cities for educational salaries. *Knights* v. *Jackson*..... 12

10. *Id. Railways; Contract Rights; Lease.* Lease of municipally owned subway *held* not impaired by state law, providing for operation by trustees, and for payment of deficits, etc., by State, the amounts to be assessed proportionately, as an addition to state taxes, upon cities served; since lease was assignable and statute provided for repairs and payment of rent, while taxes authorized were not diminution of rent imposed on city as proprietor but were state taxes as to which city was collection agency. *Boston* v. *Jackson*. 309

11. *Id.* Operation by State being authorized by state constitution and laws, law authorizing operation by trustees and delegation to them of power to determine expenditures and imposition of taxes to pay deficits, *held* not to deprive city, which had leased to railway company, of property without due process. *Id.*

12. *Id. Quaere:* Whether State may confer upon city capacity to acquire property or contract rights protected against subsequent impairment by State? *Id.*

13. *Railroads; Methods of Assessment.* Equality clause does not require that methods of assessing and equalizing state taxes shall be same as applied to other classes of property. *Southern Ry.* v. *Watts*..... 519

14. *Id. Undervaluation,* as compared with valuation of other property of same class, is valid if not intentional and systematic. *Id.*

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15. *Id. North Carolina Revaluation Act. Ad valorem* taxes imposed through application of unit rule of assessment, do not violate due process or commerce clauses, or true value and uniformity provisions of state constitution. *Id.*

16. *Id. Erroneous Assessment. Review* of errors of judgment of assessing authorities, cannot be had in suits to enjoin collection of tax. *Id.*

17. *Id. Statutory Methods of Valuation.* Revaluation Act, though referring to data commonly used in valuing railroads and authorizing state board to require railroads to furnish such information, does not make mandatory any particular method, but requires exercise of informed and honest judgment. *Id.*

18. *Id. Legislative Approval.* Failure to follow methods of earlier statutes cannot render illegal revaluation by state board which was tentative and became an assessment by legislature's approval. *Id.*

19. *Id.* State board, though empowered to reduce this statutory assessment, was not required to make a new valuation or to apply any particular method. *Id.*

20. *Id. North Carolina Franchise Tax,* equal to 1/10% of value of each company's property within State, is not an additional property tax, and does not violate uniformity clause of state constitution, or equality or commerce clauses of Federal Constitution. *Id.*

21. *Id.* Sec. 82 (3½), c. 34, N. Car. Laws 1921, concerning computation of franchise taxes, has no application to railroads. *Id.*

22. *Id. Interstate Commerce.* Aggregate burden imposed by North Carolina property, franchise and income taxes, does not obstruct interstate commerce. *Id.*

23. *Arbitrary Assessment* of property at true value, while other like property is assessed lower, denies equal protection. *Sioux City Bridge Co.* v. *Dakota Co*..... 441

24. *Id. Remedies.* Assessment should be reduced to common level, since by no judicial proceeding can aggrieved owner compel reassessment of great mass of such property at true value. *Id.*

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25. *Id. What Constitutes Discrimination.* Errors of judgment in fixing assessment do not support claim of discrimination; there must be intentional violation of principle of practical uniformity. *Id.*

26. *Road Improvement; Retroactive Legislative Ratification.* Legislature may validate tax, which was void when assessed, for want of authority in officers who undertook improvement. *Charlotte Harbor Ry.* v. *Welles*..... 8

27. *Sewer Districts; Benefits; Estoppel.* Property owner who accepts benefits is estopped from maintaining suit in which, upon ground that manner of constituting district and apportioning cost infringed constitutional rights, he seeks to cancel tax bill issued against his property. *St. Louis Co.* v. *Prendergast Co*..... 469

28. *Insurance; Premiums Paid Unauthorized Insurers.* State law exacting of persons insuring property in State a tax on premiums paid insurers not authorized to do business in State, is void as to contracts made outside State by foreign corporation doing local business. *St. Louis Compress Co.* v. *Arkansas*..... 346

