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CASES ADJUDGED

IN

THE SUPREME COURT

AT

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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.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
EDWARD T. SANFORD, Associate Justice.[2]

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

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[1] For allotment of The Chief Justice and Associate Justices among the several circuits, see p. VIII, *post*.

[2] On January 24, 1923, President Harding nominated Edward T. Sanford, of Tennessee, to succeed Mr. Justice Pitney, retired; he was confirmed by the Senate on January 29, 1923; he took the oath of office on February 5, 1923; the judicial oath was administered and he took his seat upon the bench on February 19, 1923.

RETIREMENT OF MR. JUSTICE PITNEY.

SUPREME COURT OF THE UNITED STATES.

MONDAY, MARCH 5, 1923.

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

The CHIEF JUSTICE announced the following order of the Court:

It is ordered by this Court that the accompanying correspondence between members of the Court and Mr. Justice Pitney, 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:

WASHINGTON, D. C., FEBRUARY 24, 1923.

DEAR BROTHER PITNEY: We write to assure you of our sincere appreciation of you as a colleague and to express our deep regret that failing health has compelled you to give up the work which you love, and in which you have rendered signal service to our Country.

After four years in the Federal Congress and three years in the New Jersey Senate, whose presiding officer you were, you became a Justice of the Supreme Court of the State, and ultimately the Chancellor. Your father's distinguished career on the same equity bench gave you a high standard to follow. With this seven years of legislative training and eleven years of judicial experience, you were called to our Court, fully equipped for its responsible duties.

For ten years you have given unremitting labor to the work of the Court—the consideration of cases, the preparation of your own opinions, and the most careful examination and criticism of the opinions of your colleagues. You have spared yourself in nothing. We can not but think that you have sacrificed your health in the earnest effort to do everything possible to further the work of the Court. Your opinions in thirty-four volumes—225 to 259—show a splendid sense of responsibility, accurate learning, thorough research, able reasoning, nice sense of justice, and careful preparation.

We shall miss your kindly companionship, your genial courtesy, your loyalty, and your high sense of judicial duty. Our love follows you in retirement. May the years to come give you well-earned repose and happiness.

With affectionate regard, we are,

Sincerely yours,

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

Hon. MAHLON PITNEY,
1763 R Street NW., Washington, D. C.

WASHINGTON, D. C., March 3, 1923.

MY DEAR CHIEF JUSTICE: Your letter touched me more deeply than I can tell you. To you, and to my dear brethren of the Court, I owe ten of the happiest years of my life.

Your unvarying kindness, consideration, and helpfulness did everything to stimulate my ambition to win your esteem; and if through overwork I have undermined my health, I feel fully repaid by the appreciation expressed, in your letter, of my usefulness to the Court. It is with the deepest regret that I am compelled to retire from the

bench; but it ever will be a source of consolation and pleasure to look back upon the days we spent together.

With assurance of my affectionate regards to you all, I am,

Yours fraternally,

MAHLON PITNEY.

Hon. WILLIAM H. TAFT, Chief Justice.

SUPREME COURT OF THE UNITED STATES.

October Term, 1922.[1]

Order of Allotment of Justices.

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, Edward T. Sanford, 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.

February 19, 1923.

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[1] For next previous allotment, see 260 U. S., p. xiv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1922.

GORHAM MANUFACTURING COMPANY *v.* WENDELL, INDIVIDUALLY AND AS COMPTROLLER OF THE STATE OF NEW YORK, ET AL.

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

No. 196. Argued on return to rule to show cause January 22, 1923.—Decided February 19, 1923.

1. In proceedings in the federal courts to enjoin state officials from collecting a tax, alleged to violate the Federal Constitution, the successors of such officials may be substituted as parties when such substitutions are permitted in the courts of the State. P. 3.
2. In view of the New York practice, and the consent of the parties substituted, *held*, that the State Tax Commission might be substituted for the State Comptroller whose functions have been transferred to it, and the State Attorney General for his predecessor in that office. P. 5.

THIS case is here on an appeal from a decree of the District Court (274 Fed. 975) dismissing upon the merits a suit brought by the appellant against the Comptroller and the Attorney General of the State of New York to enjoin them from collecting a tax, and penalties. The matters now disposed of arose upon motions for substitution of parties and a rule to show cause why the case should not be dismissed as to the Comptroller. See 260 U. S. 708.

Mr. Robert C. Beatty, with whom *Mr. George Carlton Comstock* was on the brief, for appellant.

Mr. Carl Sherman, Attorney General, and *Mr. C. T. Dawes,* Deputy Attorney General, of the State of New York, joined in the brief with appellant.[1]

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

On December 11, 1922, appellant made a motion to substitute the State Tax Commission of the State of New York as appellee in place of James A. Wendell, former Comptroller of the State of New York, deceased. This was consented to by Charles D. Newton, then Attorney General of New York, the other appellee. On January 1st, Charles D. Newton ceased to be Attorney General and was succeeded in office by Carl Sherman. A second motion is made to substitute the State Tax Commission for Wendell, and Sherman, Attorney General, for Newton. The State Tax Commission and Attorney General Sherman consent to the granting of this motion, indeed they ask that they be admitted as substituted parties. On consideration of the first motion, a rule was issued against appellant 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 ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600. The case comes on now for disposition of the two motions.

The suit here is a bill in equity filed by a corporation of Rhode Island in the United States District Court for the Southern District of New York, to enjoin the Comptroller and Attorney General of New York from collecting a corporation tax imposed on the complainant amounting to $13,582.56, under Article 9a of the Tax Law of the

[1] *Mr. Charles D. Newton,* former Attorney General of the State of New York, joined in the first motion for substitution.

State of New York, as amended by cc. 90 and 443 of the laws of New York of 1921. The ground alleged for the right to relief is that these chapters of the Tax Laws of New York as applied to the complainant violate its rights under the Constitution of the United States. The bill was dismissed by the District Court and this is a direct appeal from that decree under § 238 of the Judicial Code as amended January 28, 1915, c. 22, 38 Stat. 803.

The question raised by the rule was considered by this Court in *Irwin* v. *Wright,* 258 U. S. 219, 222, and the existing state of the law on the substitution of public officers in suits against their predecessors in this and other federal courts was stated. A suit to enjoin a public officer from enforcing a statute or to compel him to act by mandamus is personal, and in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office. In *United States ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600, the suit was to compel Butterworth, the Commissioner of Patents, by mandamus to issue a patent. Butterworth died pending the suit, and this Court refused to allow the plaintiff in error to substitute his successor although that successor consented to the substitution. In compliance with a suggestion from this Court, Congress enacted a statute under which successors of United States officers going out of office pending litigation may now be substituted for them. Act of February 8, 1899, c. 121, 30 Stat. 822. But the statute is not an enabling act in the case of state officers. Reference is made to *Long Sault Development Co.* v. *Call,* 242 U. S. 272, to show from the record that in the State Supreme Court a New York State Treasurer was substituted for his predecessor in office and no objection was made here. That can hardly be regarded as an authority in this Court on the point, for it passed here without notice. The same may be said of *Saranac Land & Timber Co.* v. *Roberts,* 177 U. S. 318, also cited. There is a plain inti-

mation in *Irwin* v. *Wright, supra,* however, that the federal courts can avail themselves of any state provision for substitution, for retiring state or county officers, of their successors in office in suits to enjoin them from action under color of their offices, alleged to be unauthorized or unconstitutional. This intimation is confirmed in *City of Boston* v. *Jackson,* 260 U. S. 309.

It appears from cc. 90 and 443 of Laws of New York, 1921, that the powers and duties vested in the Comptroller have been transferred to the Tax Commission; but this does not, of itself, justify the substitution of the Commission for the Comptroller in a suit which is in its essence a personal suit to prevent his personal violation of law and the rights of the complainant. Had the original suit been brought against the Tax Commission, and if the Commission is a continuous body, the retirement or death of members would not effect the abatement of the suit and successors could be substituted as parties. *Irwin* v. *Wright, supra,* 224; *Marshall* v. *Dye,* 231 U. S. 250; *Richardson* v. *McChesney,* 218 U. S. 487, 492; *Murphy* v. *Utter,* 186 U. S. 95. But that principle is not helpful here because the inherent difficulty in all these cases is not in the liability and suability of the successor in a new suit. It is in the shifting from the personal liability of the first officer for threatened wrong or abuse of his office to the personal liability of his successor when there is no privity between them, as there is not if the officer sued is injuring or is threatening to injure the complainant without lawful official authority. There is no legal relation between the wrong committed or about to be committed by the one, and that by the other. Of course, practically, the question usually presented in such cases is not really a personal one at all. It is the question whether a mode of enforcement of tax laws favorable to the state or county, is lawfully justified, or whether the state law is warranted by the fundamental law of the State or Nation. In such

cases it is, of course, of importance to the State or County that the question at issue be promptly disposed of, and that the incumbent officers charged with the defense of the State's or County's interests maintain and continue that defense whether they were in office at the beginning of the litigation or not. For this reason, where such officers on behalf of State or County consent to the substitution, the federal courts need not be astute to enforce the abatement of the suit if any basis at all can be found in state law or the practice of the state courts for substitution of the successors in office.

In the case before us, counsel have cited the New Civil Practice Act of New York that took effect October 21, 1921, which indicates a broad policy of joining of all parties to any controversy who are necessary to, or proper for, a determination thereof at any stage of the cause and as the ends of justice may require. Sections 192, 193 and 211 are cited. Undoubtedly these sections are very liberal but it may be doubted whether they meet the requirement here or were intended to do so. We need not decide this question, however, for we find ourselves able to reach the right conclusion by accepting the declaration of the Court of Appeals of New York in *People ex rel. Broderick* v. *Morton,* 156 N. Y. 136. In that case a point was raised (though it must be admitted its disposition was not necessary to the ultimate conclusion of the court), as to whether an incoming state officer could be substituted as defendant in a mandamus suit brought against his predecessor. The law did provide for such substitutions in suits against county and municipal officers. Upon this point the Court of Appeals, at page 148, said:

" But there is no apparent reason why the provisions of the Code controlling actions and special proceedings against county, town and municipal officers, should not apply as well to state officers. The practice therein provided for is simple and affords ample protection to all

parties. Section 1930 provides: 'In such an action or special proceeding, the court must, in a proper case, substitute a successor in office, in place of a person made a party in his official capacity, who has died or ceased to hold office; but such a successor shall not be substituted as a defendant, without his consent, unless at least fourteen days' notice of the application for the substitution has been personally served upon him.' "

We infer from this and from the substitution, already referred to, made by the Supreme Court of New York in *Long Sault Development Co.* v. *Call,* 242 U. S. 272, s. c. *Matter of Long Sault Development Co.,* 212 N. Y. 1, that such substitutions are a matter of state practice and law, and, as already said, this enables us to avail ourselves in such a case as this of that practice. *City of Boston* v. *Jackson, supra.*

The motions for substitution of the State Tax Commission of New York for Wendell, Comptroller, and of Sherman, Attorney General, for Newton, Attorney General, will be granted.

VANDENBURGH *v.* TRUSCON STEEL COMPANY.

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

No. 273. Argued January 17, 1923.—Decided February 19, 1923.

1. A patent cannot be extended by reissue to a field beyond its original intention. P. 14. *Miller* v. *Brass Co.,* 104 U. S. 350.
2. Patent No. 841,741, to Vandenburgh, for a bar, to be used in reinforcing concrete construction, provided on one side with a series of kerfs, each with an integral overlapping spur, and a spiral coil disposed in the kerfs and retained beneath the spurs, is not infringed by a collapsible construction consisting of a spiral loosely engaging two spacer bars. P. 14.
3. The method of attaching a metal spiral to a metal rod by kerfs, was anticipated in metal working and in reinforcing concrete, and

adding a spur or clamp, or hammering the kerf edges, to fix the rod, involved no invention P. 15.
277 Fed. 345, affirmed.

This was a bill in equity by Vandenburgh praying an injunction and accounting for the infringement of a patent granted him January 22, 1907, No. 841,741, and reissued to him August 15, 1916. Reissue No. 14,182. The patent is for a reinforcing bar to be used in concrete construction.

The patent since reissue has been the subject of litigation in the second, third and sixth circuits. In all the circuits, the first and second claims of the reissue have been held void because too broad and because secured nine years after the original issue for the purpose of covering intervening devices. In the second circuit, Judge Hough, sitting on the District Court, found that claim 3 must be so narrowly construed that defendant's device did not infringe. The Circuit Court of Appeals sustained the third claim and found infringement, reversing the District Court's decree, and sent the case back for assessment of profits which have been found to be about $15,000.00.

In the third circuit, Judge Orr found claim No. 3 invalid for lack of invention. The Circuit Court of Appeals sustained the decree of dismissal by the District Court, but on the ground of non-infringement.

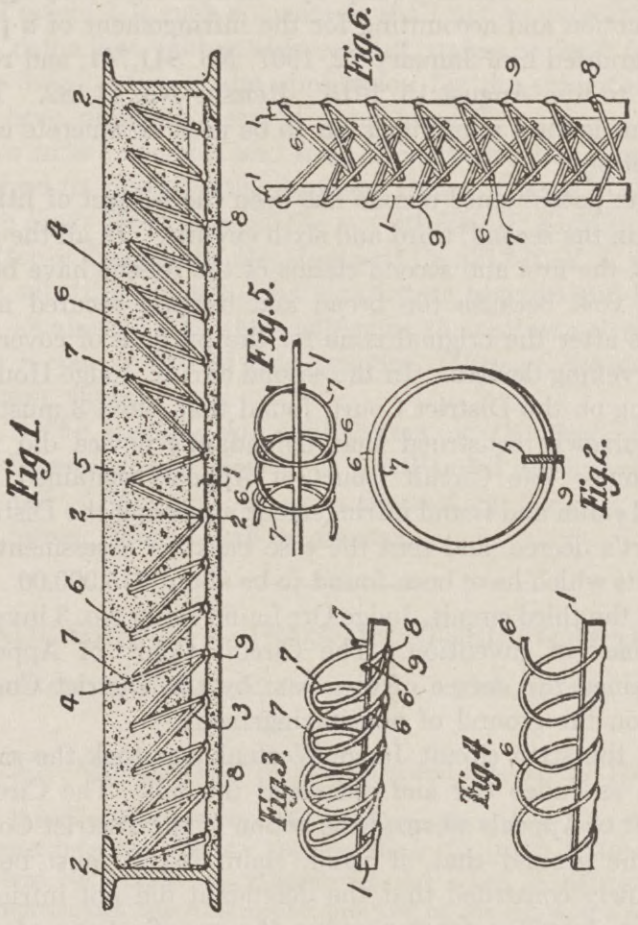
In the sixth circuit Judge Westenhaver took the same view as Judge Orr and dismissed the bill. The Circuit Court of Appeals affirmed the action of the District Court on the ground that, if valid, claim No. 3 must be so narrowly construed that the defendant did not infringe.

The drawings accompanying the specifications of the patent are the same in the reissue and appear on the page following.

The specifications say:

" The invention has for an object to provide a reinforcing-bar with one or more spirally-disposed coils secured to

the bar so as to provide an extended area of contact adapted to resist strain longitudinally and laterally of the bar and to form a truss within the body of concrete or



other plaster material which provides the maximum of supporting strength in the arch or surface to be formed.

"Other and further objects and advantages of the invention will be hereinafter set forth, and the novel features thereof defined by the appended claims.

" In the drawings, Figure 1 is a vertical section showing the bar applied to supporting girders or beams. Figure 2 is an enlarged vertical section on the line 2—2, Fig. 1. Fig. 3 is a detailed perspective of the primary and secondary coils shown in Fig. 1. Fig. 4 is a similar view of a modified form using one coil. Fig. 5 is a detailed plan of the form shown in Fig. 3, and Fig. 6 is an elevation of two meshing coils used for girder and column construction.

* * * * *

" The bar may be provided with a primary coil 6, extending in one direction, as shown in Fig. 4, which is sufficient in light construction; but when a heavier construction is to be used a secondary coil 7 is provided, which extends in the opposite direction to the coil 6 and through the same so as to cross beneath the coil 6 at a point directly above the bar, thus providing a construction in which all lateral pull or strain of the coil is avoided, owing to the equalization thereof by the oppositely-extending coils and the tendency of the coils to move or flatten toward the face of the bar resisted. This preferred construction is shown in Figs. 1 and 3, and it is also desirable that both of the coils be deflected away from the center of the bar, as shown in Fig. 1, as the greatest supporting strain carried by the arch is at the center thereof, and this deflection therefore resists such strain and tends to draw the coils upward into a position at right angles to the bar.

"As a preferred means of securing the coils to the bar I have shown a series of kerfs 8 in one face of the bar inclined away from the center of the bar toward the opposite ends thereof, and the coils are seated within these kerfs and held therein by means of the integral spurs 9, which are forced downward upon the coils when inserted and permanently retain them in position.

"In Fig. 6 a modified application of the invention is shown where two of the bars are disposed parallel to each other, with their coils intermeshing, for use in column or girder construction, wherein such a construction provides the maximum of strength with the minimum of weight in the reinforcing material.

"In the operation of the invention it will be seen that the bar supporting the coil resists any movement thereof longitudinally of the bar and provides the necessary strength upon which the truss structure formed by the coils is carried."

The first four claims of the original patent were as follows:

1. In a reinforcing bar, a spiral coil rigidly secured thereto at two points in each convolution thereof and extended beyond and free of said bar at the opposite side therefrom to the securing-point.

2. In a reinforcing-bar, a spiral coil rigidly secured thereto at two points in each convolution thereof and extended beyond and free of said bar at the opposite side therefrom to the securing-point, said coils being deflected in opposite directions from the center of the bar toward the ends thereof.

3. A reinforcing-bar provided upon one end with a series of kerfs each having an integral overlapping spur, and a coil disposed in said kerfs, each convolution thereof being retained beneath one of said spurs.

4. A reinforcing-bar provided upon one edge with a series of kerfs disposed diagonally to the length of the bar each having an overlapping integral spur projected toward the center of the bar, and a coil disposed in said kerfs and retained beneath said spurs.

The first and second claims of the reissued patent were as follows:

1. A concrete reinforcing consisting of a bar having a plurality of integral spurs, and a spiral coil permanently

secured thereto by having the spurs bent down on the several coils, the coils extending beyond and free of the bar at the opposite side therefrom to the securing point.

2. A concrete reinforcing consisting of a bar having integral means to secure a coil thereto, and a spiral coil permanently secured to the bar in each convolution and extended beyond and free of said bar at the opposite side therefrom to the securing point.

The third and fifth claims of the reissued patent were the same as the third and fourth of the original.

The defendant makes and sells a collapsible spiral, or cylindrical helix used in strengthening concrete columns or pillars. It consists of a cylindrical spiral of steel wire fitted to two T bars or spacers. Each convolution of the spiral engages the leg or outside edge of the T spacers at regular intervals. The engagement is loose fitting so that this construction which is normally stove pipe shaped can be made flat for shipment by moving the metal rods or spaces longitudinally in opposite directions. The method by which the spiral is attached to the spacer bar is a rectangular notch in the edge of the T bar, with one or both corners peened or hammered down so as to retain and loosely hold the spiral. This is said to infringe the claims of plaintiff's reissued patent Nos. 1 and 2 and also claims 3 and 5 which were in the reissue as in the original patent, except that in claim 3 the word end was changed to edge to correct an obvious error.

Mr. O. Ellery Edwards and *Mr. Carlos P. Griffin* for petitioner.

Mr. W. F. Guthrie, with whom *Mr. E. N. Pagelsen* was on the brief, for respondent.

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

The expansion and improvement of the art of reinforcing concrete began several decades ago. There were two

different needs, one was for strengthening concrete beams and the other for strengthening concrete columns. The term reinforcing bar is usually applied in the art to a rod or bar used to reinforce a concrete beam against the tension longitudinal of the beam itself. The concrete itself has great power of resisting compression, but it has not tensile strength and its weakness manifests itself in cracking along the lower half of the beam. A steel bar placed below the middle of the beam furnishes the useful tensile resistance. But it was found that certain diagonal cracks developed in the beam toward the respective ends of the beam and it was sought to prevent these by minor auxiliary rods attached to the main reinforcing bar. This was the field which Vandenburgh entered and devised an arrangement, shown in Figure 1 of his drawings, of a reinforcing bar imbedded in the lower part of the beam with transverse loops or spirals, part on one side of the center of the bar and part on the other and fitted rigidly into the bar so that those on each side leaned at an angle away from the center and in an opposite inclination from those on the other. In strong construction, these spiral loops were doubled by a second spiral which meshed with the first. Now, as the specifications show, this arrangement of the bar and opposing spirals was to apply the truss principle to the strengthening of the beam and to give it the tensional resistance along the lower part of the beam and against the diagonal tensions near the ends of the beam. No one can read the specifications and examine the drawings without perceiving that this was the gist of the Vandenburgh invention. Reference is made to the use of the plan for column construction, but the only use of it for that purpose is shown in Figure 6, which discloses two upright reinforcing bars with their spirals meshing but connected in no other way.

The truss formation was not especially adapted to the needs and strains of the concrete column. The history of

that field in the art shows that one of the pioneers was a Frenchman named Considere, who some years before the plaintiff's patent had shown that the tendency of concrete in a column was to expand outwardly under the vertical pressure to which it was chiefly exposed and the best way of reinforcing columns was by pouring the liquid concrete into a hooping made of a series of independent hoops, or into a continuous helicoidal spiral or cylindrical helix of a steel wire or rod, of a stove pipe form. After him, column hooping became common in the art as the only practical method of column reinforcing and the convolutions of the spiral were spaced and supported by steel uprights with which they engaged in various ways. In one French patent, the convolutions were tied with steel wire to the spacers. It is the form of this engagement between the uprights and the spirals which is the crux of the present suit.

The preferred form of Vandenburgh for the engagement between his reinforcing bar and the spiral loops of his truss arrangement is by a kerf or cut in the edge of bar inclined away from its center in which the coil rod is placed and held therein by an integral spur forced downward upon the coil when inserted, which permanently retains it in position. The defendant has a rectangular cut in the edge of the T spacer or upright and retains the spiral rod in it by peening or hammering down the edges of the cut so as to keep the rod from slipping out, but leaving play enough to permit the collapsing of the spiral and shipment in its collapsed form. Others had adopted a similar form of engagement. Observing this, Vandenburgh who had not used or exploited his original patent in any way, went back to the patent office and secured a reissue in which he was permitted to broaden his first and second claims with respect to the kerfs and spurs so as to change the word "rigidly" used in the original claim to "permanently." Having done this, he

proceeded to sue in the second, third and sixth circuits persons using what he insisted were equivalents of his form of engagement in their column hooping reinforcement of concrete columns. All the courts, and there are six of them, have held these changed claims of the reissued patent to be void and to give him no right to claim infringement in the collapsible feature of the column hooping. The original specifications leave no doubt that the patentee used the word "rigidly" deliberately and properly because his truss, as he portrayed it, required rigid connection between the spiral loops and the main reinforcing bar. His making his form of engagement loose was an afterthought to catch makers who had not been advised in his specifications that there was anything collapsible in his truss formation. The reissue as to the first two claims was in the teeth of the admonitions of this Court speaking through Mr. Justice Bradley in *Miller* v. *Brass Co.*, 104 U. S. 350. They are therefore void.

Counsel for the patentee say now that the collapsible feature was only an incidental matter, and that what they now rely on is the combination under claims 3 and 5 of the reinforcing bar provided upon one edge with a series of kerfs each having an integral overlapping spur and a coil each convolution thereof being beneath one of the spurs. We do not think the respondent has this combination. We think the patentee's combination must be limited to a spiral with one bar in the truss formation, or at least one in which the spiral is free at one end and has no second support or spacer such as respondent uses. Patentee relies on Fig. 4 of his drawing and says that to add another spacer or bar is only the work of a mechanic; but he can not properly say so because Fig. 4 is only a detail of Fig. 1 of the drawings and was intended to be a lighter construction of the same beam with the same truss combination as shown in Fig. 1. Moreover, it is

perfectly obvious from the description and some of the claims that the spiral of Vandenburgh was intended to be free of all but the bar shown. This is made certain by Fig. 6 which is the only application of the device to column use shown and in that we have two bars standing upright each engaged with convolutions of a spiral, the loops of each spiral meshing with those of the other spiral but free of the other bar. It is clear to us that Vandenburgh having secured a patent for a truss form of reinforcement and finding it unworkable, for it never has been adopted in the trade or in any structure, is through reissue seeking to expand the paper combination he claims into a field in which it does not belong.

But it is insisted that Vandenburgh was the first to introduce into the field of concrete reinforcing the kerf and integral spur to clamp the spiral rod, that this involved invention, and that claim No. 3 should be construed to secure him a reward for this. It may be true that in the field of reinforcing concrete the kerf and spur had not been used before as Vandenburgh used it, but the kerf and spur were old in the art in kindred fields. They were old in metal working art. Exactly the equivalent is shown in sand screens for mixing the materials of concrete and in sustaining fence wires. It is difficult to differentiate the field of metal working from this art of reinforcing concrete because the problem was only one of spacing firmly the convolutions of the metal spiral and that was a well known device for such a need. We do not think the principle of *Potts* v. *Creager,* 155 U. S. 597, applies in this case. More than this in the very field itself, there was a prior German patent of Kieserling & Moller showing the use of the kerf for spacing a spiral in reinforcing concrete. It does not seem to us that it involved real invention merely to add a spur or clamp or to peen or hammer down the edges of the kerf so as to fix the spiral rod firmly. We find therefore that claims 3 and

5 were without merit as involving invention and that the action of the Circuit Court of Appeals should be

Affirmed.

CONCRETE STEEL COMPANY *v.* VANDENBURGH.

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

No. 238. Argued January 17, 1923.—Decided February 19, 1923.

Decided upon the grounds expressed in *Vandenburgh* v. *Truscon Steel Co., ante,* 6.
278 Fed. 607, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals sustaining a patent and awarding damages for infringement.

Mr. Thomas J. Johnston, with whom *Mr. Lucius E. Varney* was on the brief, for petitioner.

Mr. O. Ellery Edwards and *Mr. Carlos P. Griffin,* with whom *Mr. Joseph W. Cox* was on the brief, for respondent.

Mr. Solicitor General Beck, Mr. Assistant Attorney General Lovett and *Mr. Melville D. Church,* by leave of court, filed a brief on behalf of the United States, as *amici curiae.*

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

This is a review of the decree of the Circuit Court of Appeals of the Second Circuit sustaining the validity of claim No. 3 of the Vandenburgh patent, just considered in the previous case of *Vandenburgh* v. *Truscon Steel Co., ante,* 6, and awarding $15,000 for profits to Vandenburgh for defendant's infringement. The two cases can not be distinguished. We must, therefore, reverse

the decree of the Circuit Court of Appeals of the Second Circuit and direct the dismissal of the bill.

Reversed.

CHARLES NELSON COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 287. Argued January 25, 26, 1923.—Decided February 19, 1923.

A contract for furnishing lumber to the Government at a specified price contained a clause obliging the contractor to deliver any quantities ordered in a certain period irrespective of the estimated quantity named in the contract. *Held* that the contractor, in furnishing lumber in excess of that quantity and in accepting the contract price therefor without protest, knowing that the Government was relying on the contract, waived his right to insist that the clause was void for lack of mutuality and could not recover the difference between the contract and higher, market prices for the excess so furnished. P. 19.

56 Ct. Clms. 448, affirmed.

APPEAL from a judgment of the Court of Claims.

Mr. William E. Humphrey and *Mr. William C. Prentiss* for appellant.

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. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims dismissing the petition of the plaintiff, the Charles Nelson Company, after a hearing of the evidence and upon findings made. The plaintiff was the lowest and accepted bidder upon advertised solicitation of the Navy

Department for the furnishing and delivery of lumber at the Puget Sound Navy Yard for a period ending December 31, 1917. This suit is to recover the sum of $20,321.33, the amount with interest of the difference between the market value and the price bid upon what the plaintiff claims was an unjust excess over and above the amount of lumber it should have delivered and that which at the insistence of the Navy Department it did deliver.

The bids were opened January 3, 1917. The contract was signed February 23, 1917. Thereby the plaintiff agreed to furnish and deliver f. o. b. alongside wharf, navy yard, Puget Sound, lumber of certain kinds in such quantities and at such times during the period ending December 31, 1917, as the supply officer of the Navy might direct. "All deliveries to be made promptly and orders of 50,000 ft. b. m. or less of assorted sizes, not more than 10,000 ft. b. m. of any one size, except with the consent of the contractor, must be delivered within 10 days after receipt of order. All other orders must be delivered within 25 days after date of receipt of order from the supply officer." The contract contained this provision which was evidently taken from the form of bids solicited:

" It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending Dec. 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for."

Then follows:

" Class 5—Continued.

Stock Classification No. 39.

Fir, Douglas, as follows:

1. 1,675,000 feet b. m. (about), of such sizes or grades as may be ordered—per M feet."

The Navy Department on orders placed by it before December 31, 1917, received from the plaintiff 3,688,259 feet b. m. of Douglas fir. The amount furnished above 1,675,000 feet was worth at market price, delivered at the navy yard, $18,310.21 more than the plaintiff was paid therefor at the prices bid and accepted.

After the execution of the contract and as a development of the World War the Government entered upon the building of submarine chasers at this navy yard, a type of vessel never before built there, and much of the lumber required of the plaintiff under its contract was used in the construction of these vessels.

The plaintiff denies that the writing signed by it was a binding contract, because there was no mutuality of obligation. The Government answers this by citing the case of *United States* v. *Purcell Envelope Co.*, 249 U. S. 313. In that case the Post Office Department invited bids "for furnishing stamped envelopes and newspaper wrappers in such quantities as may be called for by the department during a period of four years, beginning on the first day of October, 1898." The bid of the Purcell Company was accepted. The formal contract was signed by the Company and bond given. Subsequently the Postmaster General refused to sign this contract, and bought the envelopes and wrappers elsewhere. This Court held that the acceptance of the bid made the contract, that the words above quoted must be construed to mean that the Company should furnish all the envelopes and wrappers of the specified sizes which the Department would need during the four years' period, and that the Government was as much bound to take the envelopes and wrappers as the bidder was bound to furnish them. Heavy damages for the breach of the contract were awarded against the United States. But it is to be observed that there was in the contract or invitation for bids no express denial of the obligation of the Post Office

Department to take the envelopes in that case, so that the question of a lack of mutuality did not arise in the *Purcell Case* as it does here.

But we are not obliged definitely to pass upon the question whether the instrument relied on by the Government constituted a contract binding on the plaintiff for the whole amount ordered at the price bid, because under the findings of the Court of Claims, the plaintiff must be held to have waived any right to claim more than the price it bid for any part of the lumber it furnished.

The findings show that the plaintiff did not furnish the lumber itself but relied on two so-called subsidiary companies to do so. The manager of one of the companies, the Crown Lumber Company, was Scott. He was also a stockholder and officer in the plaintiff. Scott received an order for 1,675,000 feet b. m. of lumber from the plaintiff to be delivered to the navy yard. In May, there was delay in deliveries by the Crown Lumber Company of which the navy yard commandant made complaint to the plaintiff by telegram, to which plaintiff replied referring the commandant to Scott. Having delivered 950,000 feet, and accepted orders in addition thereto of 1,186,000 feet, Scott on May 21st, wrote to the navy yard supply officer calling attention to the fact that the orders received unfilled were for 1,186,000 feet whereas there were only 725,000 feet due on the original contract for 1,675,000 feet, and asking him to say which of the orders he wished to withdraw. It appeared that Scott was not then advised of the terms of the contract. The supply officer replied quoting from the contract the clause quoted above, refusing to withdraw any orders and insisting on fulfillment of all orders issued and to be issued. A copy of the letter was sent to plaintiff at its office in San Francisco. After further correspondence in which the supply officer threatened the plaintiff to buy in the open market against its account, the Crown Lumber Company by

Scott, June 7th, accepted another order "under protest, especially as to delivery date." On June 11th, Scott accepted another order "under protest." On June 26th and July 2nd he accepted other orders "under protest, especially as to delivery." In June, Scott and Jackson, vice-president of the plaintiff, held a conference with the supply officer at the navy yard to discuss the failure to keep up with the deliveries as the Government needed them. During this conference Scott again protested at being compelled to deliver any more than 1,675,000 feet at the contract price. The supply officer stood upon the contract and made no promise to pay more than the contract price. Scott testified that in spite of the letter sent him by the supply officer, he did not know, until the next September, the terms of the contract except from the insufficient memorandum of order sent him by the plaintiff company soon after the contract was signed. The Court of Claims finds that it did not appear that Scott was directed by the Company to make such a protest as at the June meeting or that he was acting within his authority in so doing. On June 18th, the plaintiff company wrote the supply officer as follows:

"Dear Sir: Contract 28942. We have for acknowledgment your letter of the 14th, in which you transmit instructions received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., in which you are instructed as follows:

"'Contract 28942, if contractor fails to make delivery, purchase authorized as requested.'

"May we be permitted to state that it has never been our intention or aim to fail to make delivery of your requirements as we may be committed to under the contract above quoted? Mr. A. A. Scott, our resident agent on Puget Sound, has been instructed to give your business the right of way, both at the Mukilteo and Port Angeles plants.

"Mr. H. W. Jackson, our vice president, was on the Sound recently, and he states that at both mills nothing is left undone in order to produce the lumber that you have ordered under the contract.

"By way of further explanation we might say that when we entered into this contract with your department we never dreamt that we would be expected to deliver extraordinary quantities of clear lumber of long lengths, such as planking, decking, etc., within the time limits specified in the contract. In connection with these orders we feel that we are entitled to some consideration and a little leniency. The contract itself states that we are committed to making deliveries on your orders 50 M feet per B. M. or less of assorted sizes, not more than 10 M feet B. M. of any one size except with the contractor's consent, which must be delivered within ten days after date of receipt of order, and that all other orders must be delivered within twenty-five days after date of receipt of order from the supply officer. Therefore we submit that when you order 100 M feet of decking or ship lumber of long lengths and ask us to furnish same within ten days you are requiring more of us than is specified in the written contract.

"For this special material, if you were to buy this in the open market to-day, you probably would penalize us $10.00 per M. We feel sure that it is not the desire of your department to arbitrarily penalize us to that extent, in view of the fact that we are doing our utmost to execute your orders within the time limits.

"We feel that we are not responsible for the extraordinary conditions which have arisen since the contract was executed. We are reliably informed that the War Department has canceled their contracts and is now redistributing their requirements, having in view existing conditions. We also feel that your department should interpret our engagement in the same way. We trust you

will accept this communication in the spirit in which it is sent. We are not asking to be relieved of any responsibility, but rather we submit the facts with a view of enlisting your cooperation to assist us in completing our engagements."

The Court of Claims further found that "no protest against furnishing more than 1,675,000 feet of lumber under the contract was ever made by the plaintiff company itself or any of its officers," and the VII finding was as follows:

"The plaintiff company furnished to the defendant on orders placed by the defendant under contract 28942, 3,688,259 feet of lumber, for which it was paid at the contract price, and it did not at the time of any payment make to the United States any protest against payment at that price, and so far as the United States was informed such payments were accepted as in full.

"The amount of lumber furnished over and above 1,675,000 feet was worth at market price, delivered at the navy yard, $18,310.21 more than the plaintiff was paid therefor at contract price."

On these findings we can see no escape for the plaintiff from acquiescence by its conduct in the price bid for the whole amount of lumber delivered.

The plaintiff relies on the opinion of this Court in *Freund* v. *United States,* 260 U. S. 60. The facts of that case are very different from this. They involved conduct on the part of the representatives of the Government of questionable fairness toward the contractors and showed no such acquiescence and absence of protest as here appear.

It may be as counsel suggest that the plaintiff's course was influenced by a patriotic wish to help the Government when it was engaged in war. If so, it was to be commended. But this can not change the legal effect of its evident acquiescence seen in its letter of June 18th

and its failure to protest thereafter and to put the Government on notice that it intended to claim a recovery on a *quantum valebat* when it was delivering the extra two million feet of lumber and receiving the payments therefor from the Government at the prices named in the bid. The judgment of the Court of Claims is

Affirmed.

CROWN DIE & TOOL COMPANY *v.* NYE TOOL & MACHINE WORKS.

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

No. 240. Argued January 17, 18, 1923.—Decided February 19, 1923.

1. A suit based on an alleged assignment of a patent right, involving the validity of the assignment under the patent laws, is within the jurisdiction of the District Court as a suit arising under those laws. P. 33.
2. The mere right to exclude others from making, using or vending a patented invention is not such an interest as may be assigned under the patent laws, and an attempted transfer thereof as against a particular person with right to enjoin his future infringements and collect damages therefor, is void. Pp. 35, 39.
3. An assignment by a patent-owner, not conveying any interest in the patent itself but only a claim for past damages against infringers, does not confer upon the assignee a right to sue for such damages in his own name without joining his assignor, who must also have been the owner of the patent when the infringements were committed. P. 39.
4. The effect of such an assignment depends upon the patent law, unaffected by Equity Rule 37 providing that suits shall be prosecuted in the name of the real party in interest. P. 44.

276 Fed. 376, reversed.

This was a bill in equity filed in the United States District Court for the Northern District of Illinois by the Nye Tool and Machine Works, a corporation of Illinois, having its place of business in Chicago, against the Crown Die

and Tool Company, a corporation of the same State and doing business in the same city. The plaintiff sought to enjoin the infringement of a patent for a machine for forming screw thread-cutting devices, and for an accounting of profits and for damages. The inventors were Wright and Hubbard, and the patent issued to their assignee, the Reed Manufacturing Company of Pennsylvania.

The plaintiff based its right to sue on the following instrument which it terms an assignment:

EXHIBIT A.

Whereas, Reed Manufacturing Company, a corporation of Pennsylvania, is the owner of Letters Patent of the United States, No. 1,033,142, for a Machine for Forming Screw-Thread Cutting Devices, granted July 23, 1912, on an application of Wright and Hubbard; and

Whereas, under said patent said Reed Manufacturing Company has the right to exclude others from manufacturing, using and selling the devices of said patent; and

Whereas, it is believed by the parties that Crown Die & Tool Company, a corporation of Illinois, has been manufacturing and using devices in infringement of said patent; and

Whereas, Nye Tool & Machine Works is engaged in the manufacture of dies with which the dies made by said Crown Die & Tool Company, by the use of said infringing machine, are in competition; and

Whereas, Nye Tool & Machine Works is desirous of acquiring from Reed Manufacturing Company all of its rights of exclusion under said patent, so far as the same may be exercised against the Crown Die & Tool Company, together with all rights of the Reed Manufacturing Company against the Crown Die & Tool Company arising out of the infringement aforesaid:

Now, Therefore, in consideration of one thousand dollars ($1,000.00), and other good and valuable considerations, the receipt of which is hereby acknowledged, the Reed Manufacturing Company hereby assigns and sets over to the Nye Tool & Machine Works all claims recoverable in law or in equity, whether for damages, profits, savings, or any other kind or description, which the Reed Manufacturing Company has against the Crown Die & Tool Company arising out of the infringement by the Crown Die & Tool Company of the Wright & Hubbard patent No. 1,033,142; and, for the same consideration, assigns and sets over all the rights which it now has arising from said patent of excluding the Crown Die & Tool Company from the practice of the invention of said patent, the intention being that, in so far as concerns the exclusion of the Crown Die & Tool Company under said patent, the Nye Tool & Machine Works shall be vested with as full rights in the premises as the Reed Manufacturing Company would have had had this assignment not been made; and that the Nye Tool & Machine Works shall have the full right to bring suit on said patent, either at law or in equity against said Crown Die & Tool Company, and for its own benefit, to exclude the Crown Die & Tool Company from practicing the invention of said patent, and for its own use and benefit to collect damages which may arise by reason of the future infringement of said patent by the Crown Die & Tool Company, but nothing herein contained shall in any way affect or alter the rights of the Reed Manufacturing Company against other than the Crown Die & Tool Company; and, for the same consideration, all rights as are herein given against the Crown Tool & Die Company are given as against any successor or assignee of the business thereof.

REED MANUFACTURING COMPANY,
By P. D. Wright,
Its President.

The defendant moved to dismiss the bill as follows:

Now comes the defendant, Crown Die and Tool Company, by its solicitor, and moves the Court to dismiss the Bill of Complaint instituted in the above entitled cause upon grounds and reasons therefor as follows—

1. That the Bill of Complaint states an alleged cause of action arising out of the assumed infringement of a patent in which plaintiff has no title, and prays an injunction, and accounting and damages.

2. That the owner of the entire or any part of the legal title to the patent sued on is not made a party to the suit.

3. That the legal effect of the alleged assignment set up as the basis of this cause of action and forming part of the Bill of Complaint herein is contrary to the statutes covering suits for infringement of patents, and shows on its face that the plaintiff has no interest in the patent sued on.

4. That the Bill of Complaint herein, including the alleged assignment, evidences a conspiracy against this defendant by the parties to the document identified as "Exhibit A," in which the plaintiff and the Reed Mfg. Company assumed the function of the Court in having already decreed that this defendant infringes Patent No. 1,033,142, and now seeks to utilize this Court to annoy and harass the Crown Die and Tool Company by instituting legal proceedings when no right of action exists.

5. That "Exhibit A" attached to the Bill of Complaint in this case purports only to convey to plaintiff all claims recoverable in law or in equity which the Reed Mfg. Co. may have against the Crown Die and Tool Co., over which subject matter this Court has no jurisdiction.

6. Prior suit pending, between the same parties in this Court, decision of which will determine any questions involved in this case.

Therefore this defendant respectfully moves the Court to dismiss said Bill of Complaint with its reasonable costs and charges in its behalf most wrongfully sustained.

CROWN DIE & TOOL CO.,
By FLORENCE KING,
Solicitor for Defendant.

The District Judge in the interest of expedition granted the motion to dismiss in order that the main question, i. e., the plaintiff's right to sue, might be determined by the Circuit Court of Appeals before the expense of an accounting should be incurred, although he thought the plaintiff had acquired the right under the instrument. 270 Fed. 587. The Circuit Court of Appeals reversed the decree of dismissal, holding the instrument to be a valid assignment of an interest in the patent conferring the right to sue and remanded the cause to the District Court for an accounting and further proceedings. 276 Fed. 376.

Although the decree of the Circuit Court of Appeals is not final, the importance of the question involved and the possible saving of useless litigation led this Court to grant the writ of certiorari before further proceedings in the District Court.

Florence King for petitioner.

Mr. Russell Wiles, with whom *Mr. W. H. Dyrenforth* and *Mr. George A. Chritton* were on the brief, for respondent.

The entry of decrees, professedly contrary to the judicial judgment of the Chancellor and for the sole purpose of permitting an appeal not otherwise authorized, is entirely subversive of the statutes relative to appeals and is open to even more severe criticism than that of entering *pro forma* decrees. *Ex parte Harley-Davidson Motor Co.,* 259 U. S. 414.

All that a patentee can acquire from the Government is the right to exclude others. *Bloomer* v. *McQuewan,* 14

How. 539, 548; *Patterson* v. *Kentucky,* 97 U. S. 501; *Fuller* v. *Berger,* 120 Fed. 274; *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U. S. 405. It would seem to follow that an assignee could buy nothing more, and should be required to buy nothing more, in order to maintain a suit. Only recently, in *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, this Court reasserted the proposition that the patent grant is nothing but the right to exclude.

The suggestion that the natural right to make, use and vend, or some part of it, and the right to exclude must coexist in the plaintiff before suit can be brought, is clearly unsound both on principle and precedent. In *Patterson* v. *Kentucky, supra,* the natural right was extinguished by the state law while the patentee was recognized as being vested with the patent monopoly which it remained the duty of the courts to preserve and protect. Today there are hundreds, if not thousands, of existing patents upon processes for the manufacture of alcoholic liquors. The natural right of each patentee has been extinguished by the Eighteenth Amendment and the statutes enacted thereunder, yet it is manifest that each patentee could maintain suit against an infringer and would in no sense be deprived of his patent rights because the infringer is a law breaker.

A common case of the complete separation of the natural right from the right to exclude is that created when a patentee grants to some one else the exclusive right to make, use and sell with such limitations as to leave the legal title in the patentee. In such a case (under the old rules) the licensee might sue in the name of the licensor to protect his own interest, but the licensor could sue alone to recover his damages. He may have a substantial interest in the recovery and in excluding unlicensed manufacture because infringing competition with the licensee cuts down the licensor's royalties. His rights as a liti-

gant are clearly sustained in *Kaiser* v. *General Phonograph Supply Co.,* 171 Fed. 432, in which case, however, the licensee was also a party.

It is equally apparent that the grantee of a territorial interest may sue for infringement committed within his territory, even though for other reasons, physical or legal, it is impossible for him to exercise his natural right.

The most common case of the separation of the patent and natural rights is where the structure of the patent in suit is dominated by some other and broader patent. The broader patent may be older or younger or of the same date with the narrower patent. In either case, for the whole life of the broader patent, and this may be the whole life of the narrower patent as well, the patentee of the narrower patent has no natural right to make, use or sell the structure of his own patent. Any suggestion that the plaintiff in a patent suit must have the natural right to make, use and sell in addition to the patent right would create an entirely new defense to patent cases, would make it impossible for the owner of the narrower patent to sue with a broad patent in force, and would immensely complicate patent litigation.

The exclusive right and the natural right flow from different sources, are of different kinds and need not coexist. It is impossible to maintain any clean-cut line of patent law unless we totally divorce the two rights, and, in discussing the patent right, assume that the natural right is immaterial. It may be non-existent or suspended; exercised, not exercised, or even misused, and the status of the plaintiff will be the same.

This would seem to be necessary on principle, since the patentee who gets from the Government only the right to exclude would be in a sad position were his franchise to be extinguished with changing conditions affecting a natural right concerning which the Federal Government is entirely uninterested and over which it has no control.

The natural right, in the main, is a creature of state laws and it must be disregarded from every aspect in considering the franchise granted by the Federal Government.

Having thus established the nature of the franchise granted by the patent, it would seem that under § 4898, Rev. Stats., providing that any patent or any interest therein shall be assignable in law by an instrument in writing, the patentee would have a right to split his right to exclusion along any lines he chooses.

The Reed Manufacturing Company had the right to exclude the Crown Company and the right to collect past and future damages and profits. It certainly had the right to sell its claim for past damages. Why it should not sell the right to future damages, if any, we do not see. In a case of a continuing trespass the owner of the chose theoretically ought to be able to sell not only his past but his future claims. But what has become of the Reed Company's right to exclude defendant? It has not been extinguished and it rests either with the Reed Company or with the plaintiff. The Reed Company has tried to sell it, has taken good money for it, and is in no position as between the parties ever to assert that it owns this right. If it has carried out its purpose, then the plaintiff has all the title necessary to maintain this suit. If not, a *bona fide* sale of a valuable right is to be prohibited at the instance of a wrongdoer totally unaffected by it and contrary to the desires of both the parties interested.

This matter does not concern either the public or the defendant because, whoever owns the patent, defendant has no right to infringe and at some time (to some one) should account.

The general rule, of course, is that all choses are assignable which would not abate at death but would fall to the estate. Expectancies even are assignable in equity, and certainly there is such expectation that an infringer will continue as to justify an assignment of future damages.

The suggestion that assignments like this would lead to a multiplicity of suits is without weight. There can never be more suits on a patent than there are infringers.

A judgment in this suit for the defendant would be *res judicata.*

The outstanding requirement of public policy is that infringement shall not exist and that infringers shall not keep their profits. Public policy is not affected by nice questions of title.

The true distinction between licenses and interests in a patent is this: The patent grants a threefold right to exclude from manufacture, from use, and from sale. All instruments which have conveyed the threefold right in the whole invention have been held transfers of an interest, while those conveying only one or two of these rights, or all of them in only some species of the patented invention, have been held licenses. Fundamentally, we believe the effort has been to prevent the possibility of two suits on the same patent against a single infringer, one by the owner of a part of the power of exclusion, and the other by the owner of the remainder. This distinction runs through all the cases.

This and other courts have repeatedly stated, *arguendo,* that there are only three kinds of assignments of interests, i. e., assignments of the entire interest, assignments of an undivided interest, and assignments of a territorial interest, and that everything else is a license. The assertion, however, that there are only three kinds of assignments is *dictum,* for the real question before the court in each case is whether a particular instrument was a license and in every case the license lacked what is here present, a complete conveyance to the plaintiff of every right under the patent which was or could be litigated in any suit by a particular defendant.

The situation is clearly one where a suit by the Reed Company for the use of the plaintiff would lie under the

old Equity Rules. The new rules abolish such suits and permit the beneficial owner to sue in its own name. It would, therefore, seem to follow that if the assignment is only a declaration of trust, and is totally ineffective as a legal transfer, nevertheless plaintiff may maintain its case.

It is especially to be noted that from time immemorial equity has protected the sale of choses in action even when their validity was seriously questioned on the law side.

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

The petitioner raises a question of jurisdiction. It says that the suit does not arise under the patent laws of the United States, but is merely a suit on a contract like one for royalties under a license of which the District Court could not have jurisdiction because the parties are both citizens of the same State. To sustain this argument are cited *Albright* v. *Teas,* 106 U. S. 613; *Pratt* v. *Paris Gas Light Co.,* 168 U. S. 255, and *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.,* 185 U. S. 282. The cases have no application and the point is without merit. The bill in this case is based on an assignment of a patent claimed to be valid under the statutes of the United States, and asking the protection of the patent right thus assigned by injunction and an accounting. It, therefore, involves the validity of the assignment of a patent, which is a question arising under the patent laws because it depends upon their construction, and if the assignment is valid, the suit is just an ordinary suit for injunction and profits dependent on the validity of the patent and its infringement under those same laws. There is no question of royalties by contract in the case.

The main question is an interesting one. The argument of counsel for the respondent and the one upon which the Circuit Court of Appeals proceeded to its con-

clusion is that the right which the patentee derives from the Government by its grant is not the right to make, use and vend; that such a right is a so-called natural right not dependent on statute but arises under the common law and has no peculiar federal source or protection other than any other right of liberty or property. All that the Government grants and protects is the power to exclude others from making, using, or vending during the grant of seventeen years. Under the patent law, § 4898 Rev. Stats., a patentee may assign by an instrument in writing his patent or any interest therein. It is argued that as the patent is only the power to exclude all from making, using and vending, the power to exclude some particular person from doing so is a part of that power of exactly the same nature, and therefore is a definite interest in the patent that can be assigned.

The analysis of the rights which a patentee acquires under the grant is sustained by a line of authorities. *Bloomer* v. *McQuewan,* 14 How. 539, 548; *Patterson* v. *Kentucky,* 97 U. S. 501; *United States* v. *American Bell Telephone Co.,* 167 U. S. 224, 249; *Bement* v. *National Harrow Co.,* 186 U. S. 70, 90; *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U. S. 405; *Heaton-Peninsular Co.* v. *Eureka Specialty Co.,* 77 Fed. 288, 294; *Fuller* v. *Berger,* 120 Fed. 274. The fullest and most satisfactory discussion of the subject is found in *Continental Paper Bag Co.* v. *Eastern Paper Bag Co., supra.* In that case it was sought to defeat a suit by a patent-owner for infringement of a patent on the ground that he was not entitled to ask a court of equity to aid him in protecting the grant of the patent to him by the Government, because he had failed and neglected ever to use the patent himself or to allow anybody else to do so and therefore had not rendered to the public the benefit and consideration for which the patent was granted. This Court held that the benefit which the Government intended to secure was not the

making or use of the patent for the benefit of the public during the seventeen years of the grant except as the patentee might voluntarily confer it from motives of gain, but only the benefit of its public use after the grant expired. The Court held that the Government did not confer on the patentee the right himself to make, use or vend his own invention, that such right was a right under the common law not arising under the federal patent laws and not within the grant of power to Congress to enact such laws, and that in the absence of the express statutory imposition upon the patentee of the obligation to make, use or vend his patented invention as a condition of receiving his patent, it would not be implied. The Court further held that in its essence all that the Government conferred by the patent was the right to exclude others from making, using or vending his invention.

We do not think, however, that these clearly established principles sustain the next step in the reasoning of the counsel for the respondent and the Circuit Court of Appeals, which is that they make the mere right to exclude persons from the making, using and vending of an invention such an interest in a patent that it can be assigned. It ignores the indispensable condition of the granting and establishment of a patent right and patent property that the patentee shall have himself the common law right of making, using and vending the invention. The sole reason and purpose of the constitutional grant to Congress to enact patent laws is to promote the progress of science and useful arts by securing for limited times to inventors the exclusive right to their respective discoveries. Article I, § 8, clause 8. In pursuance thereof, § 4886, Rev. Stats., as amended, 29 Stat. 692, provides that any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter or any new or useful improvements thereof, upon certain conditions not important here, may obtain a pat-

ent therefor. Section 4884, Rev. Stats., directs that the grant of a patent shall be to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery throughout the United States. An inventor may in writing assign his invention and the right to a patent before the patent is granted, and under § 4895, Rev. Stats., a patent will issue to the assignee. Can it be claimed that an assignment of the right to exclude all from making, using and vending and excepting therefrom the right to make, use and vend in the assignee, would be such an assignment as would justify the Patent Office in issuing the patent under the statute to the assignee? Yet if all that there is in a patent property is the bare right to exclude others from making, using or vending some thing, the patent should issue in such a case.

The error in the position of the respondent and the court below is in a failure to distinguish between the property or title or interest in a patent capable of assignment and the chief incident of that property, title or interest, an incident which can only pass by assignment when attached to the right to make, use and vend. It is the fact that the patentee has invented or discovered something useful and thus has the common law right to make, use and vend it himself which induces the Government to clothe him with power to exclude everyone else from making, using or vending it. In other words, the patent confers on such common law right the incident of exclusive enjoyment and it is the common law right with this incident which a patentee or an assignee must have. That is the implication of the descriptive words of the grant " the exclusive right to make, use and vend the invention." The Government is not granting the common law right to make, use and vend, but it is granting the incident of exclusive ownership of that common law right, which can not be enjoyed save with the common law right.

A patent confers a monopoly. So this Court has decided in the *Paper Bag Case, supra,* and in many other cases. The idea of monopoly held by one in making, using and vending connotes the right in him to do that thing from which he excludes others.

Dealing with the question of patent assignments under the laws of the United States, Mr. Justice Gray, in *Waterman* v. *Mackenzie,* 138 U. S. 252, 255, said:

"The monopoly thus granted is one entire thing, and cannot be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant and convey, either, 1st, the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, 2d, an undivided part or share of that exclusive right; or, 3d, the exclusive right under the patent within and throughout a specified part of the United States, Rev. Stat. § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. Rev. Stat. § 4919; *Gayler* v. *Wilder,* 10 How. 477, 494, 495; *Moore* v. *Marsh,* 7 Wall. 515."

The learned Justice then proceeds (page 256) to give examples of what would and would not constitute an assignment. A grant of an exclusive right to make, use and vend two patented machines within a certain district, he points out, citing *Wilson* v. *Rousseau,* 4 How. 646, 686, is an assignment because the right, although limited to making, using and vending two machines, excludes all other persons, even the patentee, from making, using or

vending like machines within the district. "On the other hand", he says, "the grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent right within the district, and is therefore only a license."

In *Gayler* v. *Wilder,* 10 How. 477, it was held that the grant of an exclusive right to make and vend an article within a certain territory upon paying to the assignor a cent per pound, reserving to the assignor the right to use and manufacture the article by paying the assignee a cent per pound, was only a license and that a suit for the infringement of the patent right must be brought in the name of the assignor. The effect of the opinion in that case is that the monopoly granted the patentee is for one entire thing and in order to enable an assignee to sue he must have received the entire and unqualified monopoly in the territory specified. Chief Justice Taney's reason for this (p. 494) is useful in this case. "For", said he, "it was obviously not the intention of the legislature to permit several monopolies to be made out of one, and divided among different persons within the same limits. Such a division would inevitably lead to fraudulent impositions upon persons who desired to purchase the use of the improvement, and would subject a party who, under a mistake as to his rights, used the invention without authority, to be harassed by a multiplicity of suits instead of one, and to successive recoveries of damages by different persons holding different portions of the patent right in the same place." See also *Pope Manufacturing Co.* v. *Gormully & Jeffery Manufacturing Co.,* 144 U. S. 238, 250.

These cases do not present the same facts as the one before us; but they indicate clearly what view the courts deciding them would have taken of an effort like that in the case at bar to divide up the monopoly of patent prop-

erty so that the patentee retains the right to make, use and vend, but gives to many different individuals the right to sue certain named infringers, respectively, and that with the sole motive of harassing them such as is avowed in the recitals of the instrument before us. If held legal, it would give the patentee an opportunity without expense to himself to stir up litigation by third persons that is certainly contrary to the purpose and spirit of the statutory provisions for the assigning of patents.

Nor do we think that the principle of *Patterson* v. *Kentucky,* 97 U. S. 501, or the instance of a patent for an improvement on a machine, patent for which is held by another, involves anything inconsistent with our conclusion that the right to exclude others conferred in a patent can only be conferred upon one who has the common law right to use, make and vend. In *Patterson* v. *Kentucky,* the patentee had the common law right to make, use and vend, but the State of Kentucky exercising her lawful police power restricted him in it. In the case of the patentee for improvement on a patented machine, the patentee has the right to make, use and vend the improvement, but he cannot make it profitable or useful unless he can secure the right to put it on to another machine.

For the reasons given, we think the attempted assignment in this case carried no part of the title to the patent or interest in it and therefore conferred no right to sue for damages for infringement of the patent after the execution of the instrument.

The remaining question is whether the instrument relied on by the plaintiff below gave it the right to sue in its own name in this case for damages for past infringements. We think not.

The plaintiff below could not bring such a suit for past infringements without joining with it the owner of the

patent when the infringements were committed. It is said that the claim of an owner of a patent for damages for infringements is only a chose in action which in modern days may be so assigned that the assignee acquires full title and the right to sue at law as well as in equity without joining his assignor. This view ignores the peculiar character of patent property and the recognized rules for the transfer of its ownership and its incidents. Patent property is the creature of statute law and its incidents are equally so and depend upon the construction to be given to the statutes creating it and them, in view of the policy of Congress in their enactment. This is shown by the opinion of this Court in *Waterman* v. *Mackenzie,* 138 U. S. 252, already cited, and in the line of authorities followed therein. It is not safe, therefore, in dealing with a transfer of rights under the patent law, to follow implicitly the rules governing a transfer of rights in a chose in action at common law. As Chief Justice Taney said in *Gayler* v. *Wilder,* 10 How. 477, 494:

"The monopoly did not exist at common law, and the rights, therefore, which may be exercised under it cannot be regulated by the rules of the common law. It is created by the act of Congress; and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes."

The law as to who should bring a suit at law for damages by infringement of a patent is clearly and correctly stated in III Robinson on Patents, § 937, as follows:

"With a single exception the plaintiff in an action at law must be the person or persons in whom the legal title to the patent resided at the time of the infringement. An infringement is an invasion of the monopoly created by the patent, and the law which defines and authorizes this monopoly confers only upon its legal owners the right to institute proceedings for its violation. These owners are the patentee, his assignee, his grantee, or his

personal representatives; and none but these are able to maintain an action for infringement in a court of law. Moreover, the injury inflicted by an act of infringement falls upon the individual who owns the monopoly at the date of the infringement. It does not affect former owners whose interest had terminated before the infringement was committed, nor does it so directly prejudice a future owner that the law can recognize his loss and give him a pecuniary redress. Hence the plaintiff must not only have a legal title to the patent, but must have also been its owner at the time of the infringement. The exception above referred to arises where an assignment of a patent is coupled with an assignment of a right of action for past infringements. In this case the present owner of the monopoly may institute proceedings for its violation during the ownership of his assignor as well as for infringements committed since the transfer of the title to himself."

In *Moore* v. *Marsh,* 7 Wall. 515, the question was whether a sale and assignment by a patentee of his patent right was, under the fourteenth section of the Patent Act of 1836, c. 357, 5 Stat. 117, 123, now embodied in § 4919 of the Revised Statutes, a bar to an action by him to recover damages for an infringement committed before such sale and transfer. The section provided:

"And such damages may be recovered by action on the case, in any court of competent jurisdiction, to be brought in the name or names of the person or persons interested, whether as patentees, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States."

The neat issue in that case was whether " the name or names of the person or persons interested " meant the person interested when the infringement took place or when the suit was brought. The Court held that it meant the person who was patentee, assignee, or grantee when

the infringement occurred and the cause of action accrued. The Court held, therefore, that the proper plaintiff in a suit for past infringements was not the present owner of the patent, and that he did not acquire the right to bring suits for prior infringements merely by the conveyance of the full title to the patent and its enjoyment. This case was followed by that of *Gordon* v. *Anthony,* on the Circuit, reported in 16 Blatchf. 234; s. c. 10 Fed. Cas. 773, No. 5,605. The decision was by Blatchford, Circuit Judge of the Second Circuit, who had been district judge and who subsequently became a Justice of this Court and had great experience in the administration of the patent law.

The question before him was whether the vendee and assignee of a receiver appointed by a state court of New York in proceedings supplementary to execution on a judgment against a debtor whose assets included a patent right and who was directed by the court to convey the same to the receiver but did not do so, could sue for damages for infringement of the patent occurring before the receivership. After saying that under the law of 1836 and under the Revised Statutes in which the sections of that law were embodied, no one could bring a suit either at law or in equity for infringement of a patent in his own name alone unless he were patentee, assignee, or grantee, the Judge continues:

"A claim to recover profits or damages for past infringement can not be severed from the title by assignment or grant, so as to give a right of action for such claim, in disregard of the statute. The profits or damages for infringement cannot be sued for except on the basis of title as patentee, or as such assignee or grantee, to the whole or a part of the patent, and not on the basis merely of the assignment of a right to a claim for profits and damages, severed from such title. Therefore, if, in the present case, no such assignment or grant has been made to the de-

fendants as the statute contemplates, they could not bring suit, in their own names, under the assignment made to them, to recover any claims, profits or damages for infringement, which belonged to Gordon, [i. e., the patentee], nor can they use the assignment as a defence against any such claims existing against themselves in favor of Gordon. In this case there has been no assignment executed by Gordon."

See also *Ball* v. *Coker,* 168 Fed. 304, 307. Counsel for plaintiff cites *Hayward* v. *Andrews,* 12 Fed. 786, to maintain the contrary and to sustain the right of the assignee of claims for past infringements to maintain suit. The case cited is not in point, the assignee in that case held the legal title to the patent.

The sole exception to the rule that only he who is the owner of the patent at the time of the infringement can sue for damages, to which Professor Robinson refers, is when such owner assigns the patent and also the claim for past infringements to the same person. In such a case, as the title and ownership of the claims are united, it is held that the owner may sue. *Dibble* v. *Augur,* 7 Blatchf. 86; 7 Fed. Cas. 642, No. 3,879; *Hamilton* v. *Rollins,* 5 Dill. 495; 11 Fed. Cas. 364, No. 5,988; *Henry* v. *Francestown Soap-Stone Stove Co.,* 2 Ban. & A. 221; 11 Fed. Cas. 1,180, No. 6,382; *Consolidated Oil Well Packer Co.* v. *Eaton, Cole & Burnham Co.,* 12 Fed. 865, 870; *Spring* v. *Domestic Sewing-Machine Co.,* 13 Fed. 446, 449; *Nellis* v. *Pennock Mfg. Co.,* 38 Fed. 379. Under this exception, therefore, if the instrument here relied on had been effective to make the plaintiff an assignee or grantee of the patent or " of any interest therein " within the meaning of § 4898, Rev. Stats., as amended, then the plaintiff could have maintained this action for damages for infringements prior to the execution of the instrument; but, as we hold, the instrument did not have this effect.

But it is urged that under Equity Rule 37 every action

must be prosecuted in the name of the real party in interest, and, therefore, as the plaintiff is the beneficial owner of the claims for past infringements, it should be permitted to sue in a court of equity. The equity rule was not intended to set aside a policy and rule having its source in the patent statutes and can not affect this case. The rule laid down by Circuit Judge Blatchford in *Gordon* v. *Anthony, supra,* applied to both actions in equity and law and grew out of the sections of statutes quoted by him and not since amended. Both at law and in equity, either the owner of the patent at the time of the past infringement, or the subsequent owner of the patent who is at the same time the assignee of the claims for past infringement, must be a party to a suit for damages for the past infringement. If the owner of the patent when the infringements took place has assigned his patent to one, and his claims for damages for infringement to another, then the latter can not sue at law at all but must compel his assignor of the claims to sue for him. In equity both such assignor and the assignee who is the real party in interest must join as plaintiffs. Such assignor is a necessary party and a bill for accounting and damages is fatally defective otherwise. III Robinson on Patents, § 1099; *Dibble* v. *Augur,* 7 Blatchf. 86; 7 Fed. Cas. 642, No. 3,879; *Gamewell Fire-Alarm Telegraph Co.* v. *City of Brooklyn,* 14 Fed. 255; *Ball* v. *Coker,* 168 Fed. 304. As the owner of the patent is not a party to this bill, the result is that on no ground can the bill of the plaintiff be sustained and that the motion to dismiss should have been granted.

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

Syllabus.

EIBEL PROCESS COMPANY *v.* MINNESOTA & ONTARIO PAPER COMPANY.

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

No. 178. Argued January 5, 8, 1923.—Decided February 19, 1923.

1. The Eibel patent, No. 845,224, for an improvement on Fourdrinier paper-making machines, whereby, mainly through a substantial elevation of the breast-roll end of the moving screen or "paper-making wire", the liquid stock discharged upon the screen acquires through gravity an additional speed, enabling it to keep pace with the screen at the critical paper-forming point, thus avoiding injurious disturbances of the stock when the screen moves very rapidly, and making possible a much speedier production of good paper than was theretofore obtained from the machines without the improvement,—*held,* a new and useful invention. P. 52.
2. The prompt and general adoption of the improvement, with increased productivity of the machines to which it was applied, is strong evidence of its novelty and usefulness. P. 56.
3. Previous adoption of a comparatively slight pitch of the screen, but for another and distinct purpose, did not constitute anticipation of this invention. P. 58.
4. Oral evidence of prior discovery must be clear and satisfactory to sustain an attack on a patent. P. 60.
5. A patent for a very meritorious improvement on an old machine, substantially advancing the art, is entitled to a liberal construction. P. 63.
6. In this case, the patent is construed to cover a Fourdrinier machine in which the pitch of the wire screen is used, not as the sole, but as an appreciable factor, in addition to those already present, in bringing about approximate equal velocity of stock and screen at the point where, otherwise, injurious disturbances of the stock would be produced. P. 65.
7. General descriptive terms in a patent are not objectionable where it would have been difficult to make them more specific and where the description is sufficient to enable those skilled in the art to apply the invention. P. 65.
8. Accidental results, not appreciated, will not constitute anticipation. P. 66.

9. An increased elevation in the pitch of an element in a machine beyond that previously employed for another purpose is not mere matter of degree but amounts to invention when applied successfully to remedy an old defect in connection with the discovery of its cause. P. 66.
10. The novelty of an invention is not impeached by the fact that the same results may be achieved in a different way. P. 69.
11. The patent in this case, claims 1, 2, 3, 7, 8 and 12, were infringed by defendants. P. 69.
12. The first five of these are claims for a machine, and not a process. P. 70.

274 Fed. 540, reversed.

This was a bill in equity charging the infringement of a patent and seeking an injunction, an accounting and damages. The patent No. 845,224 issued to William Eibel, February 26, 1907. The application was filed August 22, 1906. The specifications describe the patent as for an improvement for Fourdrinier machines for paper making and say that it "has for its object to construct and arrange the machine whereby it may be run at a very much higher speed than heretofore and produce a more uniform sheet of paper which is strong, even, and well formed." The contention of the plaintiff, the petitioner here, is that the improvement was an important step in the art of paper making, and increased the daily product from twenty to thirty per cent.

The patent was held void by the District Court for the Western District of New York in the case of *Eibel Process Co.* v. *Remington-Martin Co.*, 226 Fed. 766 (1914). On appeal, the Circuit Court of Appeals for the Second Circuit reversed the decree of dismissal in the District Court, sustained the patent and found infringement of Claims Nos. 1, 2 and 3, but did not pass upon Claims Nos. 7, 8 and 12. 234 Fed. 624 (1910). The bill in the present case was filed in the District Court for Maine, January 1, 1917. That court in 1920 held the patent valid and entered a decree of injunction and for damages. 267

Fed. 847. On appeal, the Circuit Court of Appeals for the First Circuit reversed the decree and directed the dismissal of the bill. 274 Fed. 540 (1921). Because of the conflict in the two circuits, certiorari was granted to review the latter decree.

The Fourdrinier machine has for many years been well known and most widely used for making news print paper. Its main feature is an endless wire cloth sieve passed over a series of rolls at a constant speed. The sieve known as the " wire " is woven with 60 or 70 meshes to the inch. It may be 70 feet or more in length and is often more than 100 inches in width. Its working surface with the total length of 70 feet is about 30 feet, the rest being taken up in the return of the wire underneath. At what is called the breast roll, at one end of the machine, there is discharged upon the wire from a flow box or pond, a constant stream of paper making stock of fibres of wood pulp mixed with from 135 to 200 times their weight of water of the consistency and fluidity of diluted milk. As this stream moves along the wire, the water drains through its meshes and the fibres are deposited thereon. The process is stimulated by a device to shake the wire with constant and rapid sidewise thrusts, forward and back, which insures the proper interlocking and felting of the stock as it progresses, the water continuing to drain from it. At the end of the surface length of the wire, the stock reaches what are called the couch rolls between which it is pressed and then in the form of a sheet of uniformly distributed pulp, felted sufficiently to hold together, it leaves the wire and is carried through a series of rolls or calendars by which the sheet is pressed and dried and from which it emerges to be rolled up as finished paper.

In the flow box or " pond " where the stream of pulp stock is stored there is a gate or door forming the end of the flow box called the " slice " by lifting which the stock

is given the opportunity to flow upon the wire. The stream thus issuing is given a width of the desired sheet of paper and a depth regulated by the height to which the slice is lifted. The stream on the wire is prevented from flowing off the sides by " deckle straps " which are thick rubber bands, resting on each side of the wire at each side of the pulp. Travelling with the wire, they form lateral walls confining the stock till it is too dry to flow. Between the breast roll where the stream of liquid stock strikes the wire, and the couch rolls at the end of the surface length of the wire, there is a series of parallel horizontal rolls supporting the wire, called table rolls, and, twenty feet from the breast roll, there are placed under the wire and in contact with it, three suction boxes in succession, in which a partial vacuum is maintained, and through them is sucked out the greater part of the water remaining in the wet sheet of the pulp. Placed above the wire and just beyond the first suction box is what is called the " Dandy Roll," which is faced with wire cloth. Its office is to impress the upper surface of the forming sheet of paper and give it a texture similar to that which the lower surface of the paper has from its contact with the wire. It may also carry the design which is to give the watermark to the sheet if such a mark is desired. Beyond this is a larger roll called the guide roll, arranged with an automatic device varying its axis so as to keep the wire straight. From the guide roll the wire drops below the plane to the couch rolls already referred to.

These machines are very large, some of them weighing more than a million pounds, and their cost will range as high as one hundred twenty-five thousand dollars. They are run night and day in order that the capital invested in them may yield a proper return. Speed which increases production is therefore of the highest importance. Eibel's patent had for its avowed purpose the increase of this speed.

Eibel says in his specifications:

"My invention is embodied, essentially, in the first part or element of the machine having the Fourdrinier wire or paper-making wire, and consists in causing the stock to travel by gravity in the direction of movement of the making-wire and approximately as fast as the making-wire moves, thereby resulting in a "gravity-feed" for the machine. The stock may be and preferably is caused to travel more rapidly than the normal or usual speed of the making-wire for a certain grade of stock, and means are provided for increasing the speed of the machine so as to cause the making-wire to move at a higher rate of speed than usual, being substantially equal to the speed of the rapidly-moving stock. To accomplish this result in a simple manner, the breast-roll end of the paper-making wire is maintained at a substantial elevation above the level, thereby providing a continuous downwardly-moving paper-making wire, and the declination thus given to the wire is such that the stock is caused to travel by gravity in the direction of the movement of the wire and substantially as fast as the wire moves. The declination of the paper-making wire may be adjustable or the speed of the wire may be variable, or both the declination and speed of the wire may be adjustable, in order that the velocity produced by gravity in the stock on the declining wire will approximately equal the speed of the wire. By this arrangement the speed of the machine may be increased to such an extent as to bring the speed of the making-wire up to the maximum velocity of the rapidly-moving stock and a strong, even and well-formed sheet produced which is more uniform than usual."

Two figures accompany the specifications of the Eibel patent. Figure No. 1 shows the wire of the Fourdrinier machine in outline from the breast roll to the guide and couch rolls, with a screw device for raising and lowering

the breast roll and wire from the horizontal. The outline shows an elevation of the breast roll and wire so that the angle between the wire and the horizontal at the guide roll is about four per cent., which in a surface length of 30 feet would mean an elevation of 12 inches at the breast roll. The other figure No. 2 shows a device for regulating the speed of the wire applied at the lower couch roll.

Again the patentee says:

"For the purpose of increasing the speed of the machine to the maximum I maintain the breast-roll end of the making-wire at a high elevation above the level, so that the stock travels by gravity much faster than the making-wire ordinarily runs for a certain grade of stock, and I then increase the speed of the machine to such extent as to bring the rate of speed of the making-wire up to the speed of the rapidly-moving stock, and as a result the capacity of the machine is largely increased.

"I find in practice that by providing a gravity-feed operating substantially as herein described the stock runs smoothly and evenly without waving or rippling, and the fibers are thereby permitted to settle with great uniformity as regards their distribution over the the wire, so that the paper in addition to being well formed is very uniform. Furthermore, as the stock is moving with the paper-making wire instead of being moved by the wire, or essentially by the wire, the formation of the paper will begin at the start and will continue to the end of the travel of the stock with the wire."

The claims in question are:

1. A Fourdrinier machine having the breast-roll end of the paper-making wire maintained at a substantial elevation above the level, whereby the stock is caused to travel by gravity, rapidly, in the direction of movement of the wire, and at a speed approximately equal to the speed of the wire, substantially as described.

2. A Fourdrinier machine having the breast-roll end of the paper-making wire maintained at a high elevation,

whereby the stock is caused to travel by gravity faster than the normal speed of the wire for a certain grade of stock, and having means for increasing the speed of the machine to cause the wire to travel at substantially the same rate of speed as the rapidly-moving stock, substantially as described.

3. A Fourdrinier machine having the paper-making wire declined from the breast-roll to the guide-roll, the breast-roll end of the wire being maintained at a substantial elevation above the level, whereby the stock is caused to travel by gravity, rapidly, in the direction of movement of the wire and at a speed approximately equal to the speed of the wire, substantially as described.

7. A Fourdrinier machine having the paper-making wire declined from the breast-roll to the guide-roll, and the suction-boxes supported at a corresponding declination, substantially as described.

8. A Fourdrinier machine having the paper-making wire declined from the breast-roll to the guide-roll, and the several suction-boxes arranged at different elevations, substantially as described.

12. In a Fourdrinier machine, a downwardly-moving paper-making wire, the declination and speed of which are so regulated that the velocity of the stock down the declining wire, caused by gravity, is so related to the velocity of the wire in the same direction, that waves and ripples on the stock are substantially avoided and the fibers deposited with substantial uniformity on the wire, substantially as described.

Mr. Frederick P. Fish, with whom *Mr. Guy Cunningham* and *Mr. Harrison F. Lyman* were on the briefs, for petitioner.

Mr. Amasa C. Paul, with whom *Mr. Livingston Gifford, Mr. Richard Paul, Mr. Maurice M. Moore* and *Mr. Nathan Heard* were on the briefs, for respondent.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

The evidence in the case establishes that before Eibel entered the field, continued high speeds in the wire of the Fourdrinier machine much beyond five hundred feet a minute resulted in defective paper. Eibel concluded that this was due to the disturbance and ripples in the stock as it was forming at a point between the breast roll and the first suction box, caused by the fact that at that point the wire was travelling much faster than the stock, and that if at that point the speed of the flowing stock could be increased approximately to the speed of the wire, the disturbance and rippling in the stock would cease and the defects would disappear from the paper product. Accordingly he proposed to add to the former speed of the stock by substantially tilting up the wire and giving the stock the added force of the down hill flow. He thought that as long as he could thus maintain equality of speed between stock and wire at the crucial point, and prevent the disturbance and rippling there, a further increase in the speed of the wire would not result in a defective product. He confirmed this by actual trial.

The first and most important question is whether this was a real discovery of merit. The Circuit Court of Appeals thought not. The prior art and the obvious application of the principle that water will run down hill in their opinion robbed it of novelty or discovery. The issue is one largely of evidence.

The plaintiff below introduced the patent and some evidence of infringement and a single expert to explain the discovery and invention and rested. Then the defendant brought in a mass of evidence to show prior discovery and use, to impeach the utility of plaintiff's alleged invention and to demonstrate the indefiniteness of specification and claims. The fact that the adjudication of the

validity of the patent would impose a royalty on many of the paper manufacturers of the country who were not already licensees of the plaintiff led to the defendant's sending a circular letter to awaken the interest and secure the help of all so situated. This, as the record shows, had the effect to invoke offers of testimony on the critical points in the case from the unlicensed part of the trade. The plaintiff adduced a few witnesses in rebuttal as to particular details and the same expert as in chief. The plaintiff's case as presented on the record is largely the presumption of validity and novelty attaching to the patent and such evidence as comes from defendant's witnesses. A case that can be made out in all its elements by cross-examination of opposing witnesses is a strong case. Implication of facts and conditions falling from the mouths of witnesses when only collateral to the exact point of inquiry for which they are called is generally the most trustworthy evidence because the result of the natural, so to say, subconscious adherence to truth uninfluenced by a knowledge or perception of the bearing of the implication on the ultimate issue in the case.

A thorough examination of the whole voluminous record produces a satisfying conviction, first, that for years news print paper makers and manufacturers of paper-making machinery were engaged in seeking a method of increasing the speed of the news print machines, and that they had succeeded by improving the stock and by strengthening the parts in bringing the speed of the wire and the delivered paper up to between five and six hundred feet a minute, but that, when these high speeds were attained and maintained for any length of time, though they served to enable manufacturers to advertise such maximums, their continued and regular operation showed defects in the paper which were only overcome by a reduction of speed to something less than five hundred feet. As against advertisement, and the exuberant

memory of witnesses, the actual contemporaneous record of daily figures of production whenever brought to light justifies this conclusion. A leading manufacturer, one of the most enthusiastic witnesses on the subject of speed before Eibel, produced a memorandum of a visit he made in October, 1904, less than two years before Eibel's application, to see the operation of a machine he had manufactured which he called "the banner installation of the world" and made an entry in his diary, "Grand Sight—475 feet." There is the usual unconscious straining of memory without written record carried back ten or fifteen years, but the evidence on the whole is satisfying that the practical speed for the regular production of good news print paper never much exceeded that speed which had gratified the pride of this witness. A typical case is in that of machines made by Bagley & Sewall, large manufacturers of paper-making machines for the Laurentide Paper Company. The president of Bagley & Sewall testified that the speed of the machine was 552 feet a minute with satisfactory paper, and that he visited Laurentide in October, 1904, and counted the revolutions himself. He produced a letter from Mr. Chahoon, of the Laurentide Company, of about the same date, confirming his statement of the count and the satisfactory product, and an advertisement of Bagley & Sewall to the same effect of January, 1905. In rebuttal, a monthly record of the work of the machine is produced by the foreman at Laurentide for this same machine from January, 1905, to December, 1906, showing the speed to vary from a maximum of 518 in 1905 to 475 in 1908, with a general average of less than 500, and an explanation that the high speeds did not make a good product and were reduced. Our conclusion is confirmed, and indeed the importance of the issue of fact as to maximum speed before Eibel is minimized, by the circumstance, uncontroverted, that the owners of these fastest machines, at once upon Eibel's publi-

cation of his discovery, adopted his pitch and increased their product.

What Eibel tried to do was to enable the paper maker to go to six or seven hundred feet and above in speed and retain a good product. Did he do it? Eibel was the superintendent of a paper mill at Rhinelander, Wisconsin. Before August, 1906, he raised the pitch of the wire from two or three inches to twelve inches and greatly increased the speed with a satisfactory product, and in that month he applied for a patent. The defendant's witnesses without exception refer to that disclosure as something that surprised and startled the paper-making trade. It spread, to use the expression of one witness, like wild fire. There were those who hesitated to take the venturesome step to give such an unheard-of pitch to the wire and waited until others assumed the risk, but the evidence is overwhelming that within a short interval of a year or two all of the fast machines were run with wires at a pitch of twelve inches and that this pitch has been increased to fifteen and eighteen and even twenty-four inches, that the speed of the machines with satisfactory product has increased to six hundred, six hundred and fifty, and even seven hundred feet, with plans now even for a thousand feet and that the makers of two-thirds of the print paper of the country are licensees of Eibel.

Defendant attempts to break the effect of this evidence by showing that five of the largest paper manufacturers who are licensees of Eibel are also shareholders in the Eibel Process Company, the plaintiff, and that they make 2200 tons of the 5000 tons of paper made daily in the United States. This circumstance seems to have had influence with the Circuit Court of Appeals. There are, however, ten other paper-making companies, not shareholders, who are licensees and use the Eibel pitch, and whose aggregate production is 1200 tons a day; and what is equally significant, thirteen other companies have con-

tributed to a fund to help in resisting the establishment of the right of Eibel to claim a royalty for the use of this high or substantial pitch of the wire in the making of paper. Presumably they too find it wise to use the Eibel pitch. The paper makers in this country who do not use the Eibel pitch, therefore, are few. It can hardly be that dividends on the shares of stock in the Eibel Company held by the five large companies would furnish motive enough for them to continue to be licensees and to use something that was not of great advantage to them in their chief business of making paper; and certainly no such motive would explain the action of the licensees who are not stockholders or that of the infringers, in continuing to use the Eibel pitch. It should be said that one of the large manufacturers of paper-making machinery called by the defendant said that since 1907 he had not installed a single machine without the Eibel pitch.

The fact that the Eibel pitch has thus been generally adopted in the paper-making business and that the daily product in paper making has thus been increased at least twenty per cent. over that which had been achieved before Eibel is very weighty evidence to sustain the presumption from his patent that what he discovered and invented was new and useful. Of course, although very persuasive, it is not conclusive and may be explained. This brings us to the consideration of the evidence of the prior art and the contention of the defendant, and the conclusion of the court below, that the step taken by Eibel, so far as he took one, was a mere obvious application of fully developed devices in the prior art.

Eibel in his patent gives this measure of the prior art:

"The Fourdrinier wire has usually been arranged to move in a horizontal plane, although I am aware that means have been provided for adjusting the breast-roll end of the wire to different elevations, usually below the level, to provide for running with different grades of

stock—as, for instance, with quick stock and slow stock; but so far as I am aware the making-wire has always had to perform the work of drawing along the stock, and as the wire moved much faster than the stock the stock waved or rippled badly near the breast roll end of the wire, which gradually diminished until an equilibrium was established and a smooth, even, and glassy surface presented, and not until the waving or rippling ceased did the fibers lay down uniformly and produce a well-formed sheet of paper. The machine has been run necessarily at a slow rate of speed to give ample time for the water to escape and for the fibers to lay down so as to make a uniform sheet, and in case the time was insufficient the breast-roll end of the wire has been lowered still farther until the desired result was accomplished. In accordance with my invention I operate entirely above the level to cause the stock to travel by gravity at a velocity approximately equal to the speed of the making-wire, which I believe to be a new principle of operation."

It is important that the stock when it reaches the "Dandy" roll beyond the first suction box of the machine, shall be, on the one hand, free enough of water to be a formed sheet and take an impression from the Dandy roll, and on the other that it shall not be so dry that it will not retain the impression. Paper of such a heavy composition of fibre and water that it holds water long is said to be slow stock. Paper of lighter and thinner composition parting with water easily and drying quickly is called quick stock. Various means were adopted to give the stock the proper degree of dryness at the Dandy roll, usually by adjustment of the composition of the stock. What Eibel describes in this reference was another means. It was not widely used however. It was a slight depression or elevation in the wire at the breast roll so that slow stock could be made to run up hill from the flow box to the Dandy roll, lengthening the time of

the movement and thus giving more opportunity in its progress for the needed draining of the stock. On the other hand, fast or thin stock from which the water flowed too easily could be made to retain sufficient water by hastening its progress to the Dandy roll by the down-hill tilt of the wire. This tilt was obtained by raising the breast roll end of the wire either by putting shimming blocks under that end of the machine or by special devices to be described. The sole object was greater or less drainage of stock for the Dandy roll. The Eibel invention is distinguished from the prior art in two ways, first, in that the pitch of the wire was for a different purpose to be accomplished, not at the Dandy roll some twenty or more feet from the breast roll, but at a point only nine or ten feet from there, and, second, by the fact that to achieve his purpose a high or substantial pitch must be given to the wire, while only a small or trivial pitch was needed for the drainage of the prior art.[1]

This difference in purpose and degree of pitch between Eibel's device and the prior art is quite clearly shown by reference to a patent granted to Barrett and Horne, assignors to J. H. Horne & Sons, one of the important manufacturers of paper machinery of the country, in 1899. Their specifications showed a device capable of elevating the breast roll less than three inches and its sole purpose was for drainage. Their specifications say:

[1] It is true that defendant's expert Carter points out that in some of the machines of the prior art in which means were provided for tilting up the wire, the tilting was confined to that part of the surface length covered by the shake frame, say 18 feet, and did not extend to the first suction box, whereas Eibel's tilting involved the entire surface length of thirty feet. It would follow from this that the elevation of three inches in such machines would mean a greater angle of declination than three inches for the full surface length and that the disparity between three inches and twelve inches was not so great as the figures would lead one to think. But whatever difference this might make, the fact remains that Eibel's pitch was substantially greater than anything in the prior art.

"In certain kinds of pulp, notably the wood pulp which is now largely used in making paper, the water drains away very rapidly, so that the pulp may become nearly dry before it leaves the shake-frame, and thus not be properly laid when it reaches the rollers. This tendency may be obviated to a considerable extent by downwardly inclining the shake frame toward the rollers, so that the water tends to travel along with the pulp and will not, therefore, drain out through the wire so rapidly. It is further desirable that the amount of inclination or slope should be variable, so as to adapt the machine for pulp of different kinds or grades."

The Bayliss Austin machine, one of three chiefly relied on to show prior use, was made by the Horne Company and was designed by Barrett and Horne on the model of this patent. It is very clear from an examination of the design and contract for this machine that the pitch of the wire in it could not have exceeded three inches and that it was used for drainage. Other patents were set up in defense, some of them showing devices for raising the breast roll and wire above the level, and lowering them below the level for the purpose of drainage. The angle of elevation and depression was always small. There was a constant straining by the witnesses for the defense to increase the elevation before Eibel. On the direct examination they began with a positive assertion that a pitch of four, five, and even six inches, had been used in certain machines before Eibel's time, but written records, contracts and specifications brought out on cross-examination show nothing more than three inches provided for purpose of drainage and not more than that was used. This is not to say that witnesses in the face of such records did not testify to a higher elevation, but in such cases the amount of elevation rested in memory running back more than ten or fifteen years, a memory stimulated by the subsequent high pitches of Eibel and the retrospect of the

progress that now seems so easy and clear to every one. There was, too, always indefiniteness as to when such increase in elevation of the wire had taken place, whether before or after August, 1906, Eibel's date, and there was no evidence of weight, we think, after a full examination of the record, sufficient to justify a finding that such elevations had ever exceeded three inches before his application.

This is confirmed by the fact that greater elevation was not needed for the purpose of drainage for which it was devised and used. It is true that some witnesses testify that they realized before Eibel's application that speeding up the stock to equal velocity with the wire would solve the difficulty and aid the speed. But there is not a single written record, letter or specification of prior date to Eibel's application that discloses any such discovery by anyone, or the use of the pitch of the wire to aid the speed of the machine. The oral evidence on this point falls far short of being enough to overcome the presumption of novelty from the granting of the patent. The temptation to remember in such cases and the ease with which honest witnesses can convince themselves after many years of having had a conception at the basis of a valuable patent, are well known in this branch of law, and have properly led to a rule that evidence to prove prior discovery must be clear and satisfactory. *Barbed Wire Patent Case,* 143 U. S. 275, 284; *Loom Co.* v. *Higgins,* 105 U. S. 580, 591. Indeed when we consider the indisputable fact that Eibel's successful experiment at Rhinelander and his application for a patent surprised the whole paper trade, and that for a short time many held back from risking so radical a change and then all adopted it, oral evidence that some persons had discovered the source of trouble and the means of remedying it some years before Eibel is incredible. We are confirmed in this conclusion by the finding of Judge Hale in the District Court which is not

offset by the reversal of his decree in the Circuit Court of Appeals because that court seems to have reached its conclusion chiefly on other grounds yet to be considered.

The defendant's counsel contend that the specifications of the Eibel patent require that the only force to be used in giving speed to the stock shall be the force of gravity created by the angle of down hill inclination of the wire. They say that the patentee mentions no other means of acceleration, that he must be confined to this, and that a machine which uses other factors for this purpose does not infringe. We do not understand the Circuit Court of Appeals to go quite so far, but it does seem to give a construction requiring the force of gravity caused by the pitch of the wire to be the predominating cause of the increased speed of the stock. The factors of speed of the stock in such a machine before the factor of pitch was applied to increase it, were the head or hydraulic pressure of the stock in the flow box behind the slice, imparting movement to it as it came out on to the wire under the lifted slice, and the carrying effect of the moving wire upon the fluid stock as it fell upon the wire and proceeded gradually to form into a web as the fibres were laid and the water drained.

Many calculations were made by defendant's expert Carter, based on the laws of hydraulic pressure and flow, to show that under varying conditions of head and pitch and the speed of the wire, the chief factor would be head, the next the " drag " or carrying effect of the wire and the least in degree and importance in making the velocity of the stock and the wire equal would be the pitch, and that Eibel's invention could not be present because the " drag " of the wire and its influence upon the speed of the stock must be eliminated under Eibel's specifications. We do not so understand it. As the stock descends upon the wire with the head of the flow box, it is thin and liquid, the wire at its greater speed necessarily imparts addi-

tional speed to the stock and in its unformed fluidity the added speed does not disturb or ripple the stock to the injury of the process of paper making. It is only after the stock proceeds a third or a half of the surface length of the wire that the point is reached where the overspeed of the drag becomes troublesome in the felting or formation of the web of the pulp. Before that point is reached, the "drag" may be useful in bringing the speed of the stock nearer to that of the wire without injury. The truth seems to be, and this is brought out with force in the testimony of the defendant's expert witness Livermore, that while it is possible to calculate to a nicety the velocity of the free flowing liquid stock due to head and pitch, when unaffected by drainage, variation in viscosity and fluidity and the like, yet when these conditions are present, as they always are, and the other less calculable factor of the drag of the wire enters the problem, there is no means, short of actual experiment, to enable one to anticipate results and it is quite impossible to apportion to each factor its real influence. This fact reflects on the question whether Eibel's discovery was invention rather than the mere obvious and simple application of known natural forces.

The defendant introduced expert evidence to show that with a head of 2¼ inches in the flow box and a speed of 585 feet to the minute in the wire, and excluding the factor of "drag" of the wire, it would require an elevation of 48 inches to make up the difference in speed of the stock given by the head and the speed of the wire at a distance 10 feet from the point of discharge on the wire. The conclusion drawn from this seems to be that as no practical machine uses 48 inches pitch, the Eibel invention has never been used or infringed. Disregarding its error in omitting necessary factors already adverted to, this reasoning seems to us to depend on too narrow a construction of the patent.

In administering the patent law the court first looks into the art to find what the real merit of the alleged discovery or invention is and whether it has advanced the art substantially. If it has done so, then the court is liberal in its construction of the patent to secure to the inventor the reward he deserves. If what he has done works only a slight step forward and that which he says is a discovery is on the border line between mere mechanical change and real invention, then his patent, if sustained, will be given a narrow scope and infringement will be found only in approximate copies of the new device. It is this differing attitude of the courts toward genuine discoveries and slight improvements that reconciles the sometimes apparently conflicting instances of construing specifications and the finding of equivalents in alleged infringements. In the case before us, for the reasons we have already reviewed, we think that Eibel made a very useful discovery which has substantially advanced the art. His was not a pioneer patent, creating a new art; but a patent which is only an improvement on an old machine may be very meritorious and entitled to liberal treatment. Indeed, when one notes the crude working of machines of famous pioneer inventions and discoveries, and compares them with the modern machines and processes exemplifying the principle of the pioneer discovery, one hesitates in the division of credit between the original inventor and the improvers; and certainly finds no reason to withhold from the really meritorious improver, the application of the rule "*ut res magis valeat quam pereat,*" which has been sustained in so many cases in this Court. *Winans* v. *Denmead,* 15 How. 338, 341; *Corning* v. *Burden,* 15 How. 265, 269; *Turrill* v. *Railroad Co.,* 1 Wall. 491, 510; *Rubber Co.* v. *Goodyear,* 9 Wall. 788, 795; *McClain* v. *Ortmayer,* 141 U. S. 419, 425.

Eibel was an avowed improver, not in the art of paper making generally, but upon a well-known and universally

used machine. In that machine, the speed of the stock which was the subject matter of his improvement, had always been controlled by two factors, the head of the stock in the flow box, and the carrying effect of the under moving wire. He says nothing in his specifications to exclude these factors, he merely adds another factor of speed to secure the equality of speed of the stock with the wire. He says:

"For the purpose of increasing the speed of the machine to the maximum I maintain the breast-roll end of the making-wire at a high elevation above the level, so that the stock travels by gravity much faster than the making-wire ordinarily runs for a certain grade of stock, and I then increase the speed of the machine to such extent as to bring the rate of speed of the making-wire up to the speed of the rapidly-moving stock, and as a result the capacity of the machine is largely increased."

We agree fully with Judge Hale in the District Court in his comment on this:

"The process invented by him (Eibel) begins to operate after the stock has entered upon the wire. His apparent attempt was to get rid of bubbles and wrinkles, before he got to the place on the machine where the paper is formed. To do this, he allowed gravity to work with 'drag' and with 'head.' He harnessed all the elements he could find. He brought gravity in with the other elements, and so brought the speed of the stock up to equality with that of the wire. By this means he achieved high speed and also freed the stock on the wire from waves and ripples." 267 Fed. 855.

The Circuit Court of Appeals questions the assumption that gravity was a new factor with Eibel, because the head of the flow box is only another application of the force of gravity. This is a mere criticism of a term which whether accurate or not is not misleading. What Eibel was dealing with in his patent as a new factor was the additional

force acquired by the pitch of the wire and that he called gravity, and Judge Hale in the passage quoted uses the word with the same meaning and without any confusion to the reader.

We think, then, that the Eibel patent is to be construed to cover a Fourdrinier machine in which the pitch of the wire is used as an appreciable factor, in addition to the factors of speed theretofore known in the machine, in bringing about an approximation to the equal velocity of the stock and the wire at the point where but for such approximation the injurious disturbance and ripples of the stock would be produced.

The next objection to the patent which prevailed in the Circuit Court of Appeals is that its terms are too vague because the extent of the factor of pitch is not defined except by the terms "substantial" and "high". The figure accompanying the specification and illustrating the improvement indicates an angle of four per cent. or an elevation of 12 inches, and the reference to the small elevations for drainage shown in earlier devices indicates that the patentee had in mind elevations substantial as compared with them in order to achieve his purpose of substantially increasing the speed of the stock. It was difficult for him to be more definite, due to the varying conditions of speed and stock existing in the operations of Fourdrinier machines and the necessary variation in the pitch to be used to accomplish the purpose of his invention. Indefiniteness is objectionable because the patent does not disclose to the public how the discovery, if there is one, can be made useful and how its infringement may be avoided. We do not think any such consequences are involved here. This patent and its specifications were manifested to readers who were skilled in the art of paper making and versed in the use of the Fourdrinier machine. The evidence discloses that one, so skilled, had no diffi-

culty, when his attention was called to their importance, in fixing the place of the disturbance and ripples to be removed, or in determining what was the substantial pitch needed to equalize the speeds of the stock and wire at that place. The immediate and successful use of the pitch for this purpose by the owners of the then fastest machines and by the whole trade is convincing proof that one versed in paper making could find in Eibel's specifications all he needed to know, to avail himself of the invention. Expressions quite as indefinite as " high " and " substantial " in describing an invention or discovery in patent specifications and claims have been recognized by this Court as sufficient. In *Tilghman* v. *Proctor,* 102 U. S. 707, the claim sustained was for " the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure." See also *Rubber Co.* v. *Goodyear,* 9 Wall. 788, 794; *Mowry* v. *Whitney,* 14 Wall. 620, 629; *Lawther* v. *Hamilton,* 124 U. S. 1, 9; *Carnegie Steel Co.* v. *Cambria Iron Co.,* 185 U. S. 403, 436; *Abercrombie & Fitch Co.* v. *Baldwin,* 245 U. S. 198, 205.

It is contended on behalf of the defendant that whether Barrett and Horne perceived the advantage of speeding up the stock to an equality with the wire, yet the necessary effect of their devices was to achieve that result and therefore their machine anticipated Eibel. In the first place we find no evidence that any pitch of the wire, used before Eibel, had brought about such a result as that sought by him, and in the second place if it had done so under unusual conditions, accidental results, not intended and not appreciated, do not constitute anticipation. *Tilghman* v. *Proctor,* 102 U. S. 707, 711; *Pittsburgh Reduction Co.* v. *Cowles Electric Co.,* 55 Fed. 301, 307; *Andrews* v. *Carman,* 13 Blatchf. 307, 323.

It is next objected that the alleged invention covers only a matter of degree in pitch which can not be the subject of a patent. The prior art showed the application

of gravity by use of the pitch of the wire to the improvement of the Fourdrinier machine and Eibel, it is said, merely increased degree of pitch and gravity for the same general purpose. We think this attack upon the patent can not prevail. Eibel's high or substantial pitch was directed toward a wholly different object from that of the prior art. He was seeking thereby to remove the disturbance and ripples in the formation of the stock about ten feet from the discharge, while the slight pitches of the prior art were planned to overcome the dryness in the formed web of the stock at double the distance from the discharge. It would seem that the greater speed of the stock produced by Eibel would make difficult the joint application of the principles of Eibel and Barrett and Horne, and that the function of adjusting the drainage for the Dandy roll must be carried on by some of the other methods known to the art when Eibel's pitch is used. But however this may be, the object of the one was entirely different from that of the other. Livermore, an expert witness called by the defendant, when asked the question whether the purpose of the Barrett and Horne patent had anything in common with the theory of the Eibel patent, answered:

"I should say not. It looks to me as if Barrett and Horne referred to the adjustment of inclination with one effect in mind, and that Eibel referred to like adjustment with another effect in mind. . . . In this particular case, the two effects have, so far as I can see, no special correlation to one another, and an adjustment made with one effect in mind might or might not produce a desirable effect as to the other function or phenomenon."

In considering this phase of the controversy, we must not lose sight of the fact that one essential part of Eibel's discovery was that the trouble causing the defective paper product under high machine speed was in the disturbance and ripples some ten feet from the discharge and that

they were due to the unequal speeds of stock and wire at that point and could be removed by equalizing the speeds. The invention was not the mere use of a high or substantial pitch to remedy a known source of trouble. It was the discovery of the source not before known and the application of the remedy for which Eibel was entitled to be rewarded in his patent. Had the trouble which Eibel sought to remedy been the well known difficulty of too great wetness or dryness of the web at the Dandy roll and had he found that a higher rather than a low pitch would do that work better, a patent for this improvement might well have been attacked on the ground that he was seeking monopoly for a mere matter of degree. But that is not this case. On the other hand, if all knew that the source of the trouble Eibel was seeking to remedy was where he found it to be and also knew that increased speed of the stock would remedy it, doubtless it would not have been invention on his part to use the pitch of the wire to increase the speed of the stock when such pitch had been used before to do the same thing although for a different purpose and in a less degree. We can not agree with the Circuit Court of Appeals that the causal connection between the unequal speeds of the stock and the wire, and the disturbance and rippling of the stock, and between the latter and the defective quality of the paper in high speeds of the machine was so obvious that perception of it did not involve discovery which will support a patent. The fact that in a decade of an eager quest for higher speeds this important chain of circumstances had escaped observation, the fact that no one had applied a remedy for the consequent trouble until Eibel, and the final fact that when he made known his discovery, all adopted his remedy, leave no doubt in our minds that what he saw and did was not obvious and did involve discovery and invention.

The Circuit Court of Appeals dwells on the fact that the use of the pitch of the wire was not really the intro-

duction of a new factor in the solution of the problem because the same result would have followed if the head of the flow box had been made greater in order to increase by gravity the speed of the stock. Doubtless this could have been done. There were difficulties, however, in such a method when Eibel's application was filed, because in the then machines the flow box was supported by an apron over the wire and the necessary addition to the weight of the stock in the flow box, in increasing the head, would have interfered with the free working of the wire. Since that time an improvement has been adopted by which the flow box does not rest on the wire and additional head can be imparted to the stock. The defendant invites attention to the fact that one or two paper makers are increasing this head and giving up the pitch, for the purpose of increasing the speed of the stock. We do not see that these circumstances in any way affect the validity of the Eibel patent. If defendant or others can do what Eibel accomplished in another way, and by means he did not include in his specifications and claims, i. e., by additional head and the abandonment of a substantial pitch, they are at liberty to do so and avoid infringement.

We come finally to the question of infringement. If the Eibel patent is to be construed as we have construed it, there can be no doubt that the defendant uses the Eibel invention. The device which the defendant uses for tilting the wire, i. e., by shimming blocks, and that for regulating and increasing the speed of the wire, are plainly equivalents of the same elements in the new combination which Eibel shows in his drawings and specifications. The defendant uses a Fourdrinier machine having the breast roll end of the paper-making wire maintained at an elevation of 15 inches above the level whereby the stock is caused to travel by gravity rapidly in the direction of the movement of the wire and at a speed approximately

equal to the speed of the wire substantially as described. This brings the defendant's machines within the first claim of the patent if 15 inches is a substantial elevation of the making wire, as all the witnesses concede that it is. The same conclusion must be reached as to the second claim because the defendant uses a machine "having the breast-roll end of the paper-making wire maintained at a high elevation, whereby the stock is caused to travel by gravity faster than the normal speed of the wire for a certain grade of stock, and having means for increasing the speed of the machine to cause the wire to travel at substantially the same rate of speed as the rapidly-moving stock, substantially as described." The same thing is true of the third claim.

Question has been made whether these three claims are for a machine or a process. We think they are claims for a machine, i. e., for an improvement on a machine, and that the devices for such improvement, to wit, the elevation by a screw or other equivalent method, and the control of the speed of the wire, are shown by the specifications and the figures, together with a sufficient description of their operation.

The seventh and eighth claims are for the same improvement with the suction boxes changed from their usual position in the unimproved machine to make them effectively function on the pitched wire. They are machine claims and are infringed by the defendant. Their new adjustment is part of a new combination and the words substantially as described limit them to a combination including the elements included in the first three claims.

Claim No. 12 is as follows:

"12. In a Fourdrinier machine, a downwardly-moving paper-making wire, the declination and speed of which are so regulated that the velocity of the stock down the declining wire, caused by gravity, is so related to the

velocity of the wire in the same direction, that waves and ripples on the stock are substantially avoided and the fibers deposited with substantial uniformity on the wire, substantially as described."

This comes nearer to being a process claim but whether it is or not the defendant infringes it.

The evidence discloses that after the suit was brought, the defendant reduced the pitch of one of its machines to six inches and the contention of defendant is that the machine ran as well and gave as good results as when its pitch was 15 inches. We are not called upon to decide whether this contention can be sustained because the reduction was after the bill was filed. It may be noted, however, that the admissions of witnesses seem to show that this reduction was made for purposes of the suit and that immediately after the defendant won the suit in the Circuit Court of Appeals, it restored the pitch of this machine to 15 inches, and when the decree of the Circuit Court of Appeals proved not to be final, the wire was lowered again to a 6-inch pitch. Much evidence was taken and much discussion has followed upon the point whether a 6-inch pitch accomplishing in whole or in part what Eibel sought to do would infringe a patent for a substantial pitch. We do not find it necessary to pass definitely on the question because it is not before us on the record, though we can not prevent the natural inferences upon this point to be drawn from the conclusions we have reached.

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

PENNSYLVANIA RAILROAD COMPANY *v.* UNITED STATES RAILROAD LABOR BOARD ET AL.

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

No. 585. Argued January 11, 1923.—Decided February 19, 1923.

1. Under Title III, § 307, of the Transportation Act, 1920, the Railroad Labor Board has jurisdiction to hear and decide a dispute over rules and working conditions upon the application of either side, when the parties have failed to agree upon a settlement under § 301 and no adjustment board has been organized under § 302. P. 80.
2. In authorizing such application by any "organization of employees . . . directly interested in the dispute," (§ 307), the act includes labor unions. P. 81.
3. The Board has jurisdiction to decide who may represent employees in conferences under § 301 or in applying for hearings under § 307, and to make reasonable rules in advance for ascertaining the will of the employees in this regard. § 308. P. 82.
4. The Board was created, not as a tribunal to determine the legal rights and obligations of railway employers and employees, or to protect and enforce these, but to decide how such rights ought to be exercised for coöperation in running a railroad; its decisions have no other sanction than that of public opinion. P. 84.
5. The making of decisions and publication of violations in accordance with the procedure and within the discretion defined by the statute, cannot be enjoined by the courts. *Id.*

282 Fed. 701, affirmed.

This case involves the construction of Title III of the Transportation Act of 1920, c. 91, 41 Stat. 456, 469. The Title provides for the settlement of disputes between railroad companies engaged in interstate commerce and their employees, and as a means of securing this, it creates a Railroad Labor Board and defines its functions and powers.

The Pennsylvania Railroad Company began this action by a bill in equity against the Railroad Labor Board and its individual members in the District Court for the

Northern District of Illinois, where the Board has its office, averring that the suit involved more than $3,000, and praying an injunction against the defendants' alleged unlawful proceedings under the act and especially against their threatened official publication under § 313 of the Title that the Railroad Company had violated the Board's decision under the act.

The defendants moved to dismiss the bill on the ground that the suit was one against the United States without its consent, and also for want of equity and a lack of a cause of action. They also filed an answer making the same objections to the bill as in the motion and setting forth by exhibits more in detail the proceedings before the Board and its decisions. The District Court heard the case on the bill, motion and answer, and granted the injunction as prayed. The Board appealed to the Circuit Court of Appeals, which reversed the decree and directed the dismissal of the bill. The decree of the Circuit Court of Appeals, not being made final by the statutes, the case is brought here by appeal under § 241 of the Judicial Code.

On December 28, 1917, the President, by authority of the Act of Congress of August 29, 1916, c. 418, 39 Stat. 619, 645, took over the railroads of the country, including that of the complainant, and operated them through the Director General of Railroads until March 1, 1920, when, pursuant to the Transportation Act of 1920, possession of them was restored to the companies owning them. During his operation, the Director General had increased wages and established the rules and working conditions by what were called National Agreements with National Labor Unions composed of men engaged in the various railroad crafts. Further demands by employees through such unions were presented to the Director General and were pending and undetermined when the Transportation Act was approved. Conferences were held between the

heads of the labor unions, signatories to the National Agreement, and representatives of the railroads after the railroads were restored to private ownership, but without successful issue. When the members of the Labor Board were appointed and organized, April 15, 1920, it assumed jurisdiction of these demands and proceeded to deal with them. It rendered its decision as to the wage dispute on July 20, 1920, and postponed that as to rules and working conditions until April 14, 1921, when it decided that such rules and working conditions as were fixed in the so-called National Agreements under the Director General and had been continued by the Board as a *modus vivendi* should end July 1, 1921, and remanded the matter to the individual carriers and their respective employees, calling upon them in the case of each railroad to designate representatives to confer and decide so far as possible respecting rules and working conditions for the operation of such railroad and to keep the Board advised of the progress toward agreement. The Board accompanied this decision (No. 119) with a statement of principles or rules of decision which it intended to follow in consideration and settlement of disputes between the carriers and employees. The only two here important are §§ 5 and 15, as follows:

"5. The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management."

"15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."

On June 27, 1921, the Board announced that some carriers in conference with their employees had agreed upon rules and working conditions and others had not. As to the latter the Board continued the old rules and working conditions until it should render a decision as to them.

In May, 1921, the officers of the Federation of Shop Crafts of the Pennsylvania System, a labor union of employees of that System engaged in shop work, and affiliated with the American Federation of Labor, met the representatives of the Pennsylvania Railroad Company. They said they represented a majority of the employees of the Pennsylvania System in those crafts and were prepared to confer and agree upon rules and working conditions. The Pennsylvania representatives refused to confer with the Federation for lack of proof that it did represent such a majority, and said they would send out a form of ballot to their employees asking them to designate thereon their representatives. The Federation officers objected to this ballot because it was not in accordance with Principles 5 and 15 of the Board in that it made no provision for representation of employees by an organization, but specified that those selected must be natural persons, and such only as were employees of the Pennsylvania Company, and also because it required that the representatives of the employees should be selected regionally rather than from the whole system. The result was that the Company and the Federation each sent out ballots. The Federation then filed a complaint under § 307 of the Transportation Act, against the Pennsylvania Company, complaining on behalf of its members directly interested of the Company's course in respect of the ballots. The Company appeared, a hearing was had and the Board decided (Decision No. 218) that neither of the ballots sent out by the parties was proper, that representatives so chosen were not proper representatives and that rules and work-

ing conditions agreed upon by them would be void. It further appeared that the votes cast on the Company's ballots were something more than 3,000 out of more than 33,000 employees entitled to vote. The Federation had advised its members not to vote on the Company's ballots. What the result was in the vote of the Federation ballots did not appear. The persons chosen by the 3,000 votes on the Company's ballots conferred with the Pennsylvania Company's representatives and agreed upon rules and working conditions. The Board in its decision ordered a new election for which rules were prescribed and a form of ballot was specified, on which labor organizations as well as individuals could be voted for as representatives at the option of the employee.

The Company on September 16, 1921, applied to the Board to vacate this decision on the ground that there was no dispute before the Board of which by Title III of the Transportation Act the Board was given jurisdiction. After a hearing the Board declined to vacate its order but said that it would allow the Company to be heard on the question of the ratification of its shop craft rules by representatives of the crafts concerned when fairly selected.

Title III of the Transportation Act of 1920 bears the heading "Disputes Between Carriers And Their Employees And Subordinate Officials."

Section 301 makes it the duty of carriers, their officers, employees and subordinate officials, to exert every reasonable effort to avoid interruption to the operation of an interstate commerce carrier due to a dispute between the carrier and its employees, and further provides that such disputes shall be considered and if possible decided "in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute."

The section concludes:

"If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

Section 302 provides for the establishment of railroad boards of adjustment by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof. No such boards of adjustment were established when this controversy arose.

Section 303 provides for hearing and decision by such boards of adjustment upon petition of any dispute involving only grievances, rules or working conditions not decided as provided in § 301.

Sections 304, 305 and 306 provide for the appointment and organization of the "Railroad Labor Board" composed of nine members, three from the Labor Group, three from the Carrier Group, and three from the Public Group.

Section 307 (a) provides that when a labor adjustment board under § 303 has not reached a decision of a dispute involving grievances, rules or working conditions in a reasonable time, or when the appropriate adjustment board has not been organized under § 302, the Railroad Labor Board "(1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or

working conditions which is not decided as provided in section 301."

Paragraph (b) of the same section provides for a hearing and decision of disputes over wages.

Paragraph (c) makes necessary to a decision of the Board the concurrence of five members, of whom, in the case of wage disputes, a member of the Public Group must be one. The paragraph further provides that

"All decisions of the Labor Board shall be entered upon the records of the board and copies thereof, together with such statement of facts bearing thereon as the board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each Adjustment Board, and the [Interstate Commerce] Commission, and shall be given further publicity in such manner as the Labor Board may determine."

Paragraph (d) requires that decisions of the Board shall establish standards of working conditions which in the opinion of the Board are just and reasonable.

Section 308 prescribes other duties and powers of the Labor Board, among which is that of making "regulations necessary for the efficient execution of the functions vested in it by this title."

Section 309 prescribes that

"Any party to any dispute to be considered by an Adjustment Board or by the Labor Board shall be entitled to a hearing either in person or by counsel."

Section 313 is as follows:

"The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine."

Mr. Frederic D. McKenney, with whom *Mr. Frank J. Loesch, Mr. Timothy J. Scofield, Mr. Charles F. Loesch, Mr. Robert W. Richards, Mr. C. B. Heiserman* and *Mr. E. H. Seneff* were on the brief, for appellant and petitioner.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Attorney General Daugherty* and *Mr. Solicitor General Beck* were on the brief, for appellees and respondents.

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

It is evident from a review of Title III of the Transportation Act of 1920 that Congress deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing, and if this is ineffective, by a full hearing before a National Board appointed by the President, upon which are an equal number of representatives of the Carrier Group, the Labor Group, and the Public. The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances

of the controversy and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it.

The main and controlling question in this case is, whether the members of the Board exceeded their powers on the facts as disclosed in the bill and answer.

It is contended by the carrier that the Labor Board can not obtain jurisdiction to hear and decide a dispute until it is referred by the parties to the Board after they have conferred and failed to agree under § 301. Undoubtedly the act requires a serious effort by the carrier and his employees to adjust their differences as the first step in settling a dispute but the subsequent sections dispel the idea that the jurisdiction of the Board to function in respect to the dispute is dependent on a joint submission of the dispute to it. If adjustment boards are not agreed upon, then under § 307, either side is given an opportunity to bring its complaint before the Labor Board, which then is to summon everyone having an interest, and after a full hearing is to render a decision. A dispute existed between all the carriers and the officers of the National Labor Unions as to rules and working conditions in the operation of the railroads. By order of the Labor Board, this dispute, which had arisen before the passage of the Transportation Act and before the Government had turned back the railroads to their owners, was continued for settlement before the Labor Board. That Board had been obliged to postpone the decision of the controversy until it could give it full hearing and meantime had ordered that the existing rules and conditions should be maintained as a *modus vivendi.*

Counsel of the Railroad Company insist that the Board had no jurisdiction to make an order or to take up the controversies between the Government Railroad Administration and the National Labor Unions; that when the rail-

roads were turned back to their owners each company had the right to make its own rules and conditions and to deal with its own employees under § 301, and that the jurisdiction of the Board did not attach until a dispute as to such rules and conditions between the company and its employees had thereafter arisen.

We are not called upon to pass upon the propriety or legality of what the Labor Board did in continuing the existing rules and labor conditions which had come over from the Railroad Administration, or in hearing an argument as to their amendment by its decision. It suffices for our decision that the Labor Board at the instance of the carriers finally referred the whole question of rules and labor conditions to each company and its employees to be settled by conference under § 301; that such conferences were attempted in this case, and that thereafter the matter was brought before the Board by Federation No. 90 of Shop Crafts of the Pennsylvania System under § 307. It is the alleged invalidity of this proceeding, thus initiated, which is really the basis of the bill of complaint of the Company herein, and it is this only which we need consider.

First, Did Federation No. 90 have the right under § 307 to institute the hearing of the dispute? Section 307 says that this may be invoked on the application of the chief executive of any organization of employees whose members are directly interested in the dispute. Its name indicates, and the record shows, that the Federation is an association of employees of the Pennsylvania Company directly interested in the dispute. The only question between the Company and the Federation is whether the membership of the latter includes a majority of the Company's employees who are interested. But it is said that the Federation is a labor union affiliated with the American Federation of Labor and that the phrase "organiza-

tion of employees" used in the act was not intended by Congress to include labor unions. We find nothing in the act to impose any such limitation if the organization in other respects fulfills the description of the act. Congress has frequently recognized the legality of labor unions, *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, and no reason suggests itself why such an association, if its membership is properly inclusive, may not be regarded as among the organizations of employees referred to in this legislation.

The next objection made by the Company to the jurisdiction of the Board to entertain the proceeding initiated by the Federation is that it did not involve the kind of dispute of which the Board could take cognizance under the act. The result of the conferences between the Pennsylvania Railroad Company and its employees under § 301 appears in the statement of the case. By a vote of 3,000 out of more than 30,000 employees, a representative committee was appointed with which the officers of the Company made an agreement as to rules and working conditions. Federation No. 90 for its members objected to the settlement on the ground that it had not been made by properly chosen representatives of the employees and brought this dispute before the Labor Board. The Pennsylvania Company was summoned and appeared before the Board and the issue was heard.

It is urged that the question who may represent the employees as to grievances, rules and working conditions under § 301 is not within the jurisdiction of the Labor Board to decide; that these representatives must be determined before the conferences are held under that section; that the jurisdiction of the Labor Board does not begin until after these conferences are held, and that the representatives who can make application under § 307 to the Board are representatives engaged in the conference under § 301. Such a construction would give either side

an easy opportunity to defeat the operation of the act and to prevent the Labor Board from considering any dispute. It would tend to make the act unworkable. If the Board has jurisdiction to hear representatives of the employees, it must of necessity have the power to determine who are proper representatives of the employees. That is a condition precedent to its effective exercise of jurisdiction at all. One of its specific powers conferred by § 308 is to " make regulations necessary for the efficient execution of the functions vested in it by this title." This must include the authority to determine who are proper representatives of the employees and to make reasonable rules for ascertaining the will of the employees in the matter.

Again, we think that this question of who may be representatives of employees, not only before the Board, but in the conferences and elsewhere is and always has been one of the most important of the rules and working conditions in the operation of a railroad. The purpose of Congress to promote harmonious relations between the managers of railways and their employees is seen in every section of this act, and the importance attached by Congress to conferences between them for this purpose is equally obvious. Congress must have intended, therefore, to include the procedure for determining representatives of employees as a proper subject matter of dispute to be considered by the Board under § 307. The act is to be liberally construed to effect the manifest effort of Congress to compose differences between railroad companies and their employees, and it would not help this effort, to exclude from the lawful consideration of the Labor Board a question which has so often seriously affected the relations between the companies and their employees in the past and is often encountered on the very threshold of controversies between them.

The second objection is that the Labor Board in Decision 119 and Principles 5 and 15, and in Decision 218,

compels the Railroad Company to recognize labor unions as factors in the conduct of its business. The counsel for the Company insist that the right to deal with individual representatives of its employees as to rules and working conditions is an inherent right which can not be constitutionally taken from it. The employees, or at least those who are members of the labor unions, contend that they have a lawful right to select their own representatives, and that it is not within the right of the Company to restrict them in their selection to employees of the Company or to forbid selection of officers of their labor unions qualified to deal with and protect their interests. This statute certainly does not deprive either side of the rights claimed.

But Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to coöperate in running the railroad. It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. The Board is to act as a Board of Arbitration. It is to give expression to its view of the moral obligation of each side as members of society to agree upon a basis for coöperation in the work of running the railroad in the public interest. The only limitation upon the Board's decisions is that they should establish a standard of conditions, which, in its opinion, is just and reasonable. The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision.

It is not for this or any other court to pass upon the correctness of the conclusion of the Labor Board if it keeps within the jurisdiction thus assigned to it by the statute. The statute does not require the Railway Company to recognize or to deal with, or confer with labor unions. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory coöperation and leaves it to the two sides to accept or reject the decision. The statute provides the machinery for conferences, the hearings, the decisions and the moral sanction. The Labor Board must comply with the requirements of the statute; but having thus complied, it is not in its reasonings and conclusions limited as a court is limited to a consideration of the legal rights of the parties.

The propriety of the Board's announcing in advance of litigated disputes the rules of decision as to them is not before us except as to Principles 5 and 15 of Decision No. 119, so far as they determine the methods by which representatives of employees should be selected. They were applied and followed in the form of ballot prescribed by Decision 218. These decisions were necessary in order that conferences should be properly begun under § 301, and that disputes there arising should be brought before the Board. They were therefore not premature. It is not for us to express any opinion upon the merits of these principles and decisions. All that we may do in this case is to hold, as we do, that they were within the lawful function of the Board to render, and not being compulsory, violate no legal or equitable right of the complaining company.

For this reason, we think that the District Court was wrong in enjoining the Labor Board from proceeding to entertain further jurisdiction and from publishing its

opinions, and that the Court of Appeals was right in reversing the District Court and in directing a dismissal of the bill. We do not find it necessary, therefore, to consider the questions raised at the bar as to whether the Railroad Labor Board is a corporation under the act and capable of suing or being sued, without the consent of the United States, and whether the Board's publication of its opinions in matters beyond its jurisdiction could be properly enjoined by a court of equity.

Decree affirmed.

MOORE ET AL. *v.* DEMPSEY, KEEPER OF THE ARKANSAS STATE PENITENTIARY.

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

No. 199. Argued January 9, 1923.—Decided February 19, 1923.

1. Upon an appeal from an order of the District Court dismissing a petition for *habeas corpus* upon demurrer, the allegations of fact pleaded in the petition and admitted by the demurrer must be accepted as true. P. 87.
2. A trial for murder in a state court in which the accused are hurried to conviction under mob domination without regard for their rights, is without due process of law and absolutely void. P. 90.
3. In the absence of sufficient corrective process afforded by the state courts, when persons held under a death sentence and alleging facts showing that their conviction resulted from such a trial, apply to the Federal District Court for *habeas corpus*, that court must find whether the facts so alleged are true, and whether they can be explained so far as to leave the state proceedings undisturbed. P. 91.