29. *Estates of Decedents; Unpaid Taxes.* State law which, to reach property which has escaped taxation, taxes estates for period anterior to death, but allows deductions where shown that taxes were paid or property not owned by decedent within period, valid as to creditors and distributees. *Bankers Trust Co.* v. *Blodgett*..... 647

30. *Id. Penalties.* Delinquency of decedent may be penalized by inflicting upon estate a penalty measured by discretion of legislature. *Id.*

31. *Id. Ex Post Facto Laws.* Constitutional prohibition is inapplicable to retroactive tax penalty. *Id.*

TERRITORIES. See **Constitutional Law, VI.**

TEXAS. See **Boundaries.**

TRADE-MARKS:

Infringement; Injunction. Plaintiff who purchased from foreign manufacturer of face powder its business, good will in this country, and registered trade-marks, re-registered trade-marks and continued business here under old name,

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buying powder from original concern abroad and selling it in boxes bearing the trade-mark, *held* entitled to preliminary injunction against defendant who bought product of foreign concern in its genuine boxes, which bore labels resembling those of plaintiff, and sold it here. *Bourjois & Co.* v. *Katzel* 689

TRANSFER OF CAUSES. See **Equity**, 2–7; **Procedure**, V.

TRANSPORTATION ACT. See **Carriers**, 10.

TREASURY, SECRETARY OF. See **Officers.**

TREATIES. See **Boundaries**; **Constitutional Law**, VI, 2.

TRESPASS. See **Game**; **Mines and Mining**, 2–4; **Negligence**; **Public Lands**, VI, 4.

TRIAL. See **Constitutional Law**, IX, X; **Equity**, 2–7.

TRUSTS AND TRUSTEES. See **Taxation**, I, 4.

TUCKER ACT. See **Jurisdiction**, III, 3.

UNFAIR COMPETITION. See **Anti-Trust Acts**; **Trade-Marks.**
1. *Determination by Courts; Federal Trade Commission and Clayton Acts.* What constitutes unfair competition under Trade Commission Act is for court, upon review of Commission's order; rule applies where charge is that sales or agreements lessen competition or create monopoly, contrary to Clayton Act. *Federal Trade Comm.* v. *Curtis Pub. Co.*. 568

2. *Id. Findings of Commission; When Conclusive.* Upon such review, findings of fact are conclusive, if supported by evidence. *Id.*

3. *Id. Examination of Whole Record by Court,* to determine whether there are material facts not reported by Commission; if there be evidence relating to such facts from which different conclusions may be drawn, and justice requires decision without further delay, court has power to decide without referring matter to Commission for additional findings. *Id.*

4. *Id. Magazine Distributing Agencies.* Engagement of exclusive agents by publisher, in orderly development of business and without unlawful motive, is not unfair method of competition within Trade Commission Act, though many of agents when so engaged were general distributers of newspapers and magazines. *Id.*

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UNITED STATES. See **Boundaries; Constitutional Law; Contracts,** 2–14; **Eminent Domain,** 3; **Estoppel,** 2; **Indians; Limitations,** 2, 3; **Mines and Mining; Naturalization; Patents for Inventions; Public Lands; Taxation,** I; **Waters,** 4–14.
Federal control. See **Carriers,** 8–10.
Vessels; Suits in Admiralty Act. See **Admiralty,** 2.
Crimes against; on high seas. See **Criminal Law,** 1–3.
Tucker Act. See **Jurisdiction,** III, 3.

VACCINATION. See **Constitutional Law,** XI, 7.

VALUATION. See **Interstate Commerce Acts,** I, 4–6; II, 3, 4; **Taxation,** II, 13–25.

VENUE. See **Jurisdiction,** V, 6–16.

WAIVER. See **Constitutional Law,** VIII, 2; **Equity,** 11; **Jurisdiction,** II, 2; V, 6–8.

WAR:
Supplies. See **Contracts,** 12–14.
Federal control. See **Carriers,** 8–10.

WAR, SECRETARY OF. See **Waters,** 4–7.

WASHINGTON, CITY OF. See **Party Walls,** 1–4.