Reversed.

APPEAL from an order of the District Court dismissing a petition for *habeas corpus* upon demurrer.

Mr. U. S. Bratton and *Mr. Moorfield Storey* for appellants.

Mr. Elbert Godwin, with whom *Mr. J. S. Utley,* Attorney General of the State of Arkansas, and *Mr. Wm. T. Hammock* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an appeal from an order of the District Court for the Eastern District of Arkansas dismissing a writ of *habeas corpus* upon demurrer, the presiding judge certifying that there was probable cause for allowing the appeal. There were two cases originally, but by agreement they were consolidated into one. The appellants are five negroes who were convicted of murder in the first degree and sentenced to death by the Court of the State of Arkansas. The ground of the petition for the writ is that the proceedings in the State Court, although a trial in form, were only a form, and that the appellants were hurried to conviction under the pressure of a mob without any regard for their rights and without according to them due process of law.

The case stated by the petition is as follows, and it will be understood that while we put it in narrative form, we are not affirming the facts to be as stated but only what we must take them to be, as they are admitted by the demurrer: On the night of September 30, 1919, a number of colored people assembled in their church were attacked and fired upon by a body of white men, and in the disturbance that followed a white man was killed. The report of the killing caused great excitement and was followed by the hunting down and shooting of many negroes and also by the killing on October 1 of one Clinton Lee, a white man, for whose murder the petitioners were indicted. They seem to have been arrested with many others on the same day. The petitioners say that Lee must have been killed by other whites, but that we leave on one side as what we have to deal with is not the petitioners' inno-

cence or guilt but solely the question whether their constitutional rights have been preserved. They say that their meeting was to employ counsel for protection against extortions practiced upon them by the landowners and that the landowners tried to prevent their effort, but that again we pass by as not directly bearing upon the trial. It should be mentioned however that O. S. Bratton, a son of the counsel who is said to have been contemplated and who took part in the argument here, arriving for consultation on October 1, is said to have barely escaped being mobbed; that he was arrested and confined during the month on a charge of murder and on October 31 was indicted for barratry, but later in the day was told that he would be discharged but that he must leave secretly by a closed automobile to take the train at West Helena, four miles away, to avoid being mobbed. It is alleged that the judge of the Court in which the petitioners were tried facilitated the departure and went with Bratton to see him safely off.

A Committee of Seven was appointed by the Governor in regard to what the committee called the " insurrection " in the county. The newspapers daily published inflammatory articles. On the 7th a statement by one of the committee was made public to the effect that the present trouble was " a deliberately planned insurrection of the negroes against the whites, directed by an organization known as the ' Progressive Farmers' and Household Union of America ' established for the purpose of banding negroes together for the killing of white people." According to the statement the organization was started by a swindler to get money from the blacks.

Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob would refrain, as

the petition puts it, they would execute those found guilty in the form of law. The Committee's own statement was that the reason that the people refrained from mob violence was "that this Committee gave our citizens their solemn promise that the law would be carried out." According to affidavits of two white men and the colored witnesses on whose testimony the petitioners were convicted, produced by the petitioners since the last decision of the Supreme Court hereafter mentioned, the Committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. However this may be, a grand jury of white men was organized on October 27 with one of the Committee of Seven and, it is alleged, with many of a posse organized to fight the blacks, upon it, and on the morning of the 29th the indictment was returned. On November 3 the petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—blacks being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips County and if

any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.

The averments as to the prejudice by which the trial was environed have some corroboration in appeals to the Governor, about a year later, earnestly urging him not to interfere with the execution of the petitioners. One came from five members of the Committee of Seven, and stated in addition to what has been quoted heretofore that "all our citizens are of the opinion that the law should take its course." Another from a part of the American Legion protests against a contemplated commutation of the sentence of four of the petitioners and repeats that a "solemn promise was given by the leading citizens of the community that if the guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld." A meeting of the Helena Rotary Club attended by members representing, as it said, seventy-five of the leading industrial and commercial enterprises of Helena, passed a resolution approving and supporting the action of the American Legion post. The Lions Club of Helena at a meeting attended by members said to represent sixty of the leading industrial and commercial enterprises of the city passed a resolution to the same effect. In May of the same year, a trial of six other negroes was coming on and it was represented to the Governor by the white citizens and officials of Phillips County that in all probability those negroes would be lynched. It is alleged that in order to appease the mob spirit and in a measure secure the safety of the six the Governor fixed the date for the execution of the petitioners at June 10, 1921, but that the execution was stayed by proceedings in Court; we presume the proceedings before the Chancellor to which we shall advert

In *Frank* v. *Mangum,* 237 U. S. 309, 335, it was recognized of course that if in fact a trial is dominated by a

mob so that there is an actual interference with the course of justice, there is a departure from due process of law; and that "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.

In this case a motion for a new trial on the ground alleged in this petition was overruled and upon exceptions and appeal to the Supreme Court the judgment was affirmed. The Supreme Court said that the complaint of discrimination against petitioners by the exclusion of colored men from the jury came too late and by way of answer to the objection that no fair trial could be had in the circumstances, stated that it could not say "that this must necessarily have been the case"; that eminent counsel was appointed to defend the petitioners, that the trial was had according to law, the jury correctly charged, and the testimony legally sufficient. On June 8, 1921, two days before the date fixed for their execution, a petition for *habeas corpus* was presented to the Chancellor and he issued the writ and an injunction against the execution of the petitioners; but the Supreme Court of the State

held that the Chancellor had no jurisdiction under the state law whatever might be the law of the United States. The present petition perhaps was suggested by the language of the Court: "What the result would be of an application to a Federal Court we need not inquire." It was presented to the District Court on September 21. We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed.

Order reversed. The case to stand for hearing before the District Court.

Mr. Justice McReynolds, dissenting.

We are asked to overrule the judgment of the District Court discharging a writ of *habeas corpus* by means of which five negroes sought to escape electrocution for the murder of Clinton Lee. § 753, Rev. Stats.[1] They were convicted and sentenced in the Circuit Court of Phillips County, Arkansas, two years before the writ issued. The petition for the writ was supported by affidavits of these five ignorant men whose lives were at stake, the *ex parte* affidavits of three other negroes who had pleaded guilty

[1] "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject

and were then confined in the penitentiary under sentences for the same murder, and the affidavits of two white men—low villains according to their own admissions. It should be remembered that to narrate the allegations of the petition is but to repeat statements from these sources. Considering all the circumstances—the course of the cause in the state courts and upon application here for certiorari, etc.,—the District Court held the alleged facts insufficient *prima facie* to show nullity of the original judgment.

The matter is one of gravity. If every man convicted of crime in a state court may thereafter resort to the federal court and by swearing, as advised, that certain allegations of fact tending to impeach his trial are "true to the best of his knowledge and belief," thereby obtain as of right further review, another way has been added to a list already unfortunately long to prevent prompt punishment. The delays incident to enforcement of our criminal laws have become a national scandal and give serious alarm to those who observe. Wrongly to decide the present cause probably will produce very unfortunate consequences.

In *Frank* v. *Mangum,* 237 U. S. 309, 325, 326, 327, 329, 335, after great consideration a majority of this Court approved the doctrine which should be applied here. The doctrine is right and wholesome. I can not agree now to put it aside and substitute the views expressed by the minority of the Court in that cause.

Much of the opinion in the *Frank Case* might be repeated here if emphasis were necessary. It will suffice

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or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

to quote a few paragraphs; but fully to understand the whole should be read.

"In dealing with these contentions, we should have in mind the nature and extent of the duty that is imposed upon a Federal court on application for the writ of *habeas corpus* under § 753, Rev. Stat. Under the terms of that section, in order to entitle the present appellant to the relief sought, it must appear that he is held in custody in violation of the Constitution of the United States. *Rogers* v. *Peck*, 199 U. S. 425, 434. Moreover, if he is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on *habeas corpus*. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by *habeas corpus*. That writ cannot be employed as a substitute for the writ of error. . . .

"As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. . . .

"It is, therefore, conceded by counsel for appellant that in the present case we may not review irregularities or erroneous rulings upon the trial, however serious, and that the writ of *habeas corpus* will lie only in case the judgment under which the prisoner is detained is shown to be abso-

lutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings. . . .

"But it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the State of Georgia (as will appear from decisions elsewhere cited), provide for an appeal in criminal cases to the Supreme Court of that State upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. . . .

"It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the State, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in *Ex parte Royall,* 117 U. S. 241, 252—applying in a *habeas corpus* case what was said in *Covell* v. *Heyman,* 111 U. S. 176, 182, a case of conflict of jurisdiction:—'The forbearance which courts of coördinate 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.' And see *In re Tyler, Petitioner,* 149 U. S. 164, 186. . . .

"We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.

"But the State may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court. Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prisoner's right to a fair trial. *Myers* v. *State,* 97 Georgia 76(5), 99; *Collier* v. *State,* 115 Georgia, 803."

Let us consider with some detail what was presented to the court below.

There was the complete record of the cause in the state courts—trial and Supreme—showing no irregularity. After indictment the defendants were arraigned for trial and eminent counsel appointed to defend them. He cross-examined the witnesses, made exceptions and evidently was careful to preserve a full and complete transcript of the proceedings. The trial was unusually short but there is nothing in the record to indicate that it was illegally hastened. November 3, 1919, the jury returned a verdict of "guilty;" November 11th the defendants were sen-

tenced to be executed on December 27th; December 20th new counsel chosen by them or their friends moved for a new trial and supported the motion by affidavits of defendants and two other negroes who declared they testified falsely because of torture. This motion questioned the validity of the conviction upon the very grounds now advanced—torture, prejudice, mob domination, failure of counsel to protect interests, etc. It is thus summarized by counsel for appellants—

" The grounds urged in the motion were the state of public feeling against the defendants, the fact that the defendants and witnesses were frequently subjected to torture for the purpose of extracting from them admissions of guilt and to make them testify against the defendants; that they were given no opportunity to consult with their friends and seek assistance, or informed of the charge against them until after their indictment; that they were carried from jail to the courtroom without having been permitted to see or talk with an attorney or any other person in regard to their defense; that the court appointed counsel for the defendants without consulting them, or giving them an opportunity to employ their own counsel; that the state of public feeling was such that they could not have a fair jury; that the trial proceeded without their consulting with their counsel or any witnesses, or being given an opportunity to obtain witnesses; that they were never in court before and were entirely ignorant of what they could do to defend themselves; that the trial from beginning to end occupied three-fourths of an hour and the verdict was returned in from three to six minutes. Four of the defendants say that they never had a copy of the indictment served upon them, one had it only forty-eight hours before the trial.

"Another ground was that under the practice which prevailed in the State only white men were summoned

to sit on the grand jury or the jury, and that by this discrimination the defendants were deprived of their rights under the Constitution of the United States; that they had no notice or knowledge of what steps they should take to raise this point before the trial; that the verdict is contrary to the law and evidence.

"To this motion are attached two affidavits, one of Alf Banks, Jr., and another of William Wordlaw who testified to the fact that they were whipped, placed in the electric chair and strangled by something put in their noses to make them testify. These defendants did not suffer from what was done to these witnesses, as they did not testify at their trial, but their affidavits confirm the testimony of the others as to the treatment to which the Negroes in confinement were exposed."

A new trial having been denied, an appeal was granted to the State Supreme Court and sixty days allowed for preparing bill of exceptions; March 22, 1920, this appeal was argued orally and by briefs; March 29th the court announced its opinion, reviewed the proceedings and affirmed the judgment. *Hicks* v. *State,* 143 Ark. 158. A petition for rehearing was presented April 19th and overruled April 26th.

A petition for certiorari filed in this Court May 24, 1920, with the record of proceedings in the state courts, set forth in detail the very grounds of complaint now before us. It was presented October 5th, denied October 11th, 1920.

April 29, 1921, the Governor directed execution of the defendants on June 10th. June 8th the Chancery Court of Pulaski County granted them a writ of *habeas corpus;* on June 20th the State Supreme Court held that the Chancery Court lacked jurisdiction and prohibited further proceedings. *State* v. *Martineau,* 149 Ark. 237. August 4th a justice of this Court denied writ of error. Thereupon, the Governor fixed September 23rd for execu-

tion. On September 21st the present *habeas corpus* proceeding began, and since then the matter has been in the courts.

It appears that during September, 1919, bloody conflicts took place between whites and blacks in Phillips County, Arkansas—"The Elaine Riot." Many negroes and some whites were killed. A committee of seven prominent white men was chosen to direct operations in putting down the so-called insurrection and conduct investigation with a view of discovering and punishing the guilty. This committee published a statement, certainly not intemperate, about October 7th, wherein they stated the "ignorance and superstition of a race of children" was played upon for gain by a black swindler, and told of an organization to attack the whites. It urged all persons white or black, in possession of information which might assist in discovering those responsible for the insurrection, to confer with it, upon the understanding that such action would be for the public safety and informant's identity carefully safeguarded. I find nothing in this statement which counsels lawlessness or indicates more than an honest effort by upstanding men to meet the grave situation.

It is true that in October, 1920, almost a year after the trial here under consideration, the American Legion post at Helena—approximately three hundred ex-service white men—made protest to the Governor against commutation of the sentences. It is copied in the margin as printed in the record.[1] The Helena Rotary Club, November 10,

[1] "RESOLUTION.

"It has been brought to the attention of the Richard L. Kitchens Post, No. 31, American Legion, Helena, Arkansas, that the Governor is contemplating commuting the sentence of four of the negroes, who are now under death sentences for their participation in the Elaine Riot, to lesser sentences, and we, the members of this Post, feel that any action toward this end by the Governor would do more harm in

1920, expressed emphatic approval of this protest, and the Lions Club took like action. These resolutions are not violent and certainly do not establish the theory that defendants' conviction in November, 1919—a year before—was an empty form and utterly void; nor, as the

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the community and breed lawlessness, as well as disregard for constituted authority, as at the time of this race riot the members of this Post were called upon to go to Hoop Spur and Elaine to protect life and property, and in compliance with this request, there were two American Legion members killed and one seriously injured, besides the other non-members who also perished, and when the guilty negroes were apprehended, a solemn promise was given by the leading citizens of the community, that if these guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld.

"The twelve negroes now under sentence of death, but whose sentences are suspended—account of court procedure, and six of these negro cases have—taken to the Supreme Court of the United States, which court declined to review. The other six cases, whose original trials were reversed and new trials given them, were convicted, and their cases were appealed to the Supreme Court of the State and attorneys of their own selection were permitted to handle their cases.

"Now therefore be it resolved by this Post assembled on this the 19th day of October, 1920, that we most earnestly protest against the commutation of any of the sentences of these twelve negroes convicted of murder in the Elaine riot of October 1919, their having received a fair trial and—proven guilty, and the leniency of the court was shown in the balance of the cases tried, these being the ring leaders and guilty murderers, and that law and order will be vindicated and a solemn promise kept.

"Be it further resolved that a committee of four be appointed by the Post Commander. This Committee is hereby empowered to represent this Post at a conference, or several conferences, with the Governor of Arkansas and to take such steps as they may deem necessary to carry out the wishes of this resolution and leaving nothing undone to have these sentences carried out. This committee to report in full to the next meeting of this Post.

"Passed unanimously 8:30 P. M. October 19, 1920, basement of the Episcopal Church, Helena, Arkansas."

petition recklessly alleges, do they "further and conclusively show the existence of the mob spirit prevailing among all the white people of Phillips County at the time petitioners and the other defendants were put through the form of trials and show that the only reason the mob stayed its hand, the only reason they were not lynched was that the leading citizens of the community made a solemn promise to the mob that they should be executed in the form of law."

The Supreme Court of the State twice reversed the conviction of other negroes charged with committing murder during the disorders of September, 1919. The first opinion came down on the very day upon which the judgment against petitioners was affirmed, and held the verdict so defective that no judgment could be entered upon it. The second directed a reversal because the trial court had refused to hear evidence on the motion to set aside the regular panel of the petit jury. *Banks* v. *State,* 143 Ark. 154; *Ware* v. *State,* 146 Ark. 321. The Supreme Court, as well as the trial court, considered the claims of petitioners set forth by trusted counsel in the motion for a new trial. This Court denied a petition for certiorari wherein the facts and circumstances now relied upon were set out with great detail. Years have passed since they were convicted of an atrocious crime. Certainly they have not been rushed towards the death chair; on the contrary there has been long delay and some impatience over the result is not unnatural. The recent execution of assassins in England within thirty days of the crime, affords a striking contrast.

With all those things before him, I am unable to say that the District Judge, acquainted with local conditions, erred when he held the petition for the writ of *habeas corpus* insufficient. His duty was to consider the whole case and decide whether there appeared to be substantial reason for further proceedings.

Under the disclosed circumstances I cannot agree that the solemn adjudications by courts of a great State, which this Court has refused to review, can be successfully impeached by the mere *ex parte* affidavits made upon information and belief of ignorant convicts joined by two white men—confessedly atrocious criminals. The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system.

I am authorized to say that MR. JUSTICE SUTHERLAND concurs in this dissent.

DIAZ, IN HIS OWN RIGHT, ETC., ET AL. *v.* CARLOTA AND CLEMENTINA GONZALEZ Y LUGO, ETC., ET AL.

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

No. 263. Argued January 24, 1923.—Decided February 19, 1923.

1. Power to authorize a parent to sell the interest of a minor child in land in Porto Rico, is not limited by the Porto Rican Civil Code, § 229 as amended in 1907, to the District Court of the Judicial District in which the property is situated, but may be exercised, under §§ 76 and 77 of the Code of Civ. Proc. 1904, by the court of another District to which the *ex parte* application is submitted. P. 103.
2. An interpretation of law which has become a rule of property, accepted by the practise of a community, should not be disturbed unless certainly wrong. P. 105.
3. Peculiar deference is due from this Court to the views of local matters taken by courts which, like the courts of Porto Rico, have inherited and been brought up in a different system of law to that which prevails here. P. 105.

276 Fed. 108, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing one by the Supreme Court of Porto Rico in favor of the present respondents in their suit to set aside a sale of land.

Mr. Cornelius C. Webster, with whom *Mr. Jose R. F. Savage* was on the brief, for petitioners.

Mr. Jose A. Poventud, with whom *Mr. Frederick S. Tyler* and *Mr. Frank Antonsanti* were on the brief, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the respondents to establish the nullity of a sale of their land while they were all minors. The Supreme Court of Porto Rico upheld the sale and ordered the complaint to be dismissed, 27 P. R. 364; but the judgment was reversed by the Circuit Court of Appeals, 276 Fed. 108, following another decision made by it at the same term. *Agenjo* v. *Agenjo,* 276 Fed. 105. Thereupon a writ of certiorari was granted by this Court.

The father of the respondents (plaintiffs) died in 1904, owning the land in question, and the title passed to his widow and his children, the plaintiffs. The land is in the judicial district of Humacao. In 1908 the widow obtained authority to make the sale from the District Court of the judicial district of San Juan and the sale was made. This suit proceeds on the ground that only the Court of the judicial district where the land was situated had power to authorize the sale of the minors' interest in the land.

The argument that prevailed with the Circuit Court of Appeals is forcible and perhaps might prevail with us if we looked at the face of the statutes invoked, without more. By § 229 of the Civil Code of Porto Rico, as amended by an Act of March 14, 1907, Laws of 1907,

p. 284, " The exercise of the *patria potestas* does not authorize the father or mother to alienate or burden real property which in any manner belongs to the child, and over which either of them have the administration, except after securing judicial authorization, which shall be accorded by the District Court of the Judicial District where said property is situated, upon proof being furnished as to the necessity or utility of such transfer or burden." This naturally enough is taken to mean that the Court of that district alone can give the authority required. The interpretation gains further force when it is known that this section of the Civil Code of 1902 originally gave the power to the District Court of the minors' domicile and that it was amended to its present form in 1907, with a provision, in case of a sale by auction, for a publication in a newspaper having a circulation in the district. It certainly is not unnatural to read the quoted section as excluding the application of the more general §§ 76 and 77 of the Code of Civil Procedure, 1904, by which, (76,) " In accordance with its jurisdiction, a court shall have cognizance of the suits to which the maintenance of all kinds of actions may give rise, when the parties have agreed to submit the suit to decision of court." (77) " The submission shall be understood to be made: 1. By the written agreement of the parties. 2. By the plaintiff through the mere act of applying to the court and filing the complaint. 3. By the defendant when, after his appearance in court, he takes any step other than to request that the trial be held in the proper court."

One might doubt even whether the last cited sections apply to any *ex parte* proceedings. The respondents made the most of the doubt. But those sections embody earlier law and practise and we accept the conclusion of the Supreme Court that they have been taken to extend to such cases. *Martorell* v. *Ochoa,* 26 P. R. 625. *Agenjo* v. *Santiago Rosa,* 26 P. R. 648. The most forcible objec-

tion is that which we have stated; that a special law definitely applicable limits general expressions in other laws that otherwise might be sufficient. We will not repeat the argument quoted from Manresa and Scaevola that jurisdiction is a matter of adjective law and that the general provisions with regard to it are not repealed by a repeal of the substantive law or change in the Civil Code. 26 P. R. 631, 632. We will do no more than note Manresa's conclusion that although it would be more prudent to apply to the Judge specially designated, any Judge having jurisdiction of this class of cases is made competent by the submission implied from invoking his action. The distinction taken seems to be similar to that which we take between jurisdiction and venue. *Martorell* v. *Ochoa,* 25 P. R. 707, 729. A mistake as to the latter is waived by submission, *Lee* v. *Chesapeake & Ohio Ry. Co.,* 260 U. S. 653, and in the Porto Rican law an *ex parte* application is an adequate submission. This is a perfectly intelligible view, and when we are assured by the Supreme Court that it long has been taken, 25 P. R. 729; 26 P. R. 634; interrupted only by a momentary obstruction caused perhaps by accepting too broadly and absolutely an expression in *Garzot* v. *De Rubio,* 209 U. S. 283, 303, we see no reason for not taking it here. The fact alleged that this interpretation of the law has become a rule of property, 25 P. R. 730, is very important and is not weakened by there being only a small number of decisions on the point. If it has been accepted by the practise of the community it should not be disturbed except upon an unescapable conclusion that it is wrong.

This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. It is enough to cite *De Villanueva* v. *Villanueva,* 239 U. S. 293, 299. *Nadal* v. *May,* 233 U. S. 447, 454. This is especially true in dealing with the decisions of a Court inheriting and brought up in a differ-

ent system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books. In this case a slight difference in the caution felt in dealing with the interest of minors (*Baerga* v. *Registrar of Humacao,* 29 P. R. 440, 442,) and a slight change of emphasis in the reading of statutes, explain the divergence between the Supreme Court and the Circuit Court of Appeals. Our appellate jurisdiction is not given for the purpose of remodelling the Spanish American law according to common law conceptions except so far as that law has to bend to the expressed will of the United States. The importance that we attribute to these considerations led to our granting the writ of certiorari and requires us to reverse the judgment below.

Judgment of Circuit Court of Appeals reversed. Judgment of Supreme Court of Porto Rico affirmed.

UNITED STATES GRAIN CORPORATION *v.* PHILLIPS.

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

No. 290. Argued January 23, 1923.—Decided February 19, 1923.

1. The right of a naval officer to a percentage on gold received on board and carried as freight, upon his responsibility (Rev. Stats., §§ 1624, 1547; Navy Regulations [1913] Art. 1510) did not attach to gold held and shipped by the United States Grain Corporation, as an agency of the United States, and the obligation to

carry which, upon the same terms as property of the United States, was recognized by the Secretary of the Navy. P. 113.

2. It was immaterial in such case, that the legal title to the gold was in the Grain Corporation and that the corporation, in other relations, might be treated as a distinct personality whose property was subject to execution. P. 113.

279 Fed. 244, reversed.

ERROR to a judgment of the Circuit Court of Appeals for the plaintiff, entered upon motion of the defendant (the present plaintiff in error) after that court had reversed a judgment directed for the defendant by the District Court, in an action to recover compensation for transporting gold.

Mr. Garrard Glenn, with whom *Mr. William B. Walsh* and *Mr. DeWitt C. Jones, Jr.,* were on the briefs, for plaintiff in error.

The case is appealable to this Court.

Apart from the statute and regulations upon which plaintiff relies, it is clear that he must show a contract, express or implied in fact, between himself and the defendant, binding the latter to pay freight for the transportation of gold on a vessel which the plaintiff did not own.

There was no express contract to pay for the carriage of the gold.

No contract can be implied from the regulation, because it had been duly suspended. But even if the regulation had not been suspended, still there can be no implication of a contract, because, (*a*) the plaintiff was under orders to carry the gold, and (*b*) the circumstances negatived any intention of the defendant to contract or to express any desire to do so.

Neither the statute nor the regulation inherently binds the defendant; they are disciplinary in their nature and apply only to persons who are members of the naval forces.

The statute and regulation are permissive merely; they allow the officer to make a contract, but do not create one for him. They were not intended to give the plaintiff even permission to make a charge to a coördinate agency of the Government like the defendant.

Even if the regulation were mandatory and applicable to the defendant, it could not operate because it had been duly suspended.

Mr. Harold N. Whitehouse, with whom *Mr. Edward S. Hatch* and *Mr. Maurice W. Clarke* were on the brief, for defendant in error.

The right of a commanding officer to receive compensation from the person who places gold on board his ship for freight is provided for by law.

The Secretary of the Navy is without power to suspend the provisions of Art. 1510, Navy Regulations, or to issue an order inconsistent with the provisions of § 1624, Rev. Stats.

The Secretary's order purporting to suspend the provisions of Art. 1510 was not intended to and did not apply to plaintiff in error or its gold.

The gold in question was not taken on board the "Laub" and transported to New York pursuant to an order issued by the Secretary.

The Secretary's order made the suspension of Art. 1510 depend upon certain conditions precedent, which were not complied with.

Neither the conditions imposed by the order, nor the rights provided by § 1624, Rev. Stats., and Art. 1510, were waived by the commanding officer.

The order of the Secretary purporting to suspend the provisions of Art. 1510, not having been approved by the President, was invalid.

The transaction between the United States Grain Corporation and the Government of Bulgaria was private, not governmental.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit to recover fifty-two thousand dollars, being one per centum of the value of gold carried from Constantinople to New York upon the steamship Laub, a destroyer in the Navy, of which the plaintiff, the defendant in error, was commanding officer at the time. There was a trial in the District Court in which, after the evidence was in, both sides moved for the direction of a verdict and the Court directed a verdict for the defendant. The judgment was reversed by the Circuit Court of Appeals, 279 Fed. 244, and the facts not being in dispute, judgment was ordered for the plaintiff on motion of the defendant in order to secure an earlier review here.

By Rev. Stats., § 1624, establishing Articles for the Government of the Navy, in Article 8 (13) the receiving on board of gold, silver, or jewels, and the demand of compensation for carrying them are excepted from the general prohibition there contained. Article 1510 of the Navy Regulations (1913) provides that when gold, &c., shall be placed on board any ship for freight or safe keeping the commanding officer shall sign bills of lading for the amount and be responsible for the same; that the usual percentage shall be demanded from the shippers, one-fourth of which goes to the commander in chief if he signifies to the commander of the ship in writing that he unites with the latter in the responsibility for the care of the treasure. In that case the commander of the ship gets one-half, otherwise two-thirds. By Rev. Stats., § 1547, the Regulations adopted with the approval of the President, as the foregoing was, shall be recognized as the Regulations of the Navy, "subject to alterations adopted in the same manner." The plaintiff founds his claim upon these laws and rules. Naturally, therefore, he does not question the defendant's right to bring the case to this Court. Act of March 3, 1911, c. 231 (Judicial

Code), §§ 241, 128. *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117, 121. *Howard* v. *United States*, 184 U. S. 676, 681.

The defendant, although in form a trading corporation organized under the laws of Delaware, was formed in pursuance of an Executive Order dated August 14, 1917, as an agency to enable the United States Food Administration to buy, store and sell wheat, among other things. The stock, except the shares necessary to qualify seven directors, was all subscribed for and owned by the United States. Even the directors' shares were held by the United States, endorsed in blank. The stock ultimately was $500,000,000. By an Executive Order of June 21, 1918, the defendant was designated an agency of the United States under the control of the United States Food Administrator, Mr. Hoover, to buy, hold and sell wheat. These orders were issued under the war powers conferred upon the President by the Act of August 10, 1917, c. 53, 40 Stat. 276. A later Act of February 25, 1919, c. 38, 40 Stat. 1161, made a large appropriation to furnish foodstuffs for the relief of populations outside of Germany, German-Austria, Hungary, Bulgaria, and Turkey, &c. This was carried out by an Executive Order of March 1, to the effect that the furnishing should be conducted under the direction of Mr. Hoover, who was authorized to establish the American Relief Administration to that end, and particularly to employ the Food Administration Grain Corporation as an agency for transporting and distributing foodstuffs and supplies to the populations requiring relief. Finally, an Act of March 4, 1919, c. 125, 40 Stat. 1348, to protect the United States against undue enhancement of its liabilities under its guaranties of the prices of wheat, &c., authorized the President to make necessary orders and to utilize any department or agency of the Government including the Food Administration Grain Corporation. Pursuing this act, on May 14, 1919,

the President authorized the defendant to buy and sell wheat of the crops of 1918 and 1919, and reciting that the defendant was formed as an agency of the United States and that its functions would be substantially complete on June 30, 1919, ordered it to close its books and make a complete report as of that date, change its name to that which it now bears, and to perform such duties thereafter as the President might direct.

We mention these details to show that the defendant although in form a private corporation and liable to be sued as such, was organized and owned by the United States as an agency for public service, was not engaged in ordinary merchandizing, but under Mr. Hoover's directions was performing public functions arising out of the war and its sequels. *The Western Maid,* 257 U. S. 419, 432. This being its relation to the Government it made a contract with Bulgaria for the sale of wheat under which Bulgaria forwarded the gold in question by a naval vessel of the United States to Constantinople for the defendant. On August 8, 1919, Admiral Knapp, the ranking naval officer of the United States in South European waters, cabled to the Secretary of the Navy that the Relief Administration desired to ship about five millions gold to the United States, and was willing to release the captain from all responsibility except that usually incumbent for care of public property. He asked if the Department would suspend the mandatory provisions of Article 1510 Navy Regulations including percentage charge, and direct that shipment be received for transportation as desired. On August 16 the Secretary answered that the Department suspends the above mentioned provisions with release for commanding officer and the United States, as offered. On September 10, 1919, the plaintiff was ordered by Captain Greenslade, his senior in rank, to take the gold in question on board from the United States Ship Galveston where it then was, and to transport it to New York. At the

same time he was informed of the Secretary's cable. On the 15th the plaintiff took the gold on board the Laub. On the same day, Major Galbraith purporting to act under authority of Mr. Hoover offered the plaintiff a release in the above terms with a copy of the Secretary's cable. The plaintiff handed back a written reply addressed to Major Galbraith, "Officer in Charge, U. S. Food Administration, Constantinople," saying that he could not accept the release and that he took full responsibility for the gold. On the same day the plaintiff received from Admiral Bristol, in command in Turkish waters, an order purporting to direct the plaintiff to proceed to New York and to authorize him to receive the gold, stated to be the "property of the United States Food Administration (Grain Corporation)." The order added that in accordance with Article 1510, Navy Regulations, the Admiral assumed joint responsibility with the Commanding Officer, but called attention to the cable from the Secretary which was attached.

On the facts thus abridged the plaintiff argues that it is entitled to judgment as matter of law. Some preliminary objections may be dispatched in few words. It is said that the Secretary's order did not apply to this gold, because the request to him spoke of the Relief Association as wishing to ship; that the Relief Association had no power to sell to Bulgaria, that country being excepted in the Act of February 25, 1919, which we have mentioned; that the release by Mr. Hoover, United States Food Administrator, was inadequate, and that the authority of Major Galbraith did not appear. We agree with the District Judge that the authority of Major Galbraith was fully established. Whether the sale to Bulgaria was *ultra vires* or not the gold belonged to the defendant as fully as any other money received by it, and the relations between the defendant and the Relief Association were such that it did not matter whether the one or the other

was named to the Secretary of the Navy. But these questions are immaterial in our view and we deem it apparent that the plaintiff's refusal had no reference to any of them, but was intended and purported politely to repudiate the Secretary's authority no matter how accurately given. We gather that the Admiral and the Captain meant to try a fall with the Secretary, on the supposed authority of the law.

The plaintiff's position at the time probably was the same that he takes now and that prevailed with the Circuit Court of Appeals. He took the order of the Secretary according to its face as an attempt to suspend the Regulation and thought that it was invalid without the actual approval of the President. It is suggested also that it was an unauthorized diminution of the plaintiff's compensation as established by the law. *United States* v. *Symonds,* 120 U. S. 46. But in our opinion the view taken by the District Judge was more accurate. The plaintiff did not stand as a private person making a private contract with a business corporation. He was an officer of the United States charged with duties as such. In substance the gold was the property of the United States. It is true that the legal title was in the Corporation, that the property of the Corporation might have been taken to pay a judgment against it, and that in other ways the difference of personality would be recognized. *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S. 549. But for purposes like the present imponderables have weight. When as here the question is whether the property was clothed with such a public interest that the transportation of it no more could be charged for by a public officer than the carrying of a gun, we must look not at the legal title only but at the facts beneath forms. The facts we have indicated in stating the case. The very existence of the

Corporation was created to carry on activities required by the war. Its property was held for that and no other end. It was admitted at the argument, and of course could not be denied, that if the United States had been the legal owner of the gold the plaintiff would have been acting only in the course of his duty in carrying it. We are of opinion that the same thing is true here. The order of the Secretary embodied no suspension of the Regulation but only a recognition of the fact that this was not a service for which the plaintiff was entitled to charge. His acceptance of the characterization of his act by the cable that he answered did not change the legal effect. It simply accepted a wrong reason for a right result.

Judgment reversed.
Judgment of the District Court affirmed.

ROOKER ET AL. *v.* FIDELITY TRUST COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 285. Motion to dismiss or affirm submitted January 25, 1923.—Decided February 19, 1923.

1. An objection that a state statute violates the Federal Constitution, not presented to the state trial court, nor to the State Supreme Court except by a petition for rehearing which was denied without opinion, will not support a writ of error from this court. P. 116.
2. The claim that a decision of a State Supreme Court, by construing an agreement otherwise than it had construed it upon a former, interlocutory appeal in the same case, impaired the obligation of the agreement and violated rights under the Fourteenth Amendment, will not sustain a writ of error under Jud. Code, § 237, as amended by the Act of 1916. P. 117.

Writ of error to review 131 N. E. 769, dismissed.

ERROR to a judgment of the Supreme Court of Indiana. The case is stated in the opinion.

Mr. William V. Rooker, Mr. Floyd G. Christian and *Mr. Ralph H. Waltz* for plaintiffs in error.

Mr. Charles E. Cox and *Mr. Henry Seyfried* for defendants in error.

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

For present purposes this case may be shortly stated. A wife and husband, both financially embarrassed, transferred certain land in Indiana to a corporate trustee pursuant to an arrangement whereby the trustee was to advance moneys for their benefit, assist in procuring advances from others, protect the title, ultimately sell the land, use the proceeds in satisfying such mortgages or liens as might be superior to the rights of the trustee and in repaying moneys advanced by it and by others, and turn the residue over to the wife, her personal representatives or assigns. The purpose of the transfer and the engagements of the parties were set forth in two deeds and a trust agreement, all executed the same day. Differences afterwards arose between the parties, and the grantors brought a suit in a state court in Indiana against the trustee charging that it had violated and repudiated the trust, demanding damages and an accounting, and praying that the trustee be removed and a receiver appointed to administer the trust. The trustee answered taking issue with portions of the complaint, and in an amended cross complaint set up what it claimed had been done under the trust agreement, alleged in substance that the trustee was not in default but stood ready to carry out the trust and was being hindered and obstructed by the plaintiffs, and prayed that the title of the trustee, as such, be

quieted, that further hindrance and obstruction by the plaintiffs be enjoined, that an accounting be had and that the trustee then be directed to make a sale under the trust agreement and to distribute the proceeds according to its provisions. The plaintiffs traversed portions of the amended cross complaint. Thereafter a trial of the issues was had and the court made a special finding of facts favorable to the trustee and entered judgment thereon substantially as prayed in the amended cross complaint. The Supreme Court of the State affirmed the judgment, 131 N. E. 769, and at the solicitation of the plaintiffs the Chief Justice of that court allowed the present writ of error.

The trustee challenges our jurisdiction on the ground that the case is not one the judgment in which may be reviewed by us on writ of error. The challenge is well taken unless the case comes within that part of § 237 of the Judicial Code as amended September 6, 1916, c. 448, 39 Stat. 726, which provides:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error."

It is conceded that there was no effort to question the validity of any treaty or law of, or authority exercised under, the United States. But the plaintiffs insist that the validity of a statute of Indiana relating to conclusions stated in pleadings and the mode of securing better statements, c. 322, Acts 1913; c. 62, Acts 1915, was drawn in

question by them on the ground of the statute's repugnance to various provisions of the Constitution of the United States and that the court upheld and applied the statute. Of course, in determining whether that question was raised and decided we must be guided by the record. *Butler* v. *Gage,* 138 U. S. 52, 56; *Zadig* v. *Baldwin,* 166 U. S. 485, 488. It has been examined and we find it does not show that the question was raised in any way prior to the judgment of affirmance in the Supreme Court. In their assignments of error on the appeal to that court the plaintiffs said nothing about the statute or its validity; nor was there any reference to either in the court's opinion. All that appears is that after the judgment of affirmance the plaintiffs sought to raise the question by a petition for rehearing, which was denied without opinion. But that effort came too late. *Bushnell* v. *Crooke Mining & Smelting Co.,* 148 U. S. 682, 689; *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Citizens National Bank* v. *Durr,* 257 U. S. 99, 106. Federal questions, like others, should be presented in an orderly way before judgment. *Dewey* v. *Des Moines,* 173 U. S. 193, 200. And see *John* v. *Paullin,* 231 U. S. 583, 585; *Atlantic Coast Line R. R. Co.* v. *Mims,* 242 U. S. 532, 535. It is at least doubtful that the question is one of any substance, but its tardy presentation renders further notice of it unnecessary.

The case had been before the Supreme Court of the State on a prior appeal and the court had then construed the trust agreement and dealt in a general way with the rights of the parties under it. *Rooker* v. *Fidelity Trust Co.,* 185 Ind. 172. Referring to this, the plaintiffs, by way of asserting another ground for the writ of error, claim that on the second appeal the court took and applied a view of the trust agreement different from that taken and announced on the first appeal, and that this change in decision impaired the obligation of the agreement contrary to the contract clause of the Constitution

of the United States and was a violation of the due process and equal protection clauses of the Fourteenth Amendment. Plainly this claim does not bring the case within the writ of error provision. Both decisions were in the same case. The first was interlocutory (185 Ind. 187–188); the second final. Concededly the case was properly before the court on the second appeal; the plaintiffs evidently thought so, for they took it there. Whether the second decision followed or departed from the first, it was a judicial act, not legislative. The contract clause of the Constitution, as its words show, is directed against impairment by legislative action, not against a change in judicial decision. It has no bearing on the authority of an appellate court, when a case is brought before it a second time, to determine the effect to be given to the decision made when the case was first there. *Cross Lake Shooting & Fishing Club* v. *Louisiana,* 224 U. S. 632, 638; *Ross* v. *Oregon,* 227 U. S. 150, 161; *Seattle, Renton & Southern Ry. Co.* v. *Linhoff,* 231 U. S. 568; *Kryger* v. *Wilson,* 242 U. S. 171, 177; *Columbia Railway, Gas & Electric Co.* v. *South Carolina, post,* 236. And see *King* v. *West Virginia,* 216 U. S. 92, 100; *Messenger* v. *Anderson,* 225 U. S. 436, 444. Assuming that the objection to a change in decision was seasonably presented, it amounted to nothing more than saying that in the plaintiffs' opinion the court should follow the first decision. It did not draw in question the validity of an authority exercised under a State in the sense of the writ of error provision. *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert,* 245 U. S. 162, 166; *Stadelman* v. *Miner,* 246 U. S. 544, 546; *Moss* v. *Ramey,* 239 U. S. 538, 546; *Gasquet* v. *Lapeyre,* 242 U. S. 367, 369. Whether there was any substantial change in decision we need not inquire.

There is no other ground which tends even remotely to sustain the writ of error.

Writ of error dismissed.

Syllabus.

GREAT NORTHERN RAILWAY COMPANY *v.* STEINKE ET AL.

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

No. 152. Argued December 5, 1922.—Decided February 19, 1923.

1. The Act of March 3, 1875, granting railroad rights of way and station grounds in the public lands, should receive a more liberal construction than acts making private grants or extensive grants of land to railroads. P. 124.
2. Where a railroad, under this statute, with approval of the Land Department, secured station grounds in lieu of others nearby, previously selected, persons who were without interest in the premises at the time cannot object that the second selection was void because the first one exhausted the right. P. 125.
3. In a suit by a railroad company to quiet its title to lands included in a station-grounds map which was filed, amended and refiled and then approved by the Secretary of the Interior, *held* that this Court could not take judicial notice of the records of the General Land Office to ascertain the nature and extent of the amendment, nor assume that it was insubstantial; and that, in the absence of evidence on the subject, the rights of the railroad could relate back only to the date of refiling. P. 125.
4. Where land embraced in a map duly filed and approved, "subject to all valid existing rights," under the above act, is subject, at the time of filing and approval, to a preliminary homestead entry, the railroad gets a right for station purposes subject only to the qualification that the rights of the homesteader are not to be disturbed without due compensation, and this qualification disappears when the entry is relinquished and canceled, leaving the railroad's rights as complete as if the entry had never existed. P. 126.
5. The title of a railroad to station grounds under the above act of 1875 cannot be affected by the neglect of the local land officers to note the disposal on the plat and tract-book in their office. P. 129.
6. Purchasers of lots laid out on land included in their grantor's entry and patent but adjacent to the right of way of a railroad constructed over the patented subdivision, who know that the railroad claims rights older than those of their grantor, are bound to enquire and chargeable with notice of proceedings recorded in

the General Land Office, whereby the railroad obtained a senior title to such adjacent land for station purposes, under the Act of 1875, *supra*. P. 131.

So *held*, where the railroad right was not excepted in their grantor's patent and certificate.

7. A grant of land under the Act of 1875 is upon implied condition that it be used for the *quasi* public purposes named in the act, and neither laches of the railroad grantee, nor local statutes of limitation, can invest individuals with any interest in the tract, or a right to use it for private purposes, without the sanction of the United States. P. 132.

183 N. W. 1013, reversed

CERTIORARI to a decree of the Supreme Court of North Dakota affirming a decree of a trial court against the Railway Company in a suit to determine conflicting claims to a parcel of land.

Mr. C. J. Murphy, with whom *Mr. M. L. Countryman* and *Mr. T. A. Toner* were on the brief, for petitioner.

No brief filed for respondents.

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

This is a suit by the Great Northern Railway Company to determine conflicting claims to a small tract of land adjoining its right of way at Springbrook, North Dakota. That company claims the tract under a grant of station grounds made by the United States to the St. Paul, Minneapolis and Manitoba Railway Company, and the defendants claim the same under a patent from the United States to Philander Pollock. The defendants prevailed in the trial court and in the Supreme Court of the State. 183 N. W. 1013. A writ of certiorari brings the case here. 257 U. S. 629.

At a time when the lands in that vicinity were public lands the St. Paul, Minneapolis and Manitoba Railway Company, being duly qualified so to do, sought and se-

cured a right of way through the same under the Act of March 3, 1875, c. 152, 18 Stat. 482, and constructed its road within and along such right of way. At the same time and in the same way it sought and secured certain lands two miles east of the present site of Springbrook for station grounds. Afterwards it changed its station to a point adjacent to such site and proceeded to give up the original station grounds and to select others, including the tract in controversy, in their stead. It made the requisite survey of the new grounds, prepared a map thereof and on January 12, 1900, filed the map in the local land office, whence it was to be transmitted to the General Land Office and laid before the Secretary of the Interior. The map was returned to the Company for amendment in particulars not shown in the record, was amended accordingly, and on July 18, 1900, was refiled in the local land office. The local officers then transmitted it to the General Land Office, and on October 18, 1900, the Secretary of the Interior approved it "subject to all valid existing rights." On being advised of the Secretary's approval, the local officers should have noted the disposal on the township plat and tract book in their office, but this was not done. The approved map and all papers relating thereto were preserved in the General Land Office in the usual way, and a certified copy of the map and of some of the papers was produced in evidence at the trial.

On January 12, 1900, when the map was first filed in the local land office, the tract in question was public land and free from any claim, but before July 18, 1900, when the map was refiled, the tract was included, with other land, in a preliminary homestead entry made by John Welo. That entry remained intact until May 13, 1901, and was then relinquished by Welo and canceled. On August 19, 1902, the tract was included, with other land, in a preliminary homestead entry made by Philander Pollock, and on June 1, 1903, he released the forty-acre subdivision con-

taining this tract from that entry and made another and unrelated entry of the same subdivision. Under the latter entry a patent for the full subdivision was issued to him on February 28, 1906.

Pollock and others, whom he interested in the project, platted the greater part of the forty-acre subdivision, including the tract in question, as a townsite. The defendants purchased from them some of the lots, which, as platted, cover part of this tract.

The station grounds shown on the map approved by the Secretary of the Interior consist of a long strip of land one hundred feet wide extending along one side of the right of way at Springbrook. The tract in question is part of that strip and is in close proximity to the tracks and depot.

The rights of the St. Paul, Minneapolis & Manitoba Railway Company in the road, right of way, station grounds, etc., passed to the plaintiff, the Great Northern Railway Company, in 1907.

The Supreme Court of the State, in rejecting the plaintiff's claim under the grant of station grounds and sustaining the defendants' claim under the patent to Pollock, put its decision on two independent grounds. One was that when the map was refiled in the local land office, and when it was approved by the Secretary of the Interior, the tract in question was included in Welo's preliminary homestead entry, and therefore was not subject to disposal under the Act of 1875, and that the Secretary excluded it from his approval by making the latter "subject to all valid existing rights." The other was that thereafter the land officers permitted Pollock to make an entry of the forty-acre subdivision containing this tract, issued to him a certificate of final entry making no reference to the railroad company's claim and gave him a patent purporting to cover the entire subdivision, and that the defendants purchased from Pollock in good faith relying on the final certificate and patent so issued to him.

The pertinent provisions of the Act of 1875 are as follows:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

"Sec. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled [an act to amend an act entitled] 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-four.

"Sec. 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by

the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided,* That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

"Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed."

As with other public land laws, the Secretary of the Interior was empowered to prescribe regulations for carrying the act into effect. Such regulations were prescribed. Those in force at the times to which the controversy relates were promulgated November 4, 1898. 27 L. D. 663.

In some respects the act was loosely drafted, but through a long course of administration in the land department and many adjudications in the courts its meaning and effect have come to be pretty well settled. Its purpose was to enhance the value and hasten the settlement of the public lands by inviting and encouraging the construction and operation of needed and convenient lines of railroad through them. Nothing was granted for private use or disposal, nor beyond what Congress deemed reasonably essential, presently or prospectively, for the *quasi* public uses indicated. Because of this, the act has been regarded as requiring a more liberal construction than is accorded to private grants or to the extensive land grants formerly made to some of the railroads. *United States* v. *Denver & Rio Grande Ry. Co.,* 150 U. S. 1, 8,

14. And see *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582, 596; *Nadeau* v. *Union Pacific R. R. Co.*, 253 U. S. 442, 444. There is no provision in the act for the issue of a patent, but this does not detract from the efficacy of the grant. The approved map is intended to be the equivalent of a patent defining the grant conformably to the intendment of the act, *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, and to relate back, as against intervening claims, to the date when the map was filed in the local land office for transmission through the General Land Office to the Secretary of the Interior. *Stalker* v. *Oregon Short Line R. R. Co.*, 225 U. S. 142.

In the state court the defendants sought to make the point that when the company secured the station grounds two miles east of the present site of Springbrook it exhausted its right under the act and therefore could not select or take the new grounds. But the point is without merit. The company did not try to hold the original grounds and also to secure the new ones. As shown by the map, it surrendered the former and sought the latter in their stead. By approving the map the Secretary of the Interior assented to the change,—presumably because it appeared to be one which would subserve the interests of the public as well as those of the company. It was the practice of the land department to permit such changes. As the United States found no ground for objecting, others who had no interest in the premises at the time are not in a position to complain. *Washington & Idaho R. R. Co.* v. *Coeur d'Alene Ry. & Nav. Co.*, 160 U. S. 77, 97–98.

The railway company contends that its rights under the approved map relate back to the time when the map was first filed in the local land office rather than to the time of the refiling; and, in furtherance of the contention, the company asks that we take judicial notice of the files in the General Land Office, which it says will show that

the amendments made in the map between the filing and refiling were so unsubstantial that there was no real alteration. But we think the files in such a proceeding are not within the range of judicial notice and that if there was any purpose to rely on them in this connection they, or a certified copy of them, should have been produced in evidence at the trial. It cannot be merely assumed that the amendments were immaterial, and, in the absence of any proof of their nature and extent, the date of refiling, which was after they were made, must be taken as the time to which rights under the approved map relate.

We have seen that when the map was refiled, and when it was approved, the tract in question was included in Welo's preliminary homestead entry. The Supreme Court of the State thought this prevented any right in the tract from passing to the company under the approved map, and that the words, "subject to all valid existing rights," were inserted in the approval to show the tract was excluded. We reach a different conclusion.

The words quoted were not peculiar to this map, but were commonly inserted in the approvals of that period. Their office was not to show that any of the land designated on the map was excluded from the grant, but to direct attention to what under the act would be true without them,—namely, that the grant was to be effective as against the United States, but was not to impair valid existing claims of settlers or others, and that to make the grant effective against such claimants their rights should be extinguished through private negotiations or, if need be, through condemnation proceedings. See § 3 before quoted and § 2288, Rev. Stats.

That Welo had a valid existing right in virtue of his preliminary entry must be conceded. But it was only an inchoate right to acquire the title by residing on the land and otherwise complying with the homestead law for a

prescribed period. The title and real ownership were in the United States. Welo was under no obligation to perfect his claim. He could abandon it or relinquish it, but could not transfer it to another. Subject only to his claim the approved map vested in the company a complete right to the tract for station purposes. He voluntarily relinquished his entry and thus put an end to his claim. Nothing then stood in the way of the company's right. It was as if Welo's claim never had existed.

Unlike the land grants considered in cases like *Kansas Pacific Ry. Co.* v. *Dunmeyer,* 113 U. S. 629, 639, and *Hastings & Dakota R. R. Co.* v. *Whitney,* 132 U. S. 357, 361, the Act of 1875 contains no provision whereby lands covered by homestead or similar claims when the grant attaches are excluded from it. On the contrary, a survey of all that the act does contain shows that the grant is intended to include lands of that class, but with the qualification, plainly implied in the third section, that due compensation must be made to the claimants for their inchoate or possessory rights to make the grant operative against them. *Washington & Idaho R. R. Co.* v. *Osborn,* 160 U. S. 103, 109. An abandonment of the claims relieves the grant of the qualification. On this question the decisions have been very plain. It was before the Supreme Court of North Dakota in *Jamestown & Northern R. R. Co.* v. *Jones,* 7 N. Dak. 619, which related to a right of way over which the railroad was constructed in advance of the filing and approval of the map. The part in controversy was included in an existing preëmption claim when the road was constructed and also when the map was filed and approved. Afterwards the preëmption claim was abandoned. Thereupon another claimant, who had settled on the land after the construction of the road and before the filing or approval of the map, made an entry of the same tract and received a patent,—the entry papers and patent containing no exception of the right of

way. Two points were involved. One was whether the grant of the right of way attached as of the date when the road was constructed or as of the time when the map was filed or approved; and the other was whether the preëmption claim which was in existence at all of these times operated to except the land from the grant. The decision on the latter point is shown in the following excerpt from the opinion:

"When the act of 1875 is construed as a whole, we believe that, as against the United States, the right-of-way is transferred, even when the land has been entered at the time the map is approved, and that, if such entry is subsequently abandoned or set aside, the grantee will enjoy an absolute easement in the land. The rights of the railroad company will be subject to all rights which have attached to the land before the filing and approval of the map of definite location. But, as against the United States, the grant is as effective in cases where the land has been entered as where it has not. Under any other view of the statute, the railroad company might be compelled to condemn successive rights of settlers, only to find that all its proceedings were futile, because in each case the settler's rights were, by cancellation or abandonment, destroyed. We think that it was the purpose of congress to make the grant operative as against the government, subject only to existing rights of settlers, and that the question whether a particular piece of land was within the terms of the grant, so far as the government was concerned, was not to depend upon the freedom of that land from settlement at the time the map was approved. Under this view of the statute, a railroad company could never be required to condemn any other than existing rights."

Other courts in the public land States have decided the question in the same way. *Hamilton* v. *Spokane & Palouse R. R. Co.*, 3 Idaho, 164; *Bonner* v. *Rio Grande*

Southern R. R. Co., 31 Colo. 446; *Alexander* v. *Kansas City, Ft. Scott & Memphis R. R. Co.*, 138 Mo. 464.

The case of *Jamestown & Northern R. R. Co.* v. *Jones* was brought here on writ of error and the railroad company's claim to the right of way was upheld,—the decision of the Supreme Court of North Dakota being disapproved as respects the time as of which the grant attached and sustained as respects the effect of the preëmption claim which was in existence at that time and afterwards abandoned. 177 U. S. 125. The opinion in the present case does not refer to that case, and we assume it was overlooked. Otherwise it doubtless would have been followed, as it should have been.

We come, then, to the ruling that the defendants purchased from Pollock in good faith relying on the certificate and patent issued to him, and so are entitled to prevail.

The claim on which Pollock received the certificate and patent was initiated more than two years after the new station grounds passed to the company under the approved map. True, the local land officers neglected to note that disposal on the township plat and tract book in their office; but this did not prejudice or affect the company's title. The noting was required by way of continuing a practice, which had long prevailed, of making the township plats and tract books in the land office of each district a fair and helpful index of all public land transactions in the district. Of course, a faithful adherence to the practice serves to prevent plural and conflicting disposals of the same lands, while a neglect of duty in that regard by the local officers sometimes, as here, results in confusing disposals. But the land department always has ruled that such a neglect of duty affords no justification for subordinating a senior to a junior claim or for making a second disposal in disregard of a prior one. *Edward R. Chase*, 1 L. D. 81; *Goist* v. *Bottum*, 5 L. D. 643; *Edward Young*,

9 L. D. 32; *Baird* v. *Chapman's Heirs,* 10 L. D. 210; *Linville* v. *Clearwaters,* 11 L. D. 356. In reason the point could not be ruled otherwise, for this would mean that a patent or its equivalent, although issued after full examination of the claim by the Commissioner of the General Land Office and the Secretary of the Interior, could be thwarted or made of no avail by a subsequent omission on the part of the local land officers,—notwithstanding this Court has adjudged that such a conveyance, when regularly issued and recorded in the General Land Office, passes the title and cannot be recalled or canceled by even the Secretary of the Interior. *United States* v. *Schurz,* 102 U. S. 378. The effect of such omissions often has been considered by this Court and always has been determined along the lines just indicated. It will suffice to refer to two of the cases. In *Van Wyck* v. *Knevals,* 106 U. S. 360, one party claimed under a land grant to a railroad company and the other under a patent issued on a cash entry. The grant was to attach when the route of the road was definitely fixed, and the Secretary of the Interior was then to withdraw from market all lands falling within the grant. A map definitely fixing the route was filed by the company with the Secretary and was accepted by him, but the intended withdrawal was not sent to the local land office for a half month or more. During that interval the cash entry was allowed and a patent certificate issued thereon. This Court sustained the claim under the grant as being first in time, and, in defining the rights which the company acquired through the filing and acceptance of the map, said, p. 367: " No further action is required of the company to establish the route. It then became the duty of the Secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others." In *Stalker* v. *Oregon Short Line R. R. Co.,* 225 U. S. 142, the railroad

company was relying on a grant of station grounds under the Act of 1875, which the local land officers neglected to note on their records, and the other party was claiming under a patent issued on a preëmption claim. The Supreme Court of Idaho had sustained the claim of the railroad company because the map of the station grounds was filed in the local land office before the preëmption claim was initiated, 14 Idaho, 371, and that decision was affirmed by this Court on the following grounds, p. 153: "First, if we are right in holding that the grant vested in the company when the plat was approved, as of the date when filed, the failure of the officer in the district land office to properly mark the [township] plat could not operate to defeat the grant; and, secondly, the railroad company having done everything which it was required by law to do, should not be affected by the negligence of the register in not doing a duty upon which the vesting of title as against the United States did not depend." And also, p. 154: "We therefore conclude that the subsequent issue of a patent to the land entered by Reed [the preemptor] was subject to the rights of the railroad company theretofore acquired by approval of its station ground map. The patent is not an adjudication concluding the paramount right of the company, but insofar as it included lands validly acquired theretofore, was in violation of law, and inoperative to pass title."

When Pollock initiated his claim to the forty-acre subdivision, which includes the tract in question, the railroad was constructed and being operated across that subdivision, and this was true when the defendants purchased from him. Besides, the defendants understood, as did the community in general, that the company was not claiming under Pollock and that its rights, whatever they were, were older than his. These circumstances should have put the defendants on inquiry respecting the nature and extent of the company's claim and should have prompted

them to make the inquiry with particular regard to the situation before Pollock's claim was initiated,—when the subdivision was public land. So far as appears they made no inquiry, but relied on the absence of any excepting clause in Pollock's certificate and patent, neither of which could bind the company or affect its prior rights. Among other sources of information they could have interrogated the company or its agent who was close at hand, but this was not done. In short they neglected the warning which inhered in the circumstances we have recited. The Act of 1875 was a public statute applicable to public lands in that region and some notice should have been taken of it. We have seen that it made provision for acquiring a general right of way of a uniform width and for securing additional grounds for various station purposes,—such grounds being in the nature of local extensions of the general right of way. A complete record of the company's proceedings under that act was kept in the usual way in the General Land Office, and it is reasonably certain that the defendants would have learned of those proceedings had they heeded the promptings of the situation in which they purchased. They therefore were chargeable with notice of those proceedings. *Brush* v. *Ware,* 15 Pet. 93, 111.

The defendants interposed the defense of laches and also a local statute of limitations, but the Supreme Court of the State did not rule on either. Neither was applicable to the case. The tract in question was not granted for private use or disposal, but only for the *quasi* public uses named in the act. In other words, the company received the tract on the implied condition that it be devoted to those uses. A breach of the condition subjects the grant to a forfeiture by the United States; but neither laches on the part of the company nor any local statute of limitations can invest individuals with any interest in the tract, or with a right to use it for private purposes,

without the sanction of the United States. *Northern Pacific R. R. Co.* v. *Smith,* 171 U. S. 260, 275; *Northern Pacific Ry. Co.* v. *Townsend,* 190 U. S. 267; *Northern Pacific Ry. Co.* v. *Ely,* 197 U. S. 1; *Kindred* v. *Union Pacific R. R. Co.,* 225 U. S. 582, 597; *Stuart* v. *Union Pacific R. R. Co.,* 227 U. S. 342, 353.

It follows that the judgment should have been for the company instead of for the defendants.

Judgment reversed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* WOLF ET AL.

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

No. 194. Argued January 9, 1923.—Decided February 19, 1923.

1. Under §§ 9 and 16 of the Interstate Commerce Act, 24 Stat. 382; 34 Stat. 590, an action by a shipper to recover charges collected by a carrier in excess of tariff rates must be brought within two years from the time when the cause of action accrued. P. 138.
2. The lapse of a longer time not only bars the remedy but destroys the liability. P. 140.

272 Fed. 681, reversed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court for the defendants in error in an action to recover overcharges from the Railway Company.

Mr. Frank H. Moore, with whom *Mr. Cyrus Crane, Mr. Samuel W. Moore* and *Mr. George H. Muckley* were on the brief, for plaintiff in error.

Mr. Charles M. Blackmar, with whom *Mr. Henry A. Bundschu* and *Mr. Joseph P. Duffy* were on the brief, for defendants in error.

Section 9 of the Commerce Act plainly shows the two remedies which are open to any person who has suffered damages by reason of the violation of any of the provisions of the act, and the charging of rates in excess of the lawful published tariff rates is a violation of the act. It also specifically states that such party shall be entitled to use either of said remedies but not both. There is nothing in this section which places any limitation upon the time in which such a suit should be instituted in court. This leaves the matter of time entirely open. Unless a limitation appears elsewhere in the act, the state statute of limitation applies.

Section 16 of the Commerce Act deals exclusively with procedure before the Commission, except that in subdivision (b) it provides for the enforcement in the courts of the United States of orders for the payment of money made by the Commission. There is nothing in this section which in any way relates to § 9, nor is there anything said with reference to the limitation of the time in which a suit shall be instituted originally in the District Court; but the statute does specifically say that such claims shall be filed with the Commission within two years from the time the cause of action accrues. If the construction which the defendant places on the statute is to prevail, the Court must either read out of § 16 the words " with the Commission," or must read into it words which extend its meaning to suits instituted originally in the District Court.

The defendant has pointed out in its brief that this section is no ordinary statute of limitations, that it goes further than merely barring the remedy, and destroys the liability. But the section is not ambiguous and, consequently, there is no room for construction, *United States* v. *Wiltberger,* 5 Wheat. 77, 95, 96; nor can its plain words be supplanted by speculation concerning the policy of Congress. *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1, 36, 37.

Phillips Co. v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, has no application. It was a suit to recover unreasonable charges but nevertheless charges assessed according to a published tariff.

The question involved was decided in *Lyne* v. *Delaware, Lackawanna & Western R. R. Co.*, 170 Fed. 847, 849. See also *Copp* v. *Louisville & Nashville R. R. Co.*, 50 Fed. 164; *Chicago, R. I. & P. Ry. Co.* v. *Lena Lumber Co.*, 99 Ark. 105.

Section 8 of the Commerce Act provides in substance that a carrier which shall omit any act, matter or thing in the act required to be done shall be liable to the person or persons injured thereby for the full amount of the damages. This section provides no limitation of time within which the suit shall be brought. Paragraph (g) of § 6 prohibits a carrier from collecting a greater amount than that provided in the published tariffs. Section 22 provides that nothing in the act shall in any way abridge or alter the remedies existing at common law or by statute, but the provisions of the act are in addition to such remedies. There is no limitation placed in this section.

Independently of the act, a carrier is liable for any excess collected over its published tariff rates. In the case before the Court the plaintiff asserts a right cognizable either before a state court of competent jurisdiction or before a United States District Court. *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 129; *Pennsylvania R. R. Co.* v. *Sonman Coal Co.*, 242 U. S. 120, 123.

The suit is not based, as claimed by the defendant, upon a ruling of the Commission involving the tariff in question. The basis of the plaintiff's claim is a right which may be asserted in the District Court without first making application to the Commission. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285.

The action is one to recover charges assessed in excess of the lawful published tariff rates and not one which in

any way involves unjust, unlawful, discriminatory, preferential or prejudicial rates. Concretely, the question is whether or not under the circumstances stated in a rule of the Commission the shipper is entitled to the benefit of the less-than-carload rate providing he is willing to pay for ten thousand pounds at the second class rate as a minimum. The only limitation on the rule is whether or not the shipper is able to avail himself of a regularly scheduled refrigeration less-than-carload service. That limitation has gone out of this case because the undisputed testimony is that the railway company maintains no such service. There is nothing in this rule which calls for an exercise of the administrative or executive functions of the Commission. The rule is printed in plain English and all shippers have a right to rely upon the wording of the rule.

There are two methods for the recovery of damages resulting from a violation of the act, such as charging more than the tariff rate. That is a person may either present his claim within the two-year period to the Commission, or he may sue directly in the District Court. *National Elevator Co.* v. *Chicago, M. & St. P. Ry. Co.,* 246 Fed. 588; *National Pole Co.* v. *Chicago & N. W. Ry. Co.,* 211 Fed. 65, 71; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 247; *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184.

Cases involving the exercise of the administrative functions of the Commission should in the first instance be filed before the Commission. While, on the other hand, if the action is based upon a violation or discriminatory enforcement of the carrier's published tariffs, rules or regulations, it may be brought in the District Court in the first instance. *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.,* 223 U. S. 70; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.,* 237 U. S. 121; *National Elevator Co.* v. *Chicago, M. & St. P. Ry. Co., supra; Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.,* 238 U. S. 275, 283.

In the case before the Court, the rights of the parties were fixed at the time shipments moved by tariffs lawfully filed and which were in full force and effect. *St. Louis, I. Mt. & So. Ry. Co.* v. *Hasty & Sons,* 255 U. S. 252; *Pennsylvania R. R. Co.* v. *Sonman Coal Co.,* 242 U. S. 120.

Mr. Justice McReynolds delivered the opinion of the Court.

The original action was begun in the United States District Court, Western District of Missouri, May 12, 1915, to recover charges in excess of the published tariff rates collected by the plaintiff in error upon sundry interstate shipments of strawberries. All the shipments and payments were made prior to June 1, 1912. The company demurred, "because each of said counts shows upon its face that the pretended claim which is made the basis of such count accrued more than two years prior to the institution of this action."

The trial court overruled the demurrer and this was approved by the Circuit Court of Appeals (272 Fed. 681), which said: "The controlling question in the case is whether the claims for repayment of the overcharges might be the subject of an original action in court, or, on the other hand, should first have been submitted to the Interstate Commerce Commission. . . . The former procedure was adopted in this case. If the latter should have been followed, the claims were barred by the limitation provided in section 16. We think it quite plain that there was nothing about the tariffs, rules, or claims for overcharge calling for any administrative action of the Commission as a prerequisite to an action in court. There was no attack upon the tariffs or the rules."

From 1906 to 1920 the Interstate Commerce Act, 24 Stat. 379, 382; 34 Stat. 584, 590, provided—

"Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions

of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . ."

"Sec. 16. . . . All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after." [1]

In *Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 667, an action begun in the United States Cir-

[1] The Transportation Act, February 28, 1920, c. 91, 41 Stat. 456, 492, amended the pertinent portion of § 16 so that it now reads—

"Sec. 16 (3). All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration, begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the district court or State court within one year from the date of the order, and not after."

Section 9 was not changed by the Transportation Act, 1920.

cuit Court, the plaintiff alleged that the Interstate Commerce Commission had declared the published tariff rate unreasonable and sought to recover overcharges paid more than four years prior thereto. Referring especially to § 16, *supra,* this Court declared—

"Under such a statute the lapse of time not only bars the remedy but destroys the liability (*Finn* v. *United States,* 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances must be borne in mind in construing the Commerce Act. . . . To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. . . . The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action."

True it is that the claim of Phillips & Co. was based upon schedule tariff charges theretofore declared to be unreasonable by the Interstate Commerce Commission, while here the payments demanded are said to exceed the published rates when properly applied. But the doctrine of the *Phillips Case* and the reasoning advanced to sup-

port it, we think, are applicable to the circumstances of the instant cause. The lapse of time had destroyed any liability by the carrier to the shipper or his assignee for the alleged overcharges, and the demurrer should have been sustained.

Reversed.

MINNESOTA COMMERCIAL MEN'S ASSOCIATION *v.* BENN, EXECUTRIX OF BENN.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 103. Argued January 12, 1923.—Decided February 19, 1923.

1. A judgment by default rendered against a foreign corporation on process served on a state officer as its agent, in a State in which it has done no business, nor otherwise consented to be so served, is void. P. 145.
2. Upon facts stated, *held:* (*a*) That a contract of insurance made between a mutual insurance company and a person domiciled in another State, through acceptance at the company's home office of an application received by mail, was a contract made and to be performed in the State of the company's domicile; and
(*b*) That the company could not be said to be doing business in the other State merely because one or more of its members, at its suggestion but without authority to obligate it, solicited new members there, or because it insured persons living there, mailed notices to them and paid losses by checks upon its home bank, mailed from its home office. P. 144.

149 Minn. 497, reversed.

CERTIORARI to a judgment of the Supreme Court of Minnesota affirming a judgment recovered by the respondent against the petitioner in an action based on a Montana judgment.

Mr. A. V. Rieke and *Mr. David F. Simpson,* with whom *Mr. Wm. A. Lancaster, Mr. John Junell, Mr. James E. Dorsey* and *Mr. Robert Driscoll* were on the brief, for petitioner.

Mr. Alphonse A. Tenner, with whom *Mr. M. H. Boutelle, Mr. Arthur M. Higgins, Mr. Edward E. Tenner* and *Mr. T. H. MacDonald* were on the brief, for respondent.

The petitioner was doing business in Montana, the certificate or policy was made and is payable in Montana, and is governed by the laws of that State. *Iowa State Traveling Men's Assn.* v. *Ruge,* 242 Fed. 762; *Lumbermen's Ins. Co.* v. *Meyer,* 197 U. S. 407; *Connecticut Mutual Iife Ins. Co.* v. *Spratley,* 172 U. S. 602; *Herndon-Carter Co.* v. *Norris & Co.,* 224 U. S. 496; *Commercial Mutual Accident Co.* v. *Davis,* 213 U. S. 245; *Mutual Reserve Fund Life Assn.* v. *Phelps,* 190 U. S. 147.

The ruling of these cases was not modified by *Hunter* v. *Mutual Reserve Life Ins. Co.,* 218 U. S. 573; and *Provident Savings Life Assurance Society* v. *Kentucky,* 239 U. S. 103.

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner is a mutual assessment, accident and health insurance company, incorporated under the laws of Minnesota, with many members scattered throughout the Union. It issued a certificate of membership to Robert J. Benn, of Montana. He died in 1915, and his executrix—respondent here—instituted an action against the Association in a Montana court to recover the sum said to be due under the rules. After service of summons and complaint upon the Secretary of State and the Insurance Commissioner, judgment was entered by default. Thereafter she brought an action in Minnesota upon the judgment and prevailed both in the trial and Supreme Court. 149 Minn. 497.

Defending, the Association claimed that it had never done business in Montana or consented to service of process there; that the insurance contract was executed and to be performed in Minnesota; that the Montana

court was without jurisdiction, the judgment void, and enforcement thereof would deprive petitioner of property without due process of law contrary to the Fourteenth Amendment.

The decision here must turn upon the effect of the process served on the Secretary of State in Montana. Did the court there acquire jurisdiction to enter judgment?

The Supreme Court of Minnesota followed *Wold* v. *Minnesota Commercial Men's Association* (1917), 136 Minn. 380, wherein the opinion referred to *Connecticut Mutual Life Insurance Co.* v. *Spratley,* 172 U. S. 602, and *Commercial Mutual Accident Co.* v. *Davis,* 213 U. S. 245, but did not cite *Hunter* v. *Mutual Reserve Life Insurance Co.,* 218 U. S. 573, or *Provident Savings Life Assurance Society* v. *Kentucky,* 239 U. S. 103.

Section 6519, subdivision 3, Montana Revised Code of Civil Procedure (1915) provides—"Any corporation organized under the laws of the state of Montana, or doing business therein, may be served with summons by delivering a copy of the same to the president, secretary, treasurer, or other officer of the corporation, or to the agent designated by such corporation. . . . And if none of the persons above named can be found in the state of Montana, and an affidavit stating that fact shall be filed in the office of the clerk of the court in which such action is pending, then the clerk of the court shall make an order authorizing the service of summons to be made upon the Secretary of State, who shall be and is hereby constituted an agent and attorney in fact to accept service on behalf of such corporation, and service upon said Secretary of State shall be deemed personal service upon said corporation."

Petitioner has never maintained any office except in Minneapolis, Minnesota; its business is transacted there; it has never owned property or sought permission to do business in any other State.

Applications for membership are presented on printed forms, usually by mail. The by-laws provide that no person can secure membership until the board of directors has accepted his application at the home office and certificate has issued. Such certificates are mailed as directed by the applicants.

Assessments and dues are payable at the Minneapolis office and notices in respect of them are mailed to members at their last known addresses.

New members are procured by advertisement and through the solicitation of older ones. The latter are urged to furnish lists of prospects and to use their influence to increase the membership; but no member has authority to bind the Association. Although not essential, applications frequently bear a member's recommendation. Soliciting members receive no compensation except occasional premiums or prizes. No paid solicitors or agents are employed.

Losses are settled by checks on Minneapolis banks mailed from the home office. Proofs of loss must be made on the forms provided. In case the attending physician's certificate is inadequate, the Association procures additional information through some local physician, but no resident physicians are employed outside of Minnesota. The right to make further investigation is reserved; but there is no evidence to show anything has been done under this reservation in the present case. Losses are adjusted by the directors in Minneapolis.

The Association accepted Robert J. Benn's application for health insurance, solicited and recommended by Harry K. Hartness, a member, November 6, 1908, and a further application for additional protection May 3, 1911. These were sent by mail from Kalispel, Montana, where both individuals resided. Notices were regularly mailed to Benn at his home address, and he paid dues and assessments in the ordinary course. It does not appear that there was any-

thing unusual or irregular in the proofs of death or the report of attending physician. Without further investigation and upon unsolicited information received through the mail, the Association declined to pay.

Respondent claims that the facts show petitioner was doing business in Montana and the insurance contract was made and payable there. And it is said this contention is supported by *Connecticut Mutual Life Insurance Co.* v. *Spratley, supra,* and *Pennsylvania Lumbermen's Mutual Fire Insurance Co.* v. *Meyer,* 197 U. S. 407.

Considering all the circumstances, it seems sufficiently clear that the agreement incident to membership is a Minnesota contract, there made and to be performed.

The Montana court was without jurisdiction unless petitioner by doing business in the State impliedly assented that process might be served upon the Secretary of State as its agent. "If an insurance corporation of another State transacts business in Pennsylvania without complying with its provisions it will be deemed to have assented to any valid terms prescribed by that Commonwealth as a condition of its right to do business there; and it will be estopped to say that it had not done what it should have done in order that it might lawfully enter that Commonwealth and there exert its corporate powers." *Old Wayne Mutual Life Association* v. *McDonough,* 204 U. S. 8, 21.

The circumstances chiefly relied on to show that petitioner was doing business in Montana are these: The insured was asked to send in his application, upon a form furnished by the Association, by Hartness, one of its members and a resident of Montana, who with other members had been requested to procure such applications. The form was filled and signed in Montana and then sent to Minneapolis with the requisite fee. It was accepted and certificate of membership mailed to the applicant. After customary notices from the Association, with which blank applications for new members were commonly enclosed,

the insured sent dues and assessments from his home in Montana to Minneapolis by mail and received receipts—all according to the usual method. Other members of the Association resided at Kalispel. The Association reserved the right to investigate all claims for sickness, accident or death.

Considering what this Court held in *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 531; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79; and *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516, we think it cannot be said that the Association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members. That is not enough "to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted." *People's Tobacco Co.* v. *American Tobacco Co., supra*, 87.

It also seems sufficiently clear from *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Hunter* v. *Mutual Reserve Life Insurance Co., supra*, and *Provident Savings Life Assurance Society* v. *Kentucky, supra*, that an insurance corporation is not doing business within a State merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their homes and pays losses by checks from its home office. See also *Pembleton* v. *Illinois Commercial Men's Association*, 289 Ill. 99.

We conclude that the record fails to disclose any evidence sufficient to show that petitioner was doing business in Montana within the proper meaning of those words, and that the court there lacked jurisdiction to award the challenged judgment.

Reversed.

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UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION *v.* SULLIVAN.

ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

Nos. 93 and 124. Argued January 4, 1923.—Decided February 19, 1923.

1. In a proceeding by an injured employee of the United States Shipping Board Emergency Fleet Corporation for compensation under a state compensation law, a defense that he was, in effect, an employee of the United States to be compensated under a federal act, is a claim of a right or immunity under the Constitution and laws of the United States, and, under Jud. Code, § 237, as amended, 1916, is not a basis for review in this Court by writ of error. P. 148.
2. *Held* that the record in this case does not warrant review by certiorari. P. 149.

Writ of error to review 76 Pa. Super. Ct. 30, dismissed.

ERROR to a judgment of the Superior Court of Pennsylvania affirming an award under the state workmen's compensation act. Certiorari also was applied for and denied.

Mr. Solicitor General Beck, with whom *Mr. Abram F. Myers,* Special Assistant to the Attorney General, was on the brief, for plaintiff in error.

Mr. Samuel Scoville, Jr., for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Claiming to have been injured (October, 1918) while employed by the United States Shipping Board Emergency Fleet Corporation as a motor truck driver, defendant in error Sullivan presented a claim for compensation to the Workmen's Compensation Bureau, Pennsylvania

Department of Labor and Industry. The corporation answered; denied that the injury was of a permanent nature, and asserted that it was not liable for the further reason " that claimant was a direct employee of the United States Shipping Board Emergency Fleet Corporation, and accordingly is a civil employee of the United States of America, and will be compensated for injury under the Federal workmen's compensation act, subject to sustaining proof of disability."

The referee found that while employed by the Fleet Corporation as a chauffeur Sullivan suffered injuries from a collision in Philadelphia; that neither party had served notice rejecting Article III of the Compensation Act [June 2, 1915, P. L. 736]; and awarded compensation.

The Bureau heard the matter *de novo,* and affirmed the referee's findings of fact and conclusions of law and dismissed the appeal. It said—

" In the case at bar there is no evidence that claimant was a civil employee of the United States or that he received his wages through the United States Treasury. We cannot infer that such was the case. . . . While it might be difficult to draw the exact line of demarcation as to when the defendant is acting as a private corporation or is acting for the United States, the burden would be on the defendant to prove if it were acting for the United States that it would be exempt—there is no defense of this kind interposed in this case. We only have the question of law raised by defendant that the Pennsylvania Workmen's Compensation Board has no jurisdiction. We cannot agree with this. In conclusion we hold: That we have jurisdiction, on the ground that the defendant doing business as a corporation in the State of Pennsylvania, an employer of labor in the State of Pennsylvania, is liable for compensation to the claimant in this case under our act. It is neither our duty nor privi-

lege to make a collateral investigation as to the ownership of the defendant's capital stock."

Successive appeals, limited by statute to matters of law, were dismissed by the Court of Common Pleas and the Superior Court of Pennsylvania. 76 Pa. Super. Ct. 30. The latter court—the highest where decision in the proceeding could be had—said—

"In the present case, the Workmen's Compensation Board and the court are bound to take judicial notice of acts of Congress and executive orders and regulations authorized by acts of Congress which have the force of statutes: *Caha* v. *United States,* 152 U. S. 211; as well as general acts of assembly affecting the defendant. Anything else must be averred and proved as by any other litigant. . . .

"On its face we have here a claim for workmen's compensation presented against a corporation of the District of Columbia, doing business in this State, engaged in performing certain important matters committed to it by the Shipping Board relative to the purchase, construction, equipment, etc., of merchant vessels in the commerce of the United States, and answer made that it is not liable because the injured man was a civil employee of the United States. No evidence was presented to support this answer. . . . As the case was presented before the referee and the board, we are satisfied that the award was fully justified, and it is accordingly confirmed and the appeal dismissed at the costs of the appellant."

The writ of error (No. 124) must be dismissed. The record fails affirmatively to disclose that there was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, or the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States within the requirements of § 237 of the Judicial Code, as amended

by the Act of September 6, 1916.[1] Considering the whole record it is clear that there was no controversy over the validity of any treaty, statute or authority, federal or state. Plaintiff in error by its answer claimed a right or immunity under the Constitution and laws of the United States. The state tribunals held that there was no evidence to establish the facts necessary to show that it was within the class to which exemption might extend. *Champion Lumber Co.* v. *Fisher,* 227 U. S. 445, 451, 452; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McWhirter,* 229 U. S. 265, 276; *Straus* v. *American Publishers' Association,* 231 U. S. 222, 233.

Considering the character of the record, we think it unwise to bring up the cause by certiorari with a view to considering the questions said to be involved. The petition therefor (No. 93) is accordingly denied.

Writ of error dismissed.
Petition for certiorari denied.

DURHAM PUBLIC SERVICE COMPANY *v.* CITY OF DURHAM.

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

No. 251. Argued January 19, 1923.—Decided February 19, 1923.

1. A contract between a city and a street railway company should not be allowed to exempt the latter from future liability for paving the portions of streets occupied by its tracks unless such exemption be plainly expressed. P. 151.

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[1] "Sec. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute

2. An assessment against a street railway company for paving between and near its tracks and rails, greater than the amount assessed, for the rest of the pavement, on abutting lots valued much higher than the railway property on the street, *held* not arbitrary and unreasonable. P. 152.
3. Imposition of special obligations on railway companies in respect of street paving is consistent with reasonable legislative classification. P. 154.

182 N. Car. 333, affirmed.

ERROR to a judgment of the Supreme Court of North Carolina sustaining an assessment for street paving levied against the plaintiff in error street railway company. Certiorari also was applied for and denied.

Mr. James S. Manning, with whom *Mr. W. L. Foushee* and *Mr. John H. Manning* were on the brief, for plaintiff in error.

Mr. S. C. Chambers, with whom *Mr. Jones Fuller* and *Mr. R. P. Reade* were on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

As the cause is properly here upon writ of error—*Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548, 555; Act September 6, 1916, 39 Stat. 726—we deny the petition for certiorari.

Plaintiff in error was incorporated by the Legislature of North Carolina in 1901 and empowered to operate car lines in the streets of Durham when so authorized by the municipal authorities. Shortly thereafter and in pursuance of an agreement they granted the necessary authority. The Supreme Court of North Carolina—182 N. Car.

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of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. . . ."

333—affirmed a judgment of the Superior Court which sustained an assessment of $102,942.30 made in 1920 against the corporation for the cost of paving that portion of Main Street occupied by its tracks. It refused to make the improvement as required by an ordinance; thereupon the City caused the work to be done and assessed the cost against it. The formality of the proceeding is not questioned.

Recovery is resisted upon two grounds—(1) That the original contract under which the railway lines were constructed and operated exempts the corporation from liability to pave the roadbed. Constitution, § 10, Art. I. (2) That the assessment is excessive, unreasonable and wholly arbitrary and to enforce it would deprive plaintiff in error of property without due process of law and deny it the equal protection of the laws contrary to the Fourteenth Amendment.

The original contract with the City is dated February 4, 1901, and the claim of exemption rests upon the following clause therein—

"The said Durham Traction Company [now the Durham Public Service Company] whenever it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs, but nothing herein contained shall be construed to require said Durham Traction Company to pave its roadbed, but it shall be required to restore its roadbed to the conditions in which it was at the time of laying said track, provided, however, that if the city decides to put in or change its sewerage pipes on any of the streets of the said city on which the tracks of said Durham Traction Company may be laid, the said city may require the said Traction Company to remove and replace at its own expense, the said tracks, for said purpose and said city shall incur no liability for any delays or interruptions of the business or traffic of said Traction Company, caused thereby."

The court below held that while this contract imposes

no liability for paving, neither does it grant exemption therefrom. And we agree with their conclusion. Such exemptions must plainly appear. The general rule is that doubts as to provisions in respect of them must be resolved in favor of the municipality or State. *Cleveland Electric Ry. Co.* v. *Cleveland,* 204 U. S. 116, 130.

Purporting to proceed under "An Act Relating to Local Improvements in Municipalities," ratified by the General Assembly of North Carolina, February 27, 1915,—c. 56—the governing body of Durham by resolution provided for improving Main Street and directed plaintiff in error to pave between and for eighteen inches outside its tracks. The company refused to comply and the challenged assessment followed. Among other things the Act of 1915 provides—

"Sec. 4. Every municipality shall have power, by resolution of its governing body, upon petition made as provided in the next succeeding section, to cause local improvements to be made and to defray the expense of such improvements by local assessment, by general taxation, and by borrowing, as herein provided. . . .

"Sec. 6. . . . If the resolution shall provide for a street improvement, it shall direct that any street railway company or other railroad company having tracks on the street or streets or part thereof to be improved shall make such street improvement with such material and of such a character as may be approved by the governing body, in that part of such street or streets or part thereof which the governing body may prescribe, not to exceed, however, the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of such company, and that unless such improvement shall be made on or before a day specified in such resolution, the governing body will cause such improvement to be made: *Provided, however,* that where any such company shall occupy such street or streets under a franchise or contract which

otherwise provided, such franchise or contract shall not be affected by this act, except in so far as this act may be consistent with the provisions of such franchise or contract. . . ."

By agreement of parties, the cause was tried without a jury and the court found the facts. Those so found and presently relied upon to show the arbitrary and unreasonable character of the assessment follow—

"That the section of Main Street over which the assessment extends is 2.02 miles in length and including double tracks there are 2.65 miles of track on Main Street; that there are 154 abutting property owners upon this portion of Main Street; that the assessment against said company for paving Main Street is $102,942.30 and against said 154 property owners is $89,909.56; that the value of the property of this defendant on Main Street within the area which is directly affected by said paving is $100,000 and the assessed value of said abutting property is approximately $5,083,250 exclusive of the value of property on Main Street not taxed.

"That the cost to the Traction Company of furnishing new rails and new cross ties, of taking up and relaying its track on Main Street and doing other work preparatory to the placing of the pavement upon Main Street was $75,108.85, which has been paid by the Traction Company and which said outlay and expenditure was made at the order of the City of Durham; that during the twelve months ending May 31, 1921, the company's railway showed a loss of $17,388.73 of meeting the operating expense and allowance for depreciation and if the Company is required to pay the paving assessment of the City of Durham as demanded, to wit, one-tenth of said assessment each year with interest, then there will be an additional expense of one-tenth of $102,942.30 plus interest and depreciation on same; that the gross earnings of said company from all sources for the year ending De-

cember 31, 1920, were approximately $540,000, the net earnings $147,000, the company having other valuable property and business not on Main Street, including other railway not on Main Street."

The court below held the recited facts insufficient to show that the municipal authorities acted unreasonably or arbitrarily, and we are unable to say that this was error. Counsel concede that the Constitution of North Carolina reserves to the Legislature power to alter or repeal corporate charters; also that, in general, the Legislature either directly or through recognized governmental agencies may impose assessments for local improvements and prescribe the basis of apportionment. But the claim is that the Legislature undertook arbitrarily to direct plaintiff in error to pave more than one-third of the street, while the owners of more valuable property fronting thereon are required to pay out much less and are assessed upon the front-foot basis.

Gast Realty & Investment Co. v. *Schneider Granite Co.*, 240 U. S. 55; *Hancock* v. *City of Muskogee*, 250 U. S. 454; and *Kansas City Southern Ry. Co.* v. *Road Improvement District*, 256 U. S. 658, are cited in support of this insistence; but they do not go so far. The power of the Legislature to make reasonable classifications and to impose a different burden upon the several classes cannot be denied. There are obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks. The facts and circumstances disclosed by the present record are not sufficient to justify us in overruling the judgment of the state court, which held that the assessment was not the result of arbitrary or wholly unreasonable legislative action. *Sioux City Street Ry. Co.* v. *Sioux City*, 138 U. S. 98, 107, 108; *Fair Haven & Westville R. R. Co.* v. *New Haven*, 203 U. S. 379, 388, 389; *Southern Wisconsin Ry. Co.* v. *Madison*, 240 U. S. 457, 461; *Great Northern Ry. Co.* v. *Clara City*, 246 U. S.

434, 436, 437; *Pacific Gas & Electric Co.* v. *Police Court,* 251 U. S. 22, 25, 26; *Milwaukee Electric Ry. Co.* v. *Milwaukee,* 252 U. S. 100, 104.

Affirmed.

VALLEY FARMS COMPANY OF YONKERS *v.* COUNTY OF WESTCHESTER.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 136. Argued January 24, 1923.—Decided February 19, 1923.

1. A state legislature may without notice to property owners establish a sewer district and direct that the cost of the sewer be assessed upon the real property within the district in proportion to its value as ascertained for purposes of general taxation. P. 162.
2. It is not a valid objection to such an assessment, under the Fourteenth Amendment, that the property assessed can receive no direct benefit, where it ultimately may be benefited by future extensions of the sewer. P. 163.
3. Nor is it of importance from the constitutional standpoint that the sewer had been completed before the boundaries of the district were established. P. 164.
4. Where the state law gives the property owner an opportunity to be heard upon the valuation of his property for general taxation, he is not entitled under the Amendment to a further hearing on that subject when such valuations are used as bases for apportioning special assessments. P. 164.

193 App. Div. 433; 231 N. Y. 558, affirmed.

ERROR to a judgment of the Supreme Court of New York, Appellate Division, entered on mandate of affirmance from the Court of Appeals, and directing dismissal of the complaint in an action brought by the present plaintiff in error to declare void a special tax assessment and to restrain its collection.

Mr. Robert C. Beatty for plaintiff in error.

Plaintiff in error has a constitutional right to notice and hearing as to the apportionment of the assessments

upon its property; and the act in fixing those burdens by general rule without notice and hearing and without regard to special benefit is unconstitutional. *Turner* v. *Wade,* 254 U. S. 64; *Central of Georgia Ry. Co.* v. *Wright,* 207 U. S. 127; *Spencer* v. *Merchant,* 100 N. Y. 585; affd. 125 U. S. 345; *Matter of Trustees of Union College,* 129 N. Y. 308; *French* v. *Barber Asphalt Paving Co.,* 181 U. S. 324; *Hancock* v. *Muskogee,* 250 U. S. 454.

The act is unconstitutional in that it deprives the plaintiff in error of its property without just compensation and without due process of law, because it assesses such property equally with all other property within the assessment area for the whole cost of the sanitary outlet sewer and the whole cost of the sanitary trunk sewer, whereas the property of the plaintiff in error can make no use whatever of such sanitary trunk sewer, eleven and three-quarters miles in length, and only a partial use of about one-half of the length of the sanitary outlet sewer, about three miles in length. Such partial use even as to most of its property can only begin upon the construction of a trunk sewer about four miles in length and costing over $300,000. *Gast Realty & Investment Co.* v. *Schneider Granite Co.,* 240 U. S. 55; *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6,* 256 U. S. 658; *Thomas* v. *Kansas City Southern Ry. Co.,* 277 Fed. 708; *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S. 478. *Hancock* v. *Muskogee,* 250 U. S. 454; and *Miller & Lux* v. *Sacramento Drainage District,* 256 U. S. 129, distinguished.

In each of the cases principally relied upon by the defendant in error, the Court has carefully pointed out, in holding the particular act or ordinance constitutional, that if an act works an arbitrary injustice to a complaining property owner by imposing upon his property an unjust and unequal assessment wholly disproportioned to the benefits conferred, it is unconstitutional. See also

Clark v. *Dunkirk,* 12 Hun, 181; 75 N. Y. 612; *O'Reilly* v. *Common Council,* 53 App. Div. 58; *Matter of City of New York,* 218 N. Y. 234; *Keim* v. *Desmond,* 186 N. Y. 232; *Providence Retreat* v. *Buffalo,* 29 App. Div. 160; *Kellogg* v. *Elizabeth,* 40 N. J. L. 274; *In re West Marginal Way,* 192 Pac. 961; *Morris* v. *Bayonne,* 53 N. J. L. 299; *Witman* v. *Reading City,* 169 Pa. St. 375; *Barton* v. *Kansas City,* 110 Mo. App. 31.

The assessments are wholly disproportioned to benefits in that they are based solely upon the assessments for general taxation, which results in the arbitrary adoption of the value of the lots as they may happen to be laid out upon the tax maps without regard to frontage or depth, or the distance from the sewer of large tracts assessed as one lot. *Gast Realty Case, supra; Howell* v. *Tacoma,* 3 Wash. 711.

The assessments are wholly disproportioned to benefits in that the assessments upon improved property are based on the assessed value of lands and buildings, while those on vacant property are based on the assessed value of the land. *Boston* v. *Shaw,* 1 Metc. 130; *Howell* v. *Tacoma, supra.* Sewer taxes assessed upon the value of lots without the improvements upon them have been held valid. *Snow* v. *Fitchburg,* 136 Mass. 183; *Gilmore* v. *Hentig,* 33 Kans. 156; *Douglass* v. *Craig,* 4 Kans. App. 99; Dillon, Municipal Corporations, 5th ed., § 1463, and notes.

The act as amended requires the supervisors of the County of Westchester to adopt a budget for the Bronx Valley sanitary sewer district and to determine the aggregate amount to be collected by the assessments for each year; such amount to include unconstitutional and unlawful items such as a contingent fund to meet deficiencies of revenue and the cost of all litigation now or hereafter incurred. *DeWitt* v. *Rutherford,* 57 N. J. L. 619; *West Third Street Sewer Appeal,* 187 Pa. St. 565;

Erie v. *Russell,* 148 Pa. St. 384; *Hammett* v. *Philadelphia,* 65 Pa. St. 146.

The Act of 1905 as amended up to the year 1917 provided for the fixing of the area for assessments by the commissioners appointed under such act and such area was fixed with opportunity to the property owners to be heard after notice to them. The work was entirely completed in 1913. Notwithstanding the fixing of the rights and liabilities of all property owners, the Legislature in 1917 swept away these rights and attempted to substitute a different assessment area described by metes and bounds. In so providing the constitutional rights of the property owners were disregarded.

A law much simpler and clearer in its provisions was characterized as "a farrago of irrational irregularities" by Mr. Justice Holmes in *Gast Realty & Investment Co.* v. *Schneider Granite Co., supra.*

The case of *Horton* v. *Andrus,* 191 N. Y. 231, in which certain constitutional questions were raised in reference to the original act, c. 646, Laws of 1905, did not determine the issues raised in this case which relate to the provisions of the amendments to the act.

The relief prayed for is properly granted in this form of action.

Mr. William A. Davidson, with whom *Mr. Charles M. Carter* was on the brief, for defendant in error.

Mr. Justice McReynolds delivered the opinion of the Court.

Plaintiff in error, a New York corporation, seeks cancellation of an assessment of taxes upon its real property to pay for construction and operation of the Bronx Valley sewer. Westchester County, a necessary party under the local statute, demurred to the complaint upon the ground that it states no cause of action. The trial court over-

ruled the demurrer. The Appellate Division reversed the judgment—193 App. Div. 433—and the Court of Appeals affirmed this action, without opinion—231 N. Y. 558.

The complaint alleges—

Plaintiff in error owns certain designated lands in Westchester County assessed for taxes for the year 1918 for the benefit of the Bronx Valley sewer.

That under c. 646, New York Laws of 1905, entitled "An Act to provide for the construction and maintenance of a sanitary trunk sewer and sanitary outlet sewer in the county of Westchester, and to provide means for the payment therefor," and sundry amendments thereto, especially c. 646, Laws of 1917, the Legislature attempted to designate the area benefited by the trunk and outlet sewers and to provide for taxing all property therein. The trunk sewer is 11¾ miles long, the outlet sewer 3 miles. Both are wholly within Westchester County. The former lies along the Bronx River. At a point near the south line of the county it connects with the outlet sewer which extends thence westwardly under two high ridges and across Tibbetts Valley to the Hudson River.

That the sewer system carries house drainage only—no surface water; and throughout its entire course the grade is downward; the sewage flows by gravity; there are no pumping stations.

That east of and near Hudson River a high ridge runs north and south. Immediately east of this lies Tibbetts Valley; further east there is a second north and south ridge; then comes Bronx Valley shut in on the east by a third ridge. The natural drainage of Bronx Valley is southerly into East River; Tibbetts Valley also drains southerly, but into Harlem River. No natural drainage connection exists between the two valleys; they are separated throughout their entire length by the second ridge.

That the outlet sewer, through which the whole system discharges, extends from the trunk sewer in Bronx Valley

under the second ridge at great depth below the surface, thence across Tibbetts Valley and under the first ridge also at great depth to the Hudson River. Any connection with this sewer from Tibbetts Valley must be made therein; and lands there cannot be connected at all with the trunk sewer.

That about 2500 acres—Lincoln Park section—of Tibbetts Valley is now connected with the outlet sewer; no other lands therein can use it unless and until a connecting line, four miles long, is constructed, at a probable cost of $300,000.

That notwithstanding this limited possible use Tibbetts Valley is assessed to meet the cost of the entire system just as the lands in Bronx Valley. Taxes for construction and maintenance are based wholly upon assessed valuations for general purposes. Each lot is taxed according to value and irrespective of benefits received. No power is conferred to reduce assessments in one section not benefited equally with others.

That the district was defined by the amendment of 1917, twelve years after the original act and five years after completion of the sewers. The first act limited the total cost to $2,000,000 and provided that commissioners should determine the benefited area after opportunity for hearings. Amendments have changed these fundamental provisions—the total cost exceeds $3,250,000, and the boundaries have been designated without notice to owners.

That the challenged assessments are upon valuations of both land and improvements and disproportionate to benefits. The Board of Supervisors is required to adopt a budget, which includes unconstitutional and unlawful items—among them cost of litigation and contingent fund for deficiencies.

That the act as amended prohibits assessments against lands within the sewer district when also in Mount Vernon, but directs that a corresponding sum shall be

paid by levy upon all property, real and personal, within that City.

That plaintiff's lands have been illegally assessed. The act as amended violates the Fourteenth Amendment by depriving plaintiff of property without due process of law and without just compensation and by denying it equal protection of the laws. The assessments are a cloud upon plaintiff's title and greatly depreciate market values. There is no adequate remedy at law.

The prayer is for a decree declaring the assessments void, directing their cancellation and restraining collection; and for general relief.

Counsel for plaintiff in error states that " the question here involved is whether the statutes of the State of New York, under which the Bronx Valley sewer assessments were imposed over a large area of many square miles, in Westchester County, New York, are in contravention of due process of law under the Fourteenth Amendment of the Constitution of the United States."

The argument proceeds thus—

The sewer system, intended for house drainage only, consists of a trunk sewer 11¾ miles long, in the Bronx Valley, connected with an outlet sewer extending westward three miles to the Hudson River. The Act of 1905—c. 646—provided that commissioners should prepare a map of the assessment district after notice to owners and opportunity to be heard. The supplemental Act of 1917—c. 646—disregards this map, substitutes definite boundaries and directs assessments upon all lands therein according to value, including improvements—all parcels to be treated alike.

That such assessments disregard the difference in conditions, locations and benefits and no notice or opportunity for hearing concerning the apportionments to particular parcels is provided for.

That plaintiff's Tibbetts Valley lands are so situated that they can never utilize any part of the sewer system except the lower portion of the outlet sewer, and this will be possible only through costly connections not yet planned.

That the statutes are unconstitutional, in that—they provide for no notice or hearing upon apportionment of the assessments; they direct assessments of all parcels of land according to values fixed for general taxation purposes irrespective of relation to the sewer, street frontage, depth or shape; they include improvements in assessed values and thereby adjoining lots of equal size are taxed for different sums. And they are " ' of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred,' so that such legislative action is ' palpably arbitrary or a plain abuse.' "

Myles Salt Co. v. *Iberia Drainage District,* 239 U. S. 478; *Gast Realty & Investment Co.* v. *Schneider Granite Co.,* 240 U. S. 55; and *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6,* 256 U. S. 658, are cited and relied upon; but, we think it clearly appears upon examination of those cases in connection with *Wagner* v. *Baltimore,* 239 U. S. 207, 217, 218; *Houck* v. *Little River Drainage District,* 239 U. S. 254, 262, 265; and *Miller & Lux* v. *Sacramento Drainage District,* 256 U. S. 129, that the allegations of the complaint are insufficient to bring this cause within the doctrine which plaintiff invokes.

The courts below have upheld the assessment under the constitution and laws of the State. We are concerned only with application of the Fourteenth Amendment.

In *Houck* v. *Little River Drainage District,* the owners of a large area sought to enjoin collection of a tax of twenty-five cents per acre levied generally upon lands in

the district to pay preliminary expenses. They alleged that the lands varied greatly in value and that no benefits would accrue to theirs—some of which would be condemned and others damaged. The judgment of the state courts sustaining a demurrer to the petition was affirmed here. Speaking through Mr. Justice Hughes, this Court declared—

"In view of the nature of this enterprise it is obvious that, so far as the Federal Constitution is concerned, the State might have defrayed the entire expense out of state funds raised by general taxation or it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made. *County of Mobile* v. *Kimball,* 102 U. S. 691, 703, 704. It was equally within the power of the State to create tax districts to meet the authorized outlays. . . . And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment, that is, it may define the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse. . . .

"When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly, but even in such case there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The State in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners."

In *Miller & Lux* v. *Sacramento Drainage District, supra,* we said—"Since *Houck* v. *Little River Drainage District* (1915), 239 U. S. 254, the doctrine has been definitely settled that in the absence of flagrant abuse or purely arbitrary action a State may establish drainage dis-

tricts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits."

Myles Salt Co. v. *Iberia Drainage District, Gast Realty & Investment Co.* v. *Schneider Granite Co.*, and *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6, supra,* present facts deemed sufficient to show action "palpably arbitrary and a plain abuse" of power. Here the allegations make out no such situation. All lands within the district ultimately may be connected with some portion of the sewer and we cannot say they derive no benefits therefrom or that any were included arbitrarily or for improper purposes.

It was unnecessary for the Legislature to give notice and grant hearings to owners before fixing the boundaries of the district so as to include their lands, and prescribing the method of taxation. And it is unimportant that the sewer had been completed before the boundaries of the present district were established. *Wagner* v. *Baltimore, supra.*

The state courts held that as the rolls of local assessors are adopted for taxing property within the district the right of owners to be heard as to values is adequately protected; and we think that under the circumstances they can demand no more.

The judgment of the court below is

Affirmed.

Counsel for Parties.

DOUGLAS, PROSECUTING ATTORNEY FOR KING COUNTY, ET AL. *v.* NOBLE.

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

No. 159. Argued January 2, 1923.—Decided February 19, 1923.

1. The law of Washington, Remington, 1915, §§ 8412–8425, which provides that only licensed persons shall practice dentistry, vesting the licensing power in an examining board of practicing dentists and declaring that every person of good moral character with a diploma from a reputable dental college shall be eligible and shall have a license if he passes examination, is not to be construed as vesting power in the board to grant or withhold licenses arbitrarily. P. 167.
2. The statute indicates clearly, though not in terms, the general standard of fitness, and the character of examination required, leaving to the board to determine (1) what knowledge and skill fit one to practice dentistry, and (2) whether the applicant possesses them. P. 169.
3. Delegation of these functions to a board is consistent with the Federal Constitution. P. 170.

274 Fed. 672, reversed.

APPEAL from a decree of the District Court permanently enjoining the appellants, two prosecuting attorneys, from proceeding criminally against the appellee for practicing dentistry without a license.

Mr. Malcolm Douglas, with whom *Mr. L. L. Thompson,* Attorney General of the State of Washington, and *Mr. Bert C. Ross* were on the brief, for appellants.

Mr. Cassius E. Gates, for appellee, submitted. *Mr. Browder Brown* and *Mr. J. W. A. Nichols* were also on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In 1893 the legislature of Washington provided that only licensed persons should practice dentistry. It vested the authority to license in a board of examiners, consisting of five practicing dentists; and it required that persons desiring to practice should apply to that board and undergo examination before it. Every person of good moral character with a diploma from a reputable dental college was declared eligible; and, if he or she passed the examination, became entitled to a license. Laws of Washington, 1893, c. 55. That statute, with amendments not here material, Laws of 1901, c. 152, has since been continuously in force. It is now embodied in Remington's 1915 Codes and Statutes of Washington, § 8412—§ 8425. The validity of the statute has been attacked on various grounds; and it has been repeatedly upheld by the highest court of the State.[1]

In 1921 Noble brought this suit in the federal court for the Western District of Washington to enjoin the King County prosecuting attorney from proceeding criminally against him for practicing dentistry without a license. Jurisdiction of that court was invoked solely on the ground that rights guaranteed plaintiff by the Federal Constitution were being invaded. The bill charged that these were violated, both because the licensing statute was void and because the board in administering it had exercised its power arbitrarily. The case was heard by three judges upon application for an interlocutory injunction

[1] *State ex rel. Smith* v. *Board of Dental Examiners,* 31 Wash. 492; *In re Thompson,* 36 Wash. 377, 379; *State ex rel. Brown* v. *Board of Dental Examiners,* 38 Wash. 325; *State* v. *Littooy,* 37 Wash. 693; *State ex rel. Thompson* v. *State Board of Dental Examiners,* 48 Wash. 291; *State* v. *Littooy,* 52 Wash. 87; *Brown* v. *State,* 59 Wash. 195. See also *State* v. *Brown,* 37 Wash. 97.

under § 266 of the Judicial Code. It was admitted that plaintiff was of good moral character; that he had a diploma from a reputable dental college; that he had submitted himself to the dental board for examination; that he had been examined, but had not passed the examination; and that, although refused a license, he had persisted in practicing dentistry. The board denied, by its answer, that it had acted arbitrarily in refusing a license; and this charge does not appear to have been further insisted upon.

Plaintiff rested his case solely on the claim that the statute violated the Federal Constitution. It was conceded that a State may, consistently with the Fourteenth Amendment, prescribe that only persons possessing the reasonably necessary qualifications shall practice dentistry, *Dent* v. *West Virginia,* 129 U. S. 114; and that the legislature may, if consistent with the state constitution, confer upon an administrative board the power to determine whether an applicant possesses the qualifications which the legislature has declared to be necessary. The contention is that the statute purports to confer upon the board arbitrary power to exclude applicants from the practice of dentistry and thus violates the due process clause of the Fourteenth Amendment. The District Court held the act void on that ground; and issued a permanent injunction. 274 Fed. 672. Whether it erred in so holding is the only question presented for our consideration on this appeal.

The argument is that, since the act does not state in terms what the scope and character of the examination shall be, arbitrary power is conferred upon the board to grant or withhold licenses. It is pointed out that the statute does not in terms direct that the examination shall relate to the applicant's qualifications to practice dentistry; that it does not prescribe the subjects upon which applicants shall be examined, or whether profi-

ciency shall be determined by knowledge of theory or by requiring applicants to demonstrate skill with the tools and materials of the profession; that it does not provide whether the examination shall be oral or written, or what percentages of correct answers shall be required to pass the examination; and that it does not require the keeping of records of the proceedings which could be used for purposes of review.

What authority the statute purports to confer upon the board is a question of construction. If it purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the Fourteenth Amendment. Its construction is a question of state law. Since the case is here on appeal from a federal court, we must consider it, *Davis* v. *Wallace,* 257 U. S. 478. But in passing upon such questions we follow applicable decisions of the highest court of the State. *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 154. The statutory provisions involved in the present case were construed twenty years ago by the Supreme Court of Washington in *In re Thompson,* 36 Wash. 377, 379. It was insisted there that the grant of the power to hold examinations was a delegation of arbitrary legislative power to the dental examiners. The court assumed that to delegate power to make such rules was consistent with the constitution of the State; and that the statute had conferred upon the board power to make rules. It declared that the board must have adopted rules "in order to properly determine the good character of the applicant and the good standing of the college issuing his diploma, and to conduct the examinations upon subjects reasonably required in that profession." And it held that, if there was an abuse of authority, the remedy is to review, by some appropriate proceeding, the conduct of the board,

not to attack the validity of the act. Thus, the highest court of the State has construed this statute as not conferring arbitrary power upon the board in respect to the scope and character of the examination. The statute has been in force for thirty years. The correctness of the views expressed in *In re Thompson* does not appear to have been questioned by that court since. Under such circumstances, we should, even in the absence of controlling decision, decline to give the statute a construction which would render it void, unless compelled to do so by unequivocal language in the act. *Knights Templars' & Masons' Life Indemnity Co.* v. *Jarman,* 187 U. S. 197, 205. Obviously there is none of that character.

The statute provides that the examination shall be before a board of practicing dentists; that the applicant must be a graduate of a reputable dental school; and that he must be of good moral character. Thus, the general standard of fitness and the character and scope of the examination are clearly indicated. Whether the applicant possesses the qualifications inherent in that standard is a question of fact. Compare *Red "C" Oil Mfg. Co.* v. *North Carolina,* 222 U. S. 380, 394. The decision of that fact involves ordinarily the determination of two subsidiary questions of fact. The first, what the knowledge and skill is which fits one to practice the profession. The second, whether the applicant possesses that knowledge and skill. The latter finding is necessarily an individual one. The former is ordinarily one of general application. Hence, it can be embodied in rules. The legislature itself may make this finding of the facts of general application, and by embodying it in the statute make it law. When it does so, the function of the examining board is limited to determining whether the applicant complies with the requirements so declared. But the legislature need not make this general finding. To determine the subjects of which one must have knowledge in order to be fit to prac-

tice dentistry; the extent of knowledge in each subject; the degree of skill requisite; and the procedure to be followed in conducting the examination; these are matters appropriately committed to an administrative board. *Mutual Film Corporation* v. *Ohio Industrial Commission,* 236 U. S. 230, 245–6. And a legislature may, consistently with the Federal Constitution, delegate to such board the function of determining these things, as well as the functions of determining whether the applicant complies with the detailed standard of fitness. *Reetz* v. *Michigan,* 188 U. S. 505. That the scope of the discretion here granted to the examining board was well within the limits allowed by the Federal Constitution, and that it is not to be presumed that powers conferred upon the administrative boards will be exercised arbitrarily, is settled by *Lieberman* v. *Van de Carr,* 199 U. S. 552.

Appellee relied upon *Yick Wo* v. *Hopkins,* 118 U. S. 356. There the licensing board habitually exercised its power arbitrarily, and discrimination was practiced. *Seattle* v. *Gibson,* 96 Wash. 425, and *State ex rel. Makris* v. *Superior Court for Pierce County,* 113 Wash. 296, strongly relied upon by appellee, are not inconsistent with *In re Thompson.* The ordinances involved in these later cases were construed by the state court to vest in the city officials an arbitrary discretion to grant or withhold, and to revoke, licenses. Whether the constitution of the State permits delegation to the examining board of the power to ascertain and fix the essentials of fitness is wholly a state question. *Welch* v. *Swasey,* 214 U. S. 91, 104; *Bradley* v. *Richmond,* 227 U. S. 477, 482. It is not contended that the statute violates the state constitution in this respect.

Reversed.

BANK OF AMERICA *v.* WHITNEY CENTRAL NATIONAL BANK.

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

No. 205. Argued January 15, 1923.—Decided February 19, 1923.

A national bank *held* not suable in a State where it had no place of business, resident officers or employees or business attended to by its officers or employees, but where deposits were kept and business transacted on its behalf by local banks as its correspondents. P. 172.

Affirmed.

ERROR to an order of the District Court setting aside an attempted service of summons.

Mr. Henry Root Stern, with whom *Mr. George N. Hamlin* was on the brief, for plaintiff in error.

Mr. Martin Conboy and *Mr. J. Blanc Monroe,* with whom *Mr. Monte M. Lemann* was on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Bank of America, a New York corporation, brought this action in the federal court for the Southern District of New York, against the Whitney Central National Bank, which has its banking house and usual place of business at New Orleans, Louisiana. Service of process was made solely by delivering a summons to its president while temporarily in New York. Defendant appeared specially; challenged the jurisdiction of the court; and moved that the service be set aside. The questions of fact arising on the motion were referred to a special master to take proofs and make findings. The motion was heard upon his report; and the service was set aside

on the ground that defendant was not amenable to process within the district. The case is here under § 238 of the Judicial Code; the question of jurisdiction having been duly certified. The sole question for decision is whether, at the time of the service of the process, defendant was doing business within the district in such manner as to warrant the inference that it was present there. *Philadelphia & Reading Ry. Co.* v. *McKibbin,* 243 U. S. 264, 265; *Rosenberg Bros. & Co.* v. *Curtis Brown Co.,* 260 U. S. 516.

The facts relied upon to establish presence of the defendant within the district consist wholly of its relations to the Hanover National Bank and five other banks, whose places of business are located in New York, and of transactions conducted through them. Each of these six banks is, what is commonly called, a correspondent of the defendant. In each the Whitney Central carries continuously an active, regular deposit account. But its transactions with these banks are not limited to making deposits and drawing against them. Superimposed upon the simple relation of bank and depositor are numerous other transactions which necessarily involve also the relationship of principal and agent. These additional transactions conducted by the correspondent banks include: payment in New York of drafts drawn, with accompanying documents, against letters of credit issued by defendant at New Orleans; the receipt in New York from brokers and others of securities in which the Whitney Central or its depositors are interested, and the delivery of such securities; the making of payment to persons in New York for such securities; the holding of such securities on deposit in New York for long periods and arranging substitution of securities; the cashing, under specific instructions from defendant given in New Orleans, of checks drawn on it by third parties with whom it had no banking or deposit relations; the receipt in New York

from third parties, with whom defendant apparently had no banking relations, of deposits of moneys for account of its customers.

The Whitney Central had what would popularly be called a large New York business. The transactions were varied, important and extensive. But it had no place of business in New York. None of its officers or employees was resident there. Nor was this New York business attended to by any one of its officers or employees resident elsewhere. Its regular New York business was transacted for it by its correspondents—the six independent New York banks. They, not the Whitney Central, were doing its business in New York. In this respect their relationship is comparable to that of a factor acting for an absent principal. The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se.* It flows from the fact that the corporation itself does business in the State or district in such a manner and to such an extent that its actual presence there is established. That the defendant was not in New York and, hence, was not found within the district is clear.

Whether a national bank could under any circumstances be subjected, without its consent, to suit in a State or district, other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case.[1]

Affirmed.

[1] See Revised Statutes, § 5190, and other acts concerning the place in which a national bank may do business. 29 Ops. Atty. Gen. 81, 98; and concerning the district in which a national bank may be sued. See Revised Statutes, § 5198; Act July 12, 1882, c. 290, § 4, 22 Stat. 162; Act August 13, 1888, c. 866, § 4, 25 Stat. 433; Judicial Code, subdiv. 16 of § 24; *First National Bank of Charlotte* v. *Morgan,* 132 U. S. 141, 145; *Continental National Bank of Memphis* v. *Buford,* 191 U. S. 119, 123, et seq.

LUMIERE *v.* MAE EDNA WILDER, INC.

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

No. 242. Argued January 18, 1923.—Decided February 19, 1923.

Under the provision of the Copyright Act that suits "may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found," jurisdiction cannot be acquired over a corporation in a district where it has no office and does no business, by serving process on its president while there temporarily and not on business of the corporation. P. 177.

Affirmed.

APPEAL from an order of the District Court quashing service of a subpœna *ad respondendum*.

Mr. Williams S. Evans for appellant.

We contend that the plain intent of Congress was, not only to give jurisdiction to the court of the district where the defendant or his agent was a resident, but also to that of any district in which the defendant or his agent may be found. The punctuation plainly shows that two contingencies were considered. One, the residence of the defendant or his agent, and two, the place where the defendant or his agent was found and served with process.

We contend that the word "he" in the last clause refers to the "defendant or his agent" and that it means that civil actions under the copyright law may be instituted in the district in which the defendant's agent is found in the sense that he is served with process.

Any other interpretation with respect to a corporation would be impossible, since one can find or serve a corporation only in the person of its agent.

We are not unmindful of the many decisions under the anti-trust, the patent and similar statutes, which

have determined that a corporation is not "found" in a district when one of its officers is temporarily in the district, even though he be conducting some incidental business of the company. The distinction between the statutes on which these decisions have been made and the statute at bar is, that, at bar, by the very language of the statute it is provided that one can serve either the defendant or his agent, where either resides or is found, whereas this language is not used in any of the other statutes under consideration.

The manifest purpose of this enactment was to increase the protection that the Copyright Act was designed to provide for authors,—make it as convenient as possible for them to enforce their rights.

If it was not the intention to change the status provided by § 52, Jud. Code, this section of the Copyright Act would be unnecessary.

Cases decided under § 52, Jud. Code, can have no application, for jurisdiction under that section is limited to the district where the defendant "resides."

Cases under the Sherman Act are not in point for the language there is, "the district in which the defendant resides or is found or has an agent." Having an agent in a district plainly means something definite and permanent and is distinctly in contrast with the situation where service may be made in the district where the "defendant or his agent resides or in which he may be found."

Cases under the patent law, Jud. Code, § 48, are not in point. The language of that section is "the district courts of the United States shall have jurisdiction . . . in the district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have a regular and established place of business." The distinction is manifest.

The words of this act should be given their plain and usual meaning.

Mr. Frederick F. Church for appellee.

Mr. Justice Brandeis delivered the opinion of the Court.

The venue of suits for infringement of copyright is not determined by the general provision governing suits in the federal district courts. Judicial Code, § 51. The Copyright Act provides that suits "may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found." Act of March 4, 1909, c. 320, § 35, 35 Stat. 1075, 1084. Whether under this section a valid service was made upon defendant is the only question for decision.

New York is divided into four federal judicial districts. Judicial Code, § 97. Lumiere, a citizen and resident of New York City, in the Southern District, brought, in the federal court for that district, this suit to enjoin the infringement of a copyright by publications in that city. The defendant, Mae Edna Wilder, Inc., is a New York corporation with its place of business in Rochester, in the Western District. It was not an inhabitant of the Southern District. It had no place of business there. It had no agent or employee there authorized to carry on business on its behalf. It transacted no business there. The only service of process made was by delivering to Mr. Adkin, who was its president, a copy of the subpoena while he was temporarily in New York City. He was not an inhabitant of the Southern District; and it was not shown that he was there on business of the company. The defendant, appearing especially for the purpose of objecting to the jurisdiction of the court, moved to quash the service on the ground that it was not amenable to process. The motion was granted; and the case is here on appeal

under § 238 of the Judicial Code, the question of jurisdiction having been duly certified.

That jurisdiction over a corporation cannot be acquired in a district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, even if he is there on business of the company, has been settled. *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264; *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516; *Bank of America* v. *Whitney Central National Bank, ante,* 171. The contention here is that jurisdiction was obtained over the defendant because its president is an agent within the meaning of the statute and was personally found in New York City. If such facts are sufficient to give jurisdiction, a suit upon a copyright may be brought in any district of the United States in which one who is an officer or an agent of a defendant is served with process; although neither plaintiff nor defendant has his residence or a place of business there, and although the copyright was not infringed there. It is not to be lightly assumed that Congress intended such a thing. Compare *In re Keasbey & Mattison Co.*, 160 U. S. 221; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501; *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357.

Ordinarily a civil suit to enforce a personal liability under a federal statute can be brought only in the district of which the defendant is an inhabitant. Judicial Code, § 51. In a few classes of cases, a carefully limited right to sue elsewhere has been given. In patent cases it is the district of which the defendant is an inhabitant or in which acts of infringement have been committed and the defendant has a regular and established place of business. Judicial Code, § 48; *W. S. Tyler Co.* v. *Ludlow-Saylor Wire Co.*, 236 U. S. 723. In cases under the anti-trust laws, it is where the defendant " resides or is found or has an agent; " (Act of October 15, 1914, c. 323, § 4, 38 Stat.

730, 731); and in the case of corporations, the "district whereof it is an inhabitant" or "any district wherein it may be found or transacts business." § 12, p. 736. It is not reasonable to conclude that Congress intended in copyright cases to give a right far greater than these. Agent is a word used in the law in many senses. What it means in a statute is to be determined from the context and the subject-matter. The president of a business corporation is, commonly, authorized to represent it for many purposes; and it may often be said properly that he is acting as its agent. But induction into office does not impress upon a person the status of agent of the corporation, so that he must be deemed its agent in every jurisdiction which he happens to enter, although the corporation transacts no business there and he is not there in any way representing it. The service of process made upon Mr. Adkin was, clearly, not service upon an agent of the corporation within the meaning of the Copyright Act.

As there is in this case only one defendant, the provision concerning suits in States which contain more than one federal judicial district can have no application. See Judicial Code, § 52; *Camp* v. *Gress*, 250 U. S. 308, 314. Whether, under the Copyright Act, service upon an agent would be effective as upon one "found," if it appeared that the agent when served was transacting some business for defendant within the jurisdiction, but was there only temporarily and had his residence and place of business elsewhere, is a question which we need not decide in this case.

Affirmed.

PRICE FIRE & WATER PROOFING COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 257. Argued January 22, 1923.—Decided February 19, 1923.

Expenses incurred by a manufacturer after termination of its work for the Government during the war and after November 12, 1918, in efforts to keep alive its organization and regain its commercial business, are not recoverable from the United States under the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272. P. 183.
56 Ct. Clms. 502, affirmed.

APPEAL from a judgment of the Court of Claims in an action to recover, under the Dent Act, the amount of various expenditures and liabilities incurred by the claimant in connection with or growing out of work done for the Government.

Mr. S. S. Ashbaugh for appellant.

The plaintiff did not "sustain or receive in common with the community generally" these expenses; nor did the depression of the market because of the sale of government goods "at prices below cost of production" occur until many months after these expenses began, and until large parts of them had been incurred. They are peculiar to the plaintiff, and are connected directly with its ownership, use, and enjoyment of its own particular property and business, which in itself gives a basis for a further judgment for the $125,000.00. It is brought within the rule of *United States* v. *Russell,* 13 Wall. 623, where the Government was held liable for the "services rendered and the expenses incurred." It is also within the rule stated in *Henry* v. *Dubuque & Pacific R. R. Co.,* 2 Iowa, 300, that "just compensation should be precisely commensurate with the injury sustained by having the prop-

erty taken; neither more nor less." *Holton* v. *Milwaukee,* 31 Wis. 27.