WATERS. See **Admiralty; Contracts,** 2; **Criminal Law,** 1–3; **Game; Public Lands,** VI.
State boundaries; Red River; Treaty of 1819. See **Boundaries.**

1. *Erosion, Accretion and Avulsion.* Doctrine applies to boundary rivers. *Oklahoma* v. *Texas* 606

2. *Appropriation; Innavigable Streams; Injunction. Modified Final Decree,* enjoining Colorado and its officers from taking, under irrigation appropriation, more than specified amount of water. *Wyoming* v. *Colorado* 1

3. *Id. Percolating Waters; Utah Law.* Appropriation of water of natural stream to beneficial use so far attaches to underground waters feeding stream by percolation through adjacent public lands, that one who, as incident to mining operations after lands have become private, intercepts and collects such percolating waters, may not sell to others right

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to use on distant lands waters so collected and thus diminish supply of prior appropriator. *Snake Creek Co.* v. *Midway Irrig. Co*..... 596

4. *Navigable Waters; Obstructions; Federal Jurisdiction.* By Act 1890, Congress assumed jurisdiction over obstructions to navigation and committed to Secretary of War necessary administrative power. *Southern Pac. Co.* v. *Olympian Co*.. 205

5. *Id. Bridges; Approval; Secretary of War.* Under § 7, railroad bridge over navigable stream cannot be constructed before approval of location and plans. *Id.*

6. *Id.* Power to approve or disapprove includes power to condition approval. *Id.*

7. *Id. Negligence.* Where railroad obtained Secretary's approval of new bridge, conditioned upon removal of old bridge and piers to specified depth, and complied with condition, the condition was an authoritative determination of what was necessary to insure free navigation; and where later the Government, by dredging, lowered bed and surface of river so that stumps of piles of old piers protruded above new bed, forming an obstruction which damaged a vessel, railroad was not liable. *Id.*

8. *Indian Reservation; Boundary; Arkansas River.* Where act of Congress establishing reservation described west boundary as "the main channel," and deed to United States for Osages by Cherokees described land by townships "on the left bank," deed is to be interpreted in conformity with act; act carried title to land in river bed out to main channel. *Brewer Oil Co.* v. *United States*..... 77

9. *Territories; Navigable Waters; Power of Congress.* Congress may make grants below high water mark of navigable waters in a Territory, to carry out public purposes appropriate to objects for which United States holds Territory. *Id.*

10. *Id. Louisiana Purchase.* Principle not affected as to lands within Louisiana Purchase by purpose, declared in Treaty with France, that statehood should ultimately be conferred on inhabitants of territory purchased. *Id.*

11. *Navigability.* Navigable river is one used as highway for commerce, over which trade and travel are conducted in modes customary on water. *Id.*

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12. *Id. Findings,* of lower courts that Arkansas River, along Osage Reservation in Oklahoma, is not and never has been navigable, accepted. *Id.*

13. *Id. Ineffective State Declaration.* Grant of land in bed of non-navigable river made by United States while holding complete sovereignty over locality, not divested by retroactive rule of State subsequently created out of that territory, classifying river as navigable. *Id.*

14. *Id. Federal Question.* Such grant being attacked on ground that river was navigable and its bed not subject to be granted by United States, question of navigability is not local but a federal question. *Id.*

WITHDRAWAL. See **Mines and Mining,** 2; **Public Lands,** II, 5; III, 1–3.

WITNESSES. See **Equity,** 1.

WORDS AND PHRASES:

1. "Income." See *Lederer* v. *Stockton* 3

2. "Navigability." *Brewer Oil Co.* v. *United States* 77

3. "Other form of appropriation." See *Mason* v. *United States* 545

4. "Person." See *United States* v. *Wong Sing* 18

5. "Possession." See *Cox* v. *Hart* 427

6. "Proper district." See *General Inv. Co.* v. *Lake Shore Ry* 261

7. "White Person." See *Ozawa* v. *United States* 178
Yamashita v. *Hinkle* 199

WRIT:

Error and certiorari. See **Jurisdiction; Procedure.**
Mandamus. See **Mandamus.**

WYOMING. See **Waters,** 2.