The difference between the doctrine of government liability for private property taken for public use, and the doctrine of *damnun absque injuria,* is clear and distinct. The one doctrine is within the rule of the *Russell Case* and the other within the rule of the Soda Lake cases recently affirmed by this Court (*Horstmann Co.* v. *United States,* 257 U. S. 138) where a loss was inflicted but no taking of property was proved or found. The rights of the plaintiff have been fixed by these decisions of the several courts. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563.

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 Brandeis delivered the opinion of the Court.

By the Dent Act (March 2, 1919, c. 94, 40 Stat. 1272) the Secretary of War was authorized to adjust and discharge, upon a fair and equitable basis, agreements, express or implied, made prior to November 12, 1918, in connection with the prosecution of the war, "when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law." If an adjustment offered by the Secretary was refused by the claimant, the Court of Claims was given jurisdiction to award fair and just compensation. But it was expressly provided that neither the Secretary, nor the court, should include in the award "prospective or possible profits on any part of the con-

tract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform" the contract.

The claimant herein owned an establishment for fireproofing and waterproofing cloth. In 1917, an arrangement was made by which, after January 1, 1918, the plant, with increased facilities, was to be operated, by the claimant, wholly on cloth to be delivered to it, from time to time, by the Government. Payment was to be made at an agreed rate per yard. No agreement was executed in the manner provided by law. Thereafter many orders for finishing goods were given. There were serious delays and irregularities on the part of the Government both in delivering the goods for finishing and in removing them from the premises after the work had been done; and upon the signing of the Armistice, all unfinished orders were cancelled. For all goods finished the claimant was paid, at the agreed price. But by the action of the Government prior to November 12, 1918, and by its cancellation of the orders, it was subjected to large and unanticipated expenses. A claim for these expenses and the losses incurred was duly presented to the Secretary of War. An adjustment offered by him was rejected; and thereupon claimant brought this suit in the Court of Claims for $641,313.64. The petition set forth ten distinct causes of action. On nine of these the court made the allowances set forth in the margin,[1] which aggregate $47,700.08; and judgment was entered below for this

[1](1) Storage and hauling charges on untreated gray goods: On this cause of action the Court of Claims awarded the plaintiff the sum of..... $2,147.05

(2) Storage charges on treated goods after notice of completion: On this cause of action the Court of Claims awarded the plaintiff the sum of..... 544.60

amount. The tenth cause of action, on which $590,000 was claimed, was for loss to commercial business. On this no allowance was made. A motion for a new trial asked for by claimant (on what ground does not appear) was overruled. Whether the court erred in disallowing the claim on the tenth cause of action is the sole question for decision on this appeal.

The facts found by the court bearing especially on this cause of action were these:

"When in the latter part of 1917 this arrangement was made the plaintiff's plant, its processes, business, and good will as a going concern were valuable, but what the value thereof was is not shown to the satisfaction of the court on the present record.

(3) Alterations and additions to the plant for storage purposes, including restoration: On this cause of action the Court of Claims awarded the plaintiff the sum of	$11,249.16
(4) Extra protection demanded by the defendants: On this cause of action the Court of Claims awarded the plaintiff the sum of	2,953.11
(5) Wages paid unemployed labor from December 29, 1917, to March 23, 1918: On this cause of action the Court of Claims awarded the plaintiff the sum of	3,013.52
(6) Allowance on chemicals and materials left over after suspension of work: On this cause of action the Court of Claims awarded the plaintiff the sum of.	3,877.87
(7) Increased plant facilities: On this cause of action the Court of Claims awarded the plaintiff the sum of.	20,000.00
(8) Deductions made by defendants because of increased yardage resulting from treatment and for alleged loss in shipment: On this cause of action the Court of Claims awarded the plaintiff the sum of	954.09
(9) Insurance premiums paid by plaintiff in excess of that provided for: On this cause of action the Court of Claims awarded the plaintiff the sum of.	2,960.68
Total amount awarded by Court of Claims...	$47,700.08

"When Government work ceased in November, 1918, the plaintiff had no other business upon which it could continue the operation of its plant and it became idle. The cessation of hostilities left the Government with large quantities of goods on hand of the kind produced by the plaintiff company and by other concerns producing for the Government the same general character of goods. These goods were sold by the Government at different times in large lots at public auction and generally at prices below cost of production, and the sale of these goods by the Government supplied to a very considerable extent the demands of the trade for this class of goods. In an effort to reestablish its business and preserve the value attaching to its plant as an operating concern and in the belief that if normal conditions should be restored it could again do a profitable business, it has expended considerable sums of money, by operating at a loss, in keeping its business alive and its organization existent, and by reason of such efforts since the cessation of Government work it has sustained an operating loss of $125,000. It has not succeeded in reestablishing its business on a profitable basis, and its plant and business are now worth much less than before it took on Government work and devoted its facilities thereto."

Claimant contends here that it should be allowed to recover this $125,000 as expenses incurred in efforts to keep alive its business and organization to February, 1921, when the testimony was taken. The Dent Act does not permit any recovery on this ground. These were not "expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform" the contract. Nor were they made or incurred prior to November 12, 1918. There was no breach of contract or wrongful act on the part of the United States in this connection. Nor was there a taking of property for which compensation can be made. It is urged here that the full

amount should be allowed to reimburse claimant for expenditures incurred at the plant in the early months of 1918, when it was idle because of the Government's delay in supplying goods for finishing. Some allowance for expenses incurred during that period was allowed under the fifth cause of action and is included in the $47,700.08 for which judgment was entered. For awarding more there is no basis in the findings. No request for additional findings appears to have been made below. Nor was leave sought there, or here, to reopen the case so that additional evidence could be introduced. The findings made are conclusive.[1]

Affirmed.

THE NEW ENGLAND DIVISIONS CASE.[2]

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

No. 646. Argued January 9, 10, 1923.—Decided February 19, 1923.

1. Section 418 of the Transportation Act, 1920, authorizes the Interstate Commerce Commission, when establishing divisions of joint rates, to consider not only what is just, reasonable and equitable as between all the carriers participating, but also the financial needs of particular carriers which should be supplied, in the public interest, in order to maintain them in effective operation as part of an adequate transportation system. P. 189.
2. Where joint rates among a group of carriers were increased by the Commission with special reference to the financial necessities of a part of them, a division, subsequently ordered, which gave the needy carriers a relatively greater share, to meet those necessities, but left the share of the others adequate to avoid a confiscatory

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[1] There is nothing in *Roxford Knitting Co.* v. *Moore & Tierney*, 265 Fed. 177, or in *United States* v. *Russell*, 13 Wall. 623, which were relied upon by claimant, that lends support to its contention.

[2] The docket title of this case is: *Akron, Canton & Youngstown Railway Company* v. *United States, Interstate Commerce Commission, Boston & Maine Railroad, et al.*

result, did not deprive them of their property without due process of law. P. 195.

3. In fixing divisions of numerous joint rates of numerous carriers, the Commission is not required by either the Transportation Act or the Constitution, to take specific evidence and make separate adjudication as to each division of each rate of each carrier, but may order a general increase of divisions to the carriers in a specified territory, basing this on evidence which the Commission deems typical in character, and ample in quantity, to justify it in respect of each division of rate involved. P. 196.
4. An order of the Commission for a general increase of divisions to some of many carriers, made after opportunity for a full hearing had been afforded to all, did not exceed the authority conferred by § 418 of the Transportation Act, or deprive the other carriers of revenues without due process, merely because the Commission recognized that the results would not all be accurate and that changes must be made upon future investigation. P. 199.
5. An order of the Commission fixing divisions of joint rates among a group of carriers by awarding a horizontal 15% increase to those west of a certain river and leaving the others to divide their proportions according to existing or future agreements or through further applications to the Commission, *held* proper and sufficient. P. 201.
6. The order here involved was supported by the evidence before the Commission. P. 203.
7. The Court cannot consider the weight of evidence before the Commission or the wisdom of its order. *Id.*

282 Fed. 306, affirmed.

APPEAL from a decree of the District Court refusing an interlocutory injunction in a suit to set aside an order of the Interstate Commerce Commission.

Mr. Walter C. Noyes, with whom *Mr. H. T. Newcomb* was on the brief, for appellants.

Mr. Herbert A. Taylor, with whom *Mr. George F. Brownell* was on the brief, for Erie R. R. Co. and Chicago & Erie R. R. Co., appellants.

Mr. Alexander H. Elder for Central R. R. Co. of New Jersey, appellant.

Mr. Charles F. Choate, Jr., with whom *Mr. James Garfield* was on the brief, for Boston & Maine Railroad et al., interveners.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Attorney General Daugherty* and *Mr. Solicitor General Beck* were on the brief, for the United States.

Mr. Walker D. Hines, with whom *Mr. P. J. Farrell* and *Mr. J. Carter Fort* were on the brief, for the Interstate Commerce Commission.

Mr. Justice Brandeis delivered the opinion of the Court.

Transportation Act, 1920, c. 91, § 418, 41 Stat. 456, 486, amending Interstate Commerce Act, § 15(6), authorizes the Commission, upon complaint or upon its own initiative, to prescribe, after full hearing, the divisions of joint rates among carriers parties to the rate. In determining the divisions, the Commission is directed to give due consideration, among other things, to the importance to the public of the transportation service rendered by the several carriers; to their revenues, taxes, and operating expenses; to the efficiency with which the carriers concerned are operated; to the amount required to pay a fair return on their railway property; to the fact whether a particular carrier is an original, intermediate, or delivering line; and to any other fact which would, ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another of the joint rate.

Invoking this power of the Commission, the railroads of New England [1] instituted, in August, 1920, proceedings to

[1] Except the Boston & Albany which is leased to the New York Central, one of the Trunk Lines which was a respondent before the Commission; and branches of two Canadian systems, the Grand Trunk and the Canadian Pacific.

secure for themselves larger divisions from the freight moving between that section and the rest of the United States, the joint rates on which had just been increased pursuant to the order entered in *Ex parte 74, Increased Rates, 1920,* 58 I. C. C. 220. More than 600 carriers of the United States, mostly railroads, were made respondents. The case was submitted on voluminous evidence. On July 6, 1921, a report was filed. The relief sought was not then granted; but no order was entered. Instead, the parties were directed by the report to proceed individually to readjust their divisional arrangements; and the record was held open for submission of the readjustment; *New England Divisions,* 62 I. C. C. 513. This direction was not acted on. Five months later the case was reargued upon the same evidence. On January 30, 1922, the Commission modified its findings and made an order (amended March 28, 1922) which directed, in substance, that the divisions, or shares, of the several New England railroads [2] in the joint through freight rates be increased fifteen per cent., *New England Divisions,* 66 I. C. C. 196. Since it did not increase any rate, it necessarily reduced the aggregate amounts receivable from each rate by carriers operating west of Hudson River. The order was limited to joint class rates and those joint commodity rates which are divided on the same basis as the class rates.[3] It related only to transportation wholly within the United States. It was to continue in force only until further order of the Commission. And it left the door open for correction upon application of any carrier in respect to any rate.

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[2] Other than the Bangor & Aroostook, which had been a complainant before the Commission; and the Boston & Albany, which had not.

[3] Thus, the order does not include traffic passing through Canada. Nor does it apply to rates on coal (which constitutes about two-fifths of the total interchanged tonnage); nor to those on certain other commodities.

Prior to the effective date of that order, there was in force between each of the New England carriers and substantially each of the railroads operating west of the Hudson, a series of contracts providing for the division of all joint class rates upon the basis of stated percentages.[4] These agreements were in the form of express contracts. Section 208(b) of Transportation Act, 1920, provided that all divisions of joint rates in effect at the time of its passage should continue in force until thereafter changed either by mutual agreement between the interested carriers or by state or federal authorities. The second report enjoined upon all parties the necessity for proceeding, as expeditiously as possible, with a revision of divisions upon a more logical and systematic basis; made specific suggestions as to the character of the study to be pursued; and invited carriers to present to the Commission any cases of inability to agree upon such revision. No further application was, however, made to the Commission.

In March, 1922, this suit was commenced in the federal court for the Southern District of New York to enjoin enforcement of the order and to have it set aside as void. The Akron, Canton & Youngstown Railway and forty-three other carriers [5] joined as plaintiffs, suing on behalf of themselves and others similarly situated. The United States alone was named as defendant. But the Interstate Commerce Commission and ten New England carriers intervened as such, and filed answers. The case was then heard, on application for an interlocutory injunction, by

[4] Compare *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 139, note 2; *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247.

[5] The number of carriers named as respondents in the order entered by the Commission is 617. Only 44 of these originally joined as plaintiffs in this suit. One of these—the Illinois Central—withdrew; 39 intervened later as plaintiffs. Leading trunk lines—New York Central, the Pennsylvania, and the Baltimore & Ohio—by which a large part of all traffic interchanged with the New England railroads was carried, acquiesced in the Commission's order.

three judges under the provisions of Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219. The full record of the proceedings before the Commission, including all the evidence, was introduced. The injunction was denied, 282 Fed. 306; and the case is here by direct appeal. Plaintiffs urge six reasons why the order of the Commission should be held void.

First. It is contended that the order is void, because its purpose was not to establish divisions just, reasonable and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation. The argument is that Congress did not authorize the Commission to exercise its power to accomplish that purpose. An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. Compare *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433, 443. But the order here assailed is not subject to that infirmity.

Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language.[6] And to attain it, new

[6] Thus: to enable the carriers "properly to meet the transportation needs of the public," § 422, p. 491; to give due consideration to "the transportation needs of the country, . . . and the necessity . . . of enlarging [transportation] facilities," § 422, p. 488; to "best meet the emergency and serve the public interest," § 402, p. 477; to "best promote the service in the interest of the public and the commerce of the people," § 402, pp. 476, 477; "that the public interest will be promoted," § 407, p. 482.

rights, new obligations, new machinery, were created. The new provisions took a wide range.[7] Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.[8] Upon the Commission, new powers were conferred and new duties were imposed.

The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation.

[7] Among them are the establishment of the Railroad Labor and the Adjustment Boards. Title III, pp. 469–474; See *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board, ante,* 72; the provisions for raising capital, by new Government loans, § 210, pp. 468–9, by loans from the Railroad Contingent Fund (the recapture provision), § 15a (10, 16), pp. 490, 491; those placing the issue of new securities under the control of the Commission, unaffected by the laws of the several States, § 439, pp. 494–496; the provision for consolidation of railways into a limited number of systems, § 407, pp. 480–482; provisions for securing adequate car service; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.,* 258 U. S. 377; for joint use of terminals; for routing; for interchange of traffic between railroads, and between a railroad and water carrier, § 402, pp. 476–478; § 405, p. 479; §§ 412, 413, p. 483.

[8] Section 422, pp. 488, 489. To this end, also, the Commission was empowered, among other things, to permit pooling of traffic or earnings, § 407, pp. 480, 481; to authorize abandonment of unprofitable and unnecessary lines, § 402, p. 477; *Texas* v. *Eastern Texas R. R. Co.,* 258 U. S. 204; to fix minimum, as well as maximum, rates; and thus prevent cut-throat competition and the taking away of traffic from weaker competitors, § 418, p. 485; to prevent the depletion of interstate revenues by discriminating intrastate rates, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *New York* v. *United States,* 257 U. S. 591; and to determine the division of joint rates.

There was a limit to what the traffic would bear. A five per cent. increase had been granted in 1914, *Five Per Cent. Case,* 31 I. C. C. 351; 32 I. C. C. 325; fifteen per cent. in 1917, *Fifteen Per Cent. Case,* 45 I. C. 303; twenty-five per cent. in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

Raising joint rates for the benefit of the weak carriers might be the only feasible method of obtaining currently the needed revenues. Local rates might already be so high that a further increase would kill the local traffic. The through joint rates might be so low that they could be raised without proving burdensome. On the other

hand the revenues of connecting carriers might be ample; so that any increase of their earnings from joint rates would be unjustifiable. Where the through traffic would, under those circumstances, bear an increase of the joint rates, it might be proper to raise them, and give to the weak line the whole of the resulting increase in revenue. That, to some extent, may have been the situation in New England, when, in 1920, the Commission was confronted with the duty, under the new § 15a, of raising rates so as to yield a return of substantially 6 per cent. on the value of the property used in the transportation service. *Ex parte 74, Increased Rates, 1920,* 58 I. C. C. 220.[9]

The deficiency in income of the New England lines in 1920 was so great that (even before the raise in wages ordered by the Railroad Labor Board) an increase in freight revenues of 47.40 per cent. was estimated to be necessary to secure to them a fair return. On a like estimate, the increased revenues required to give the same return to carriers in Trunk Line Territory was only 29.76 per cent. and to carriers in Central Freight Association Territory 24.31 per cent.[10] To have raised the additional revenues needed by the New England lines wholly by raising the rates within New England—particularly when rates west of the Hudson were raised much less—might have killed New England traffic. Rates there had already been subjected (besides the three general increases mentioned above) to a special increase, applicable only to New England, of about ten per cent. in 1918. *Proposed*

[9] There is evidence that the rate per ton per mile received by the New Haven from freight local to its lines was four times as high as the rate per ton per mile, under existing divisions, on freight interchanged by it with carriers west of Hudson River.

[10] What is known as Official Classification Territory comprises the three subdivisions, New England Freight Association Territory, Trunk Line Association Territory and Central Freight Association Territory. See map, *Five Per Cent. Case,* 31 I. C. C. 350.

Increases in New England, 49 I. C. C. 421. A further large increase in rates local to New England would, doubtless, have provoked more serious competition from auto trucks and water carriers. For hauls are short and the ocean is near. Instead of erecting New England into a separate rate group, the Commission placed it, with the other two subdivisions of Official Classification Territory, into the Eastern Group; and ordered that freight rates in that group be raised 40 per cent. At that rate level the revenues of the carriers in Trunk Line and Central Freight Association territories would, it was asserted, exceed by 1.48 per cent. what they would have received if they had been a separate group. It was estimated that the excess would be about $25,000,000.[11] Substantially that amount (besides the additional revenue to be raised otherwise) was said to be necessary to meet the needs of the New England lines.

Plaintiffs insist that Transportation Act, 1920, did not, by its amendment of § 15(6) change, or add to, the factors to be considered by the Commission in passing upon divisions; that it had, theretofore, been the Commission's practice to consider all the factors enumerated in § 15(6);[12] that this enumeration merely put into statutory form the interpretation theretofore adopted; that the only new feature was the grant of authority to enter upon the enquiry into divisions on the Commission's initiative; that this authority was conferred in order to

[11] Estimated on the volume of traffic moving in 1919.

[12] Citing *Star Grain and Lumber Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 14 I. C. C. 364, 370; *Manufacturers Ry. Co.* v. *St. Louis, Iron Mountain & Southern Ry. Co.,* 21 I. C. C. 304, 313; *Investigation of Alleged Unreasonable Rates on Meats,* 23 I. C. C. 656, 661; *Class Rates from Chestnut Ridge Railway Stations,* 41 I. C. C. 62; *Western Pacific R. R. Co.* v. *Southern Pacific Co.,* 55 I. C. C. 71, 84. See *Low Moor Iron Co.* v. *Chesapeake & Ohio Ry. Co.,* 42 I. C. C. 221.

protect the short lines, which, because of their weakness, might refrain from making complaint, for fear of giving offence;[13] and that the power conferred upon the Commission is coextensive only with the duty imposed on the carriers by § 400 of Transportation Act, 1920, which declares that they shall establish "in case of joint rates . . . just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers." It is true that § 12 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 551, 552, which first conferred upon the Commission authority to establish or adjust divisions,[14] did not, in terms, confer upon the Commission power to act on its own initiative. The language of the act seemed to indicate that the authority was to be exercised only when the parties failed to agree among themselves, and only in supplement to some order fixing the rates.[15] The extent of the Commission's power was a subject of doubt; and Transportation Act, 1920, undertook by § 15(6) to remove doubts which had arisen. But Congress had, also, the broader purpose explained above. This is indicated, among other things, by expressions used in dealing with joint rates. By new § 15(6), p. 486, the Commission is directed to give due consideration, in determining divisions, to "the importance to the public of the transportation services of

[13] Citing H. R. No. 456, pp. 9, 10, 66th Cong., 1st sess.; Conference Report No. 650, 66th Cong., 2d sess.; Mr. Esch, 59 Cong. Rec., part 4, p. 3268; Senator Robinson, 59 Cong. Rec., part 4, p. 3331.

[14] Power to establish through routes and joint rates had been conferred by § 4 of the Hepburn Act, June 29, 1906, c. 3591, 34 Stat. 584, 590.

[15] Compare *Morgantown & Kingwood Divisions*, 49 I. C. C. 540. The section was involved in *Tap Line Cases*, 234 U. S. 1, 28; *O'Keefe* v. *United States*, 240 U. S. 294, 300; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 480, 483; *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114, 118.

such carriers;" [16] just as by new § 15(3), page 485, the Commission is authorized upon its own initiative when "desirable in the public interest" to establish joint rates and "the divisions of such rates".

Second. It is contended that if the act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers, it is unconstitutional. There is no claim that the apportionment results in confiscatory rates, nor is there in this record any basis for such a contention. The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process. But the argument begs the question. What is its just share?—It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable and equitable. Cost of the service is one of the elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom.

[16] In thus making clear that in fixing divisions as well as rates the public interest should be considered, Congress doubtless had in mind expression to the contrary in opinions of the Commission. See *Germain Co.* v. *New Orleans & Northeastern R. R. Co.*, 17 I. C. C. 22, 24; *Board of Trade of Chicago* v. *Atlantic City R. R. Co.*, 20 I. C. C. 504, 508; *In re Divisions of Joint Rates on Coal*, 22 I. C. C. 51, 53; *Morgantown & Kingwood Divisions*, 49 I. C. C. 540, 550.

What the Commission did was to raise the additional revenues needed by the New England lines, in part, directly, through increase of all rates 40 per cent. and, in part, indirectly, through increasing their divisions on joint rates. In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax. It is not true, as argued, that the order compels the strong railroads to support the weak. No part of the revenues needed by the New England lines is paid by the western carriers. All is paid by the community pursuant to the single rate increase ordered in *Ex parte 74*. If, by a single order, the Commission had raised joint rates throughout the Eastern Group 40 per cent., and, in the same order, had declared that 90 per cent. of the whole increase in the joint rates should go to the New England lines (in addition to what they would receive under existing divisions), clearly nothing would have been taken from the Trunk Line and Central Freight Association carriers, in so ordering. The order entered in *Ex parte 74* was at all times subject to change. The special needs of the New England lines were at all times before the Commission. That these needs were met by two orders instead of one, is not of legal significance. The order here in question may properly be deemed a supplement to, or modification of, that entered in *Ex parte 74*.

Third. It is asserted that the order is necessarily based upon the theory that, under § 15(6), the Commission has authority to fix divisions as between groups of carriers without considering the carriers individually; that Congress did not confer such authority; and that, hence, the order is void. Whether Congress did confer that authority we have no occasion to consider; for it is clear that the Commission did not base its order upon any such theory. The order directs a 15 per cent. increase in the divisions to the several New England lines. It is comprehensive. But it is based upon evidence which the

Commission assumed was typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier. Whether the assumption was well founded will be discussed later. Here we are to consider merely, whether Congress authorized the method of proof and of adjudication pursued, and whether it could authorize it, consistently with the Constitution.

Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that the Commission had been confronted with similar situations in the past and how it had dealt with them.

For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure.[17] This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551, 552, to be upon

[17] Compare *Burnham, Hanna, Munger Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 14 I. C. C. 299; *City of Spokane* v. *Northern Pacific Ry. Co.*, 15 I. C. C. 376.

the carrier.[18] Thus, the practice did not have its origin in the group system of rate-making provided for in 1920 by the new § 15a. It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such enquiries; [19] and we must assume that

[18] *Advances in Rates—Eastern Case,* 20 I. C. C. 243, 248; *Railroad Commission of Texas* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 20 I. C. C. 463, 484; *Five Per Cent. Case,* 31 I. C. C. 351, 402, 403, 448, 449; *1915 Western Rate Advance Case,* 35 I. C. C. 497; *Western Passenger Fares,* 37 I. C. C. 1; *Fifteen Per Cent. Case,* 45 I. C. C. 303. See also the successive orders issued in the Shreveport controversy, 23 I. C. C. 31; 34 I. C. C. 472; 41 I. C. C. 83; 43 I. C. C. 45; 48 I. C. C. 312. Compare *Houston East & West Texas Ry. Co.* v. *United States,* 234 U. S. 342, 349; *Eastern Texas R. R. Co.* v. *Railroad Commission of Texas,* 242 Fed. 300; *Looney* v. *Eastern Texas R. R. Co.,* 247 U. S. 214; also *Illinois Central R. R. Co.* v. *State Public Utilities Commission,* 245 U. S. 493, with *Business Men's League of St. Louis* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 41 I. C. C. 13, 503, and 49 I. C. C. 713. The Commission has, since 1920, also reduced rates in broad group proceedings upon consideration of typical conditions throughout the entire region involved in the reduction. *Reduced Rates, 1922,* 68 I. C. C. 676; *Rates on Grain, etc.,* 64 I. C. C. 85. Referring to the latter case the Commission said in their second report in this case (66 I. C. C. 203), "In all such general rate cases we have realized and have held that if we were required to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the Commission reduced to a state of administrative paralysis."

[19] Plaintiffs argue that there is a difference, because all interstate rates are required to be filed with the Commission and published, and hence appear specifically in the record; whereas divisions are not required to be filed or published. The difference is without legal significance. Papers on the Commission files are not a part of the record in a case,—unless they are introduced as evidence. It is the nature of the enquiry, not the accident whether papers are on file or published, which determines whether facts can be proved by evi-

Congress intended to confer upon the Commission power to pursue it.[20]

That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may, consistently with the due process clause, create rebuttable presumptions, *Mobile, Jackson & Kansas City R. R. Co.* v. *Turnipseed,* 219 U. S. 35; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; and shift the burden of proof, *Minneapolis & St. Louis R. R. Co.* v. *Railroad & Warehouse Commission,* 193 U. S. 53. It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed. As pointed out in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563, 579, serious injustice to any carrier could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing.

Fourth. It is asserted that the order directs a transfer of revenues of the western carriers to the New England

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dence which is typical. The Commission could, of course, require carriers to introduce all their division sheets. To a proceeding of this character the rule acted on in *Florida East Coast Ry. Co.* v. *United States,* 234 U. S. 167, is not applicable; compare *United States* v. *L. & N. R. R. Co.,* 235 U. S. 314.

[20] Since Transportation Act, 1920, the Commission has on several occasions modified the divisions of a carrier without considering each individual joint rate. *Pittsburgh & West Virginia Ry. Co.* v. *Pittsburgh & Lake Erie R. R. Co.,* 61 I. C. C. 272; *East Jersey R. R. & Terminal Co.* v. *Central R. R. Co. of New Jersey,* 63 I. C. C. 80; *Division of Joint Rates and Fares of Missouri & North Arkansas R. R. Co.,* 68 I. C. C. 47.

carriers, pending a decision in the matter of divisions; that Congress has not granted authority to take such provisional action; and that, hence, the order is void. The argument is, that under § 15(6), the Commission may prescribe divisions only when, upon full hearing, it is of opinion that those existing are, or will be, unjust, unreasonable or inequitable; that in such event it shall prescribe divisions which are just, reasonable and equitable; and that the provisional character of the order demonstrates that the hearing has not been a full one. Whether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The Commission recognized, and observed, these essentials of a full hearing.

The complaint before it was filed in August, 1920. The hearings did not begin until December 15, 1920. The parties had, therefore, ample time to prepare to present their evidence and arguments. The case was not submitted until April 23, 1921. There was thus ample time for, and every carrier was, in fact, afforded the opportunity of, introducing any and all evidence it desired. The record made is voluminous. That the evidence left in the minds of the Commission many doubts, is true. But it had brought conviction that the New England lines were entitled to relief; that the divisional arrangements of the carriers required a thorough revision to put them upon a more logical and systematic basis; that a horizontal increase of the New England lines' divisions, made before such revision, would leave some divisions too high and others too low; that the comprehensive revision proposed would necessarily take a long time; and that, meanwhile, the New England lines should be accorded " a

portion of the relief to which . . . they are entitled and which the public interest clearly requires". The Commission further concluded that, on the evidence before it, no substantial injustice would be done to the carriers west of the Hudson by an order which increased by 15 per cent. the existing divisions of the New England lines, and reduced, by the amount required for this purpose, the divisions of the several carriers west of the Hudson, in the proportions in which they then shared the balance of each joint rate; or as otherwise might be agreed between them or determined by the Commission upon application.

A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. To grant under such circumstances immediate relief, subject to later readjustments, was no more a transfer of revenues pending a decision, than was the like action, in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury of the carriers. That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution.

Fifth. It is contended that the order is void, because it confines itself to dealing with the main, or primary, divisions of the joint rates at the Hudson River and fails to prescribe the subdivisions of that part of the rate which goes to the several carriers. The argument is, that if the Commission acts at all in apportioning the joint rate, its action is invalid unless it prescribes the proportion to be received by each of the connecting carriers. For this contention there is no warrant either in the language of the act, in the practice of carriers, or in reason. The duty imposed upon the Commission does not extend beyond

the need for its action. If the real controversy is merely how much of the joint rate shall go to carriers east of Hudson River and how much to carriers west, there is nothing in the law which prevents the Commission from letting the parties east of the river, and likewise those west of it, apportion their respective shares among themselves. It is obviously of no interest to the western carriers how those of New England decide to apportion their share; nor is it of interest to the eastern carriers how those west of the Hudson divide the share apportioned to that territory. If on these matters the carriers interested can reach an agreement and no public interest is prejudiced, clearly, there is no occasion for the Commission to act.

But there is a further answer to this contention. The Commission has fixed the subdivisions east and also those west of the River. The divisions of the several New England lines are definitely fixed; for the amount receivable by each carrier from each joint rate is ordered increased fifteen per cent. What remains of each joint rate goes to the western lines. This balance, the order recites, shall be divided among them " in the same proportions as at present, or otherwise as they may agree, or failing such agreement, as may be determined by the Commission upon application therefor." That fixes the divisions by reference. The fact that they are fixed provisionally and by reference, does not invalidate the order. It is urged that this disposition demonstrates failure by the Commission to consider the several factors which the statute declares shall be taken into consideration in determining divisions. But this is not true. This feature in the order indicates rather that the Commission has considered the question; concluded that the apportionment by the western lines of their share on existing proportions, was not inconsistent with the public interest; and that, in the absence of complaint, it might be assumed to be satisfactory to all parties. This objection presents in a different form largely

what has been more fully discussed above. There was, thus, on the part of the Commission neither usurpation of power, nor neglect of duty, in limiting its definite decision to the primary divisions at the Hudson River gateways, and leaving the interested parties to deal, in the first instance, with the subdivisions among the carriers in their respective territories.[21]

Sixth. It is contended that the order is void, because it is unsupported by evidence. An order of the Commission fixing rates, if unsupported by evidence, is clearly invalid, *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Florida East Coast Ry. Co.* v. *United States*, 234 U. S. 167. The rule must, of course, be the same in respect to an order fixing divisions. The contention that the order is unsupported by the evidence rests largely upon arguments which assume a construction of the statute which we hold to be erroneous, or upon expressions in the first report of the Commission, which, in view of the second report and order thereon, must be deemed to have been withdrawn. That the evidence was

[21] The junction points on which are based the divisions between the New England lines and the lines operating west of the Hudson River were fully set forth in the report of the Commission. To fix divisions on the percentage basis with a basic dividing line was what had been commonly done in the agreements of carriers through their freight associations. In leaving to the respondent carriers, in the first instance, the apportionment among themselves of that part of the joint rate receivable by the carriers operating west of the Hudson River the Commission followed a long established practice. *Brownsville, Texas, Class and Commodity Rates*, 30 I. C. C. 479, 484; *Pacific Fruit Exchange* v. *Southern Pacific Co.*, 31 I. C. C. 159, 161, 162, 163; *Grain Rates from Milwaukee*, 33 I. C. C. 417, 420, 421; *Sloss-Sheffield Steel & Iron Co.* v. *Louisville & Nashville R. R. Co.*, 35 I. C. C. 460, 465, 466; *St. Louis, Missouri—Illinois Passenger Fares*, 41 I. C. C. 584, 598, 599. And the practice had at least the tacit approval of this Court. Compare *Intermountain Rate Cases*, 234 U. S. 476, 485, 486, 494; *O'Keefe* v. *United States*, 240 U. S. 294; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457.

ample to support the order made, is shown in the opinion of the lower court, 282 Fed. 306, 308, 309, and in the reports of the Commission. To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province. *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457; *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, 562; *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, 62. But the way is still open to any carrier to apply to the Commission for modification of the order, if it is believed to operate unjustly in any respect.

Affirmed.

UNITED STATES *v.* BHAGAT SINGH THIND.

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

No. 202. Argued January 11, 12, 1923.—Decided February 19, 1923.

1. A high caste Hindu, of full Indian blood, born at Amrit Sar, Punjab, India, is not a "white person", within the meaning of Rev. Stats., § 2169, relating to the naturalization of aliens. P. 207.
2. "Free white persons," as used in that section, are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. P. 214. *Ozawa* v. *United States,* 260 U. S. 178.
3. The action of Congress in excluding from admission to this country all natives of Asia within designated limits including all of India, is evidence of a like attitude toward naturalization of Asians within those limits. P. 215.

QUESTIONS certified by the Circuit Court of Appeals, arising upon an appeal to that court from a decree of the District Court dismissing, on motion, a bill brought by the United States to cancel a certificate of naturalization.

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

Mr. Will R. King, with whom *Mr. Thomas Mannix* was on the brief, for Bhagat Singh Thind.

Section 2169, Rev. Stats., applies "to aliens being free white persons and to aliens of African nativity and to persons of African descent." It may be assumed that the terms "Caucasian" and "white persons" are synonymous.

In the latter part of the Eighteenth Century Blumenbach divided the human race into five groups, namely, the Caucasian, the Mongolian, the Ethiopian, the Malay and the American Indian; and, while this classification has been the subject of much criticism, it has stood the test of time and is practical. Blumenbach's Life and Works, p. 265; Enc. Brit., tit. "Anthropology;" Huxley, Man's Place in Nature, p. 372; *In re Saito,* 62 Fed. 126; Taylor, Origin of the Aryans, p. 2; Bopp's Comparative Grammar (1833–1835); Mueller, Survey of Languages, p. 29; Mueller, Home of Aryans, p. 48; 14 Enc. Brit., pp. 382, 487; Peschel, Races of Men (Leipsic, 1874), pp. 20, 270; Keane, Man: Past and Present, pp. 442, 443, 557; Keane, The World's Peoples, p. 404; Anderson, The Peoples of India (London, 1913), pp. 21, 27, 68; 2 Enc. Brit., pp. 712, 749.

The foregoing authorities show that the people residing in many of the states of India, particularly in the north and northwest, including the Punjab, belong to the Aryan race. The Aryan race is the race which speaks the Aryan language. It has been pointed out by many scholars that identity of language does not necessarily prove identity of blood, for ordinarily anyone can learn a foreign language. But this argument has no application to the Aryan of India; for, as far back as history

goes, the Aryans themselves have been the conquering race. No other race superimposed any foreign language upon them. The Aryan language is indigenous to the Aryan of India as well as to the Aryan of Europe.

The high-class Hindu regards the aboriginal Indian Mongoloid in the same manner as the American regards the negro, speaking from a matrimonial standpoint. The caste system prevails in India to a degree unsurpassed elsewhere. "Roughly, a caste is a group of human beings who may not intermarry, or (usually) eat with members of any other caste." Anderson, Peoples of India, p. 35.

With this caste system prevailing, there was comparatively a small mixture of blood between the different castes. Besides ethnological and philological aspects, it is a historical fact that the Aryans came to India, probably about the year 2000 B. C., and conquered the aborigines. See 2 Historians' History of the World, p. 475.

Upon the interpretation of § 2169, Rev. Stats., by the different federal courts, see *In re Singh,* 257 Fed. 209; *In re Mozumdar,* 207 Fed. 115; *In re Halladjian,* 174 Fed. 834; *United States* v. *Balsara,* 180 Fed. 694; *Dow* v. *United States,* 226 Fed. 145; *In re Najour,* 174 Fed. 735; *In re Ellis,* 179 Fed. 1002.

The Naturalization Act and the Immigration Act of February 5, 1917, relate to two entirely different subjects, and for that reason alone there could be no amendment to the Naturalization Act by implication.

Mr. Justice Sutherland delivered the opinion of the Court.

This cause is here upon a certificate from the Circuit Court of Appeals, requesting the instruction of this Court in respect of the following questions:

"1. Is a high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India, a white person within the meaning of section 2169, Revised Statutes?

" 2. Does the act of February 5, 1917, (39 Stat. L. 875, section 3) disqualify from naturalization as citizens those Hindus, now barred by that act, who had lawfully entered the United States prior to the passage of said act? "

The appellee was granted a certificate of citizenship by the District Court of the United States for the District of Oregon, over the objection of the naturalization examiner for the United States. A bill in equity was then filed by the United States, seeking a cancellation of the certificate on the ground that the appellee was not a white person and therefore not lawfully entitled to naturalization. The District Court, on motion, dismissed the bill (268 Fed. 683) and an appeal was taken to the Circuit Court of Appeals. No question is made in respect of the individual qualifications of the appellee. The sole question is whether he falls within the class designated by Congress as eligible.

Section 2169, Revised Statutes, provides that the provisions of the Naturalization Act " shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

If the applicant is a white person within the meaning of this section he is entitled to naturalization; otherwise not. In *Ozawa* v. *United States,* 260 U. S. 178, we had occasion to consider the application of these words to the case of a cultivated Japanese and were constrained to hold that he was not within their meaning. As there pointed out, the provision is not that any particular class of persons shall be excluded, but it is, in effect, that only white persons shall be included within the privilege of the statute. " 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," (p. 195) citing *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 644. Following a long line of decisions of the lower federal courts, we held that the words imported a racial and not an individual test and were meant to indicate only persons of what is *popularly* known as the Caucasian race. But, as there pointed out, the conclusion that the phrase " white persons " and the word " Caucasian " are synonymous does not end the matter. It enabled us to dispose of the problem as it was there presented, since the applicant for citizenship clearly fell outside the zone of debatable ground on the negative side; but the decision still left the question to be dealt with, in doubtful and different cases, by the " process of judicial inclusion and exclusion." Mere ability on the part of an applicant for naturalization to establish a line of descent from a Caucasian ancestor will not *ipso facto* and necessarily conclude the inquiry. " Caucasian " is a conventional word of much flexibility, as a study of the literature dealing with racial questions will disclose, and while it and the words " white persons " are treated as synonymous for the purposes of that case, they are not of identical meaning—*idem per idem*.

In the endeavor to ascertain the meaning of the statute we must not fail to keep in mind that it does not employ the word " Caucasian " but the words " white persons," and these are words of common speech and not of scientific origin. The word " Caucasian " not only was not employed in the law but was probably wholly unfamiliar to the original framers of the statute in 1790. When we employ it we do so as an aid to the ascertainment of the legislative intent and not as an invariable substitute for the statutory words. Indeed, as used in the science of ethnology, the connotation of the word is by no means clear and the use of it in its scientific sense as an equiva-

lent for the words of the statute, other considerations aside, would simply mean the substitution of one perplexity for another. But in this country, during the last half century especially, the word by common usage has acquired a popular meaning, not clearly defined to be sure, but sufficiently so to enable us to say that its popular as distinguished from its scientific application is of appreciably narrower scope. It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken. See *Maillard* v. *Lawrence*, 16 How. 251, 261.

They imply, as we have said, a racial test; but the term "race" is one which, for the practical purposes of the statute, must be applied to a group of living persons *now* possessing in common the requisite characteristics, not to groups of persons who are supposed to be or really are descended from some remote, common ancestor, but who, whether they both resemble him to a greater or less extent, have, at any rate, ceased altogether to resemble one another. It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today; and it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either. The question for deter-

mination is not, therefore, whether by the speculative processes of ethnological reasoning we may present a probability to the scientific mind that they have the same origin, but whether we can satisfy the common understanding that they are now the same or sufficiently the same to justify the interpreters of a statute—written in the words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category as white persons. In 1790 the Adamite theory of creation—which gave a common ancestor to all mankind—was generally accepted, and it is not at all probable that it was intended by the legislators of that day to submit the question of the application of the words " white persons " to the mere test of an indefinitely remote common ancestry, without regard to the extent of the subsequent divergence of the various branches from such common ancestry or from one another.

The eligibility of this applicant for citizenship is based on the sole fact that he is of high caste Hindu stock, born in Punjab, one of the extreme northwestern districts of India, and classified by certain scientific authorities as of the Caucasian or Aryan race. The Aryan theory as a racial basis seems to be discredited by most, if not all, modern writers on the subject of ethnology. A review of their contentions would serve no useful purpose. It is enough to refer to the works of Deniker (Races of Man, 317), Keane (Man: Past and Present, 445–6), Huxley (Man's Place in Nature, 278) and to the Dictionary of Races, Senate Document No. 662, 61st Cong., 3d sess., 1910–1911, p. 17.

The term "Aryan " has to do with linguistic and not at all with physical characteristics, and it would seem reasonably clear that mere resemblance in language, indicating a common linguistic root buried in remotely ancient soil, is altogether inadequate to prove common racial origin. There is, and can be, no assurance that the so-called

Aryan language was not spoken by a variety of races living in proximity to one another. Our own history has witnessed the adoption of the English tongue by millions of Negroes, whose descendants can never be classified racially with the descendants of white persons notwithstanding both may speak a common root language.

The word "Caucasian" is in scarcely better repute.[1] It is at best a conventional term, with an altogether fortuitous origin,[2] which, under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example, (The World's Peoples, 24, 28, 307, *et seq.*) it includes not only the Hindu but some of the Polynesians,[3] (that is the Maori, Tahitians, Samoans, Hawaiians and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black. We venture to think that the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.[4]

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[1] Dictionary of Races, *supra,* p. 31.

[2] 2 Encyclopædia Britannica (11th ed.), p. 113: "The ill-chosen name of Caucasian, invented by Blumenbach in allusion to a South Caucasian skull of specially typical proportions, and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races. Again, two of the best-marked varieties of mankind are the Australians and the Bushmen, neither of whom, however, seems to have a natural place in Blumenbach's series."

[3] The United States Bureau of Immigration classifies all Pacific Islanders as belonging to the "Mongolic grand division." Dictionary of Races, *supra,* p. 102.

[4] Keane himself says that the Caucasic division of the human family is "in point of fact the most debatable field in the whole range of anthropological studies." Man: Past and Present, p. 444.

And again: "Hence it seems to require a strong mental effort to sweep into a single category, however elastic, so many different

The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has five races; Keane following Linnaeus, four; Deniker, twenty-nine.[5] The explanation probably is that "the innumerable varieties of mankind run into one another by insensible degrees,"[6] and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.

It may be, therefore, that a given group cannot be properly assigned to any of the enumerated grand racial divisions. The type may have been so changed by intermixture of blood as to justify an intermediate classification. Something very like this has actually taken place in India. Thus, in Hindustan and Berar there was such an intermixture of the "Aryan" invader with the dark-skinned Dravidian.[7]

In the Punjab and Rajputana, while the invaders seem to have met with more success in the effort to preserve

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peoples—Europeans, North Africans, West Asiatics, Iranians and others all the way to the Indo-Gangetic plains and uplands, whose complexion presents every shade of color, except yellow, from white to the deepest brown or even black.

"But they are grouped together in a single division, because their essential properties are one, . . . their substantial uniformity speaks to the eye that sees below the surface . . . we recognize a common racial stamp in the facial expression, the structure of the hair, partly also the bodily proportions, in all of which points they agree more with each other than with the other main divisions. Even in the case of certain black or very dark races, such as the Bejas, Somali, and a few other Eastern Hamites, we are reminded instinctively more of Europeans or Berbers than of negroes, thanks to their more regular features and brighter expression." *Id.* 448.

[5] Dictionary of Races, *supra*, p. 6. See, generally, 2 Encyclopædia Britannica, (11th ed.), p. 113.

[6] 2 Encyclopædia Britannica, 11th ed., p. 113.

[7] 13 Encyclopædia Britannica, (11th ed.), p. 502.

their racial purity,[8] intermarriages did occur producing an intermingling of the two and destroying to a greater or less degree the purity of the "Aryan" blood. The rules of caste, while calculated to prevent this intermixture, seem not to have been entirely successful.[9]

It does not seem necessary to pursue the matter of scientific classification further. We are unable to agree with the District Court, or with other lower federal courts, in the conclusion that a native Hindu is eligible for naturalization under § 2169. The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forbears had come. When they extended the privilege of American citizenship to "any alien, being a free white person," it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them. It was the descendants of these, and

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[8] *Id.*

[9] 13 Encyclopædia Britannica, p. 503: "In spite, however, of the artificial restrictions placed on the intermarrying of the castes, the mingling of the two races seems to have proceeded at a tolerably rapid rate. Indeed, the paucity of women of the Aryan stock would probably render these mixed unions almost a necessity from the very outset; and the vaunted purity of blood which the caste rules were calculated to perpetuate can scarcely have remained of more than a relative degree even in the case of the Brahman caste."

And see the observations of Keane (Man: Past and Present, p. 561) as to the doubtful origin and effect of caste.

other immigrants of like origin, who constituted the white population of the country when § 2169, reënacting the naturalization test of 1790, was adopted; and there is no reason to doubt, with like intent and meaning.

What, if any, people of primarily Asiatic stock come within the words of the section we do not deem it necessary now to decide. There is much in the origin and historic development of the statute to suggest that no Asiatic whatever was included. The debates in Congress, during the consideration of the subject in 1870 and 1875, are persuasively of this character. In 1873, for example, the words " free white persons " were unintentionally omitted from the compilation of the Revised Statutes. This omission was supplied in 1875 by the act to correct errors and supply omissions. C. 80, 18 Stat. 318. When this act was under consideration by Congress efforts were made to strike out the words quoted, and it was insisted upon the one hand and conceded upon the other, that the effect of their retention was to exclude Asiatics generally from citizenship. While what was said upon that occasion, to be sure, furnishes no basis for judicial construction of the statute, it is, nevertheless, an important historic incident, which may not be altogether ignored in the search for the true meaning of words which are themselves historic. That question, however, may well be left for final determination until the details have been more completely disclosed by the consideration of particular cases, as they from time to time arise. The words of the statute, it must be conceded, do not readily yield to exact interpretation, and it is probably better to leave them as they are than to risk undue extension or undue limitation of their meaning by any general paraphrase at this time.

What we now hold is that the words " free white persons " are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word " Caucasian " only as that

word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

It is not without significance in this connection that Congress, by the Act of February 5, 1917, c. 29, § 3, 39 Stat. 874, has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India. This not only constitutes conclusive evidence of the congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants.

It follows that a negative answer must be given to the first question, which disposes of the case and renders an answer to the second question unnecessary, and it will be so certified.

Answer to question No. 1, No.

BROWNLOW ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA, ET AL. *v.* SCHWARTZ.

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

No. 95. Argued January 16, 1923.—Decided February 19, 1923.

Before allowance of a writ of error to review a judgment directing issue of a writ of mandamus to compel the granting of a building permit, the permit was issued, the building erected and the property transferred to persons not parties to the cause. *Held*, that, irrespective of the motive for granting the permit, the cause was moot, and, for that reason, the judgment below should be reversed, with directions for dismissal of the petition for mandamus, without costs. P. 217.

50 App. D. C. 279; 270 Fed. 1019, 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 the writ of mandamus, and directing that the writ be issued.

Mr. Robert L. Williams, with whom *Mr. F. H. Stephens* was on the brief, for plaintiffs in error.

Mr. W. Gwynn Gardiner for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The defendant in error, petitioner below, on June 9, 1920, filed a petition in the Supreme Court of the District of Columbia, praying for a writ of mandamus against respondents requiring them to issue to her a permit to erect a building for business purposes on a lot situated on a residence street in Washington. Prior to filing the petition she made preparations to erect the building and applied to the Building Inspector for a permit, which he

declined to issue, upon grounds not necessary to be stated here.

The plaintiffs in error, respondents below, filed an answer to the petition and return to the rule to show cause; and to the answer a demurrer was interposed. On July 6, 1920, the demurrer was overruled, the rule to show cause discharged, and petition dismissed. Upon appeal to the Court of Appeals this judgment was, on February 7, 1921, reversed and the cause remanded with directions to issue the writ as prayed. On March 19, 1921, an application for a rehearing was overruled and on June 13th following, this writ of error was allowed.

On March 14th, after the decision of the Court of Appeals but before the allowance of the writ of error, the permit demanded by petitioner was issued by the Building Inspector, and thereupon the building was constructed. It had been fully completed when the writ of error was allowed. On June 2, 1921, petitioner conveyed all her interest in the property to persons not parties to this cause.

It thus appears that there is now no actual controversy between the parties—no issue on the merits which this Court can properly decide. The case has become moot for two reasons: (1) because the permit, the issuance of which constituted the sole relief sought by petitioner, has been issued and the building to which it related has been completed, and (2) because, the first reason aside, petitioner no longer has any interest in the building, and therefore has no basis for maintaining the action.

This Court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause

which no longer exists is a proceeding which this Court uniformly has declined to entertain. See *Mills* v. *Green,* 159 U. S. 651; *Codlin* v. *Kohlhausen,* 181 U. S. 151; *Little* v. *Bowers,* 134 U. S. 547, 556; *Singer Manufacturing Co.* v. *Wright,* 141 U. S. 696, 699; *American Book Co.* v. *Kansas,* 193 U. S. 49; *United States* v. *Hamburg-American Co.,* 239 U. S. 466, 475; *Berry* v. *Davis,* 242 U. S. 468, 470; *Board of Public Utility Commissioners* v. *Compañia General de Tabacos de Filipinas,* 249 U. S. 425; *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360; *Heitmuller* v. *Stokes,* 256 U. S. 359.

It is urged that the permit was issued by the Inspector of Buildings only because he believed it was incumbent upon him to comply with the judgment of the Court of Appeals and avoid even the appearance of disobeying it. The motive of the officer, so far as this question is concerned, is quite immaterial. We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate. *American Book Co.* v. *Kansas, supra.* The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the writ of error would leave the judgment of the Court of Appeals requiring the issuance of the mandamus in force—at least apparently so—notwithstanding the basis therefor has disappeared. Our action must, therefore, dispose of the case, not merely of the appellate proceeding which brought it here. The practice now established by this Court, under similar conditions and circumstances, is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint or petition. *United States* v. *Hamburg-American Co., supra; Berry* v. *Davis, supra; Board of Public Utility Commissioners* v. *Compañia General de Tabacos de Filipinas, supra; Commercial Cable Co.* v. *Burleson, supra; Heitmuller* v. *Stokes, supra.*

Following these precedents, the judgment below should be reversed, with directions to the Court of Appeals to

remand the cause to the Supreme Court with instructions to dismiss the petition without costs, because the controversy involved has become moot and, therefore, is no longer a subject appropriate for judicial action.

And it is so ordered.

CRAMER ET AL. *v.* UNITED STATES.

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

No. 207. Argued January 15, 16, 1923.—Decided February 19, 1923.

1. Lands definitely occupied by individual Indians were excepted from the Central Pacific grant of July 25, 1866, c. 242, 14 Stat. 239, as lands "reserved . . . or otherwise disposed of." P. 226.
2. Such possessory rights, though not recognized by any statute or other formal governmental action of the time, were protected by the settled policy of the Government towards the Indians. P. 229.
3. The Act of March 3, 1851, which required that claims of rights in lands in California derived from Spain and Mexico be presented for settlement within a specified time, and directed the Commission thereby created to inquire into the tenures of certain Indians, has no application to claims of individual Indians, not of those classes, and based on an occupancy not shown to have been initiated when the act was passed. P. 230.
4. The United States, as guardian of individual Indians who have occupied public land in accordance with its policy, may maintain a bill to cancel a patent illegally issued to another for the land so occupied. P. 232.
5. The six year limitation on suits by the United States to annul land patents is inapplicable when the suit is to protect the rights of Indians. P. 233.
6. The acceptance by government agents of leases from a patentee on behalf of Indian occupants, cannot estop the Government from maintaining the Indian's independent right to the land occupied by a suit against the patentee. P. 234.
7. The rights of one who occupies part of a subdivision of public land without laying claim to or exercising dominion over the remainder, are confined to the part occupied. P. 234.

276 Fed. 78, reversed.

APPEAL from a decree of the Circuit Court of Appeals reversing a decree of the District Court and directing cancelation of a patent as to 360 acres of land, in a suit brought by the United States for that purpose on behalf of several Indians.

Mr. C. F. R. Ogilby and *Mr. Frank Thunen* for appellants.

The decree claims support in the policy of the Department of the Interior, but there is no precedent in the Department of the Interior; nor could such policy override the contrary intent declared by Congress and heretofore concretely applied by this Court.

The grant to appellants' predecessor does not except lands occupied by Indians. *Buttz* v. *Northern Pacific R. R.,* 119 U. S. 55; *United States* v. *Fitzgerald,* 15 Pet. 405.

There was never any tribal occupancy of this land, and the law never gave recognition to right of individual Indian occupancy until the Act of March 3, 1875. *Gritts* v. *Fisher,* 224 U. S. 640; *Sizemore* v. *Brady,* 235 U. S. 441; *United States* v. *Fitzgerald,* 15 Pet. 405.

The Court of Appeals has overlooked the distinction between Indian rights guaranteed by treaty and mere squatter privileges; it has given scant consideration to the *Buttz Case,* and has wholly ignored *Barker* v. *Harvey,* 181 U. S. 481.

We have direct and convincing evidence, not only in the earlier acts of Congress, but also in the congressional debates, where are reflected the history and spirit of the times, that Indian titles and possessory claims in California were, from the beginning of our state history, designed by Congress to be foreclosed and extinguished, except in so far as specific reservations might have been made for Indian accommodation. *Barker* v. *Harvey,* 181 U. S. 481; *Botiller* v. *Dominguez,* 130 U. S. 238; *Cherokee*

Nation v. *Georgia,* 5 Pet. 1; *Johnson* v. *McIntosh,* 8 Wheat. 543; 3 Kent, p. 380; *Thompson* v. *Doaksum,* 68 Cal. 593; *United States* v. *48 Pounds of Rising Star Tea,* 35 Fed. 403; *Worcester* v. *Georgia,* 6 Pet. 515. Acts of March 3, 1851, 9 Stat. 631; August 30, 1852, 10 Stat. 56; March 3, 1853, 10 Stat. 238; July 31, 1854, 10 Stat. 352; March 3, 1855, 10 Stat. 698, 699; February 28, 1859, 11 Stat. 400; June 19, 1860, 12 Stat. 57; April 8, 1864, 13 Stat. 39; July 27, 1868, 15 Stat. 198; March 3, 1871 (Rev. Stats., § 2079); March 3, 1873, 17 Stat. 633; January 12, 1891, 26 Stat. 712; March 1, 1907, 34 Stat. 1022, 1023; March 4, 1913, 37 Stat. 1007. 23 Cong. Globe, App. pp. 61, 362, 777; 24 Cong. Globe, p. 19; 25 Cong. Globe, p. 1082; Report Indian Commissioner, Sen. Doc., 38th Cong., 1st sess., vol. 3, p. 133; Cong. Globe, 1863–1864, pt. 2, p. 1209; Report, Commissioner of Indian Affairs, 1890, p. xxx.

The evidence does not support the finding that the Indians occupied the land before the fee became vested in appellants' predecessor.

Upon failure of the Government's allegation that the land was within an Indian reservation, the cause abated for: (1) change of cause and parties; (2) incapacity of plaintiff to sue for want of interest; (3) lack of jurisdiction; and (4) because of prior action pending in the state court involving the changed issue. *Dias* v. *Phillips,* 59 Cal. 293; *United States* v. *Waller,* 243 U. S. 452. *United States* v. *Osage County,* 251 U. S. 128, and *Heckman* v. *United States,* 224 U. S. 413, distinguished.

These Indians entered as squatters. Their claim is not based on occupancy initiated under any law of the United States; it is simply such adverse claim as any citizen might make to land patented to another. The United States was neither legally nor morally bound to maintain them in possession of lands to which they made no claim prior to that of the Government; and since the

United States has conveyed its title, what circumstance has arisen to impose upon it any obligation to the Indians with reference to these lands? True, the Government may owe the Indians the duty of protection, shelter and sustenance; but even that may be questioned where the Indians have adopted the civilized mode of life and have not availed themselves of the protection and care afforded them by the Government reservations. The failure of this action by virtue of the Government's lack of interest is well supported by precedent. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *Curtner* v. *United States*, 149 U. S. 662.

The cause is barred by the statute of limitations. *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447. *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355; and *United States* v. *Whited and Wheless*, 246 U. S. 552, distinguished.

The Government is estopped by its patent and by the leases. *Peyton* v. *Smith*, 5 Pet. 483.

The appellants purchased while the leases from the Company to the United States were in effect, and their purchases were made expressly subject to the Government's leasehold interest. Neither they nor the Railway Company had any intimation of any right asserted by the Indians or by the United States in its own behalf or in behalf of the Indians. The appellants paid value and are, in every sense, innocent purchasers. The land is not in terms excepted from the grant, and there is no act of Congress conferring any right upon the Indians.

The Court of Appeals concludes its opinion with the statement that for these lands the Railroad Company "was authorized to take lieu lands". In this, however, the court has overlooked the fact that no lieu lands are shown to exist, even though we assume the abstract right.

The respect owed by respondent to the grant of July 25, 1866, is the respect owed by any grantor to the title of

his grantee. *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228; *Burke* v. *Southern Pacific R. R. Co.,* 234 U. S. 669; *United States* v. *Northern Pacific Ry. Co.,* 256 U. S. 51.

It is true the Government sometimes claims immunity from certain species of estoppel, but the rule is well established that this immunity is limited to questions of delay and laches; it does not extend to general considerations of equity. *Iowa* v. *Carr,* 191 Fed. 257.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. S. W. Williams,* Special Assistant to the Attorney General, were on the brief, for the United States.

The decree is supported by the policy of Congress. *Johnson* v. *McIntosh,* 8 Wheat. 543; *Beecher* v. *Wetherby,* 95 U. S. 517; *United States* v. *Thomas,* 151 U. S. 577; *Minnesota* v. *Hitchcock,* 185 U. S. 373; Circulars of May 31, 1884, 3 L. D. 371; October 26, 1887, 6 L. D. 341; and December 30, 1903, 32 L. D. 382; *Poisal* v. *Fitzgerald,* 15 L. D. 19; Act September 4, 1841, 5 Stat. 453; Northern Pacific Railroad Company grant, Act July 2, 1864, 13 Stat. 365.

The grant to the railroad company excepts lands that were in the actual occupation of the Indians. *Ma-Gee-See* v. *Johnson,* 30 L. D. 125; *State of Wisconsin,* 19 L. D. 518; *Schumacher* v. *Washington,* 33 L. D. 454; *United States* v. *Boyd,* 68 Fed. 577. *Buttz* v. *Northern Pacific R. R.,* 119 U. S. 55, distinguished.

We do not concede that there was never tribal occupancy of the land in controversy. We think that everything in the record indicates that there was tribal occupancy.

But it is immaterial whether the land was occupied by a band of Indians, because the occupancy of the two families was sufficient to except the lands from the grant to the railroad company. We submit that the Indian

right of occupancy, of which so much is said in the various acts of Congress and court decisions, is the mere right to occupy as for the purpose of hunting and fishing, and that it is not the same as actual residence upon the land where the Indians live and make their home. This latter means more. Such lands are not public lands not reserved or otherwise appropriated.

The Act of March 3, 1851, is clearly inapplicable; so is the Act of April 8, 1864, 13 Stat. 39; no provision was made under them for these Indians. *Donnelly* v. *United States,* 228 U. S. 243.

It is as much the duty of the Government to protect the Indians in the occupation of the public domain where no provision is made for them as it is to protect them in the use and possession of the land allotted to them under restrictions. *United States* v. *Osage County,* 251 U. S. 128; *United States* v. *Waller,* 243 U. S. 452; *United States* v. *Beebe,* 127 U. S. 338; *United States* v. *New Orleans Pacific Ry. Co.,* 248 U. S. 507.

This cause is not barred by the statute of limitations. *Northern Pacific R. R. Co.* v. *United States,* 227 U. S. 355; *United States* v. *Whited & Wheless,* 246 U. S. 552.

The Government is not estopped to bring this suit, either because of the patent to the railroad company or because of the leases it took from the company through its officers and agents.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

This appeal brings up for review a decree of the Circuit Court of Appeals, directing the cancellation of a land patent issued in 1904 by the United States to the defendant, the Central Pacific Railway Company, in so far as it purports to convey certain legal subdivisions of land in Sections 13 and 23, Township 43 North, Range 8 West, M. D. M., Siskiyou County, California. 276 Fed. 78.

The suit was brought in the federal District Court for the Northern District of California by the United States, acting in behalf of three Indians, who, it was claimed, had occupied the lands continuously since before 1859. The Act of July 25, 1866, c. 242, 14 Stat. 239, granted to the predecessor of the defendant company a series of odd numbered sections of land, including those named, but excepted from the grant such lands as "shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of." [1] The obligations of the grant were complied with and patent conveying the sections mentioned above, with others, was issued to the defendant company, as successor in interest of the legislative grantee.

The original complaint alleged an actual occupancy by the individual Indians, but sought cancellation of the patent primarily on the ground that the lands formed part of an Indian reservation provided for in a treaty which was pending for ratification when the Act of 1866 was passed; but this last contention was abandoned on the trial, it appearing that the treaty had been rejected by the Senate prior to that date.

But the District Court found for the plaintiff upon the issue of actual occupancy and entered a decree confirming the right of possession in the Indians, which, however, was confined to the land actually enclosed, being an irregular body of about 175 acres and which did not in terms cancel the patent.

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[1] "Sec. 2. . . . and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections. . . ."

After the submission of the case plaintiff was allowed, over defendants' objection, to amend its bill by reciting that in bringing the suit the Government proceeded in its own right and as guardian of its Indian wards, thereafter named in the bill, by omitting all reference to the treaty, and by making the allegations respecting the Indian occupancy somewhat more specific.

The District Court refused to reopen the case on the defendants' application to allow further proof on the issue last stated, holding that, as the occupation by the Indians was alleged in the original bill, defendants should have offered their evidence on that issue at the trial. The court found that as early as 1859 the Indians named lived with their parents upon the lands described and had resided there continuously ever since; that they had under fence between 150 and 175 acres in an irregularly shaped tract, running diagonally through the two sections, portions of which they had irrigated and cultivated; that they had constructed and maintained dwelling houses and divers outbuildings, and had actually resided upon the lands and improved them for the purpose of making for themselves homes. These findings have support in the evidence and will be accepted here. *Adamson* v. *Gilliland,* 242 U. S. 350, 353.

The decree of the Circuit Court of Appeals agreed with that of the District Court generally but extended the right of possession to the whole of each of the legal subdivisions which was fenced and cultivated in part, and reversed the decree, with instructions to enter one cancelling the patent in respect of the entire 360 acres.

A reversal of this decree is now sought upon several grounds.

1. It is urged that the occupancy of land by individual Indians does not come within the exceptive provision of the grant.

Until the Act of March 3, 1875, c. 131, 18 Stat. 402, 420, extending the homestead privilege to Indians, the right

of an individual Indian to acquire title to public lands by entry was not recognized. It cannot, therefore, be said that these lands were occupied by homestead settlers nor were they granted, sold or preëmpted, but the question remains, were they "reserved . . . or otherwise disposed of?" Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States. *Beecher* v. *Wetherby,* 95 U. S. 517, 525; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 385. It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life. That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight. *Midway Co.* v. *Eaton,* 183 U. S. 602, 609; *Hastings & Dakota R. R. Co.* v. *Whitney,* 132 U. S. 357, 366. That department has exercised its authority by issuing instructions from time to time to its local officers to protect the holdings of non-reservation Indians against the efforts of white men to dispossess them. See 3 L. D. 371; 6 L. D. 341; 32 L. D. 382. In *Poisal* v. *Fitzgerald,* 15 L. D. 19, the right of occupancy of an individual Indian was upheld as against an attempted homestead entry by a white man. In *State of Wisconsin,* 19 L. D. 518, there had been granted to the State certain swamp lands within an Indian reservation, but the right of Indian occupancy was upheld, although the grant in terms was not subject

thereto. In *Ma-Gee-See* v. *Johnson,* 30 L. D. 125, Johnson had made an entry under § 2289, Rev. Stats., which applied to "unappropriated public lands." It appeared that at the time of the entry and for some time thereafter the land had been in the possession and use of the plaintiff, an Indian. It was held that under the circumstances the land was not unappropriated within the meaning of the statute, and therefore not open to entry. In *Schumacher* v. *State of Washington,* 33 L. D. 454, 456, certain lands claimed by the State under a school grant, were occupied and had been improved by an Indian living apart from his tribe, but application for allotment had not been made until after the State had sold the land. It was held that the grant to the State did not attach under the provision excepting lands "otherwise disposed of by or under authority of an act of Congress." Secretary Hitchcock, in deciding the case, said:

"It is true that the Indian did not give notice of his intention to apply for an allotment of this land until after the State had made disposal thereof, but the purchaser at such sale was bound to take notice of the actual possession of the land by the Indian if, as alleged, he was openly and notoriously in possession thereof at and prior to the alleged sale, and that the act did not limit the time within which application for allotment should be made."

Congress itself, in apparent recognition of possible individual Indian possession, has in several of the state enabling acts required the incoming State to disclaim all right and title to lands "owned or *held* by *any Indian* or Indian tribes." See 25 Stat. 676, c. 180, § 4, par. 2; 28 Stat. 107, c. 138, § 3, par. 2.

The action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating and improving the soil and establishing fixed homes thereon was in harmony with the well understood desire of the Government which

we have mentioned. To hold that by so doing they acquired no possessory rights to which the Government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation.

The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy. *Broder* v. *Water Co.*, 101 U. S. 274, 276, furnishes an analogy. There this Court, holding that the Act of July 26, 1866, c. 262, § 9, 14 Stat. 251, acknowledging and confirming rights of way for the construction of ditches and canals, was in effect declaratory of a preëxisting right, said: "It is the established doctrine of this court that rights of . . . persons who had constructed canals and ditches . . . are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a preëxisting right of possession,* constituting a valid claim to its continued use, than the establishment of a new one." Then, referring to the land grant to the Pacific Railroad Companies, which was made expressly subject to "pre-emption, homestead, swamp land, or other lawful claim," and which antedated the Act of 1866, the Court held that defendant's right of way for its canal, independent of that act, was within the excepting provision of the grant and said: "We have had occasion to construe a very common clause of reservation in grants to other railroad companies, and in aid of other works of internal improvements, and in all of them we have done so in the light of the general principle that Congress, in the act of making these donations, could not be supposed to exercise its liberality at the expense of pre-existing rights, which, though imperfect, were

still meritorious, and had just claims to legislative protection."

We are referred to *Buttz* v. *Northern Pacific R. R.*, 119 U. S. 55, but that case affords no aid to the defendant. There the railroad ran through a section of the country where the original right of Indian occupancy had not been extinguished and this Court held (p. 66): "The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance." The United States, however, undertook to extinguish the Indian title as rapidly as might be consistent, etc., and when this was done the right of the company, it was held, immediately attached free from the Indian title.

In our opinion the possession of the property in question by these Indians was within the policy and with the implied consent of the Government. That possession was definite and substantial in character and open to observation when the railroad grant was made, and we have no doubt falls within the clause of the grant excepting from its operation lands "reserved . . . or otherwise disposed of."

2. It is insisted that any rights these Indians might otherwise have had are barred by the provisions of the Act of March 3, 1851, c. 41, 9 Stat. 631. This statute required every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments to present the same for settlement to a commission created by the act. There was a provision directing the commission to ascertain and report the tenure by which the mission lands were held and those held by civilized Indians, and other Indians described.[1]

[1] "Sec. 8. . . . That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary

The act plainly has no application. The Indians here concerned do not belong to any of the classes described therein and their claims were in no way derived from the Spanish or Mexican governments. Moreover, it does not appear that these Indians were occupying the lands in question when the act was passed.

Barker v. *Harvey*, 181 U. S. 481, does not support the defendants' contention. There the Indians whose claims were in dispute were Mission Indians claiming a right of occupancy derived from the Mexican Government. They had failed to present their claims to the Commission, and this, it was held, constituted an abandonment. The Indians here concerned have no such claim and are not shown to be within the terms of the Act of 1851 in any respect. It further appeared in that case that prior to the cession to the United States the Mexican authorities, upon examination, found that the Indians had aban-

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evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered."

"Sec. 13. . . . That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; . . ."

"Sec. 16. . . . That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians."

doned the lands and thereupon made an absolute grant to the plaintiff's predecessors, and, this grant having been confirmed by the Commission, a patent for the lands had issued.

3. The contention that the United States was without authority to maintain the suit in the capacity of guardian for these Indians is without merit. In *United States* v. *Kagama,* 118 U. S. 375, 383, 384, the general doctrine was laid down by this Court that the Indian tribes are wards of the nation, communities dependent on the United States. "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." This duty of protection and power extend to individual Indians, even though they may have become citizens. *United States* v. *Nice,* 241 U. S. 591, 598, and cases cited; *Heckman* v. *United States,* 224 U. S. 413, 436; *United States* v. *Gray,* 201 Fed. 291; *United States* v. *Fitzgerald,* 201 Fed. 295. In *United States* v. *Gray, supra,* the capacity of the United States to sue for the breach of a lease made by an Indian allottee was asserted and upheld. After pointing out the fact that it was the policy of the Government to protect all Indians and their property and to teach and persuade them to abandon their nomadic habits the court said: "The civil and political status of the Indians does not condition the power of the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power, nor relieve it of its duty. . . ." In *United States* v. *Fitzgerald, supra,* it was held that the United States had capacity to sue for the taking of personal property from an Indian held by him subject to the management of an Indian agent, on the ground, among others, that such taking obstructs the execution of its governmental policy. At page 296 the

court said: "The United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies. It may maintain such suits, although it has no pecuniary interest in the subject-matter thereof, for the purpose of protecting and enforcing its governmental rights and to aid in the execution of its governmental policies." Congress may, if it thinks fit, emancipate the Indians from their wardship wholly or partially, *United States* v. *Waller,* 243 U. S. 452, 459, but in respect of the Indians here concerned that has not been done. It results, from the conclusion we have reached to the effect that these Indians had occupied the lands in dispute with the implied consent of the United States and in accordance with its policy, that the United States sustains such a relation to the subject matter and persons that its authority to maintain the suit cannot be questioned.

4. The suit is not barred by the Act of March 3, 1891, c. 561, § 8, 26 Stat. 1095, 1099, limiting the time within which suits may be brought by the United States to annul patents.

The object of that statute is to extinguish any right the *Government* may have in the land which is the subject of the patent, not to foreclose claims of third parties. Here the purpose of the annulment was not to establish the right of the United States to the lands, but to remove a cloud upon the possessory rights of its wards. As stated by this Court in *United States* v. *Winona & St. Peter R. R. Co.,* 165 U. S. 463, 475, the statute was passed in recognition of "the fact that when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration." After the

lapse of the statutory period, the patent becomes conclusive against the Government but not as against claims and rights of others, merely because the relation of the Government to them is such as to justify or require its affirmative intervention. See *Northern Pacific Ry. Co.* v. *United States,* 227 U. S. 355, 367; *La Roque* v. *United States,* 239 U. S. 62, 68.

5. Neither is the Government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the Government was, under the circumstances, unauthorized and could not bind the Government; much less could it deprive the Indians of their rights. See and compare *Lee* v. *Munroe & Thornton,* 7 Cranch, 366; *Whiteside* v. *United States,* 93 U. S. 247, 257; *Dubuque & Sioux City R. R. Co.* v. *Des Moines Valley R. R. Co.,* 109 U. S. 329, 336; *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 291.

6. We think, however, the Circuit Court of Appeals erred in holding that the right of the Indians extended to the entire area of each legal subdivision, irrespective of the inclosure, and we agree with the District Court in confining the right to the lands actually inclosed, including the whole of the northeast quarter of the southwest quarter of Section 13, the small portion thereof which had not been enclosed having been improved. The Court of Appeals, in support of its conclusion, relied upon *Quinby* v. *Conlan,* 104 U. S. 420. In that case Conlan had entered upon a quarter section of land, occupied a portion thereof, and declared his purpose to acquire a preëmption right to the whole, and soon thereafter had filed his declaratory

statement in legal form, claiming the whole as a preemptor. This Court sustained Conlan's claim as against Quinby, a subsequent settler. Here the claim for the Indians is based on occupancy alone, and the extent of it is clearly fixed by the inclosure, cultivation and improvements. The evidence does not disclose any act of dominion on their part over, or any claim or assertion of right to, any lands beyond the limits of their actual possessions as thus defined. Under the circumstances, their rights are confined to the limits of actual occupancy and cannot be extended constructively to other lands never possessed or claimed, simply because they form part of the same legal subdivisions. See *Garrison* v. *Sampson,* 15 Cal. 93, 95, where the Supreme Court of California said:

"A fatal objection to the judgment consists in the finding of the Judge in favor of the plaintiff for the whole tract of land sued for. The plaintiff claims by force of prior possession and a contract or consent on the part of the defendant, whom he mediately or immediately let into possession, to hold the premises for him or subject to his order. The land is public land. It was not taken up by the plaintiff under the Possessory Act of this State, nor was it inclosed. There were a house and corral on the land. Of these he may be said to have been in the actual occupancy. But we cannot see from the proofs any right of possession to the whole of the quarter section, or even any claim to it. We do not understand that the mere fact that a man enters upon a portion of the public land, and builds or occupies a house or corral on a small part of it, gives him any claim to the whole subdivision, even as against one entering upon it without title. The case would be different if he claimed under the Possessory Act, and pursued the necessary steps prescribed by it; or if he had made his entry under the preëmption laws of the United States. But merely going on waste and uninclosed land, and building a house and corral, and even subse-

quently cutting hay on a part, did not extend his possession to the whole of the one hundred and sixty acres."

This is in accordance with the general rule that possession alone, without title or color of title confers no right beyond the limits of actual possession. See *Green* v. *Liter,* 8 Cranch, 229, 250; *Watkins* v. *Holman,* 16 Pet. 25, 55; *Marine Ry. & Coal Co.* v. *United States,* 257 U. S. 47, 65; *Humphries* v. *Huffman,* 33 Ohio St. 395, 401; *Langdon* v. *Templeton,* 66 Vt. 173, 179; *Ryan* v. *Kilpatrick,* 66 Ala. 332, 337.

Certain other contentions of defendants we deem it unnecessary to review, although they have been carefully considered. Aside from that stated in the last paragraph we find no error, but for the reasons there given, the decree of the Circuit Court of Appeals is reversed and the cause remanded to the District Court, with instructions to amend its decree so as to cancel the patent in respect of the lands possessed by the Indians and, as so amended, that decree is affirmed.

Reversed.

COLUMBIA RAILWAY, GAS & ELECTRIC COMPANY *v.* STATE OF SOUTH CAROLINA.

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

No. 297. Argued January 26, 1923.—Decided February 19, 1923.

1. Article I, § 10 of the Constitution affords no protection against impairment of the obligation of a contract by judicial decision. P. 244.
2. But where a state court, though placing its decision upon the construction of a contract, in substance and effect gives force to a statute complained of as impairing the contract obligation, jurisdiction of this Court attaches. P. 245.
3. A clause in a grant will be construed as a covenant, if reasonably possible, rather than as a condition subsequent. P. 248.

4. The fact that a legislative grant upon valuable consideration was made to attain a particular end, cannot in itself debase the estate granted. P. 249.
5. The fact that such a grant makes express provision for forfeiture in case of default in one of the obligations imposed on the grantee, is a strong reason against construing other obligations, not so fortified, as conditions subsequent. P. 250.
6. A state statute which seeks to convert a covenant in a prior legislative contract into a condition subsequent and to impose as a penalty for its violation the forfeiture of valuable property, impairs the obligation of the contract and is void. P. 251.

112 S. Car. 528, reversed.

ERROR to a judgment of the Supreme Court of South Carolina affirming a judgment for the State in a suit to enforce a forfeiture of a grant and recover possession of the property, for breach of an alleged condition subsequent.

Mr. William Elliott and *Mr. Jo-Berry S. Lyles,* with whom *Mr. R. B. Herbert* and *Mr. W. C. McLain* were on the briefs, for plaintiff in error.

Mr. S. M. Wolfe, Attorney General of the State of South Carolina, and *Mr. J. Fraser Lyon* for defendant in error.

There was no irrepealable contract in this case within the meaning of Art. I, § 10, of the Constitution of the United States.

We are not now dealing with ordinary lands subject to sale, nor with proprietary rights of the State, but with navigable waters and the soil thereunder, held in trust by the State for all of the people, wherein an inalienable duty and obligation is due all of the people in their sovereign capacity.

This trust cannot be relinquished by a transfer of the property, and the control of the State, for the purposes of a trust, can never be lost. The State can no more abdicate its trust over the property in which the whole

people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties, than it can abdicate its police powers in the administration of government and the preservation of peace.

The canal is a governmental subject, and there can be no contract and no irrepealable law on the subject.

The Act of 1887 and conveyances thereunder was merely a license and defendant a governmental agency charged with effectuating a governmental purpose, to wit, improvement of navigation, and the State, in consideration of public policy, has determined, its agent having refused to act, that the work and property shall not be further entrusted to defendant licensee.

The State might have repealed the Acts of 1887 and 1890 and it would have been valid and effective for the purpose of restoring the State to the same control, dominion, and ownership of the property that it had prior to the passage of the Act of December 24, 1887. *State* v. *Columbia Water Power Co.*, 82 S. Car. 181; Const., S. Car., 1868, Art. I, § 40; Art. VI, § 1; Const., S. Car., 1895, Art. I, § 28; Art. XIV, § 1; *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 388; *People* v. *Kirk*, 53 Amer. St. Rep. 294; 27 R. C. L., Waters, § 236, p. 1327; *Long Sault Development Co.* v. *Kennedy*, 212 N. Y. 1.

There were conditions subsequent in the Acts of 1887 and 1890 and the conveyances thereunder, the violation of which would work a forfeiture.

The Supreme Court of South Carolina has construed this contract in the light of the history of all the legislation pertinent thereto and such acts as necessarily form a part thereof and has held the contract to embody a "condition subsequent," the default in the performance of which would work a forfeiture. The State of South Carolina takes the position, therefore, that by this construction the Supreme Court of the United States, in reviewing

this case on appeal, is bound. *Chicago & Northwestern Ry. Co.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35; *Truax* v. *Corrigan*, 257 U. S. 312; *Clement National Bank* v. *Vermont*, 231 U. S. 120; *Aberdeen Bank* v. *Chehalis*, 166 U. S. 440.

But if this Court should not find that it is bound by the decision of the Supreme Court of South Carolina that there was a condition subsequent in the contract, then we submit, where an act is fairly susceptible of either of two constructions, that one must be adopted which is most favorable to the State. Only that which is granted in clear and explicit terms passes by a grant of property, franchise, or privilege in which the Government or the public are at interest. *Cooshaw Mining Co.* v. *South Carolina*, 144 U. S. 550; *Blair* v. *Chicago*, 201 U. S. 400; *United States* v. *Michigan*, 190 U. S. 379.

The question that is to be determined is, What is the proper construction of the language used in the Acts of 1887 and 1890?—whether they constitute a condition subsequent, the violation of which would cause a reversion of the property to the original grantor, the State of South Carolina? This construction must be made in the light of the history of the canal as appearing upon our statute books and the public resolutions of the General Assembly of South Carolina prior to it, as well as the decisions of the Supreme Court of South Carolina.

A study or examination of these acts and decisions will convince the Court that in the entire history of Columbia Canal project the legislature never gave any intimation of any abandonment of its obligation to maintain the canal from the time it was constructed, about 1822 or 1823, up to the present, but evidenced its purpose that the use of this canal should be maintained for the public for the purposes for which it was originally built.

Our contention is that there is but one intention which appears from the whole act and which controls the legis-

lature, and the proviso in the first section of the act was merely to postpone a reversion for seven years which would have otherwise occurred in two years under the provisions of § 7. This is a concession and limitation upon the intention of the legislature that the canal should be completed as soon as practicable. Citations of authority that a court of equity will never declare a forfeiture when the parties cannot be put *in statu quo* cannot be applicable to the Acts of 1887 and 1890.

The Act of 1917 was not given force and effect as a legislative adjudication of forfeiture. It was not offered, admitted, or relied upon as evidence to prove plaintiff's case. The contract was not impaired and defendant was not deprived of due process of law thereby.

The case was not removable. The complaint sets up no right, title, or interest given or arising under any statute or constitutional provision of the United States. The only right asserted is based upon the statute of the State.

Mr. Justice Sutherland delivered the opinion of the Court.

This was an action brought by the State against the defendant (plaintiff in error) to recover possession of a certain canal property, known as the Columbia Canal, on the ground that the defendant had forfeited the same by reason of its failure to fulfill certain conditions subsequent upon which its continued title depended. Prior to the year 1887 a small canal, following the course of the one now in question, was owned by the State, the title being vested in the Board of Directors of the state penitentiary. In 1887 the legislature passed an act incorporating the Board of Canal Trustees, to whom the penitentiary directors were required to and did transfer the canal. Acts S. Car. 1887, p. 1090.

By § 1 of this act, the title to the canal was vested in the trustees for the use and benefit of the City of Co-

lumbia, subject to the performance of certain obligations therein set forth, and to the proviso, "that should the said canal not be completed to Gervais street within seven years from the passage of this Act all the rights, powers and privileges guaranteed by this Act shall cease, and the said property shall revert to the State." [1]

By § 3 they were authorized to construct a dam across Broad River and raise the water in the river so as to get a fall of 37 feet at the south side of Gervais Street, provided that the canal be so enlarged as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and 10 feet deep and "develop at least 10,000 horse power at the south side of Gervais street."

By § 5 the canal was to be opened for navigation free of charge.

By § 7 the trustees were required to complete the canal within two years so as to carry a body of water of the di-

[1] "Section 1. That the Board of Directors of the South Carolina Penitentiary are hereby authorized, empowered and required to transfer, assign and release to the Board of Trustees of the Columbia Canal, hereinafter created and provided for the property known as the Columbia Canal, together with the lands now held therewith, acquired under the acts of the General Assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment and release all the right, title and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the said Board of Trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this Act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said Board of Trustees and their assigns: *Provided,* That should the said canal not be completed to Gervais street within seven years from the passage of this Act all the rights, powers and privileges guaranteed by this Act shall cease, and the said property shall revert to the State."

mensions stated from the source of the canal down to Gervais Street and to furnish free of charge 500 horsepower to the State, 500 horsepower to Sullivan Fenner and 500 horsepower to the City of Columbia, and "as soon as is practicable, complete the canal down to the Congaree River a few yards above the mouth of Rocky Branch." [1]

By a subsequent act, passed in 1890, the trustees were authorized to "sell, alienate and transfer" the property subject "to all the duties and liabilities imposed thereby [that is by the Act of 1887], and subject to all contracts, liabilities and obligations made and entered into by said board. . . ." Acts S. Car. 1890, p. 967. Under this statute the canal was sold to defendant's predecessor, whose title the defendant now has.

The case turns upon the provision contained in § 7, requiring the trustees, as soon as practicable, to complete the canal down to the Congaree River, and depends upon whether this is a condition subsequent, the failure to perform which incurs a forfeiture, or is a covenant the breach of which gives rise to another form of remedy.

[1] "Sec. 7. That the Board of Trustees shall, within two years from the ratification of this Act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and ten feet deep, from the source of the canal down to Gervais street, and to furnish to the State, free of charge, on the line of the canal, 500 horse power of water power, to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the Canal Commission, and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as is practicable, complete the canal down to the Congaree River a few yards above the mouth of Rocky Branch: *Provided,* That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal by the said Board of Trustees or their assigns shall always be subject to this right."

That the provision has not been complied with is not disputed.

The legislature, in 1917, passed an act, Acts S. Car. 1917, p. 348, which begins with a preamble reciting certain of the provisions of the Act of 1887, including that relating to the completion of the canal down to the Congaree River, and declaring that there had been a failure to fulfill the conditions imposed by that act. By § 1 it is then enacted that these conditions have not been complied with but have been disregarded, by reason whereof the right, title and interest, "transferred by virtue of said Acts, have been forfeited and reverted to the State." By § 2 the Attorney General, and other officers named, are directed, within ninety days, to make such reëntry for the State as might be necessary and proper under the circumstances and to take such steps as might be lawful and proper to obtain possession and control of the property and improvements placed thereon, unless satisfactory arrangements be made by the claimants of the canal. By § 3 the Attorney General is directed, at the time of reëntry or thereafter, to commence such proceedings as might be proper in any of the courts of the State to assert the right of the State to said property and improvements.

In pursuance of the act last referred to this action was brought in a state court of common pleas. The complaint alleged that the defendant had failed to complete the canal as soon as practicable down to the Congaree River, and had failed to comply with the provisions of the Act of 1887 in other particulars. The other alleged violations may be dismissed from consideration, since the judgment of the trial court is based alone upon the one just specified, and its judgment is affirmed by the State Supreme Court without reference to the others.

That the legislation of 1887 and 1890, and the transactions based thereon, establish a contract between the

State and the defendant is clear. The remaining inquiries are: (1) What is the pertinent obligation of this contract and (2) has that obligation been impaired, in violation of Article I, § 10, of the Constitution?

We are met at the threshold with a challenge on the part of the State to our jurisdiction, and this must first be considered. The judgment of the state court, it is asserted, was based upon its own construction of the contract and not at all upon the Act of 1917.

As this Court has repeatedly ruled, the Constitution affords no protection as against an impairment by judicial decision. *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.,* 125 U. S. 18, 30; *Louisiana Ry. & Nav. Co.* v. *New Orleans,* 235 U. S. 164, 170, and cases cited.

If, therefore, the judgment, although in effect impairing the obligation of the contract, nevertheless proceeds upon reasons apart from and without giving effect to the statute, this Court is without jurisdiction to review it. *Bacon* v. *Texas,* 163 U. S. 207, 216, wherein the doctrine is stated as follows:

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the State which has been upheld or effect given it by the state court. *Lehigh Water Co.* v. *Easton,* 121 U. S. 388; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.,* 125 U. S. 18; *Central Land Co.* v. *Laidley,* 159 U. S. 103, 109. . . . If the judgment of the state court gives no effect to the subsequent law of the State, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract."

But, although the state court may have construed the contract and placed its decision distinctly upon its own construction, if it appear, upon examination, that in real substance and effect, force has been given to the statute complained of our jurisdiction attaches. In *Houston & Texas Central R. R. Co.* v. *Texas,* 177 U. S. 66, 77, this Court said:

"Thus we see that, although the decision of the state court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the state constitution, and were hence void, and that no payments made with such warrants had any validity, and although this ground of invalidity was arrived at without any reference made to the act of 1870, yet the necessary consequence of the judgment was that effect was thereby given to that act, and in a manner which the company has always claimed to be illegal and unwarranted by the act when properly construed. The company has never accepted such a construction, but on the contrary has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below. *Bridge Proprietors* v. *Hoboken Company,* 1 Wall. 116; *University* v. *People,* 99 U. S. 309; *Fisk* v. *Jefferson Police Jury,* 116 U. S. 131; *New Orleans Water Works Company* v. *Louisiana Sugar Refining Company,* 125 U. S. 18; *Central Land Company* v. *Laidley,* 159 U. S. 103, 109; *Bacon* v. *Texas,* 163 U. S. 207, 216; *McCullough* v. *Virginia,* 172 U. S. 102."

The record before us in the present case plainly discloses that the basis for bringing the action against the defendant was the Act of 1917. The complaint alleges at

considerable length the provisions of the Act of 1887 and the various transactions resulting in the acquisition of the property by the defendant and its consequent assumption of the obligations contained in that statute. The provisions of the Act of 1917, as heretofore recited, are then set forth, followed by a statement of certain negotiations had with the defendant, and it is then alleged that the Attorney General and the other officers mentioned, not considering it appropriate and proper to commit a breach of the peace by making forcible entry upon the property and taking possession thereof, have, therefore, by virtue of § 3 of said act instituted this action.

The sufficiency of the complaint was challenged by demurrer, upon the ground, among others, that the contract in question was impaired by the Act of 1917. The demurrer having been overruled, an answer was filed, alleging such impairment and this claim was asserted and insisted upon at every stage of the proceedings to their conclusion in the State Supreme Court.

The trial court, in passing upon the demurrer, referred to the Act of 1917 as authorizing a judicial proceeding and held that, coupled with a demand for possession and refusal, it was equivalent to the exercise of the right of reëntry. Upon the trial of the case that court said that the declaration in this act that there had been a failure to perform the conditions of the contract was entitled to some respect, but the court had the right to inquire into the facts and determine whether as found by the legislature they were true. It further held that that act was binding on the court under the evidence. It is apparent that the trial court gave effect to the Act of 1917, although the precise extent is not clearly disclosed. Whatever it was, it entered into and affected the judgment and this judgment was affirmed by the Supreme Court.

We accord to this ruling the respect which we must always give to the decisions of an appellate tribunal of a

State, but, as will presently appear, we have arrived at a result respecting the merits at variance with that pronounced, a result which seems to us manifestly right and forces us to conclude that the construction put upon the contract by the state courts could only have been reached by giving effect to the statute of 1917. What was said in *Terre Haute & Indianapolis R. R. Co.* v. *Indiana,* 194 U. S. 579, 589, is apposite and controlling:

"The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court."

And see *Detroit United Ry.* v. *Michigan,* 242 U. S. 238, 246–248.

The jurisdiction of this Court is, therefore, upheld, and we proceed to the consideration of the case on its merits; and here the crucial question is: What is the nature of the contractual obligation with which the judgment of the state court deals?

By the Act of 1887 numerous obligations were imposed on the canal trustees and their assigns, among them: (a) to complete the canal within two years so as to carry a designated body of water to Gervais Street; (b) furnish a measure of 1500 horsepower to the State and others; (c) keep the canal open for navigation free of charge, and (d) complete the canal as soon as practicable down to the Congaree River. No provision is made in respect of the consequences to result in case of a failure to perform any

of these obligations. The only specific provision suggesting a forfeiture is " that should the said canal not be completed to Gervais street within seven years . . . all the rights, powers and privileges guaranteed by this Act shall cease, and the said property shall revert to the State."

The effect of the Acts of 1887 and 1890 and the subsequent transactions based on them, was to vest in the defendant title to the property in fee; and for this the consideration moving from the defendant was valuable and substantial. Did the failure to comply with the provision requiring completion of the canal to the Congaree River divest defendant of this title?

We begin the inquiry with the general rule before us that " conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are construed strictly," 2 Washburn on Real Property, 6th ed., § 942; and that " courts always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so." *Id.*, § 938. Here there are no express terms creating, and no words such as are commonly used to introduce, a condition; nor is there any provision giving the right of reëntry upon failure to perform. It is urged by the State Supreme Court that the legislative intention must be gathered from the statute as a whole, to be read in the light of its dominant purpose which was to connect the waters of the Broad and Congaree Rivers above and below shoal water, so as to promote navigation; the other purposes, though important, being subsidiary. But the purpose to accomplish this result is equally consistent with the view which regards the provision in question as a covenant, the only difference being that the remedy for a breach would be different and less drastic. In *Oregon & California R. R. Co.* v. *United States,* 238 U. S. 393, this Court was called upon to construe the proviso in a land grant act to the

effect that the lands granted must be sold only to actual settlers, etc., and it was held that this did not constitute a condition subsequent, but an enforceable covenant. In the course of the opinion (p. 419) it was said:

"It appears, therefore, that the acts of Congress have no such certainty as to establish forfeiture of the grants as their sanction, nor necessity for it to secure the accomplishment of their purposes,—either of the construction of the road or sale to actual settlers—and we think the principle must govern that conditions subsequent are not favored but are always strictly construed, and where there are doubts whether a clause be a covenant or condition the courts will incline against the latter construction; indeed, always construe clauses in deeds as covenants rather than as conditions, if it is possible to do so."

And see *Woodruff* v. *Woodruff,* 44 N. J. Eq. 349, 353.

Moreover, the conveyance was absolute and for a valuable consideration, and a mere purpose to attain a particular end, however it may have influenced the legislation, could not have the effect of debasing the fee. See *Stuart* v. *Easton,* 170 U. S. 383, 394–397, where this Court said: "While the proprietaries may have been mainly influenced in making the grant by a desire to advance the interests of the town, or were actuated by motives of charity, yet the transaction was not a mere gift, but was upon a valuable consideration, and it was the evident intention of the grantors to convey all their estate or interest in the land for the benefit of the county. The declaration in the patent of the purposes for which the land was to be held, conjoined as it was with a reference to the act of the assembly wherein the trust was created, could not have the effect of qualifying the grant of the fee simple, any more than if the declaration of the purposes for which the land was to be held had been omitted and a declaration of the trust made in an independent instrument."

Not only does the statute contain no positive terms creating, or words requiring the provision in question to

be construed as, a condition subsequent, but the clear implication is to the contrary. The clause relating to the section of the canal down to Gervais Street is expressly that upon failure to complete in seven years the property shall revert to the State. In contrast, it is significant that no forfeiture is specifically prescribed with respect to the non-completion of the Congaree section of the canal. If this requirement, nevertheless, be construed as a condition subsequent there can be no rational ground for holding that the other obligations of the contract are not susceptible of a like construction. Among these obligations is that requiring the completion of the canal to Gervais Street in two years; but the express provision for a forfeiture for failure to complete it in seven years, negatives, as a matter of logical necessity, any suggestion that a forfeiture would be incurred for a failure to complete in two years. The inference, as applied to the other obligations, including that now in question, while not so direct and obvious, is, nevertheless, one which naturally flows from the premises.

The proviso for a forfeiture in the one case is at least strongly persuasive of an intention not to impose it in other cases not so qualified. When, in addition to this, we consider all the circumstances, including the fact that the sale to the defendant was absolute and for a valuable consideration, that there are no express terms creating a condition, no clause of reëntry nor words of any sort indicating such purpose, the conclusion is unavoidable that the obligation in question is a covenant and not a condition subsequent. *Board of Commissioners* v. *Young,* 59 Fed. 96; opinion by Judge, afterward Justice, Lurton. We quote from page 105:

"That the grantor ever contemplated a reverter is not to be presumed, in the light of the presence of absolute words of conveyance and quitclaim, and the absence of any provision for a reverter or reëntry. If it had been intended that the conveyance should terminate on an

abandonment of the public use, it is strange that some language was not used indicative of such purpose. Too much weight was attached to the circumstance that the city wished the title in order to maintain a suit against a trespasser. Such suit could have been maintained without the title. Too little weight has been given to the fact that the deed was upon a valuable consideration; to the fact that it was a quitclaim of all right, title, and interest; to the fact of a previous common-law dedication; and to the failure, under such circumstances, to make the title subject to an express right of reëntry. The minuteness of direction concerning the administration of property conveyed to a public use is insufficient to take the case out of the rule, supported by an overwhelming weight of authority, that the mere expression of a purpose or particular use to which property is to be appropriated will not make the estate a conditional one."

The effect of the Act of 1917 is to convert that which we have held to be a covenant into a condition subsequent and to impose as a penalty for its violation the forfeiture of an extensive and valuable property. It requires no argument to demonstrate that this constitutes an impairment of the contract here involved, in violation of the Constitution. The impairment of a contract may consist in increasing its burdens as well as in diminishing its efficiency. "Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation." *Green* v. *Biddle,* 8 Wheat. 1, 84. See also *Boise Water Co.* v. *Boise City,* 230 U. S. 84, 90, 92.

The judgment of the State Supreme Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

RANDALL ET AL. *v.* BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 274. Argued January 25, 1923.—Decided February 19, 1923.

A writ of error to the highest court of a State must be dismissed when the judgment is one of an intermediate court which the highest court has declined to review for want of jurisdiction. Writ of error to review 131 N. E. 776, dismissed.

Mr. Otto Gresham for plaintiffs in error.

Mr. Clyde H. Jones, with whom *Mr. D. P. Flanagan* was on the brief, for defendant in error.

Memorandum opinion by MR. JUSTICE SUTHERLAND.

This is a writ of error to the Supreme Court of Indiana, when, clearly, it should have been to the State Appellate Court.

The action was brought in the Superior Court for Tippecanoe County. A demurrer to the complaint was sustained. An appeal was allowed to the Supreme Court but that court, of its own motion, entered an order transferring the cause to the Appellate Court, for want of jurisdiction. The Appellate Court thereupon took the case, received the briefs of counsel, heard oral arguments and affirmed the judgment of the trial court. A petition for rehearing was submitted and denied. Plaintiffs in error then applied to the Supreme Court for an order to vacate its former order of transfer, or, in the alternative, for a writ of error *coram nobis,* which the Supreme Court denied.

It therefore appears that the Supreme Court refused to take the case on appeal for want of jurisdiction, and the judgment of the highest court of the State in which a deci-

sion in the suit could be had, Judicial Code, § 237, is that of the Appellate Court to which the writ should have been directed.

The writ of error must, therefore, be dismissed on the authority of *Western Union Telegraph Co.* v. *Hughes,* 203 U. S. 505; *Lane* v. *Wallace,* 131 U. S. Appendix CCXIX; *Norfolk & Suburban Turnpike Co.* v. *Virginia,* 225 U. S. 264, 269; *Second National Bank* v. *First National Bank,* 242 U. S. 600; *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530.

Dismissed.

UNITED STATES *v.* STATE OF OKLAHOMA.

IN EQUITY.

No. 25, Original. Argued on motion to dismiss January 2, 1923.—Decided February 19, 1923.

1. The right to priority of payment provided for by Rev. Stats., § 3466, attaches when the conditions specified by the section come into existence; and it cannot be impaired or superseded by a state law. P. 259.
2. The State of Oklahoma acquires no lien on the assets of a state bank under § 303 of c. 6, Rev. Laws Okla. 1910, before possession of the bank has been taken by the state bank commissioner. P. 260.
3. The word "insolvent," as used in Rev. Stats., § 3466, and the Bankruptcy Law, applies only where a debtor's property is insufficient to pay all his debts. P. 260.
4. But "insolvent," in the sense of the Oklahoma statute, *supra,* where it authorizes the bank commissioner, upon becoming satisfied of a bank's insolvency, to take possession and wind up its affairs, is a broader term, applicable where a bank is unable to pay depositors in the ordinary course of business, though its assets may exceed its debts. *Id.*
5. Such a taking over of a bank by the act of the commissioner upon a finding by him of its insolvency, does not establish the right of the United States to priority of payment under Rev. Stats., § 3466, because it does not imply insolvency within the

meaning of that section and does not otherwise satisfy its conditions, either as a voluntary assignment, as an attachment of assets of an absconding, concealed or absent debtor, or as an act of bankruptcy, as defined by the Bankruptcy Act (§ 3a) or any law of the State. P. 262.

Bill dismissed.

UPON motion to dismiss the bill in a suit instituted in this Court by the United States against the State of Oklahoma, in which the plaintiff sought to establish a right of priority of payment out of the assets of a liquidating Oklahoma bank, in which it had deposited moneys as guardian of individual Indians.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. S. W. Williams,* Special Assistant to the Attorney General, were on the brief, for the United States.

The State of Oklahoma is the proper party defendant and this Court has original jurisdiction. When a state bank in Oklahoma becomes insolvent the State, by the action of its bank commissioner, acquires title to the bank's assets. *State* v. *Cockrell,* 27 Okla. 630. Consequently a suit against the bank commissioner is in effect a suit against the State.

Assets of an insolvent state bank in Oklahoma are subject to the Government's claim as a prior creditor under Rev. Stats., § 3466.

Whenever a debtor is divested of his property in any of the ways mentioned in this section, the " person who becomes invested with the title is thereby made a trustee for the United States and is bound to pay their debt first out of the proceeds of the debtor's property". *Beaston* v. *Farmers' Bank,* 12 Pet. 102, 132. But, to entitle the United States to priority, there must be bankruptcy or insolvency as the latter is defined by the statutes or the authorities.

The bank in this case was adjudged insolvent by the bank commissioner, who under the law was authorized to take such action. Revised Laws Oklahoma, 1910, § 302.

The position of the bank commissioner in taking charge of the bank's affairs and collecting and distributing its assets is, under the state decisions, analogous to that of a receiver or trustee in bankruptcy or of an assignee for the benefit of creditors. *Briscoe* v. *Hamer,* 50 Okla. 281.

As stated, therefore, the case is one where the United States is entitled to be paid first, unless by reason of § 303 of the state law the state itself has a prior lien on the bank's assets for the benefit of the depositors' guaranty fund.

Under § 303, Rev. Laws Oklahoma, 1910, the lien of the State does not attach until the bank commissioner takes possession of the bank and its assets. Before he may do that, he must find the bank to be insolvent, and immediately upon his doing that the priority of the United States attaches. The State, therefore, has no anterior lien such as would take precedence over the claim of the United States. Moreover, the laws of the State cannot create priority in favor of other creditors and so defeat the priority of the United States. *Field* v. *United States,* 9 Pet. 182, 200.

That priority does not yield to any claim of creditors, however high may be the dignity of their debt. *Conrad* v. *Atlantic Insurance Co.,* 1 Pet. 386.

There is no force in the argument that by depositing the money in the state bank the United States consented to the State's method of distributing the bank's funds and thereby waived its claim to priority, because Congress alone has power to waive rights of the Government, and there is no pretense that Congress has done so in this case. Nor was the United States compelled to proceed on the bond of the surety company before enforcing its direct remedy against the debtor, for the settled rule of equity is to the contrary. *Lewis* v. *United States,* 92 U. S. 618,

The United States is entitled to priority in regard to moneys which it has deposited as guardian of the Indians.

Mr. William H. Zwick, with whom *Mr. George F. Short,* Attorney General of the State of Oklahoma, was on the brief, for defendant.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit commenced in this Court by the United States against the State of Oklahoma to establish priority in favor of the United States under § 3466 of the Revised Statutes and to have a debt owing by the state bank of Guthrie, Oklahoma, paid before any distribution of the assets of the bank.

The case was heard on the motion of the State to dismiss the complaint on the ground that the allegations thereof are not sufficient to constitute a cause of action.

The facts as set forth in the complaint are in substance the following. The bank was organized under the laws of Oklahoma, and was engaged in a general banking business at Guthrie until, October 26, 1921, it was found insolvent under the state law and unable to pay its debts and unable to continue as a going banking concern. The United States, under various acts of Congress, is guardian of certain incompetent and restricted Indians residing within Oklahoma, and as such guardian caused to be deposited in that bank certain sums of money received by the United States, through the office of the superintendent of the Five Civilized Tribes in Oklahoma, on account of certain individual members and allottees of such tribes who were incompetent and restricted and wards of the United States. Before such deposit was made the bank, pursuant to regulations prescribed by the Secretary of the Interior, delivered to the United States a bond with the Fidelity and Casualty Co. of New York as surety thereon to secure the payment of such funds, and that bond is in

force; on October 26, 1921, the sum so deposited and due the United States amounted to not less than $42,000 with interest. October 7, 1921, a state bank examiner made an examination of the bank and found that it was insolvent under the Oklahoma law and unable to pay its debts and to continue as a going banking concern, and so reported to the bank commissioner who, on October 26, 1921, adjudged the bank insolvent and took charge and possession of its assets, books and records for the purposes specified in the state depositors' guaranty fund law. The assets of the bank so taken and now in the possession of the bank commissioner are in excess of the amount claimed by the United States; and the United States claims to be entitled to have its debt first satisfied in full out of such assets, before other creditors are paid anything. Demand for such prior payment was made by the United States and refused by the State.

The claim of priority asserted by the United States is based upon § 3466 of the Revised Statutes of the United States, which provides:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The applicable provisions of the Oklahoma statutes are found in c. 6 of the Revised Laws of Oklahoma, 1910. A state banking board is created and given the supervision and management of a depositors' guaranty fund, created by levying assessments against the capital stock of each bank and trust company.

The provision of § 302, under which possession of the bank and its assets were taken, is as follows:

"Whenever any bank or trust company organized or existing under the laws of this State shall voluntarily place itself in the hands of the bank commissioner, or whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this State shall have been adjudged to be forfeited, or whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

The State asserts a lien superior to the priority rights of the United States, under § 303, which is as follows:

"In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Section 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

The United States, asserting that it is not bound first to proceed on the bond of the surety company (citing

Lewis v. *United States,* 92 U. S. 618), invokes jurisdiction of this Court on the ground that, when the bank and its assets were taken over by the State through its bank commissioner, the State acquired title to the same and is therefore the proper party to be sued. *State* v. *Cockrell,* 27 Okla. 630; *Lankford* v. *Platte Iron Works Co.,* 235 U. S. 461; *American Water Co.* v. *Lankford, id.* 496; *Farish* v. *State Banking Board, id.* 498. No objection to jurisdiction is made by the State; and the State does not deny that the United States is entitled to priority on account of money deposited by it as guardian of the Indians to the same extent as in the case of any other deposit. The State's contentions are that § 3466 properly construed does not give the United States priority; that the State has a lien on the bank's assets, and that the priority rights (if any) of the United States are subject thereto; and that priority rights under the act do not apply where a sovereign State has a lien against its debtor.

Section 3466 relied on by the Government is a reënactment and extension of § 65, Act of March 2, 1799, 1 Stat. 676; and the same or equivalent language, so far as the question here involved is concerned, is found in earlier statutes. Act of March 3, 1797, c. 20, § 5, 1 Stat. 515; also, Act of May 2, 1792, c. 27, § 18, 1 Stat. 263; Act of August 4, 1790, c. 35, § 45, 1 Stat. 169; Act of July 31, 1789, c. 5, § 21, 1 Stat. 42. It has been considered in a number of cases in this Court. The claim of the United States to the asserted priority rests exclusively upon the statute. No lien is created by it. It does not overreach or supersede any *bona fide* transfer of property in the ordinary course of business. It establishes priority which is limited to the particular state of things specified. The meaning of the word " insolvent " used in the act and of the insolvency therein referred to is limited by the language to cases where " a debtor, not having sufficient

property to pay all his debts, makes a voluntary assignment", etc. Mere inability of the debtor to pay all his debts in ordinary course of business is not insolvency within the meaning of the act, but it must be manifested in one of the modes pointed out in the latter part of the statute which defines or explains the meaning of insolvency referred to in the earlier part. *United States* v. *State Bank of North Carolina,* 6 Pet. 29, 35; *United States* v. *Fisher,* 2 Cranch, 358, 390; *United States* v. *Hooe,* 3 Cranch, 73, 90; *Prince* v. *Bartlett,* 8 Cranch, 431, 433; *Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386, 439; *Brent* v. *Bank of Washington,* 10 Pet. 596, 611; *Field* v. *United States,* 9 Pet. 182, 201. Where the debtor is divested of his property in one of the modes specified in the act, the person who becomes invested with the title is made trustee for the United States and bound first to pay its debt out of the debtor's property. *Beaston* v. *Farmers' Bank of Delaware,* 12 Pet. 102, 133–135. The priority given the United States cannot be impaired or superseded by state law. If priority in favor of the United States attaches at all, it takes effect immediately upon the taking over of the bank. The State has no lien on the assets of the bank before the taking of such possession by the bank commissioner.

Does § 3466 apply? It requires that there shall be an insolvent debtor "not having sufficient property to pay all his debts." The complaint does not allege that the bank's assets were not sufficient to pay all its debts. After stating that the bank examiner found that it was insolvent and unable to pay all its debts and unable to continue as a going banking concern, and that the bank commissioner pursuant to the authority vested in him by the laws of the State adjudged the bank insolvent and thereupon took charge and possession of its assets for the purposes of liquidation, the complaint does allege that the bank was and is insolvent. But the word "insolvent" is used in

different senses. Section 3466 makes it apply only in cases where the debtor "not having sufficient property to pay all his debts, . . ." The Bankruptcy Act of July 1, 1898, c. 541, § 1, 30 Stat. 544, provides:

"A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

In § 302 of the Oklahoma law, the meaning of "insolvency" of a bank is not so limited, and, when regard is had to other provisions of the Oklahoma state depositors' guaranty fund law and its object—the full and prompt payment of depositors in banks unable to carry on as going banking concerns—it is clear that the meaning there intended is not the same as in § 3466 or in the Bankruptcy Act. The bank commissioner under the Oklahoma law properly may "become satisfied" of the insolvency of a state bank whenever it is unable to pay its depositors in ordinary course of business and is unable to continue as a going banking concern, even though it has sufficient property to pay all its debts and is not insolvent within the meaning of § 3466 or the Federal Bankruptcy Act. This view is in harmony with the meaning of insolvency as defined by the Supreme Court of Oklahoma: "Independent of statute, it may generally be said that insolvency, when applied to a person, firm, or corporation engaged in trade, means inability to pay debts as they become due in the usual course of business. The definition is one generally accepted by both the state and federal courts." *Oklahoma Moline Plow Co.* v. *Smith,* 41 Okla. 498, 503.

The allegations of the complaint do not show the debtor to be insolvent within the meaning of § 3466 or of the Bankruptcy Act.

It remains to be considered whether an act of bankruptcy was committed. In order to give the priority specified in § 3466, there must be a case of an insolvent debtor who makes a voluntary assignment of his property, or a case in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, or a case in which an act of bankruptcy is committed. In this case it is not alleged that the Oklahoma state bank voluntarily placed itself in the hands of the bank commissioner under § 302 or that it made a voluntary assignment of its property, but it is alleged that the bank commissioner adjudged it insolvent and took charge and possession of its assets. No action on the part of the bank was necessary, and none is alleged. And it is plain that the case is not within the absconding, concealed or absent debtor clause.

The complaint does not expressly allege that the bank committed any act of bankruptcy or state any facts as constituting an act of bankruptcy. But it is claimed that the position of the bank commissioner in taking charge of the bank's affairs under § 302 is analogous to that of a receiver or a trustee in bankruptcy, or that of an assignee for the benefit of creditors. The facts set forth in the complaint do not constitute an act of bankruptcy as defined by the Federal Bankruptcy Act (§ 3a). There is not alleged any conveyance to defraud, or preference through transfer or through legal proceedings, or general assignment for the benefit of creditors. Nor is the case within the meaning of the last clause of § 3a (4) "or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State . . ." The allegations do not show insolvency within the meaning of § 3466 or of the Bankruptcy Act. The insolvency contemplated by § 302 of the state law is not the same or equivalent condition. The bank commissioner does not take possession because of the existence of insolvency

within the meaning of these federal laws. He is not a receiver or trustee put in charge because of any such insolvency. He acts as an arm or instrumentality of the State in the exercise of its police powers to effect the purpose of the law for the protection of depositors. It would defeat the purpose of that law to require that the bank must be insolvent within the meaning defined in § 3466 or in the Bankruptcy Law before the benefit of the state law can be made available to depositors. A primary purpose of his possession is the prompt payment of depositors by the use of the state guaranty fund to the extent necessary, and the case is to be distinguished from that defined in the Bankruptcy Act, and the commissioner is not a receiver or trustee within its meaning. The legislation of Oklahoma, so far as banks are concerned, does not define acts of bankruptcy or deal with bankrupt or insolvent banks otherwise than by the state law herein referred to.

As insolvency within the meaning of § 3466 was not necessary for the taking of possession by the bank commissioner and is not shown to exist, and as no act of bankruptcy as defined by applicable federal legislation on the subject of bankruptcies or as defined by any law of Oklahoma is shown to have been committed, and as the debtor bank was not divested of its assets in one of the modes specified in § 3466, the case is not within that section.

The State's motion to dismiss the complaint is granted.

Bill dismissed.

WESTERN & ATLANTIC RAILROAD *v.* RAILROAD COMMISSION OF GEORGIA ET AL.

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

No. 195. Argued January 9, 1923.—Decided February 19, 1923.

1. An order of the District Court, sitting under Jud. Code, § 266, denying an application for a preliminary injunction upon the sole ground that the pecuniary amount requisite to confer jurisdiction was not involved, is reviewable by appeal here. P. 265.
2. In a suit by a railroad attacking as unconstitutional a state order requiring it to establish and operate an industrial spur track, the pecuniary amount involved includes, not only the cost of construction, but also interest thereon, depreciation, maintenance and operating expenses, capitalized at a reasonable rate. P. 267.

275 Fed. 128, reversed.

APPEAL from an order of the District Court refusing a preliminary injunction.

Mr. Fitzgerald Hall, with whom *Mr. Henry C. Peeples* and *Mr. Frank Slemons* were on the brief, for appellant.

No brief filed for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit commenced in the District Court by the Western & Atlantic Railroad, against the Railroad Commission of Georgia, its members, its special attorney, and the Attorney General of the State to restrain and enjoin the enforcement of an order of the Commission requiring the plaintiff to construct and put in service a spur or industrial track to the Farmers Warehouse Company's warehouse abutting the right of way of the railroad at Smyrna, Georgia. A law of Georgia (§ 2664 of the 1910 Georgia Code) authorizes the Commission to prescribe rules with reference to spur tracks and side tracks, and

with reference to their use and construction, and gives it power to compel service to be furnished warehouses and similar places of business along the line of railroads where practicable and in the judgment of the Commission the business is sufficient to justify, and on such terms and conditions as the Commission may prescribe. The plaintiff attacks the order as unreasonable and arbitrary because under the circumstances it would deprive the plaintiff of its property without due process of law in contravention of the Fourteenth Amendment, interfere with and burden the interstate commerce of the plaintiff and compel it unjustly to discriminate against other shippers in violation of the Act to Regulate Commerce. Before the expiration of the time allowed by the Commission for compliance with its order, this suit was commenced and plaintiff gave notice of motion for temporary injunction. The defendants answered and, among other things, denied that the value of the matter in controversy is sufficient to give the court jurisdiction and averred that it does not exceed $3,000. There was a hearing before three judges as required by § 266 of the Judicial Code, and the application for a temporary injunction was denied upon the sole ground that the requisite amount was not involved. This appeal calls for a review of that ruling. *North Pacific S. S. Co.* v. *Soley,* 257 U. S. 216, 221; *Gilbert* v. *David,* 235 U. S. 561, 568.

The complaint alleges that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and by way of detail it is stated, among other things, that the initial cost of the construction of the side track would be $1,266.24; that the interest on the money which plaintiff would have to expend for the construction of the track, depreciation charges, necessary maintenance and operating expenses would exceed $200 a year, and that compliance with the order would hamper and delay the plaintiff in the proper

operation of its trains and would impose upon it additional costs and expenses, but would not increase its earnings. The affidavit of the plaintiff's general manager supports the allegations of the complaint and states that the patrons of the plaintiff, including the Farmers Warehouse Company, have adequate trackage and depot facilities, not only to take care of present business but of any probable increase at Smyrna; that the railroad line from Atlanta to Chattanooga is largely single track; that the traffic is very heavy, and that the problem of keeping trains moving promptly is serious and difficult; that, because business does not justify it, the plaintiff does not have a switch engine at Smyrna, and, if the private siding were constructed in accordance with the order of the Railroad Commission, plaintiff would have to delay its freight trains so that the road engines could switch this additional track thereby delaying the prompt movement of the trains, and that the track could never be used by others and would be simply an accommodation for one patron, adding nothing to the earnings of the railroad but considerably increasing its expense. The affidavit of the plaintiff's superintendent also supports the complaint and is in substance to the same effect. Defendants' answer states that in all human probability the business of the warehouse will be permanent, and affidavits of directors of the warehouse company tend to support that statement. The denial of jurisdictional amount in defendants' answer is not supported by any affidavit in their behalf.

The decision in the District Court states:

"The propriety of requiring the construction of this particular track is alone in issue. The cost in material and labor is stated in the petition to be but $1,260, and this amount alone is involved. . . . The cost of future maintenance is not involved now, because that is an incident of the future use. The maintenance cost for some years will be slight, and if the business done over

the track does not justify its maintenance, the question of its abandonment will be open then."

We are unable to agree that the cost in material and labor is all that is involved in this case. Plaintiff seeks to be relieved not only from constructing the side track but also from maintaining it in suitable condition for use, and from the cost and expense of using and operating it for the movement of cars to and from the warehouse. The value of all these is involved. *Glenwood Light & Water Co.* v. *Mutual Light Co.*, 239 U. S. 121, 125; *Berryman* v. *Board of Trustees of Whitman College*, 222 U. S. 334; *Bitterman* v. *Louisville & Nashville R. R. Co.*, 207 U. S. 205, 225; *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 336. It is shown that the permanent annual burden on account of interest on such cost, depreciation, maintenance and operating expenses of such side track will exceed $200, and this capitalized at a reasonable rate exceeds $3,000. Laying aside other considerations bearing upon the matter, the amount is shown to be sufficient. This being so, the District Court should have taken jurisdiction and should have proceeded to determine the merits of plaintiff's application for a temporary injunction, which it did not do.

Order declining jurisdiction vacated with directions for further proceedings.

CITY OF PADUCAH ET AL. *v.* PADUCAH RAILWAY COMPANY.

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

No. 243. Argued January 18, 1923.—Decided February 19, 1923.

1. A city with power to fix the fares chargeable by street railway companies will not be adjudged to have surrendered any part of it unless plainly authorized and unmistakably intending to do so. P. 272.

2. A street railway company has a constitutional right to a reasonable return on the value of its property used in the public service, if it has not contracted the right away. P. 272.
3. A contract between a city and a street railway company considered and *construed* as fixing fares for the first year of operation under it, but as leaving unfettered the rights of the company and of the city, respectively, thereafter to charge and prescribe other fares that are just and reasonable. P. 273.
4. A decree enjoining a city from enforcing street railway fares found to be confiscatory, should be so framed as to protect the city's right to prescribe the same fares if, through change of conditions, they become just and reasonable. P. 275.

Modified and affirmed.

APPEAL from a decree of the District Court permanently enjoining the City from enforcing an ordinance prescribing fares for the Railway Company.

Mr. W. A. Berry, with whom *Mr. J. D. Mocquot* and *Mr. Roscoe Reed* were on the brief, for appellants.

Mr. Charles K. Wheeler, with whom *Mr. D. H. Hughes* and *Mr. James G. Wheeler* were on the brief, for appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The appellee, the Paducah Railway Company, is the owner of an electric street car system in Paducah, Kentucky, and is operating it under a franchise ordinance adopted April 29, 1919. Section XV thereof (printed in the margin)[1] relates to fares to be charged. The company

[1] SECTION XV.

The fare for one continuous trip for twelve (12) months from the commencement of operation under this franchise is hereby fixed as follows:

Cash fare for adults.....6¢
Children under twelve and over five.....Half fare.
Children under five when accompanied by guardian.....Nothing.

At the end of such period the purchaser, shall submit a verified statement of the receipts and expenditures to the Mayor and Com-

commenced operation under this ordinance October 1, 1919, charging the fare therein specified, six cents for adults, half fare for children under twelve and over five years of age. On September 17, 1920, the company notified the city that it would fail to earn enough to meet operating expenses, taxes, depreciation, and a reasonable rate of return upon its investment by $72,350.10, and furnished the city a statement showing (for eleven months, actual and September estimated) that operating expenses, including depreciation and taxes, exceeded the total revenue by $4,055.86, and that the additional amount required to provide an eight per cent. return on

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missioners of the City of Paducah and if it appear therefrom (after investigation and verification of such report) that the purchaser has received more than a sufficient sum to pay expenses and a reasonable rate of return on the capital invested, such purchaser shall re-pay to the City of Paducah the difference between the amount necessary for such expenses and a reasonable rate of return upon invested capital and the amount actually received.

At the expiration of each twelve months during the life of this franchise, for the purpose of regulating fares to be charged by the purchaser, and to accomplish that purpose, and to prevent excessive fares, the purchaser, shall at the expiration of each twelve months during the life of this franchise submit to the Commissioners of the City of Paducah a verified statement of the receipts and expenditures and if from any of such reports it appears the fare as fixed is more than sufficient to provide a reasonable rate of return upon the invested capital, the City shall reduce such fare accordingly.

For the purpose of ascertaining the rate of fare to be charged hereunder the City may cause said property to be appraised as follows:

The City shall appoint a disinterested street railway expert, and the purchaser shall appoint such expert appraiser for its part, and the two so appointed shall select a third expert appraiser. . . . Said experts shall report in writing to the Mayor and Commissioners of the City of Paducah within three months after their appointment the total valuation of the property owned, controlled or used by the purchaser, in connection with the operation of a street-car system in Paducah, and its vicinity but this franchise shall not be estimated or considered in its value. The cost of such appraisal to be borne equally by the City and the purchaser hereof.

the investment of $854,303 was $72,350.10; that the number of passengers carried was 2,979,654 and the average fare 5.32 cents; that to provide sufficient revenue on the basis of then existing price levels, it would require a cash fare of 13.5 cents, and stated that in the hope that during the ensuing year prices would decline, it was willing to operate for the twelve months beginning October 1, 1920, at a lower fare. It notified the city that, effective on that day, the rates of fare would be: cash fare, 10 cents; tokens, 7.5 cents; half fare, 5 cents. On September 20, 1920, the company, supplementing its earlier communication, requested the city, if dissatisfied with the value of the property as shown in the statement theretofore furnished, to have an appraisal of the property as provided in section XV of the franchise ordinance. On September 21, 1920, claiming that the company was limited to the fares specified in section XV as maximum, the city, without any investigation of the facts reported by the company or any appraisal of the property, passed an ordinance prescribing the same fare and imposing penalties for the violation of the ordinance.[1]

[1] Section 1. That commencing immediately after 12 o'clock midnight on September 30th, 1920, the fares that may be charged and collected for passage upon any street car within the City of Paducah, and upon any electric street car system operating under any franchise granted by the City of Paducah, shall be as follows:

Cash fare for adults..... 6 cents.
For children under 12 years of age and over 5 years of age. Half fare.
For children under 5 when accompanied by any person
who is over 5 years of age..... Nothing.

Section 2. Any person, firm or corporation operating any electric street railway or car within the City of Paducah, or under any franchise granted by the City of Paducah, who shall charge or attempt to collect any greater rate of fares for transportation upon any such electric street car than is provided in Section 1 hereof, shall be guilty of a violation of this ordinance, and each such person, firm or corporation so violating said ordinance shall be fined in any sum not less than Ten ($10.00) Dollars, nor more than Twenty ($20.00) Dollars for each violation thereof.

The company thereupon brought this suit to restrain and enjoin the enforcement of the ordinance on the ground that the rates specified are unremunerative and confiscatory, and that the enforcement of the ordinance would take the company's property without due process of law and deny it equal protection of the laws in violation of the Fourteenth Amendment.

After hearing the parties, the District Court, on September 30, 1920, granted a temporary injunction.

On October 12, 1920, the company furnished a statement of receipts and expenditures for the first twelve months' period in form similar to that submitted September 17, 1920, shortly before the expiration of the year, showing that operating expenses including depreciation and taxes exceeded the total revenue by $4,338.21, and that the additional amount of revenue required to provide an eight per cent. return on the investment as claimed was $72,862.45.

At the trial of the case on the merits, the company offered evidence sufficient to sustain the allegations of the complaint. The city offered no evidence and made no serious contention that the rates fixed in the ordinance complained of were sufficient, but insisted that the franchise ordinance was a contract binding the company to the fares specified in section XV as the maximum never to be exceeded during the twenty-year term.

The District Court held that the franchise fixed rates for the first year only, and final decree was entered enjoining the enforcement of the ordinance.

On this appeal, the city's only contention is that, under the franchise, the company has no right at any time to have fares in excess of those specified in that section, and because of the contract, it may not invoke constitutional protection against the enforcement of the specified rates, even if shown to be too low to yield a reasonable return.

Before considering the language, it is appropriate to take note of the situation existing at the time the passage of the franchise was being considered. The plaintiff's predecessor, the Paducah Traction Company, had operated the system for many years. Until July 1, 1918, there was a five-cent fare. The city and company agreed upon a fare of seven cents to commence on that date. On September 1, 1918, a receiver was appointed and that fare continued in force until October 1, 1919, the date of the commencement of the term of the present franchise. The District Judge in his opinion on granting the motion for a temporary injunction said: "The predecessor of the plaintiff had failed to accomplish either an adequate transportation system for the city or the making of anything resembling profits for itself." Operating expenses greatly increased between 1914 and the adoption of the franchise ordinance.

That the city had power under its charter to prescribe just and reasonable fares from time to time was stated by counsel on the argument and is assumed. The surrender of this power or any part of it is a very grave act; authority to make it must be plain, and the intention so to do must clearly and unmistakably appear. *Home Telephone & Telegraph Co.* v. *Los Angeles,* 211 U. S. 265, 273, and cases there cited.

The company was entitled to just compensation, i. e., a reasonable return on the value of its property used in the public service, and unless contracted away, that right is protected by constitutional safeguards which may not be overridden by legislative enactment or considerations of public policy. *Southern Iowa Electric Co.* v. *City of Chariton,* 255 U. S. 539, 542, and cases there cited; *San Antonio* v. *San Antonio Public Service Co.,* 255 U. S. 547.

On the argument, it was stated by counsel that the city and company have power to contract as to rates and we so assume. If the franchise here amounts to a contract

binding the company to the fare stated therein as a maximum, as claimed by the city, for the whole franchise term of twenty years, it cannot complain, and there is no ground for relief; and the question whether such rates are too low to give a reasonable return or sufficient is immaterial. *Southern Iowa Electric Co.* v. *City of Chariton, supra,* 543; *San Antonio* v. *San Antonio Public Service Co., supra.*

In the construction of section XV, regard properly may be had to the facts, the situation of the parties at the time of the adoption of the ordinance and to their respective powers and rights liable to be effected by the franchise.

The first clause is as follows:

"The fare for one continuous trip for twelve (12) months from the commencement of operation under this franchise is hereby fixed as follows:

Cash fare for adults..... 6¢
Children under twelve and over five..... Half fare
Children under five when accompanied by guardian..... Nothing."

By this provision a definite fare for a specified period is fixed. There is nothing indicating any intention that the fares are to continue beyond the twelve months or that they are to be taken as maximum and not to be exceeded after the expiration of that period.

The second clause is as follows:

"At the end of such period the purchaser, shall submit a verified statement of the receipts and expenditures to the Mayor and Commissioners of the City of Paducah and if it appear therefrom (after investigation and verification of such report) that the purchaser has received more than a sufficient sum to pay expenses and a reasonable rate of return on the capital invested, such purchaser shall re-pay to the City of Paducah the difference between the amount necessary for such expenses and a

reasonable rate of return upon invested capital and the amount actually received."

The purpose of this is plain. The parties here provided for payment to the city by the company of any excess that might result from possible decline of operating expenses or other causes. There is no support here for the city's contention that the fares specified in the section were fixed as the permanent maximum fares for the whole period.

The third clause, commencing the second paragraph of the section, is as follows:

"At the expiration of each twelve months during the life of this franchise, for the purpose of regulating fares to be charged by the purchaser, and to accomplish that purpose, and to prevent excessive fares, the purchaser, shall at the expiration of each twelve months during the life of this franchise submit to the Commissioners of the City of Paducah a verified statement of the receipts and expenditures and if from any of such reports it appears the fare as fixed is more than sufficient to provide a reasonable rate of return upon the invested capital, the City shall reduce such fare accordingly."

The reports required are for the purpose of regulating fares, and were intended to furnish the city facts in aid of the exercise of its power to prescribe just and reasonable fares and to prevent excessive fares; and by this provision there is evidenced a definite understanding that, if in any twelve months' period the revenue yielded by the fares established and in effect for that period, is more than sufficient, as defined in the ordinance, the city will reduce the fares accordingly. There is nothing here to indicate an intention that the fare prescribed in the first clause shall be deemed maximum for the term of the franchise.

The third paragraph commences with the following language: "For the purpose of ascertaining the rate of fare to be charged hereunder the City may cause said

property to be appraised as follows:" The remaining part of the section relates to the valuation. It gives the city authority to require an appraisal of property to be made in the manner specified and imposes upon the company one-half of the expense thereof. This is a further aid to the exercise of the city's power to prescribe just and reasonable fares.

The conclusions to be drawn as to the matter in controversy are obvious. The parties agreed to and were bound to the specified fares for the first twelve months. These fares were not agreed to be maximum for any other part of the franchise term. The right of the company thereafter to have fares sufficient to provide a reasonable rate of return upon its invested capital was not contracted away. The power and duty of the city thereafter to prescribe fares that are just and reasonable was not contracted away; it was definitely understood that, if from any of such reports it appears that " the fare as fixed " (meaning, as established and in effect) was excessive, the city will reduce such fare accordingly.

We have examined the record and are satisfied that the fares prescribed by the ordinance of September 21, 1920, were shown to be too low under the conditions existing at the time of the trial, and that the company is entitled to the injunction.

The decree entered is general in form and is not limited as to time. The terms of the ordinance prescribing the fare in question are general and fix no time limit. It is obvious that conditions may have so changed or hereafter may so change that these or even lower fares may be just and reasonable. The decree appealed from should be modified to safeguard the right of the city under its charter and the franchise properly to exercise its power to prescribe just and reasonable fares.

The decree is modified in accordance with this opinion, and as so modified is affirmed.

MUNTER *v.* WEIL CORSET COMPANY, INC.

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

No. 255. Argued January 22, 1923.—Decided February 26, 1923.

1. In an action on contract in the District Court valid service on the defendant cannot be made in another district and State. P. 277.
2. Motion by a defendant in the District Court that the cause be "erased from the docket", for want of proper service, *held* in effect a motion to dismiss for want of jurisdiction. P. 277.
3. The methods of raising questions of jurisdiction in the federal courts are not controlled by state procedure and the Conformity Act (Rev. Stats. § 914), but are determined by this Court. P. 278.
4. A defendant who seasonably objects to a void service of process does not submit to the jurisdiction by failing to conform to an erroneous view of the District Court on the manner of raising the objection, or by subsequent inactivity concurred in by the opposite party. P. 278.

Reversed.

ERROR to a judgment of the District Court, entered on default in an action for goods sold and delivered and for breach of contract.

Mr. Elijah N. Zoline for plaintiff in error.

Mr. Benjamin Slade for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Action in the District Court for the District of Connecticut, by the Weil Corset Company, a corporation of Connecticut, against Charles Munter, a citizen and resident of New York, for breach of contract, damages being laid at $7,273.26 with interest from November 13, 1914. Service upon Munter was made in New York City.

The case is between citizens of different States and involves more than three thousand dollars, exclusive of

interest and costs. It therefore is within the general jurisdiction of the District Courts. § 24 of the Judicial Code. The plaintiff being a resident of the district in which the suit was brought, the defendant could not object to the venue or place of suit. § 51, Judicial Code. *Camp* v. *Gress*, 250 U. S. 308; *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U. S. 653.

But service of process was made upon Munter in New York and he availed himself of the fact by filing on August 30, 1918, before the return day, by his attorney, the following motion: "The defendant moves that the above entitled case be erased from the docket, because it appears from the writ and complaint therein that the defendant was at the time of the commencement of said action a resident of the State of New York, and it appears from the return thereon that service of said writ and complaint was not otherwise made upon him than by leaving a copy of said writ and complaint with him in the Borough of Manhattan, City, County and State of New York."

The court denied the motion on the ground that it "contained no prayer for judgment," a prayer for judgment, it was held, being necessary under the statutes of Connecticut in pleas "to the jurisdiction, or in abatement, or both" and that the condition was made applicable to the District Court by the Conformity Act (§ 914, Revised Statutes, United States). That act provides that "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

It may well be contended that the objection to the motion was more verbal than real. There was substan-

tially a prayer for judgment, the only judgment that could be granted, that is, that the "case be erased from the docket" which, necessarily, meant dismissed for want of jurisdiction in the court over the defendant because the "service of said writ and complaint was not otherwise made upon him than by leaving a copy of said writ and complaint with him in the Borough of Manhattan, City, County and State of New York."

We have decided in cases which concern the jurisdiction of the federal courts that notwithstanding the Conformity Act, neither the statutes of the States nor the decisions of their courts are conclusive upon the federal court, the determination of such questions being "in this court alone." *Mechanical Appliance Co.* v. *Castleman,* 215 U. S. 437, 443. The motion of Munter, therefore, should have been granted, and the action dismissed.

It is, however, contended that he, by his subsequent conduct, submitted to the ruling and waived his right of objection. The motion was made August 30, 1918. The case was assigned for trial for November 28, 1921. After some correspondence with counsel for plaintiff and some conversation with the court, Munter, through other counsel, moved the court "for an order vacating and setting aside the decision of June 12, 1919, and directing that the above entitled action be erased from the docket of the Court."

The court denied the motion. The court took pains to review the prior proceedings and distinguished between the objections to the jurisdiction that cannot be waived, and those that can be waived, assigning the objection of Munter to the latter, and when they are waived, "the jurisdiction of the court is complete."

The court deduced a waiver from the conduct of counsel, notwithstanding the court conceded that counsel had strenuously insisted upon the objection. The conclusion was reached because in the view of the court the defective

service had not been properly taken advantage of, and that " by failing to follow up the ruling made on June 12, 1919," the defendant was " guilty of gross laches and by his laches " had " waived his right," and this was " equivalent to an actual waiver under the statute accorded him— to object to the jurisdiction."

We are unable to concur. The service on Munter was void. The District Court of Connecticut had no power to send its process to New York for service. *Toland* v. *Sprague,* 12 Pet. 300, 330; *Herndon* v. *Ridgway,* 17 How. 424; *Insurance Co.* v. *Bangs,* 103 U. S. 435. That Munter might have waived his right to object to the service is established by the cases cited by the court. They are all to the effect that pleading to the merits or a general appearance without objecting to the service is a waiver. There is no such pleading or appearance in the present case and no action or conduct tantamount to either. There was delay, it is true, but it was as much the delay of the Corset Company as of Munter, and to this situation the Company brought its action. It subjected its action to the indulgence of Munter and he, in the exercise of his right, immediately declared his opposition to the invalid service made in another district and State. He did all that was incumbent upon him to avail of his right. The court erred by denying it, and erred again in refusing to set aside the order denying it.

Reversed and remanded with directions to dismiss the action.

DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT UNDER SECTION 206 OF TRANSPORTATION ACT OF 1920, *v.* L. N. DANTZLER LUMBER COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 228. Argued January 17, 1923.—Decided February 26, 1923.

Under the Federal Control Act, § 10, a carrier, or the Director General of Railroads, could not, during federal control, be subjected to garnishment in a state court. P. 286.

126 Miss. 812, reversed.

CERTIORARI to a judgment rendered by the Supreme Court of Mississippi against the Director General of Railroads as garnishee.

Mr. R. C. Beckett, with whom *Mr. Carl Fox* was on the briefs, for petitioner.

Mr. W. A. White, for respondent, submitted. *Mr. W. H. White* and *Mr. E. J. Ford* were also on the briefs.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

This case presents an asserted conflict between the laws of Mississippi, subjecting property to attachment, and the statutes of the United States which empowered the President to take control of the railroad transportation systems of the United States, and exempt their property from State processes. Act of August 29, 1916, 39 Stat. 619, 645; 40 Stat. 451. See also 41 Stat. 456.

The respondent, the L. N. Dantzler Lumber Company, herein called the Lumber Company, is a corporation of Mississippi. It filed a bill for attachment under the Code of Mississippi of 1906 against the Texas & Pacific

Railway Company, a non-resident of Mississippi, and certain other railroads, including the Mobile & Ohio Railroad Company, a Mississippi corporation, having officers and agents in the State.

The purpose of the bill was to subject the indebtedness of the defendant railroads to the Texas & Pacific Railway Company to the satisfaction of a claim for damages to a shipment of cattle from Ft. Worth, Texas, to a station in Harrison County, Mississippi. The shipment was evidenced by a bill of lading dated October 10, 1917.

The charge is that, by reason of the negligence of the railroad companies, the Lumber Company was damaged in the sum of $5,600, and for the payment of this amount a claim was rendered by the Lumber Company to the Texas & Pacific Railway Company. Payment was refused.

It is further charged that the several railroad companies are indebted to the Texas & Pacific Railway Company; and that the Lumber Company has the right to subject such sums to the satisfaction of its claim against the Texas & Pacific Railway Company, that company being a non-resident of Mississippi, and having no officer in the State upon whom service of process can be had. Personal service is prayed against those companies upon which it can be had, and service by publication upon those companies upon which personal service cannot be had, and that they make answer stating what funds of the Texas & Pacific Railway Company they have in their hands, and in what amounts they will be indebted to that company in the future, and that the respective funds in their hands be subjected to the demand of the Lumber Company.

The Mobile & Ohio Railroad Company alleged that the suit is one in attachment and that the company was made a party simply as garnishee in order that any indebtedness from it to the Texas & Pacific Railway Company

might be condemned to pay the demand of the Lumber Company and that the service for that process is mesne process and within the prohibition of the act of Congress, violates that act and is void.

A statement of its indebtedness to the Texas & Pacific Railway Company was attached to the answer showing an indebtedness of $3,053.94.

The company further answering, alleged that on December 26, 1917, the President of the United States took possession of and assumed control of the transportation systems of the United States, including the Mobile & Ohio Railroad Company and the Texas & Pacific Railway Company and proclaimed in part, as follows: "Except with the prior written assent of said Director General [a Director General was appointed by the President] no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers."

And further that Congress ratified the action of the President and provided for the control of the railroads by an Act approved March 21, 1918, c. 25, 40 Stat. 451, § 10 of which provides as follows: "No process, mesne or final, shall be levied against any property under such Federal control." And that any money due from the company to the Texas & Pacific Railway Company is property under federal control within the meaning of the President's proclamation and the act of Congress under the orders of the Director General appointed by the President.

A decree *pro confesso* was entered against the Texas & Pacific Railway Company, the decree reciting that the company had been summoned according to law, and having failed to appear and plead, answer or demur, the allegations of the bill were taken as confessed against the company.

Subsequently the cause was set down for hearing on the decree, the answer of the other railroads, including that of the Mobile & Ohio Railroad Company, and upon the motion of the latter to discharge it as garnishee. The motion was sustained and the writ of garnishment dismissed as to it. Relief against the other roads, moreover, was denied, the court being of the opinion that it had no jurisdiction. The dismissal was reversed on appeal by the Supreme Court of the State. 119 Miss. 328.

The Supreme Court stated the question to be whether the suit could be maintained by reason of the attachment, no other property of the Texas & Pacific Railway Company being within the State than the indebtedness of the Mobile & Ohio Railroad Company to the Texas & Pacific Railway Company.

The court decided the question in the affirmative, expressing a contrary view of the President's proclamation and the acts of Congress than that asserted by the Mobile & Ohio Railroad Company, and even intimating that otherwise the proclamation and acts would be an encroachment upon the power of the State. The court, besides, defined the words " mesne " to mean " intermediate, intervening, the middle between two extremes." This being the definition of " mesne " process, it was the conclusion of the court, as we understand its opinion, that the present proceeding was commenced under the law of the State by original process and did not incur the prohibition of § 10.

The conclusion and judgment were that the " Court below erred in discharging the Mobile & Ohio Railroad Company as garnishee, and in holding that it had no jurisdiction to proceed to determine the controversy before it."

Upon return of the case a supplemental bill was filed and a new garnishment served on the Mobile & Ohio Railroad Company.

The company answered the bill repeating, in effect, its former answer and making other defenses not of importance to consider.

The Director General filed what he called an amended answer to the bill, averring that his former answer was filed in the name of the Mobile & Ohio Railroad Company, and was intended to be and was, in fact, the answer of the Director General, and the indebtedness admitted therein to be due the Texas & Pacific Railway Company was the indebtedness of the Director General, and not the indebtedness of the Mobile & Ohio Railroad Company. It set forth, as the answer of the Mobile & Ohio Railroad Company had done, that on December 26, 1917, the President by proclamation issued in pursuance of law, took possession of the railroad transportation systems of the United States, including the property of the Mobile & Ohio Railroad Company. The Director General of Railroads was created by the President, to whom the present Director General is the successor, and as such, was at the time of the summons against the Mobile & Ohio Railroad Company operating the same, and that the latter company has not been in possession or control of, nor has it operated or had anything to do with the operation of that railroad since December 28, 1917.

And the Director General further answered that after the answer of the Mobile & Ohio Railroad Company was filed, in order to avoid confusion, he issued General Order No. 50, afterward amended by Order No. 50–A, providing that suits or causes of action arising out of the operation of railroads by him should be brought against him and not against the railroad companies. And further that after the Mobile & Ohio Railroad Company (and other railroad companies) was taken over by him the account between it (and other railroad companies) was continued as before Government control, and that in "the sense that there was money due from the Director General on account of

his operation of the Mobile and Ohio Railroad to the Director General on account of his operation of the Texas and Pacific Railroad, there was an indebtedness as set out in the original answer filed herein; but that it was not a debt in the true sense of the word or within the meaning of the laws of Mississippi, subjecting debts to garnishments in cases of this kind." And he prayed to be dismissed with costs.

Of the second trial of the case it is only necessary to say that the court refused to let the Mobile & Ohio Railroad Company out of the case, or the Director General into it (the answer of the Director General was struck out on motion of the Lumber Company), and the Texas & Pacific Railway Company having failed to appear, a decree was rendered against it in favor of the Lumber Company in the sum of $6,552.00.

It was further decreed that there was an admitted indebtedness from the Mobile & Ohio Railroad Company to the Lumber Company in the sum of $3,053.94 which was ordered to be paid into the Chancery Court of Harrison County, Mississippi, within thirty days . . . to be disbursed in accordance with the decree.

An appeal was taken by the Mobile & Ohio Railroad Company to the Supreme Court and in that court, James C. Davis, Director General of Railroads, as Agent of the United States, operating the Mobile & Ohio Railroad Company, was substituted as defendant, the court saying: "The record now makes the Director General, an agent of the United States Government, the defendant in the garnishment."

The court reversed the decree of the Chancery Court against the Mobile & Ohio Railroad Company, deciding that it should have been discharged as garnishee, and ordered a decree against Davis as Director General for the sum of $3,053.94 with interest at 6% from June 29, 1920, until paid. To review that judgment is the purpose of this certiorari.

In its opinion upon the second appeal the court reaffirmed the view expressed upon the first appeal and sustained the validity and operation of the state statute against the acts of Congress and the proclamation of the President, rejecting the defense set up that the carrier was an instrumentality or agency of the Federal Government, citing *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554.

It was deduced from that decision that the Director General was to be treated as a Director General of each separate system of transportation and, that the separate systems being operated by the Director General, are separate parties within the meaning of the purposes of the Federal Control Act, and that, therefore, the judgment against the Mobile & Ohio Railroad Company was, in effect, in view of the substitution made, a judgment against the Director General of the Mobile & Ohio Railroad Company and that the Lumber Company was entitled to recover.

It was, however, decided that the Director General could not be required to pay the amount of the judgment into court but that the Lumber Company would have to secure it in a manner provided for by the Federal Control Act.

We think the decision of the Supreme Court is based on a misunderstanding of the *Ault Case.* The liability of the Texas & Pacific Railway Company occurred before the Mobile & Ohio Railroad Company passed under government control, and while the liability continued and the Texas & Pacific Railway Company was subject to suit after the assumption of such control, necessarily, the procedure had to be in accordance with the acts of Congress.

As to what this procedure should be, the contentions of the parties are in conflict. We have seen that the Supreme Court upon the first appeal, 119 Miss. 328, decided that a carrier, though operated under government

control, might be subject to garnishment and that judgment could be rendered against it for a debt it owed to the principal defendant, and further, that the indebted company—in this case the Mobile & Ohio Railroad Company—could not plead any defense which was personal to the principal defendant—in this case the Texas & Pacific Railway Company. From these conclusions the court considered it was not precluded by § 10 of the Federal Control Act, which provided that "no process, mesne or final, shall be levied against any property under such Federal control."

This makes the question in the case.

The Lumber Company contests the pertinency of the provisions and their control. It asserts that no decree *in rem* had been rendered in the case, and that "the final decree of the Supreme Court of Mississippi discharged the fund, and this court is dealing solely with a judgment *in personam* against the Director General, which there has been no effort to enforce." In other words, it is said, "The Supreme Court expressly released the fund and rendered a decree *in personam,* and not a word in the decree or the opinion relates to a refusal to pay the money into court, but the opinion expressly provides this is not to be done or any other sort of execution to issue."

And again, the contention is, that the Lumber Company "was proceeding as it unquestionably had a right to, but for Federal control, and the Director General came into the suit saying in effect, 'because of Federal Control I am the one to sue'," and procured dismissal of the other defendants.

And further: "He cannot assume the liability for the purpose of raising or attempting to raise a federal question, and then deny the liability on the merits." It would be unjust therefore, is the contention, "now for the Director General to be even heard to say that he is not responsible for the debt", and "the natural consequences to

follow his substitution, upon the grounds stated by him, was to render the decree against him as such substitute and he is complaining of the very ruling he himself invoked." And this, it is contended, contravenes the *Ault Case*.

The view is partial and overlooks antagonistic things—overlooks that the Mobile & Ohio Railroad Company was made a defendant through garnishment, attempting thereby to defeat the provision of the Federal Control Act which provides "no process, mesne or final, shall be levied against any property under such Federal control." And the prohibition was necessary to the unity and effectiveness of control in the President and, under him, in the Director General. Such is the ruling in the *Ault Case* where it is decided that the railroad systems could be "dealt with as active responsible parties answerable for their own wrongs," but it was also decided that "levy or execution upon their property was precluded as inconsistent with the Government's needs". "Thus, under § 10", is the declaration, "if the cause of action arose prior to government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the Government, save from the immunity of physical property from levy . . ."

To repeat, the right of suit against the carriers was decided, but there was also decided the exemption of their property from levy or execution. The garnishment proceedings against the Mobile & Ohio Railroad Company were an infraction of the exemption—an infringement of the prohibition of the proclamation of the President and congressional enactments. It is not excluded from the condemnation because it is a procedure under the statutes of the State.

The defense was seasonably made. It is to be remembered that the Mobile & Ohio Railroad Company, im-

mediately in the proceeding against it, attacked the jurisdiction of the court and adduced the proclamation of the President exempting the property of any of the railroad systems of the United States from process, and also adduced § 10. The attack was successful in the trial court. It was declared impotent by the Supreme Court of the State and the case was remanded for further proceedings in accordance with the law of the State, that is, in execution of the garnishment proceedings against the indebtedness of the Mobile & Ohio Railroad Company to the Texas & Pacific Railway Company. The Director General then entered the case and took up the contest commenced by the Mobile & Ohio Railroad Company against the law of the State and the jurisdiction of the state court to enforce it.

This the Director General did, and nothing more. In other words, the Director General contested the jurisdiction and power of the court to proceed against property under the control of the United States, and which the proclamation of the President and the statutes of the United States had exempted from state control.

Reversed and remanded for further proceedings not inconsistent with this opinion.

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OKLAHOMA NATURAL GAS COMPANY *v.* RUSSELL ET AL., CONSTITUTING THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ET AL.

OKLAHOMA GAS & ELECTRIC COMPANY ET AL. *v.* CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

Nos. 406 and 419. Argued February 20, 21, 1923.—Decided March 5, 1923.

1. In its application to cases involving orders of state administrative boards, Jud. Code § 266 was not confined, by the Amendment of March 4, 1913, to those in which the constitutionality of a statute is challenged, but applies also where the order is attacked as in itself unconstitutional. P. 292.
2. A public service company which is being actually subjected to a confiscatory limitation of its rates imposed by an order of a state board, and which has appealed to the State Supreme Court for a revision of the order, pursuant to the state law, and been denied a supersedeas, is not debarred by the fact that the appeal remains undecided from obtaining injunctive relief from the federal court. P. 292. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, distinguished.
3. Where the District Court has erroneously declined to entertain an application for a preliminary injunction, this Court as a general rule will remand the case for determination of the merits, and not decide for itself in the first instance. P. 293.

Reversed.

APPEALS from orders of the District Court denying applications for preliminary injunctions to restrain the enforcement of state orders fixing the rates of the appellant gas companies.

Mr. David A. Richardson, with whom *Mr. C. B. Ames, Mr. T. G. Chambers, Mr. Russell G. Lowe* and *Mr. B. A. Ames* were on the briefs, for appellant in No. 406.

Mr. Robert M. Rainey and *Mr. Streeter B. Flynn,* with whom *Mr. Dennis T. Flynn* and *Mr. John H. Roemer* were on the brief, for appellants in No. 419.

Mr. Henry G. Snyder and *Mr. E. S. Ratliff,* with whom *Mr. I. J. Underwood, Mr. F. E. Murrell* and *Mr. Cliff V. Perry* were on the briefs, for appellees.

Mr. Justice Holmes delivered the opinion of the Court.

These two cases were argued separately, but they turn on the same point, were decided in a single opinion by the Court below and do not require a separate consideration here. The plaintiffs are corporations organized under the laws of Oklahoma and furnish natural gas to consumers in that State, at rates established by the Corporation Commission. They applied to the Commission for higher rates but were denied an advance. The Constitution of Oklahoma, admitted to be like that of Virginia dealt with in *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, gives an appeal to the Supreme Court of the State, acting in a legislative capacity as explained in the case cited, with power to substitute a different order and to grant a supersedeas in the meantime. Appeals were taken to the Supreme Court and supersedeas was applied for but refused. The appeals are still not decided. After the plaintiffs had been denied a supersedeas by the Supreme Court, they filed these bills alleging that the present rates are confiscatory, setting up their constitutional rights and asking preliminary injunctions, and permanent injunctions unless the Supreme Court should allow adequate rates. Applications for temporary injunctions supported by evi-

dence were heard by three judges but were denied by the majority on the authority of the *Prentis Case*. Appeals were taken directly to this Court.

A doubt has been suggested whether these cases are within § 266 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1087, 1162; as amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a State, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words " enforcement or execution of such statute " the words " or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State " but did not change the statement of the ground, which still reads " the unconstitutionality of such statute." So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this Court has assumed repeatedly that the section was to be taken more broadly. *Louisville & Nashville R. R. Co.* v. *Finn,* 235 U. S. 601, 604. *Phoenix Ry. Co.* v. *Geary,* 239 U. S. 277, 280, 281. *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission,* 260 U. S. 212. *Western & Atlantic R. R.* v. *Railroad Commission of Georgia, ante,* 264. The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous as the original statute covered them. *Louisville & Nashville R. R. Co.* v. *Garrett,* 231 U. S. 298, 301, 318. *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548, 555. *Grand Trunk Western Ry. Co.* v. *Railroad Commission of Indiana,* 221 U. S. 400, 403. But it plainly was intended to enlarge not to restrict the law. We mention the matter simply to put doubts to rest.

Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they now are limited. They have done all that they can under the state law to get relief and cannot get it. If the Supreme Court of the State hereafter shall change the rate, even *nunc pro tunc,* the plaintiffs will have no adequate remedy for what they may have lost before the Court shall have acted. *Springfield Gas & Electric Co.* v. *Barker,* 231 Fed. 331, 335. In such a state of facts *Prentis* v. *Atlantic Coast Line Co.* has no application. See *Love* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 185 Fed. 321, 324, 325. Rules of comity or convenience must give way to constitutional rights. In the case cited there was no doubt as to the jurisdiction of the Circuit Court but simply a decision that the bills should be retained to await the result of appeals if the companies saw fit to take them. 211 U. S. 232. The companies had made no effort to secure a revision and there had been no present invasion upon their rights, but only the taking of preliminary steps toward cutting them down. In such circumstances it was thought to be more reasonable and proper to await further action on the part of the State.

As in our opinion the District Court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has not yet been considered, the cases should be remanded to that Court with directions to proceed to the trial. Generally it is not desirable that we should pass upon such matters until they have been dealt with below. *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, 267, 268. *Brown* v. *Fletcher,* 237 U. S. 583, 587, 588.

Decrees reversed and cases remanded for further proceedings consistent with this opinion.

UNITED STATES AND CITY OF NEW YORK *v.* BENEDICT, SOLE SURVIVING TRUSTEE OF LANGLEY.

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

No. 394. Argued January 23, 1923.—Decided March 5, 1923.

1. In an action to recover money from the United States, wherein, upon a suggestion made by the Circuit Court of Appeals to avoid a reversal, the plaintiff assigned part of the recovery to a city which claimed an interest in the premises but insisted that the complaint should have been dismissed. *Held,* that the city, by not objecting to the suggestion in the Court of Appeals and by waiting three months before suing out a writ of error here, must be deemed to have accepted the assignment and consented to the judgment and that its writ of error must be dismissed. P. 298.
2. In an action against the United States for a balance due on property taken under the Lever Act, interest is recoverable from the date of the taking. P. 298. *Seaboard Air Line Ry. Co.* v. *United States, post,* 299.

Writ of error of City of New York to review 280 Fed. 76, dismissed. As to the United States, judgment affirmed.

ERROR to a judgment of the Circuit Court of Appeals affirming, with modification, a judgment of the District Court for the plaintiff, in an action against the United States for a balance due as compensation for property taken under the Lever Act. The City of New York was joined as co-defendant to adjudicate its claim of interest in the property.

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. Charles J. Nehrbas, with whom *Mr. Edward J. Kenney, Jr.,* was on the brief, for the City of New York, plaintiff in error.

The City of New York succeeded in the Circuit Court of Appeals to the extent of recovering the value of the beds of the streets between First Avenue and the high water line, but was unsuccessful in that it failed to recover the value of the portions of the streets between the high water line and the pier line.

The City has accordingly sued out its writ of error to bring before this Court the question of its right to compensation for the portions of the beds of the streets in question between the high water line and the pier line approved by the Secretary of War on March 4, 1890.

The deed conveyed to the City the land within the lines of the streets to the pier head line.

The deed was within the power of the trustees who executed it, and was in all respects valid and effectual to convey the premises to the City.

The judgment should be modified by requiring defendant in error to assign to the City of New York an additional portion of the judgment recovered against the United States, representing the compensation, with interest, awarded for the portions of the streets between the high water line and the pier head line, to wit, the sum of $589,731.82.

Mr. Royal E. T. Riggs, with whom *Mr. William H. Seibert* was on the brief, for defendant in error.

The only question between plaintiff and the United States is the right to interest and the assignments of error do not present that question for review.

Just compensation must include interest upon the value of the property at the time of the taking from the date of the actual appropriation thereof to the date of payment therefor.

The Circuit Court of Appeals erred in requiring the plaintiff to execute and file an assignment of $162,240 of the judgment to the City of New York because: (a) The

City had stipulated on the trial that it was entitled to no relief in this action. (b) The plaintiff was entitled to the judgment even if the title to the streets was in the City. (c) Title to the disputed streets was in the plaintiff.

The City's assignments of error presented no claim in the court below to any part of judgment, and the action of that court in ordering the assignment was a plain error which may be remedied in this Court.

The deed from the trustees if valid conveyed the property with 61st, 62nd and 63rd Streets from Second Avenue only to " the New York Bay " and terminated at high water mark. The City cannot claim that the deed carried to the pier head line of 1890, as that point is not before the Court under the pleadings. Under the law of New York the conveyance to " the New York Bay " terminated at high water mark and such construction is corroborated by the map attached to the deed.

Mr. Justice McReynolds delivered the opinion of the Court.

Relying upon the Lever Act—40 Stat. 276, 279—the United States took possession of certain land along New York Bay, April 6, 1918, and, as surviving trustee under the will of Langley, defendant in error Benedict instituted this proceeding to recover its value. The tract had been platted into blocks and trustees holding the title had undertaken to convey to New York City the beds of 61st, 62nd and 63rd streets from designated avenues " to the New York Bay," as laid down on the Commissioners' map. The City was made defendant to the amended complaint because of possible interest arising out of this conveyance. No right of recovery against it was suggested. It answered rather vaguely, but claimed title to " the lands included within the limits of 61st Street, 62nd Street and 63rd Street from the westerly side of First Avenue to the New York Bay," and stated that " the

area of said streets is 81,120 square feet." It asked that the complaint be dismissed. Later it moved, without success, to amend the answer and set up ownership to the beds of 61st, 62nd and 63rd streets to the pierhead line.

The cause was tried by the court without a jury. The United States stipulated that defendant in error had good title to all the tract, upland and submerged, except such as lay within 61st, 62nd and 63rd streets to high water mark. Among the findings of fact which the City proposed is this—

"That on April 25, 1899, the said trustees duly executed and delivered to John Whalen, the then corporation counsel of the city of New York, a deed granting and conveying to the city of New York the fee, impressed with a trust for street purposes, of the lands included within the limits of 61st Street, 62nd Street and 63rd Street from the westerly side of First Avenue to the New York Bay."

Judgment went against the United States for a sum equal to two dollars per square foot of the whole area, with interest, less cash originally paid. The trial court held the trustees' deed to the streets invalid, but if valid that the recovery nevertheless should be for the same amount as streets were essential to enjoyment of the property. 271 Fed. 714.

Writs of error from the Circuit Court of Appeals were sued out by both defendants. The City assigned as error—among others—the trial court's refusal to dismiss the complaint. By opinion dated January 18, 1922—280 Fed. 76—the court ruled that the City had good title to the streets, that the judgment of the District Court was erroneous and a new trial would be awarded unless out of the recovery defendant in error should assign to it $162,240—two dollars per square foot for the platted streets up to New York Bay, 81,120 square feet as stated

by the answer. January 28th the trustees so assigned $162,240, with interest from April 6, 1918, and on January 31st the contested judgment was formally affirmed.

In the Circuit Court of Appeals the City entered no objection to the arrangement suggested by the opinion. Its counsel here claim that "the judgment should be modified by requiring defendant in error to assign to the City of New York an additional portion of the judgment recovered against the United States, representing the compensation, with interest, awarded for the portions of the streets between the high water line and the pierhead line, to wit, the sum of $589,731.82."

The situation is a peculiar one. The City asked, not for recovery, but to be dismissed. Of its own motion and off the record, the court proposed a method of settlement which the trustee adopted in preference to reversal. These unusual circumstances required the City to act promptly if it did not approve. After nearly three months it took a writ of error and now seeks to reverse the judgment because a greater sum was not awarded. We think it may not deny voluntary acceptance of the assignment and full assent to the arrangement which defendant in error carried out with the obvious purpose of ending the controversy between them. It cannot hold what it accepted and demand more. The final judgment must be treated as though entered upon its express consent; and its writ of error is accordingly dismissed.

The United States object to the judgment because interest was allowed from date of the taking. This point has been discussed and determined in *Seaboard Air Line Ry. Co.* v. *United States,* decided today, *post,* 299, and needs no further elaboration. As to the United States, the judgment below is

Affirmed.

Counsel for Parties.

SEABOARD AIR LINE RAILWAY COMPANY ET AL. *v.* UNITED STATES.

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

No. 407. Argued January 23, 1923.—Decided March 5, 1923.

1. In an action against the United States under § 10 of the Lever Act, to recover just compensation for property requisitioned for public use, the owner is entitled to judgment for the value of the property as of the time of the taking and for so much in addition as will produce a full equivalent of that value, paid contemporaneously with the taking. P. 304.
2. This additional amount may be measured by allowing interest at a proper rate; and the legal rate in the State where the property lies may be applied for this purpose if fair and reasonable. P. 305.
3. The just compensation to which the owner is entitled depends on the Constitution and cannot be restricted by statute, and its ascertainment is a judicial function. P. 304.
4. The rule disallowing interest against the United States in the absence of a stipulation or statute, is inapplicable to an action, not based on contract or any mere claim or accounting against the Government, but which is part of a proceeding initiated by the United States for the condemnation of property and seeks ascertainment and payment of just compensation for it. P. 306.

280 Fed. 349, reversed.

ERROR to a judgment of the Circuit Court of Appeals reversing a judgment of the District Court for the railway company in an action under the Lever Act.

Mr. Forney Johnston, with whom *Mr. Henry Buist, Mr. George L. Buist, Mr. J. Harry Covington* and *Mr. James F. Wright* were on the brief, for plaintiffs in error.

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

Interest upon the amount found to be the value of property taken for a public use, pursuant to the Lever Act, can not be awarded against the United States.

Under the Constitution, when private property is taken for public use, no particular method for ascertaining the just compensation to which the owner is entitled is necessary. All that is required is that it be conducted in some fair and just manner with opportunity for the owner to present evidence and be heard. *Bauman* v. *Ross,* 167 U. S. 548; *United States* v. *Jones,* 109 U. S. 513.

Under the Lever Act, two methods were provided, and the property owner had his choice. First, the President was directed to ascertain and pay it. Second, if the owner was unwilling to accept the President's award, he could take 75 per cent of it and sue for the balance deemed by him to be proper in order to make the award adequate. But this suit must be in the courts which the United States had empowered to decide claims against it, and we think it is obvious that such a suit must be regarded as an action upon the contract which the United States had made in the act itself to pay just compensation.

When, therefore, the property owner declined to accept the President's award, and elected to sue, he must have realized that his suit would be subject to the delays incident to all litigation, and to the well-established principles governing such suits and the well-defined limitations which the United States had fixed with respect to its liability. One of these limitations which had become thoroughly well settled was that interest is never recoverable on claims against the Government, in the absence of a statutory enactment, or of an express contract for the payment thereof.

The jurisdiction granted to the District Courts under this section is to be exercised in accordance with the law governing the usual proceeding of the District Court in actions at law for money compensation. *United States* v. *Pfitsch,* 256 U. S. 547. The act itself makes no provision

for the payment of interest or for any special form of procedure or measure of damages, nor does it repeal or modify the provisions of §§ 1090 and 1091, Rev. Stats., relative to the allowance of interest on claims against the United States.

Interest, therefore, can not be allowed. *Tillson* v. *United States,* 100 U. S. 43; *Harvey* v. *United States,* 113 U. S. 243; *United States* v. *Bayard,* 127 U. S. 251; *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *North American Transportation & Trading Co.,* 253 U. S. 330. *United States* v. *Rogers,* 255 U. S. 163, and *United States* v. *Highsmith,* 255 U. S. 170, were both condemnation proceedings to acquire real estate for government uses and were regulated by the Act of August 1, 1888, 25 Stat. 357. Section 2 of this act provides that the practice, pleadings, forms and modes of proceedings in causes arising under the provisions of the act shall conform to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record in the State within which such circuit or district courts are held. In fixing the compensation the District Court and the Circuit Court of Appeals in affirming the judgment followed the New Mexico statute fixing the rate of interest at 6 per cent. In doing this the Circuit Court of Appeals followed the provisions of the condemnation statute and also the decision in *United States* v. *Sargent,* 162 Fed. 81, wherein the laws of Minnesota were followed where land was appropriated in that State.

The *Sargent Case* also recognized as settled the immunity of the Government for the payment of interest on claims, but held that a proceeding instituted by the United States for the condemnation of land for public use is not one to collect an account or claim but an adversary proceeding instituted by the Government against landowners for the taking. In this connection attention is invited to a large number of so-called overflow cases instituted in the Court of Claims and the United States District Courts

under the provisions of the Tucker Act to recover just compensation for land taken by the United States as a result of overflow consequent upon the construction of locks and dams, starting with *United States* v. *Lynah,* 188 U. S. 445, and ending with *United States* v. *Cress,* 243 U. S. 316. It is to be noted that the only interest paid plaintiffs in the hundreds of suits decided during that period was the statutory interest at 4 per cent per annum allowed on judgments of the circuit and district courts (but not those of the Court of Claims) from the date of the rendition of same to the date of payment, as provided by § 10 of the Tucker Act, 24 Stat. 505.

Mr. Justice Butler delivered the opinion of the Court.

The plaintiff in error, the Seaboard Air Line Railway Company, was the owner of 2.6 acres of land at Charleston, South Carolina, adjoining the Charleston Port Terminal, subject to a mortgage to the Guaranty Trust Company and William C. Cox.[1] On May 23, 1919, the United States, under authority of § 10 of the Lever Act,[2] requisitioned and took possession of such land to provide storage facilities for supplies necessary to the support of the Army and other uses connected with the public defense.

The President, through the War Department Board of Appraisers, determined the compensation to be the sum

[1] For convenience, the railway company and mortgagees will be referred to herein as " the owner."

[2] Act of Congress approved August 10, 1917, c. 53, 40 Stat. 276:

" Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue

of $235.80, with interest thereon at the rate of six per cent. per annum from the date of the taking to the date of voucher for final payment. The amount was not satisfactory to the owner, and the United States was so notified. Demand was made for seventy-five per cent. of the award, but no part of the amount was paid. The owner sued to recover such further sum as, when added to such seventy-five per cent., would amount to just compensation for the property so taken.

The jury returned a verdict as follows:

"We, find that the fair and reasonable value which would constitute a just compensation to be paid for the taking for public purposes on 23 May, 1919, of the lands mentioned and described in the Petition, under the issue herein to be Six Thousand Dollars."

Judgment was entered for $6,000 with interest from May 23, 1919, at the rate of seven per cent. per annum (the statutory rate in South Carolina).

The United States objected to the interest allowed and took the case to the Circuit Court of Appeals, and that court reversed the judgment of the District Court and awarded a new trial, unless the owner file a remittitur abating all interest. The owner refused and brought the case here on writ of error.

Did the District Court err in allowing interest on the amount of the verdict?

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the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: *Provided,* That nothing in this section, or in the section that follows, shall be construed to require any natural person to furnish to the Government any necessaries held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them."

The rule is that, in the absence of a stipulation to pay interest or a statute allowing it, none can be recovered against the United States upon unpaid accounts or claims. *United States* v. *Rogers,* 255 U. S. 163, 169; *United States* v. *North American Transportation & Trading Co.,* 253 U. S. 330; *United States* v. *North Carolina,* 136 U. S. 211, 216; *Angarica* v. *Bayard,* 127 U. S. 251, 260; *Harvey* v. *United States,* 113 U. S. 243.

Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327.

The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. *United States* v. *Rogers* (C. C. A., Eighth Circuit), 257 Fed. 397, 400. He is entitled to the damages inflicted by the taking. *Northern Pacific Ry. Co.* v. *North American Telegraph Co.* (C. C. A., Eighth Circuit), 230 Fed. 347, 352, and cases there cited.

The United States in effect claims that the owner is entitled to no more than the value of the land, as of date of taking, to be paid at a later time, when ascertained. The owner has been deprived of the land and its use since the taking, May 23, 1919. The value of the property, as ascertained by the President, was $235.80, and this was allowed with interest from date of taking. But as judicially determined later, the value when taken was $6,000.

The owner's right does not depend on contract, express or implied. A promise to pay is not necessary. None is

alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 337; *Searl* v. *School District, Lake County,* 133 U. S. 553, 562; *United States* v. *Jones,* 109 U. S. 513, 518, *et seq.; United States* v. *Sargent,* 162 Fed. 81, 83. It is not suggested in this case that the provisions of § 10 of the Lever Act do not meet the constitutional requirement. The only question here is whether payment at a subsequent date of the value of the land as of the date of taking possession is sufficient to constitute just compensation.

In support of its contention the Government cites *United States* v. *North American Transportation & Trading Co.,* 253 U. S. 330. That case does not sustain its contention. That was a suit in the Court of Claims based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it adopted by the conformity provisions.

The case of *United States* v. *Rogers,* 255 U. S. 163, is a condemnation case, and it was held that the owner was entitled as a part of the just compensation to interest on the confirmed award of the commissioners from the time when the United States took possession. The land was situated in New Mexico, and the proceedings were had under the Conformity Act of August 1, 1888, c. 728, 25 Stat. 357. Interest was allowed, not by virtue of state statute, but as constituting a part of the just compensation safeguarded by the Constitution. Speaking for the

Court, Mr. Justice Day said: "Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property." (Citing *Monongahela Navigation Co.* v. *United States, supra,* 341).

It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and § 10 of the Lever Act directs payment. The rule above referred to, that in the absence of agreement to pay or statute allowing it the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that "just compensation" shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a "palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making 'just compensation' for the land as it stands, at the time of taking." *United States* v. *Sargent* (C. C. A., Eighth Circuit), 162 Fed. 81, 84.

The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have "just compensation" to which he is entitled.

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

POTHIER *v.* RODMAN, UNITED STATES MARSHAL, ET AL.

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND, DISMISSING A PETITION FOR WRIT OF HABEAS CORPUS.

No. —. Motion for leave to docket case and proceed in forma pauperis. Submitted February 23, 1923.—Decided March 12, 1923.

1. Upon application for leave to proceed *in forma pauperis*, an affidavit of the poverty of the applicant must be made by the applicant himself. P. 309.
2. The application must be denied unless jurisdiction over the appeal or writ of error to which it relates appears from the motion papers or record. P. 309.
3. The jurisdiction of this Court to review directly an order of the District Court dismissing a petition for *habeas corpus* depends on Jud. Code, § 238; a question of the jurisdiction of the District Court or a constitutional question must be involved. P. 310.
4. The issue of jurisdiction which Jud. Code, § 238, makes cognizable by this Court on direct appeal from the District Court, must be an issue concerning the jurisdiction of the court from which the appeal is taken. P. 311.
5. When it is alleged against an indictment for murder committed in territory within the exclusive jurisdiction of the United States, that such jurisdiction did not exist, the objection goes, not to the jurisdiction of the District Court in which the indictment was returned, but to the merits of the case. P. 311.
6. Under the Act of September 14, 1922, c. 305, 42 Stat. 837, an appeal to this Court, which should have been taken to the Circuit Court of Appeals, must be transferred to that court, in the proper circuit. P. 312.

Motion denied; cause transferred.

MOTION for leave to proceed *in forma pauperis* on an appeal from an order of the District Court dismissing a petition for *habeas corpus*. See 285 Fed. 632.

Mr. Davis G. Arnold for appellant.

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

This is a motion for leave to proceed on this appeal *in forma pauperis*. The character of the appeal is set forth in the motion papers, and upon the facts therein stated we reach our conclusion.

The Act of July 20, 1892, c. 209, § 1, 27 Stat. 252, as amended June 27, 1922, c. 246, 42 Stat. 666, provides:

"That any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal."

Counsel for appellant files the motion setting out in brief the facts of the cause and accompanies it with an affidavit of his own, alleging that he has examined the case, that he believes the appellant has a just cause for appeal, that the appellant is without funds, and because of his poverty he is unable to pay the costs of the appeal, that his friends and relatives have already expended large

sums in his defense, and that during his continued confinement in jail the American Red Cross has been providing for his sickly wife and child. The affidavit further alleges that the appellant was allowed to prosecute the proceedings before the District Court *in forma pauperis.*

Under the statute the affidavit as to the poverty of the applicant is to be made by himself and not by another, even his counsel. A supporting affidavit may properly be made by the counsel, but the importance that he who is seeking the privilege accorded by the statute should be required to expose himself to the pains of perjury in a case of bad faith is plain.

Assuming, however, that this defect can be satisfactorily supplied, the motion must be denied, because it does not appear from the motion papers or the record that this Court has jurisdiction of the appeal. There can be no doubt from a reading of the statute that an application of this character can not be granted if it appear on its face that the appeal or writ of error in which the costs are to be incurred at public expense does not lie and can not be considered by the Court. The case made in the motion is as follows:

On October 19, 1922, the appellant was arrested and brought before Henry C. Hart, United States Commissioner for the District of Rhode Island, under a warrant to apprehend him and to remove him pursuant to § 1014 of the Revised Statutes, from Rhode Island to the Southern Division of the Western District of Washington for trial under an indictment for murder of Alexander P. Cronkhite, committed in territory in that District within the exclusive jurisdiction of the United States, to wit, the Camp Lewis Military Reservation. Appellant pleaded not guilty and was committed to the custody of the marshal without bail.

The petition for the writ of *habeas corpus* reciting these facts was filed in the District Court and was accompanied

by a prayer for a writ of certiorari directing the United States Commissioner to send up the proceedings.

The petition averred that the place in which the indictment alleged the crime to have been committed was within the exclusive jurisdiction of the State of Washington, and that the indictment did not, therefore, charge a crime against the United States, and that the court in which the indictment was found was without jurisdiction to hear it.

The District Court of Rhode Island found that this averment did not state a case warranting the discharge of the accused from custody or a halting of his removal under the warrant to the place of trial and so made the order appealed from.

Appeal from the order lay to the Circuit Court of Appeals of the First Circuit, not to this Court. Final decisions of a District Court are to be reviewed by the proper Circuit Courts of Appeals in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in § 238 of the Judicial Code, unless otherwise provided by law. (§ 128 Judicial Code as amended, Act January 28, 1915, c. 22, § 2, 38 Stat. 803.) There is no other provision of law for appeals from an order granting or denying writs of *habeas corpus* except when they come within § 238. *Horn* v. *Mitchell,* 243 U. S. 247, 248–9; *Chin Fong* v. *Backus,* 241 U. S. 1, 3; *Wise* v. *Henkel,* 220 U. S. 556, 557; *In re Lennon,* 150 U. S. 393, 399; *Cross* v. *Burke,* 146 U. S. 82, 88; *Lau Ow Bew* v. *United States,* 144 U. S. 47, 58.

Section 238, Judicial Code, as amended January 28, 1915, c. 22, 38 Stat. 803, allows appeals direct from the District Courts to this Court,

1st, 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;

2nd, from the final sentences and decrees in prize causes;

3rd, in any case that involves the construction or application of the Constitution of the United States;

4th, 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;

5th, 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.

The case presented on this motion comes within none of these classes. Even if a direct appeal from a conviction under the indictment in the District Court of Western Washington would lie to this Court under § 238 on the question whether Camp Lewis was within the exclusive jurisdiction of the United States, still the issue of jurisdiction which § 238 makes cognizable by this Court on direct appeal is the jurisdiction of the District Court from which the appeal is taken, not that of the court to whose jurisdiction it is proposed to remove the petitioner. *Carey* v. *Houston & Texas Central Ry. Co.,* 150 U. S. 170, 180; *Ex parte Jim Hong,* 211 Fed. 73, 78. There was no doubt of the jurisdiction of the District Court of Rhode Island to issue a writ of *habeas corpus* to look into the legality of the detention of the petitioner. Certainly he made no question of it because he asked for its exercise.

But it is clear that the objection raised by the petitioner does not raise a question of jurisdiction directly appealable to this Court from the District Court. Such an objection goes to the merits and the appeal must be to the Circuit Court of Appeals. *Louie* v. *United States,* 254 U. S. 548, 550, 551.

Nor is there any question of the construction or application of the Constitution of the United States or of the validity of a statute or treaty of the United States or of a statute of a State under the Federal Constitution. The assignments of error recite that constitutional questions

did arise but neither the motion nor the record discloses one. The issue is simply whether the specified place of the alleged murder is within the exclusive jurisdiction of the United States and that does not appear to involve in any way the construction of the Federal Constitution.

This motion must, therefore, be denied, but the ground upon which we deny it requires us to go further. The Act of September 14, 1922, c. 305, 42 Stat. 837, requires us, when an appeal has been taken to this Court that should have been taken to the Circuit Court of Appeals, not to dismiss the appeal but to transfer it to the proper Circuit Court of Appeals, which in this case is that of the First Circuit. *Heitler* v. *United States,* 260 U. S. 438.

If the motion disclosed that the present appeal had been framed under § 238 to present solely the question of the jurisdiction of the District Court of Rhode Island certified here by that court, it would require us to consider whether on such a limited appeal it would be our duty and within our power to order a transfer of the appeal to the Circuit Court of Appeals under the Act of September 14, 1922. The record shows, however, that the appeal is not so limited. The order of transfer to the Circuit Court of Appeals for the First Circuit will be made.

CITY OF NEW YORK *v.* NEW YORK TELEPHONE COMPANY.

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

No. 588. Argued February 21, 23, 1923.—Decided March 12, 1923.

1. In a suit to enjoin enforcement of orders of a state commission respecting telephone rates, upon the ground that the rates are confiscatory, a city with no control over such rates but interested only indirectly as a subscriber is not a necessary party. P. 315. *In re Engelhard & Sons Co.,* 231 U. S. 646.

2. In such case, where the interests of the city were fully represented through the commission and other officials made parties, application of the city to become a party also was addressed to the District Court's discretion, and its order denying the application is not final and appealable. P. 316.

Appeal dismissed.

APPEAL from an order of the District Court denying appellant's application to be made a party defendant in an injunction suit.

Mr. M. Maldwin Fertig, with whom *Mr. George P. Nicholson* and *Mr. Harry Hertzoff* were on the brief, for appellant.

The order appealed from is a final order. *Gay* v. *Hudson River Co.,* 184 Fed. 689; *Matter of Farmers' Loan & Trust Co.,* 129 U. S. 206; *Brush Electric Co.* v. *Electric Imp. Co.,* 51 Fed. 557; *La Bourgogne,* 210 U. S. 95; *Heike* v. *United States,* 217 U. S. 423.

The order appealed from impaired a substantial right of the City and, therefore, it is a final order. *Central Trust Co.* v. *United States Light & Heating Co.,* 233 Fed. 420; *Odell* v. *Batterman,* 223 Fed. 292; *Gas & Electric Securities Co.* v. *Manhattan & Queens Traction Co.,* 266 Fed. 625.

Abuse of discretionary power is reviewable by this Court.

Mr. John W. Davis, with whom *Mr. Charles T. Russell* was on the brief, for appellee.

Not only is the order appealed from not of that final character which furnishes the basis for an appeal, but the application to intervene was addressed to the discretion of the District Court; consequently, this appeal should be dismissed. *In re Engelhard & Sons Co.,* 231 U. S. 646; *Ex Parte Leaf Tobacco Board of Trade,* 222 U. S. 578; *Credits Commutation Co.* v. *United States,* 177 U. S. 311; *Guion* v. *Liverpool Ins. Co.,* 109 U. S. 173; *Ex parte Cut-*

ting, 94 U. S. 14; *Farmers Bank* v. *Arizona Association,* 220 Fed. 1; *Swift* v. *Black Panther Oil Co.,* 244 Fed. 20; *Western Union Tel. Co.* v. *United States, etc., Co.,* 221 Fed. 545; *United States* v. *Philips,* 107 Fed. 824.

The fact that the City of New York is a municipality and has attempted to assume the self-appointed duty of protecting the interests of its citizens in this rate litigation, does not confer upon the appellant an absolute right to intervene; the application rests entirely within the discretion of the trial court.

Even if the order appealed from should be considered a final order, the decision of the District Court denying the appellant's motion to intervene should be affirmed.

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

The New York Telephone Company, the appellee herein, filed its bill in the District Court against the members of the New York Public Service Commission, the counsel of the Commission and the Attorney General of the State, asking an injunction against the enforcement of two orders of the Public Service Commission as to telephone rates, one as to rates in the City of New York and the other as to those in the State of New York, outside of the city, which it alleged to be confiscatory of its property and in violation of the Fourteenth Amendment. Thereafter the City of New York moved the court for an order making it a party defendant in the cause. This order the District Court denied. Thereafter an interlocutory injunction against the orders was granted and an appeal, No. 542, is pending here and has been argued but not decided. This is a separate appeal from the order refusing the application of the City to be made a party defendant.

Under Article 1, § 12, of the Public Service Commissions Law of the State of New York, it is made the duty of

counsel to the Commission "to represent and appear for the people of the state of New York and the commission in all actions and proceedings involving any question under this chapter, or within the jurisdiction of the commission under the railroad law, or under or in reference to any act or order of the commission, and, if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved."

Chapter 15 of the Laws of 1922 of the State directs that:

"The attorney general shall appear for the people of the state, and take such steps as may be necessary to protect the interests of the public, in the proceeding heretofore instituted by the public service commission and entitled 'In the matter of the hearing on motion of the commission, as to rates, charges and rentals, and the regulations and practices affecting rates, charges and rentals of the New York Telephone Company.' For such purpose, he may employ special deputies, experts and other assistants, and incur such other expenses as he may find necessary, within the amount appropriated by this act."

The necessary defendant in the suit to enjoin the orders lowering rates was the Public Service Commission whose orders they were. In addition the counsel of the Commission and the Attorney General were made parties defendant under the legislation above recited. The City of New York has no control over the rates. Its only interest in them is as a subscriber, and even as such its interest in the general rates is not direct because its own rates are settled by a special contract. Under such circumstances, the City is certainly not a necessary party.

In re Engelhard & Sons Co., 231 U. S. 646, an action had been brought against the City of Louisville to restrain the enforcement of an ordinance prescribing tele-

phone rates. One of the subscribers filed a petition in the District Court asking to be made a party defendant. This was denied and the petitioner sought in this Court a mandamus to compel the District Judge to grant the petition. It was pressed upon the Court that petitioner had a common interest with other subscribers in the rates under discussion and that under Equity Rule No. 38 when the question is one of common or general interest and it is impracticable to bring them all before the court, one may sue or defend for all. This Court held that the City was the proper defendant in the suit as the representative of all interested. We said:

"It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them."

There is nothing in this case to show that the Public Commission will not fully and properly represent the subscribers resident in New York City. Indeed it was said at the bar that the City and the Public Commission and the Attorney General were coöperating in every way in the defense of the suit. It was completely within the discretion of the District Court to refuse to allow the City to become a defendant when its interests and those of its residents were fully represented under the law and protected by those who had been made defendants. There is nothing to show that the refusal complained of was an abuse of discretion. This same controversy arose in the case of the *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219, and the same conclusion was reached. Indeed it was there said that an order like the one here objected to was not of such a final character as to furnish the basis of an appeal, citing *Ex parte Cutting*, 94 U. S. 14, 22; *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 315; *Ex parte Leaf Tobacco Board of Trade*,

222 U. S. 578, 581. These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, but the present is not one of them.

Our conclusion is that this appeal should be

Dismissed.

UNITED STATES *v.* ALLEN.

APPEAL FROM THE COURT OF CLAIMS.

No. 232. Argued March 1, 1923.—Decided March 12, 1923.

Under the Act of May 22, 1917, c. 20, 40 Stat. 84, providing that, during the War, warrant and petty officers and enlisted men of the Coast Guard should receive the same rates of pay as those prescribed for corresponding grades or ratings and length of service in the Navy, a yeoman of the Coast Guard, whose duties and qualifications in fact corresponded to those of a chief yeoman in the Navy, was entitled to the greater pay of the latter position, notwithstanding an order of the Secretary of the Navy making a different classification. P. 319.

56 Ct. Clms. 265, affirmed.

APPEAL from a judgment of the Court of Claims awarding a sum as additional pay to a yeoman of the Coast Guard.

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.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Action for $600.00 based on the claim of Allen, who was a yeoman in the Coast Guard, for pay at the rate fixed by law for a chief yeoman in the Navy from April 6, 1917,

to May 28, 1919, under the following provisions of the Act of May 22, 1917, c. 20, 40 Stat. 84: "An Act To temporarily increase the commissioned and warrant and enlisted strength of the Navy and Marine Corps, and for other purposes." Section 15: ". . . That during the continuance of the present war, warrant officers, petty officers and enlisted men of the United States Coast Guard shall receive the same rates of pay as are or may hereafter be prescribed for corresponding grades or ratings and length of service in the Navy." Section 13: "Nothing contained in this Act shall operate to reduce the rank, pay, or allowances that would have been received by any person in the Navy, Marine Corps, or Coast Guard except for the passage of this Act."

Judgment was rendered for $486.32, to review which this appeal is prosecuted.

The question presented is not the absolute rank of Allen but the correspondence of his duties and his emolument to those of chief yeoman in the Navy.

The Commandant of the Coast Guard submitted, June 5, 1917, to the Chief of the Bureau of Navigation of the Navy Department a tabular statement showing the several grades and ratings in the Navy to which the Coast Guard grades or ratings corresponded. This tabular statement was arranged on the basis of the duties and responsibilities of the several ratings.

In this table a ship's writer was put down as corresponding to a yeoman, first class, in the Navy, and a yeoman in the Coast Guard to a chief yeoman in the Navy. October 10, 1917, the Secretary of the Navy issued a general order giving the corresponding grades in which both ship's writers and yeomen in the Coast Guard were tabulated as corresponding to yeoman, first-class, in the Navy instead of chief yeoman in the Navy. The tabulated statement by the Commandant of the Coast Guard was in many other respects changed by the Navy Depart-

ment. The action of the Navy Department was carried out by a circular letter from the Coast Guard headquarters, and, according to it, pay of all petty officers and nearly all enlisted men in the Coast Guard was higher than the pay in the Navy, thus giving to such officers no benefit of § 15 of the Act of May 22, 1917.

Allen, during the time covered by his claim, was paid as a yeoman in the Coast Guard, $1,783.80; as chief yeoman in the Navy, he would have received $2,270.12, a difference of $486.32.

The finding of the court was that he was entitled to recover the sum of $486.32 more than that which he did receive, and it awarded him judgment for that amount, rejecting the contention of the Government that " the fact that Congress did not expressly provide what grades and ratings of the Coast Guard should be considered ' corresponding ' to the grades and ratings in the Navy left that fact to be determined by the Secretary of the Navy."

The finding and judgment of the court are in accordance with a table of grades and ratings submitted by the Commandant of the Coast Guard, pursuant to § 15 of the Act of May 22, 1917, above referred to. To this table of ratings, and the action of the Commandant, the United States opposes the order of the Secretary of the Navy, No. 329, and maintains that it was the duty of the latter, under the Act of May 22, 1917, in order to standardize the pay of the Coast Guard and Navy, to determine what were the corresponding grades or ratings. " That preliminary question was required to be settled before any pay could be fixed or allowed." And further, " The Secretary of the Navy, acting in his administrative capacity, and within his discretionary powers, promulgated a table of grades and ratings under which the claimant [Allen] was paid."

To these contentions the court gave attentive and elaborate consideration, and determined that they were con-

trary to the purpose of the Act of May 22, 1917, fixing the pay of petty officers and enlisted men during the continuance of the war with Germany so that they should receive the same pay prescribed for corresponding grades and ratings in the Navy. It held that the test of correspondence or equality was the duties and responsibilities of yeomen in the Coast Guard and yeomen in the Navy. In other words, it was the judgment of the court, that, as the duties and qualifications of the officers were identical, their pay should be the same. Correspondence of duties is a question of fact, not a matter of deference to the judgment of the Secretary of the Navy.

The court said, " The statute (act of May 22, 1917) was passed by Congress for the purpose of equalizing as far as possible the pay of officers of the Coast Guard with that of officers of the Navy. The act attempted to assimilate the pay, and the court in construing the act will, so far as conditions admit, put such a construction upon it as will carry out the intent of Congress. In the case at bar a Coast Guard officer renders similar service to that rendered by a naval officer, has the same duties to perform, and possesses the same qualifications; the pay of the Coast Guard officer can be assimilated to the pay of the officer of the Navy, and therefore we think that the plaintiff is entitled to receive the pay prescribed for chief yeoman in the Navy."

The conclusion was that the purpose of the act was " to establish uniformity in the pay of like officers in the Coast Guard and the Navy," and that it could not be defeated by an administrative order of the Secretary of the Navy. Hence, the further conclusion was that Allen was entitled to recover the sum of $486.32 and it was so ordered.

We concur, and affirm the judgment.

Affirmed.

UNITED STATES *v.* MORAN.

APPEAL FROM THE COURT OF CLAIMS.

No. 231. Argued March 1, 1923.—Decided March 12, 1923.

Decided on the authority of *United States* v. *Allen, ante,* 317. 56 Ct. Clms. 492, affirmed.

APPEAL from a judgment of the Court of Claims awarding a sum as additional pay to a master-at-arms in the Coast Guard.

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.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Action for $600.00. Judgment for $260.50. The case was submitted with *United States* v. *Allen,* just decided, *ante,* 317, depends upon the same statute and presents the question of the claim of a master at arms in the Coast Guard to receive pay at the rate allowed by the statute to a chief master at arms in the Navy, less all pay previously received in the lower grade.

Moran enlisted in the United States Revenue Cutter Service, the name of which has since been changed to the United States Coast Guard, as an ordinary seaman and attained the rank of master at arms, the duties of which corresponded in all respects to the duties of chief master at arms in the Navy.

Moran, therefore, since April 6, 1917, has been, and is, entitled to receive a rate of pay corresponding to that of a chief master at arms in the Navy. Had he been so paid, and as required by the Act of May 22, 1917, c. 20, 40 Stat. 84, he would have received during the entire period from August 1, 1917, when he was placed on active duty, to December 31, 1918, the sum of $1,790.50. The pay received by him, however, was $1,530.00, leaving a balance due of $260.50. For this sum the Court of Claims gave judgment.

The findings of the court sustain its action, and on the authority of the *Allen Case* we affirm the judgment.

Affirmed.

EWEN *v.* AMERICAN FIDELITY COMPANY.

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

No. 92. Argued March 1, 1923.—Decided March 12, 1923.

A surety company organized under Illinois Rev. Stats., 1917, c. 32, § 102f, *et seq.*, is thereby expressly made subject to the Act of April 18, 1872, governing corporations for pecuniary profit, and under § 12 of that act, its dissolution does not take away or impair any remedy given against the corporation for liabilities incurred previously to its dissolution. P. 324.

Held, therefore, that a New York attachment suit against an Illinois surety company did not fall by reason of the company's dissolution in proceedings in Illinois and lapse of time, claimed to have extinguished the corporation for all purposes.

271 Fed. 848, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment for the respondent in an action brought against it as surety on an undertaking in attachment.

Mr. William R. Wilder, with whom *Mr. Henry E. Davis* and *Mr. John Ewen* were on the briefs, for petitioner.

Mr. Joseph M. Proskauer, with whom *Mr. Abram I. Elkus* and *Mr. Wesley S. Sawyer* were on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the Court.

This is an action upon an undertaking to pay the amount of any judgment that might be recovered by one Mackey in a suit against the Illinois Surety Company, not exceeding $7,500 and interest, the contract being made by the present defendant in order to dissolve an attachment in that suit. That suit was begun in May, 1915, in New York. Mackey recovered a judgment for a much larger sum on June 21, 1919, and assigned the same and this undertaking to the present plaintiff. The defence is that the Illinois Surety Company, an Illinois corporation, had ceased to exist before the judgment was recovered, and that the judgment against it was void. On this ground judgment was given for the defendant in the District Court and the judgment was affirmed by the Circuit Court of Appeals.

On April 19, 1916, a majority of the stockholders of the Surety Company filed a bill in Illinois alleging that the Company was insolvent and praying that it be restrained from further prosecution of its business, that a receiver be appointed and that upon final hearing a decree might be entered dissolving the Company and providing for the distribution of its assets. The answer of the Company was filed with the bill. It admitted the allegations and submitted to the jurisdiction of the Court. On the same day an order was entered "without bond from the complainants and until the further order of the court" restraining the Company from further prosecution of its business. Later on the same day another decree appointed a receiver to collect the property, with power to institute and to defend suits and to apply to the Court for

further orders concerning the collection and distribution of the assets and the closing of the Company's concerns for which purposes jurisdiction was retained until final hearing and settlement of all unfinished business of the Company and the receivership. The receiver continued to defend the above mentioned suit in New York until about April 28, 1919, when the counsel for the Company notified the plaintiff that they no longer were authorized to appear for it; the ground of the notice being an order of the Court in Illinois that the receiver should discontinue the defence and notify the plaintiff Mackey to file his claim in that proceeding. (This order imposed no personal obligation on Mackey as he was not within the jurisdiction of the Illinois Court.) Thereafter the defendant failed to appear, and upon a report by a referee the judgment in question was entered on June 21, 1919. This was more than three years after the Company had been restrained from transacting business. The defendant says that by the Illinois statutes the Company became extinct in one year, with a continued liability to creditors of only two years more, and that the last two years had elapsed.

The Illinois Surety Company was organized under a general law of Illinois to be found in Hurd's Revised Statutes of Illinois, 1917, c. 32, § 102 f and following. By § 14 of the act (Hurd, § 102 s), corporations formed under it "shall be subject to all laws of this State governing corporations for pecuniary profit, as provided for in an Act . . . approved April 18, 1872 . . . and amendments thereto, in force July 1, 1897, and the duties thereof, and shall have the powers thereof, so far as the same are not inconsistent with the provisions of this act. Such Companies shall also be subject to the provisions and requirements of an Act entitled 'An Act in regard to the dissolution of Insurance Companies,' approved February 17, 1874." The act last mentioned allows a ma-

jority of the stockholders of any Illinois insurance company to apply by petition to close its concerns and authorizes the Court after due notice to all the parties interested to proceed to hear the matter and for reasonable cause to decree a dissolution, § 2. (Hurd, c. 73, § 12.) It also provides in the next section that the charters of all such companies, which either from neglect, or by vote of their members or officers, or in obedience to the decree of any Court, have ceased for one year to transact the business for which they were organized, shall be deemed extinct, with authority to the Court upon petition to fix the time within which the companies shall close their concerns: *"Provided,* that this section shall not be construed to relieve any such company from its liabilities to the assured or any of its creditors," § 3. (Hurd, § 13.) The fourth section (Hurd, § 14) continues the companies for two years more for the purpose of prosecuting and defending suits, &c., but not for that of going on with their business. The facts that we have stated were thought to bring the case within this statute and so to make the New York judgment void.

We should hesitate long before deciding that the cessation of business for a year under the above mentioned decree fell within § 3 of the Insurance Act or that the proviso had no effect upon the following § 4, not to speak of other difficulties. But it is not necessary to stop at this point. The Company, as has been shown, was subject also to the laws governing corporations for pecuniary profit. By § 10 of the Act of April 18, 1872 (Hurd, c. 32, § 10) these corporations are continued for two years for substantially the same purposes as are insurance companies, but it is explicitly provided by § 12 that the dissolution for any cause shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution. The argument seems to us strong that the

section concerning surety companies quoted at the outset takes in this § 12 without qualification and, if necessary, might be said to show that a larger signification should be given to the proviso quoted from § 3 of the Insurance Act, at least as applied to this Company. But we are relieved from an independent consideration of the matter by the opinion of the Supreme Court of Illinois in *Evans* v. *Illinois Surety Co.*, 298 Ill. 101, 106, 107, April 21, 1921, the very case in which the above mentioned injunction was issued. On p. 106 it quotes § 12 of the Corporation Act, and on p. 107, says, "there can be no question but that the provisions of the General Incorporation Act heretofore quoted, and all its other applicable provisions, apply to corporations organized under the Surety Act." This was later than the decision of the Circuit Court of Appeals and appears to us to warrant our taking the same view without discussion at greater length.

Judgment reversed.

FOX FILM CORPORATION *v.* KNOWLES ET AL.

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

Nos. 310, 311. Argued February 27, 1923.—Decided March 12, 1923.

1. Under § 24 of the Copyright Act of 1909, which allows renewals of copyrights subsisting when it went into effect with the proviso that application shall be made and registered within the period of one year prior to expiration of the existing term, an author's executor may renew, within that year, although the author died before its commencement, so that the right to file application did not accrue in his lifetime. P. 328.
2. The statute intends that an executor, there being no widow, widower or child, shall have the same right as his testator might have exercised had he continued to survive. P. 329.
3. It is no novelty for an executor to be given rights by statute which his testator could not have exercised while he lived. P. 330.

279 Fed. 1018, reversed.

CERTIORARI to decrees of the Circuit Court of Appeals affirming the District Court in dismissing bills brought by the petitioner, as assignee of copyright privileges, to restrain infringements and for accounting and damages.

Mr. Alfred A. Wheat, with whom *Mr. Saul E. Rogers* and *Mr. Wm. J. Hughes* were on the brief, for petitioner.

Mr. Louis R. Bick, with whom *Mr. Fred Francis Weiss* was on the brief, for respondents.

The copyright statute was enacted to enable an author, or those who may be dependent upon him, to reap the value of his work, but only under certain circumstances. Under the section as it now reads, neither the author nor his assignee possesses any right or power that may be transferred to run beyond a period of 28 years. When the renewal of the copyright is sought, a new property right is created, not in any way dependent upon the previous benefits of the original copyright. This new property right, however, does not come into being until the beginning of the last year of the original copyright. Not until then has the author any estate or right.

Petitioner argues that, if our construction of the statute is correct, Congress would not have inserted the word "executor" in this section, unless it was intended that the author should have the right to bequeath the renewal right in advance of its accrual. But Congress, we believe, appreciated that an occasion might arise where the author might die within the last year of the copyright without having applied for a renewal, and where no widow or children survived him. Under these conditions it gives the executor the right to obtain the renewal for the benefit of the estate of the author, as the new property right was in existence at the time of the author's death. *White-Smith Music Pub. Co.* v. *Goff,* 187 Fed. 247; *Silverman* v. *Sunrise Pictures Corporation,* 273 Fed. 909.

Mr. J. Joseph Lilly, by leave of court, filed a brief as *amicus curiæ.*

MR. JUSTICE HOLMES delivered the opinion of the Court.

These are bills in equity brought by the petitioner to restrain dramatic performances based upon two poems, "Over the Hills to the Poor House" and "Over the Hills from the Poor House," and for an account and damages. The author of the poems, Will Carleton, held a renewed copyright for them which expired on or about February 21, 1915. He died on December 18, 1912, testate, leaving all his property to Norman E. Goodrich and appointing him sole executor. On January 21, 1915, the executor applied for and obtained a renewal of the copyright to February 21, 1929. Later the exclusive right to dramatize the poems was assigned to the plaintiff. The only defense relied upon here is that the statutes did not give the executor a right of renewal and that therefore the copyright has expired. The bills were dismissed upon this ground by the District Court, (No. 310) 274 Fed. 731; (No. 311) 275 Fed. 582, and the decrees were affirmed on the authority of *Silverman* v. *Sunrise Pictures Corporation,* 273 Fed. 909, by the Circuit Court of Appeals. 279 Fed. 1018.

This copyright was subsisting when the Copyright Act of March 4, 1909, c. 320, 35 Stat. 1075, went into effect. By § 24 of that statute copyrights so subsisting "may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the

renewal period: . . . *Provided,* That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term." The argument on which the statute was held not to apply to the present case was that the renewal creates a new estate, *White-Smith Music Pub. Co.* v. *Goff,* 187 Fed. 247; that the estate is purely statutory, and does not exist until within one year prior to the expiring of the existing term; that therefore Carleton dying more than a year before that moment had nothing to bequeath; and that the statute gave nothing to the executor except when the testator had the right to renew at the moment of his decease. It is argued that the executor is mentioned only to provide for the case of the testator's dying within the year without having exercised his right to renew, and thus having a right that the statute allowed him to transmit.

All of these propositions may be admitted, (for the purposes of the present argument only,) except the last. But we see no sufficient reason for thus limiting the right of the executor. The section read as a whole would express to the ordinary reader a general intent to secure the continuance of the copyright after the author's death and none the less so if the actual continuance was effected by creating a new estate, or if the beneficiaries in certain cases are pointed out. No one doubts that if Carleton had died leaving a widow she could have applied as the executor did, and executors are mentioned alongside of the widow with no suggestion in the statute that when executors are the proper persons, if anyone, to make the claim, they cannot make it whenever a widow might have made it. The next of kin come after the executors. Surely they again have the same rights that the widow would have had. The limitation is derived from a theory that the statute cannot have intended the executor to take

unless he took what the testator already had. We should not have derived that notion from the section, which seems to us to have the broad intent that we have expressed, and the words specially applicable seem to us plainly to import that if there is no widow or child the executor may exercise the power that the testator might have exercised if he had been alive. The executor represents the person of his testator, Littleton, § 237, and it is no novelty for him to be given rights that the testator could not have exercised while he lived. *Green* v. *Ekins*, 2 Atk. 473, 476. A familiar illustration is to be found in the Employers' Liability Act which gives to personal representatives a new cause of action for causing death, although the foundation is the original wrongful injury to the deceased. *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 68, 70.

Decrees reversed.

PULLMAN COMPANY *v.* RICHARDSON, AS TREASURER OF THE STATE OF CALIFORNIA.

HINES, AS DIRECTOR GENERAL OF RAILROADS, ET AL. *v.* RICHARDSON, AS TREASURER OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Nos. 143–148, and 149. Argued December 4, 5, 1922.—Decided March 12, 1923.

1. A State may tax that part of the property of a carrier engaged in interstate and local business which is permanently located or commonly used within the State, according to its fair value as part of a going concern, measured with reference to the gross receipts from both local and interstate business. P. 338.
2. A tax, measured in this way, which is called a property tax, which is imposed in lieu of all other taxes upon the carrier's property in the State, which is not in excess of what would be a legitimate tax

on such property, valued as part of a going concern, nor relatively higher than taxes on other classes of property, does not discriminate against interstate commerce. P. 339.

3. A state statutory provision that a foreign corporation failing to pay a tax shall be excluded from doing business in the State would be void as applied to interstate commerce. P. 339.
4. The tax here involved, based on the California Constitution (Art. XIII, § 14, as amended, 1910) and on subsequent statutes, was not intended to reach income from property situated or business done outside of the State. P. 340.

185 Cal. 484, affirmed.

ERROR to judgments of the Supreme Court of California affirming judgments for the defendant in actions brought against the State Treasurer to recover money paid, under protest, as taxes.

In the first six cases, the taxes were paid and the actions brought by the Pullman Company. In the last of the cases, the taxes were paid while the business of the Company was under federal control, and the action brought by the Company and the Director General of Railroads.

Mr. Cordenio A. Severance, with whom *Mr. Gustavus A. Fernald* and *Mr. Burke Corbet* were on the brief, for plaintiffs in error.

There is no doubt that a State is entitled to tax instrumentalities of interstate commerce within the State and that, in so doing, it may take into account "intangible values" accruing from their use as part of a unit system of transportation. The so-called unit system of taxation approved in *Adams Express Co.* v. *Ohio,* 165 U. S. 227, and other cases, need only be referred to. It is but one method of ascertaining a fair valuation of the property taxed. Gross-receipts or gross-earnings systems of taxation may be used as a method of arriving at the same result; but the State may not tax interstate commerce itself, or the earnings therefrom, or property situated without the State; and if, under the circumstances, the tax may be said to be so directly aimed at interstate

earnings as to evidence an intention to levy upon them, as such, the tax will be declared void as an unlawful burden upon interstate commerce. In determining this question, the controlling matter is not the expressed intention of the legislature, nor the manner in which the law is administered, but the effect of the act.

The difficulty has been in applying the foregoing principles to the particular case.

However, the expressed intention of the legislature, as well as the manner in which the law is administered, may be, and should be, considered to such extent as it is or may be an indication that the gross receipts are aimed at and the purpose of such aim, in a particular case.

[The following cases were reviewed: *State Tax on Railway Gross Receipts,* 15 Wall. 284; *State Freight Tax,* 15 Wall. 232; *Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196; *Ratterman* v. *Western Union Tel. Co.,* 127 U. S. 411; *Western Union Tel. Co.* v. *Pennsylvania,* 128 U. S. 39; *Leloup* v. *Mobile,* 127 U. S. 640; *Western Union Tel. Co.* v. *Alabama,* 132 U. S. 472; *Lyng* v. *Michigan,* 135 U. S. 161; *Crutcher* v. *Kentucky,* 141 U. S. 47; *Pacific Express Co.* v. *Seibert,* 142 U. S. 339; *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217; *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688; *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379; *Fargo* v. *Hart,* 193 U. S. 490; *Galveston, etc., Ry. Co.* v. *Texas,* 210 U. S. 217; *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; *Meyer* v. *Wells Fargo & Co.,* 223 U. S. 298; *United States Express Co.* v. *Minnesota,* 223 U. S. 335; *Lehigh Valley R. R. Co.* v. *Pennsylvania,* 145 U. S. 192; *Ewing* v. *Leavenworth,* 226 U. S. 464; *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217; *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; *Ohio Tax Cases,* 232 U. S. 576; *Kansas City, etc., Ry.*

Co. v. *Kansas,* 240 U. S. 227; *Kansas City, etc., R. R. Co.* v. *Stiles,* 242 U. S. 111; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *Union Tank Line Co.* v. *Wright,* 249 U. S. 275; *Wallace* v. *Hines,* 253 U. S. 66.]

This tax is aimed so directly at gross receipts as to constitute an unlawful burden on interstate commerce and a tax upon the income of property and business without the State.

No reference was made to the value of the property in ascertaining the tax. The theoretical method alleged to have been adopted by the Tax Commission for determining whether the gross receipts tax is equivalent to an *ad valorem* tax is fallacious and misleading.

The situation is exactly like that in *Fargo* v. *Michigan,* 121 U. S. 230, and similar to that in other kindred cases.

The burden of sustaining the tax rests with the State. *Bank of California* v. *Roberts,* 173 Cal. 402; *Galveston, etc., Ry. Co.* v. *Texas,* 210 U. S. 217; *Foote* v. *Maryland,* 232 U. S. 494.

The forfeiture clause of the tax law renders it invalid. *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor,* 223 U. S. 280; *Pickard* v. *Pullman Southern Car Co.,* 117 U. S. 34; *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 530; *Leloup* v. *Mobile,* 127 U. S. 640; *Allen* v. *Pullman's Palace Car Co.,* 191 U. S. 171; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1; *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350; *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688.

Mr. U. S. Webb, Attorney General of the State of California, and *Mr. Raymond Benjamin,* for defendant in error, submitted.

Mr. Justice Van Devanter delivered the opinion of the Court.

These were actions by the Pullman Company against the Treasurer of California to recover moneys paid under

protest as state taxes. Each action related to a designated part of the tax for a distinct year and was brought on the theory that the part designated was invalid because imposed under constitutional and statutory provisions repugnant to the Constitution of the United States. The Treasurer prevailed in the court of first instance and in the Supreme Court of the State. 185 Cal. 484. The Pullman Company then brought the cases here on writs of error.

In 1910 California adopted an amendment to her constitution, § 14 of Article XIII, one purpose of which was to effect a separation of state from local taxation by subjecting public service corporations to a designated tax for state purposes and relieving them from taxation for county and municipal purposes. Referring to this feature of the amendment, the Supreme Court of the State said in *San Francisco* v. *Pacific Telephone & Telegraph Co.*, 166 Cal. 244, 248: "Under the old system, the property and franchises of the corporations above referred to were taxed for both state and local purposes. The amendment creates a new mode of taxing such property and franchises, and appropriates the revenue so raised to state purposes solely. The new method, by which taxes are collected exclusively for the state, is substituted for the former system, under which the same subjects were taxed for both state and local purposes."

The pertinent parts of the amendment are as follows (Laws 1910–11, p. xliv):

"Sec. 14 (a). . . . all sleeping car, dining car, drawing-room car, and palace car companies, . . . operating upon the railroads in this State; . . . shall annually pay to the State a tax upon their franchises, . . . rolling stock, . . . and other property, or any part thereof used exclusively in the operation of their business in this State, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon

the gross receipts from operation of such companies and each thereof within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State, and a proportion, based upon the proportion of the mileage within this State to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this State.

"The percentages above mentioned shall be as follows: . . . on all sleeping car, dining car, drawing-room car, palace car companies, . . . three per cent; . . . Such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided; . . .

"(e) . . . In the event that the above named revenues are at any time deemed insufficient to meet the annual expenditures of the State, including the above named expenditures for educational purposes, there may be levied, in the manner to be provided by law, a tax, for State purposes, on all the property in the State, including the classes of property enumerated in this section, sufficient to meet the deficiency. . . .

"(f) All the provisions of this section shall be self-executing, and the Legislature shall pass all laws necessary to carry this section into effect, and shall provide for a valuation and assessment of the property enumerated in this section, . . . The rates of taxation fixed in this section shall remain in force until changed by the Legislature, two thirds of all the members elected to each of the two houses voting in favor thereof."

Several acts to carry the amendment into effect were adopted from time to time, but it suffices here to say of them, first, that the computing percentage applicable to sleeping car, dining car, drawing-room car, and palace car

companies was increased to four per cent. in 1913 (c. 6, Laws 1913) and reduced to three and ninety-five hundredths per cent. in 1915 (c. 2, Laws 1915); secondly, that provision was made for enforcing the tax by either the usual tax sale or a suit in the name of the State (c. 335, §§ 20, 21, 24, Laws 1910–11; c. 6, § 5, Laws 1913), and, thirdly, that there was further provision that if the tax was not paid within a designated period the delinquent company, if a domestic corporation, "will forfeit its charter" and, if a foreign corporation, "will forfeit its right to do business in this State," and that the transaction of any business in the State on behalf of a company incurring any such forfeiture, except to settle its affairs, should be punished by substantial fines. Laws 1911, c. 335, § 24; Laws 1913, c. 6, § 5, and c. 320, § 9.

The taxes in question were levied under the new system in 1911 and six subsequent years. All were alike, save in particulars not material here; so it will be enough to state the facts relating to the tax levied in 1911.

The Pullman Company is an Illinois corporation engaged in operating sleeping and parlor cars on the railroads of the country. Some of its cars are operated between points in California, some between points within and points without that State and some through the State between points outside. In 1910 the company's gross receipts from all its operations within the State were $1,905,302.97. Of this sum $938,786.80 came from operations which began and ended in the State and $966,516.17 came from that part of the interstate operations which was within the State. The latter amount was arrived at by taking every service performed partly within and partly without the State and determining on a mileage basis what portion of the sum received therefor was attributable to the part of the service within the State. To illustrate: If a passenger was carried in a sleeping car from Oakland to Chicago for $14.00, and one-seventh of

the mileage was in California, $2.00 was deemed the gross receipt for so much of the service as was rendered in that State.

The gross receipts were calculated and reported by the company and the state officers accepted the calculation. The amount of the tax was computed by applying to the gross receipts the percentage rule prescribed by the amendment to the state constitution. In this way a tax of $57,159.08 was levied in 1911. Had the gross receipts from intrastate business alone been considered the tax would have been $28,163.61,—that is, $28,995.47 less than the actual levy.

The company objected to the consideration of the gross receipts from the interstate business, although they came only from service within the State, and objected to a corresponding part of the tax—the $28,995.47. That part was paid under protest and the first of these actions was brought to recover it,—an admissible course under the state law. Laws 1910–1911, c. 335, § 23; Laws 1913, c. 320, § 7. The other part was paid voluntarily and is not in controversy.

The company insists that the tax in question and the provisions therefor in the state constitution and statutes are invalid under the commerce clause of the Constitution of the United States, because (a) the tax is laid on gross receipts from interstate commerce, and (b) its payment is made a condition to continuing an interstate business within the State, and are invalid under the due process of law clause of the Fourteenth Amendment, because the tax is intended to reach income from property situated and business done without the State.

The state court holds that the tax is not a tax on gross receipts as such, but is in both name and essence a tax on property within the State, and that it is computed with reference to the gross receipts only as a means of adjust-

ing it to the real value of the property in the relation in which the same is used.

The principles to be applied in cases of this class repeatedly have been considered by this court and are now settled.

A State can neither tax the act of engaging in interstate commerce nor lay a tax on gross receipts therefrom. In either case the tax would be a restraint or burden on such commerce and its imposition an invasion of the power of regulation confided to Congress by the commerce clause of the Constitution. *Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217; *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298.

The rule is otherwise with property used in interstate commerce. A State within whose limits such property is permanently located or commonly used may tax it. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, 453; *Wells, Fargo & Co.* v. *Nevada,* 248 U. S. 165, 167; *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, 282. And, if the property be part of a system and have an augmented value by reason of a connected operation of the whole, it may be taxed according to its value as part of the system, although the other parts be outside the State;—in other words, the tax may be made to cover the enhanced value which comes to the property in the State through its organic relation to the system. *Fargo* v. *Hart,* 193 U. S. 490, 499; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas, supra,* p. 225; *United States Express Co.* v. *Minnesota,* 223 U. S. 335, 337; *Union Tank Line Co.* v. *Wright, supra.*

In taxing property so situated and used a State may select and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from its use in both intrastate

and interstate commerce as an index or measure of its value,—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce. *Cudahy Packing Co.* v. *Minnesota, supra; St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 367; *United States Express Co.* v. *Minnesota, supra; Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas, supra,* p. 227; *Union Tank Line Co.* v. *Wright, supra.*

An examination of the tax in question in the light of these principles shows that the chief objection urged against it is not tenable. The provisions under which the tax is imposed call it a property tax, specify the property subjected to it and declare that it is in lieu of all other taxes on such property. The Supreme Court of the State holds it is a tax on the property specified. In no material respect does it differ from the tax which was recognized by this Court as a property tax in *United States Express Co.* v. *Minnesota* and *Cudahy Packing Co.* v. *Minnesota,* above cited. True, it is computed with special regard to the gross receipts, but this, as is fairly shown, is done merely as a means of getting at the full value of the property, considering its nature and use. The tax is not claimed to be in excess of what would be legitimate as an ordinary tax on the property valued as part of a going concern, nor to be relatively higher than the taxes on other kinds of property. There is no ground for thinking that it operates as a discrimination against interstate commerce.

The statutory provision that a foreign corporation which fails to pay the tax shall be excluded from doing business in the State requires but brief notice. It is not sought to be enforced here. The Pullman Company has not failed to pay the tax. The provision has not been

construed by the state court. If it be construed as covering interstate commerce it is void, for the right to engage in such commerce is not within the State's control. See *Western Union Telegraph Co.* v. *Massachusetts,* 125 U. S. 530, 554; *Leloup* v. *Port of Mobile,* 127 U. S. 640, 645; *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 695–696. The state court may construe it as confined to intrastate business. *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 368–369. In neither event would it affect the validity of the tax before us.

We find nothing in the provisions under which the tax was levied, in the decision of the state court, or in the record, which gives any support to the contention that the tax is intended to reach income from property situated or business done without the State.

Judgment affirmed.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

IN EQUITY.

No. 18, Original.

PARTIAL DECREE RELATING TO STATE BOUNDARY, ENTERED MARCH 12, 1923.

Decree declaring the general course of and rules for locating the boundary between Oklahoma and Texas on the south bank of Red River; the effects of past and future erosion, accretion and avulsion; the status and ownership of the area known as the Big Bend, and of certain islands; the rights of inhabitants of Texas to access to the stream; limiting the actual survey to be made to places designated or to be designated; appointing commissioners to run, locate and mark those portions of the boundary, and providing for vacancies and specifying the method of marking and report to be made; with other provisions as to the work of the commission, objections, approval and costs.

This cause having been heard and submitted upon certain questions, and the Court having considered the same and announced its conclusions in an opinion delivered January 15, 1923, [260 U. S. 606]

It is ordered, adjudged, and decreed:

1. The boundary between the States of Oklahoma and Texas, where it follows the course of the Red River from the 100th meridian of west longitude to the eastern boundary of the State of Oklahoma, is part of the international boundary established by the treaty of 1819 between the United States and Spain, and is on and along the south bank of that river as the same existed in 1821, when the treaty became effective, save as hereinafter stated.

2. Where intervening changes in that bank have occurred through the natural and gradual processes known as erosion and accretion the boundary has followed the change; but where the stream has left its former channel and made for itself a new one through adjacent upland by the process known as avulsion the boundary has not followed the change, but has remained on and along what was the south bank before the change occurred.

3. Where, since 1821, the river has cut a secondary or additional channel through adjacent upland on the south side in such a way that land theretofore on that side has become an island, the boundary is along that part of the south bank as theretofore existing which by the change became the northerly bank of the island; and where by accretion or erosion there have been subsequent changes in that bank the boundary has changed with them.

4. The rules stated in the last two paragraphs will be equally applicable to such changes as may occur in the future.

5. The south bank of the river is the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river

which separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed and to preserve the course of the river.

6. The boundary between the two States is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.

7. At exceptional places where there is no well defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline conforming to the mean level of the waters when at other places in that vicinity they reach and wash the cut bank without overflowing it.

8. The area known as the Big Bend, which lies within a northerly bend of the river between a southerly extension of the east line of range thirteen west in Oklahoma and a southerly extension of the west line of range fourteen west in that State, has been since before 1821 fast upland on the southerly side of the river, is within the State of Texas and never was owned by the United States. The northerly border of that area is part of the south bank of the river on and along which the state boundary extends.

9. Burke Bet Island and Goat Island, both of which are in the vicinity of the Big Bend Area, are islands in the river, have been islands since before 1821, are within the State of Oklahoma, and are the property of the United States.

10. The island in front of the line between Hardeman and Wilbarger Counties, in the State of Texas, was part of the fast valley land on the south side of the river in 1821, and was severed from the land on that side by avulsion in 1902. The island is within the State of Texas and the state boundary is along its northerly bank.

11. The treaty of 1819 secures to the inhabitants of the State of Texas a right of reasonable access to the

waters of the river along the state boundary, such as will enable them to reach the waters at all stages and to use the same for beneficial purposes in common with the inhabitants of the State of Oklahoma and of other parts of the United States.

12. The two States and the United States having joined in a request that they be permitted to withdraw the prayer in their pleadings that the boundary for its full length along the river be run, located and marked upon the ground, and having also joined in a further request that the boundary be run, located and marked only at the places hereinafter named, the requests are granted, and Arthur D. Kidder and Arthur A. Stiles, both cadastral engineers, are designated as commissioners to run, locate and mark upon the ground the following portions of the boundary in accordance with this decree and the principles announced in the opinion delivered January 15, 1923:

(a) Along the Big Bend Area as hereinbefore defined;

(b) From the Big Bend Area westward to a southerly extension of the west line of range sixteen west in Oklahoma;

(c) Along all places where by avulsion since 1821 the river has come to occupy a new channel whereby fast upland theretofore on one side of the river has come to be on the other side,—the line in every such instance to be run, located and marked on and along what was the south bank before the change occurred; and

(d) Along any other places which either State or the United States may designate in a request in writing approved by a member of this court.

13. The mode of marking those portions of the boundary shall be by establishing in the vicinity thereof permanent monuments upon the fast upland on the southerly side of the river at suitable distances apart and carefully taking the distances and courses from such monuments to the boundary as the same exists at the time the work

is done. A description of the monuments and a statement of such distances and courses shall be included in the report of the commissioners.

14. Before they enter upon their work each commissioner shall take and subscribe an oath to perform his duties faithfully and impartially. They shall prosecute the work with all convenient dispatch, shall have authority to employ such assistants as may be needed therein, and shall include in their final report a statement of the work done and of the time employed and the expenses incurred in its performance.

15. The boundary along the Big Bend Area as hereinbefore defined shall be run, located, monumented and reported to the court before the commissioners take up other portions of the work. In running and locating that part of the boundary the commissioners shall ascertain the exact location of all oil wells which are within three hundred feet of the same and shall include a statement thereof in their report.

16. The work of the commissioners shall be subject in all its parts to the approval of the court. Copies of their reports shall be promptly delivered to the two States and the United States, and exceptions or objections thereto, if there be such, shall be presented to the court, or, if it be not in session, filed with the Clerk, within forty days after the report is made.

17. If for any reason there be a vacancy in the commission when the court is not in session the same may be filled by the designation of a new commissioner by the Chief Justice.

18. The cost of executing this decree, including the compensation of the commissioners, shall be borne in equal parts by the State of Oklahoma, the State of Texas and the United States.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

IN EQUITY.

No. 18, Original.

SUPPLEMENT TO PARTIAL DECREE OF JUNE 5, 1922, ENTERED MARCH 12, 1923.

Supplemental decree relating to certain lands in the bed of Red River and bordering its north side; declaring principles determining ownership and riparian rights and specifying the limits of particular titles; and directing the receiver to surrender possession of all patented and allotted tracts on the northerly side of the medial line of the river, within the receivership area and having no oil wells, such surrender to discharge them from the receivership.

On consideration of the several stipulations, suggestions and supporting briefs relating to the entry of a further decree to supplement the partial decree entered June 5, 1922, under the opinion delivered May 1, 1922, [258 U. S. 574]

It is ordered, adjudged, and decreed:

1. This supplemental decree relates only to the bed of the Red River, and to lands bordering on the north side of the same, between the 98th meridian of west longitude and the mouth of the North Fork.

2. The several interveners who, under patents or Indian allotments by the United States, own lands bordering on the north side of the river are severally the owners of so much of the bed of the river as lies in front of their lands and north of the medial line of the river, except as is otherwise stated herein.

3. Where, under grants from the United States, the State of Oklahoma owns lands bordering on the north side of the river the State has the same riparian rights in

the river bed that an individual owning the same lands under a patent or Indian allotment would have.

4. The full title and ownership of so much of the bed of the river as lies south of its medial line are in the United States.

5. In the sense intended herein, the medial line of the river is a line drawn midway between the northerly and southerly banks of the river, commonly called cut banks, save that, under a stipulation between the parties affected, to which full effect must be given, this line, in so far as it reaches and is in contact with patented or allotted tracts which are within what is now the bed of the river, shall be regarded and treated as falling no farther north than the southerly line of such tracts as the same were represented by the official survey according to which they were patented or allotted.

6. Where tracts on the north side of the river, which were not riparian when surveyed, were patented or allotted after they had become riparian, such disposals carried the title to the medial line of the river, unless other tracts between them and that line had been disposed of theretofore, in which event the later disposals did not carry any right in, or affect the title to, such intervening tracts.

7. Where tracts on the north side, which had come to be in the river bed after survey and before disposal, were patented or allotted as if they were upland, while the adjacent land behind them which was then actually riparian was as yet unsold and unallotted, such disposals carried the title to the medial line of the river, unless other tracts between them and that line had been disposed of theretofore, in which event the later disposals did not carry any right in, or affect the title to, such intervening tracts.

8. The patenting and allotting of lands bordering on the north side of the river did not carry or give any right to islands in the river which were in existence at that time.

9. The patent issued for lot 1 of section 35 in township 4 south of range 14 west, under which the intervener E. Everett Rowell is now claiming, carried the right and title to the river bed between such lot and the medial line of the river.

10. The patent issued for lots 1 and 2 of section 8 in township 5 south of range 14 west, under which the interveners A. E. Pearson, et al., are now claiming, carried the right and title to the river bed between such lots and the medial line of the river.

11. The patent issued for the northeast quarter of the northeast quarter of section 7 in township 5 south of range 14 west, under which the interveners A. E. Pearson, et al., are now claiming, invested the patentee with the full ownership of the land within the limits of that tract as shown on the plat of the official survey, but did not carry any right or title to any part of the river bed as an incident to the disposal of that tract.

12. The patent issued for lots 6 and 7 of section 7 in township 5 south of range 14 west, under which the interveners Robert L. Owen, et al., are now claiming, carried the right and title to the river bed between such lots and the medial line of the river.

13. The allotments in severalty made of the following tracts, to or on behalf of the Indians named, respectively included and covered the right and title to the portions of the river bed between such tracts and the medial line of the river.

Henry Boot-Pawle, allotment No. 3332, Kiowa, 1910, E½ of the NE¼ and lot 4 of section 33, twp. 5 S., range 12 W; Webster Lonewolf, allotment No. 3327, Kiowa, 1910, W½ of the NE¼ and lot 3 of section 33, twp. 5 S., range 12 W; Amy Laura Bear, allotment No. 3361, Kiowa, 1910, E½ of NW¼ and lot 2 of section 33, twp. 5 S., range 12 W; Mary Hummingbird, allotment No. 3315, Kiowa, 1910, W½ of NW¼ and lot 1 of section

33, twp. 5 S., range 12 W; Alice Carpio, allotment No. 3419, Comanche, 1910, lot 4 of section 32, twp. 5 S., range 12 W; Isabel Tsa-tah-sis-ko, allotment No. 3280, Apache, 1910, lot 3 of section 24, twp. 5 S., range 13 W; Richard Ko-sope, deceased, allotment No. 3279, Apache, 1910, lot 5 of section 23, twp. 5 S., range 13 W; Julia Mah-seet, allotment No. 3430, Comanche, 1910, lot 4 of section 23, twp. 5 S., range 13 W; William Quo-in-quodle, allotment No. 3312, Kiowa, 1910, N½ of the NW¼ and the SE¼ of the NW¼ of section 23, twp. 5 S., range 13 W; Albert Aun-ko, allotment No. 3298, Kiowa, 1910, SE¼ of the SW¼ and the SW¼ of the SE¼ of section 10, and lot 1 of section 15, all in township 5 S., range 13 W; Edgar Kau-bin, allotment No. 3318, Kiowa, 1910, NE¼ of the SW¼ and the NW¼ of the SE¼ and lot 1 of section 10, twp. 5 S., range 13 W; Cora Tso-odle, deceased, allotment No. 3292, Kiowa, 1910, lots 4 and 5 and the SW¼ of the NW¼ of section 4, twp. 5 S., range 13 W; Ned Odle-pah-quote, deceased, allotment No. 3299, Kiowa, 1910, lots 1 and 2 and the SE¼ of the NE¼ of section 5, twp. 5 S., range 13 W; Lena Ho-ah-wah, allotment No. 3405, Comanche, 1910, NE¼ of the SE¼ and lot 7 of section 31, and the NW¼ of the SW¼ of section 32, all in twp. 4 S., range 13 W; Lily Black Bear, allotment No. 3281, Apache, 1910, NE¼ of the SW¼ of section 31, twp. 4 S., range 13 W; John Paut-chee, allotment No. 3390, Comanche, 1910, lots 3 and 4 of section 31, twp. 4 S., range 13 W; Josie Star, allotment No. 3283, Apache, 1910, N½ of the NE¼ and lot 2 of section 35, twp. 4 S., range 14 W; George Ase-perm-my, allotment No. 3432, Comanche, 1910, lot 3 of section 35, twp. 4 S., range 14 W; Emma A-one-ty, allotment No. 3306, Kiowa, 1910, N½ of the NW¼ and lot 4 of section 35, twp. 4 S., range 14 W; James Too-ah-imp-ah, allotment No. 3423, Comanche, 1910, E½ of the NW¼ and lots 2 and 3 of section 34, twp. 4 S., range 14 W; Day Tah-too-ah-ni-pah,

allotment No. 3385, Comanche, 1910, W½ of the NW¼ and lot 4 of section 34, twp. 4 S., range 14 W; Ray Doyah, allotment No. 3303, Kiowa, 1910, N½ of the SE¼ and lots 1 and 2 of section 33, twp. 4 S., range 14 W; Cynthia Berry, allotment No. 3282, Apache, 1910, lot 2 of section 4, twp. 5 S., range 14 W; Maggie Turtle Mountain Reid, allotment No. 3293, Kiowa, 1910, SW¼ of the NE¼ and lots 2 and 6 of section 5, twp. 5 S., range 14 W; Robert To-quothy, allotment No. 3413, Comanche, 1910, N½ of the SW¼ and lot 5 of section 5, and lot 3 of section 8, all in twp. 5 S., range 14 W; George Emau-ah, deceased, allotment No. 3364, Kiowa, 1910, lots 3 and 4 of section 7, twp. 5 S., range 14 W; Louis Sah-koodle-quoie, deceased, allotment No. 3326, Kiowa, 1910, lots 1 and 2 of section 12, twp. 5 S., range 15 W; Fannie Zo-tigh, deceased, allotment No. 3320, Kiowa, 1910, E½ of the SE¼ of section 11, and lots 2 and 3 of section 14, twp. 5 S., range 15 W; William Tix-sey, allotment No. 3396, Comanche, 1910, N½ of the SW¼ and lot 1 of section 11, twp. 5 S., range 15 W; Alice Ware, allotment No. 3307, Kiowa, 1910, lot 2 of section 10, twp. 5 S., range 15 W; Dora Au-tau-bo, allotment No. 3295, Kiowa, 1910, lot 4 of section 9, twp. 5 S., range 15 W; Martin Topaum, allotment No. 3305, Kiowa, 1910, E½ of the SW¼ of section 4, and lot 2 of section 9, twp. 5 S., range 15 W; William Bointy, allotment No. 3291, Kiowa, 1910, W½ of the SW¼ of section 4, lot 1 of section 9, and lot 6 of section 5, all in twp. 5 S., range 15 W; Richard Hummingbird, allotment No. 3317, Kiowa, 1910, lot 7 of section 6, twp. 5 S., range 15 W; Cynthis Looking-glass, allotment No. 3416, Comanche, 1910, lot 4 and the SE¼ of the SW¼ of section 19, and lot 2 of section 30, all in twp. 4 S., range 16 W; Ernest Wesley Gallaher, allotment No. 3348, Kiowa, 1910, N½ of the NW¼ and lot 3 of section 35, twp. 5 S., range 12 W; Mary Tsa-tsa-tine, deceased, allotment No. 3368, Kiowa, 1910, lot 1 of section 35, twp.

5 S., range 12 W; Lulu Pe-sau-ny, allotment No. 3409, Comanche, 1910, E½ of the SE¼ and lot 4 of section 15, twp. 5 S., range 13 W; Lizzie Po-hoc-su-cut, allotment No. 3399, Comanche, 1910, NE¼ of the SW¼ and lot 5 of section 7, all in twp. 5 S., range 14 W; Nettie Goom-do, allotment No. 3322, Kiowa, 1910, lots 3 and 4 of section 10, twp. 5 S., range 15 W.

14. The allotments in severalty made of the following tracts, to or on behalf of the Indians named, respectively included and covered the right and title to the portions of the river bed between such tracts and the medial line of the river, save that this paragraph must be understood to be without prejudice to any rights which other persons or allottees may have in virtue of prior or contemporary disposals or allotments of other tracts between those described and that line:

Francis Chanate, allotment No. 3333, Kiowa, 1910, W½ of the NE¼ and the NW¼ of the SE¼ of section 13, twp. 5 S., range 12 W; Velma-mi-he-copy, allotment No. 3428, Comanche, 1910, NE¼ of NE¼ of section 9, twp. 5 S., range 13 W; Maggie Hummingbird, deceased, allotment No. 3314, Kiowa, 1910, NW¼ of the SW¼ and the S½ of the SW¼ of section 12, twp. 5 S., range 15 W; Rob-peet-sue-ni, allotment No. 3382, Kiowa, 1910, W½ of the SE¼ and lot 2 of section 11, twp. 5 S., range 15 W; Carl Ye-ah-que, allotment No. 3362, Kiowa, 1910, SW¼ of the SW¼ of section 3, and W½ of the NW¼ of section 10, twp. 5 S., range 15 W; Cynthia Cozad, allotment No. 3345, Kiowa, 1910, lots 1 and 2 of section 4, twp. 5 S., range 16 W; Jesse Locke, allotment No. 3403, Comanche, 1910, SW¼ of the SW¼ of section 33, and the E½ of the SE¼ of section 32, twp. 4 S., range 16 W; John Ah-ke-ah-bo, allotment No. 3288, Kiowa, 1910, NE¼ of the NE¼ and the S½ of the NE¼ of section 32, twp. 4 S., range 16 W; Louis Cozad, allotment No. 3343, Kiowa, 1910, NE¼ of the SW¼ and the W½ of the SW¼ of

section 29, twp. 4 S., range 16 W; Maud Khoda Ko-se-pe-ah, allotment No. 3388, Comanche, 1910, SW¼ of the NW¼ of section 29, and the SE¼ of the NE¼ and the NE¼ of the SE¼ of section 30, twp. 4 S., range 16 W; Carrie Geiogemah, allotment No. 3351, Kiowa, 1910, NE¼ of the NE¼ and W½ of the NE¼ of section 30, twp. 4 S., range 16 W; Florence Calisay, allotment No. 3349, Kiowa, 1910, NE¼ of the SW¼ and the N½ of the SE¼ of section 12, twp. 5 S., range 15 W; Mary Alice Sah-maunty, allotment No. 3360, Kiowa, 1910, N½ of the SW¼ and the SW¼ of the SE¼ of section 35, twp. 4 S., range 16 W; Philomena Senoya, allotment No. 3441, Comanche, 1910, W½ of the SW¼ of section 36 and the SE¼ of the SE¼ of section 35, twp. 4 S., range 16 W; Hattie Jones, allotment No. 3324, Kiowa, 1910, NW¼ of the SE¼ and the E½ of the SW¼ of section 36, twp. 4 S., range 16 W; John Tah-hah, allotment No. 3401, Comanche, 1910, E½ of the SE¼ and the SW¼ of the SE¼ of section 36, twp. 4 S., range 16 W; Montgomery Fuller, allotment No. 3420, Comanche, 1910, E½ of the NE¼ and the NE¼ of the SE¼ of section 10, twp. 5 S., range 15 W; Elton Pah-che-ka, allotment No. 3414, Comanche, 1910, W½ of the NE¼ and NW¼ of the SE¼ of section 10, twp. 5 S., range 15 W.

15. The receiver is directed to surrender, as soon as conveniently may be done, the possession of all patented and allotted tracts on the northerly side of the medial line which are within the receivership area and are without an oil well; and after the possession of any such tract is so surrendered that tract shall be regarded as fully discharged from the receivership.

WORK, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. MOSIER ET AL.

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

No. 25. Argued April 20, 1922; restored to docket for reargument May 29, 1922; reargued February 27, 28, 1923.—Decided March 19, 1923.

1. Under the provision of the Act of June 28, 1906, directing that mineral rights of the Osage Indians shall be leased by the Tribal Council under rules prescribed by the Secretary of the Interior, and with his approval, but upon royalties determined by the President, bonuses procured, with the Secretary's approval, through auctioning the privilege of taking leases of particular tracts, were in effect a supplement to the royalties prescribed in advance by the President—part of the income of the property,—and are distributable to tribal members in the same way as the statute prescribes for the royalties. P. 357.
2. The question whether such bonuses are included in royalties is one of statutory construction, not finally entrusted to the discretion of the Secretary, but determinable in court at the instance of the beneficiaries as of right. P. 358.
3. The act directs that the *pro rata* share of an Osage minor in the income received by the United States for the Tribe from bonds, mineral leases, sale of extra lands, and grazing rents, shall be paid quarterly to the minor's parents until he becomes of age; and the discretion allowed to withhold payment when the Commissioner of Indian Affairs becomes satisfied that a minor's interest is being misused or squandered, cannot be enlarged by a general regulation of the Secretary declaring that such income is misused if not devoted solely to the care and use of the minor, and providing that only fifty dollars per month shall be paid his parents on his behalf unless upon a specific showing that his funds are being used for his specific benefit. P. 359.
4. It was the intent of the act that such income should go into the family funds for the support of the family and of the minor as part of the family. P. 361.
5. Subject to the rights of the distributees as defined by the statute itself, discretion is vested in the Commissioner to determine in each case whether there has been misuse or squandering, and what is

such; and to that end he may withhold further payments until an account has been rendered by the minor's parents showing how the last payments were used. P. 362.

6. Until there has been full opportunity for the exercise of this discretion, neither the Commissioner nor the Secretary of the Interior can be compelled by mandamus to make a payment. P. 362.

50 App. D. C. 219; 269 Fed. 871, reversed.

This writ of error brings in review a judgment of the Court of Appeals of the District of Columbia, affirming a judgment of mandamus against the Secretary of the Interior commanding him to pay to the relators all the moneys due their minor children, members of the Tribe of Osage Indians of Oklahoma, by reason of the distributions made under the Act of June 28, 1906, 34 Stat. 539, including their respective shares of bonus moneys paid the Secretary for oil leases made by the Tribal Council.

The relators are W. T. Mosier and Louisa Mosier, members of the Osage Tribe of Indians and enrolled as such under the Act of Congress of June 28, 1906, 34 Stat. 539, and are parents of John T. Mosier, Edwin P. Mosier, Luther C. Mosier and Agnes C. Mosier, also enrolled members of the same tribe, who are minors and in the care and keeping of the relators.

In their petition, after reference to the provisions of the law of 1906 and their history, they allege that the Secretary of the Interior has refused to pay them certain income due them under the statute as parents of these minors, and has imposed on payment thereof conditions and limitations unauthorized by the act and beyond his power to impose. The Secretary answered admitting his refusal, and asserting that under the statute he and the Commissioner of Indian Affairs were vested with a discretion to protect the interest of the minors, and that his refusal was in the exercise of that discretion. The facts are shown in the admissions in the pleadings and by a stipulation. They can be better understood after a state-

ment of the act whose construction is the subject-matter of the controversy.

The Act of 1906, *supra,* entitled, "An Act For the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes," provided for the enrollment of the tribe including minors, and for the division of the land between them by selection, the selection for the minors being made by their parents, but forbade the sale of the oil, gas, coal or other minerals covered by the lands, the minerals being reserved to the use of the tribe for a period of twenty-five years, the royalties to be paid to the tribe. The act directed that the gas, oil, coal and other minerals should become the property of the individual owner of the land at the end of that period unless otherwise provided. Section three of the act directs the leasing of oil, gas and other mineral rights in these lands by the Tribal Council under such rules and regulations as the Secretary may direct and with his approval, provided " that the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States." The effect of the act was to give to each member of the tribe three selections of land, part of which was to be a homestead and the remainder surplus land, all to be farmed by him for twenty-five years and to become his absolute property at the end of that time. Under § 4, funds belonging to the tribe and derived from various sources were to be held by the United States as trustee for twenty-five years, and the interest as earned thereon was to be divided between the members of the tribe. In addition, under the second paragraph of § 4, the royalty received from oil, gas, coal and other mineral leases and all moneys secured from the sale of town lots and other lands of the tribe, and from rent of grazing lands, were to be distributed to the members of the tribe as income, payable quarterly. Thus the members of the tribe were

to share in two kinds of property, first, homesteads and farm lands and their proceeds, and, second, income from the sources above mentioned. So far as minors were concerned, the methods of distribution of the income from the two kinds were described in somewhat different language. The directions as to proceeds from lands is in § 7 as follows:

"That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided,* That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: *And provided further,* That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

The first paragraph of § 4 prescribes the method of distributing the income from the second kind of property and directs that it shall be paid quarterly to the members entitled except in case of minors, in which case it shall be paid quarterly—

"to the parents until said minor arrives at the age of twenty-one years: *Provided,* That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further,* That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided."

For ten years, after the act, the sums due the minors were small and were evidently not more than enough to

furnish reasonable support of the minors by the parents; but thereafter by the increase in the value of the oil and gas properties, the income payable grew to such amounts that Secretary of Interior Lane, who was the first defendant herein, deemed it his duty to take action to prevent a sacrifice of the minors' income and through the Commissioner of Indian Affairs called for accounts from the parents of the manner of the disposition of minors' income paid them. He issued an order that the income should be devoted solely to the care and use of the minor whose income it was, that any other use would be misuse, and that no more than fifty dollars a month would be paid to the parents on account of a minor's share, unless a specific showing was made that the funds were being used for the specific benefit of each particular child. As already shown, the royalties on mineral leases were fixed by the President. As the mineral properties became more valuable and after a general lease known as the Foster Lease was ended, the practice was initiated with approval of the Secretary of putting up the privilege of leasing particular mineral properties at auction. Large sums as down payments in addition to the royalties as fixed by the President were realized, inuring to the benefit of the tribe. The Secretary held that these sums, called "bonuses," were not royalties but should be deposited in the Treasury as part of the trust funds for the tribe held by the United States and that only the interest therefrom should be distributed. The Comptroller of the Treasury ruled against this view at least so far as to hold that there was no authority of law for such an interest bearing deposit in the United States Treasury. 23 Comp. Dec. 483, 486. Nevertheless, the Secretary withheld payment of minors' interest therein from the parents. While it was admitted that many of the Osages are idle, wasteful, extravagant and improvident, it was also admitted that the relators were not so. The stipulation of facts

showed that at no time prior to the rendition of accounts by the relators under the order of April 26, 1917, had the Indian Commissioner ever determined that the relators had misused or squandered the funds, that relators' accounts theretofore showed that the funds paid them were providently expended for the direct use and benefit of the minors or were invested and retained for their ultimate use and benefit, but that since April 26, 1917, the relators had neglected and refused to render any accounting and the Commissioner had been without information on which to determine whether the funds were being misused or squandered.

Mr. C. Edward Wright, with whom *Mr. Edwin S. Booth* was on the brief, for plaintiff in error.[1]

Mr. T. J. Leahy, with whom *Mr. F. W. Clements* and *Mr. C. S. Macdonald* were on the brief, for defendants in error.

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

The questions presented are, first, the proper classification of bonuses under the statute, second, the validity of the conditions imposed by the Secretary on the payment of the minors' incomes to the parents, and third, the propriety of mandamus as a remedy in this case.

The bonus which was the result of bidding for desirable and profitable oil and gas leases secured for the members of the Osage Tribe the just value of the use of their property which the fixing of royalties in advance by the President was not adapted to give them. It was in effect a supplement to the royalties already determined. It was really part of the royalty or rental in a lump sum or down

[1]At the first hearing *Messrs. Wright and Booth* argued the case on behalf of the plaintiff in error.

payment. We do not see how it can be classified as anything else. It was income from the use of the mineral resources of the land. Of course, it involved a consumption and reduction of the mineral value of the land, but so does a royalty. This is an inevitable characteristic of income from the product of the mine. What was intended to be distributed to the members of the tribe was the income from the mineral deposits in their lands, and the bonus was part of that. Doubtless Congress had in mind regular annual or quarterly equal payments when it used the word royalties; and did not anticipate such large down payments. But in the unexpected event, we must decide under what head the bonus is to be treated, whether as capital or income, and it seems clear to us that, in view of the entire statute, it is more aptly described by the latter term.

Nor is the settlement of this question a matter of discretionary construction by the Secretary. The Act of June 28, 1906, 34 Stat. 539, was enacted to make a definite disposition of the Osage Indians' resources. Except those which were sold outright or were kept as tribal lands for grazing, all lands were divided between the members of the tribe, adults and minors, share and share alike, for individual use for every purpose except the production of minerals, and at the end of twenty-five years the parcels were to vest absolutely in the respective individuals or their heirs. On the other hand, the funds of the tribe were to be kept by the United States in its treasury and interest thereon was to be paid quarterly to the members, share and share alike. In addition to this interest, there was also to be distributed as they fell due, the royalties from leases of mineral rights, the proceeds of the sale of certain lands already referred to and the rentals from the grazing lands. The question whether bonuses were to be included in royalties is a matter of statutory construction, not finally entrusted to the discretion of the Secre-

tary, but determinable in court at the instance of the beneficiaries as of right.

Having thus determined that the duty of the Secretary to pay this income to the adult members of the tribe is ministerial, we come now to the question how much discretion the statute gives him in withholding payment from minors. In respect to the income from the distributed lands, the Secretary has no duty whatever. The lands of the minors are given over to the custody and use of the parents who can cultivate or lease them and apply the proceeds as they see fit. Congress evidently intended to trust to the natural disposition of the parents to look after and care for their children out of the proceeds, and to allow them to treat the proceeds of the inalienable lands as a family fund to be administered by them until the children should reach their majority. It was probably anticipated that the proceeds of a minor's land from agriculture only would not be large and could not greatly exceed, if indeed it would equal, the expense his care and support would entail on the family.

With respect to the payment of income from United States bonds, mineral leases, sale of extra lands and grazing rents, belonging to minors, Congress seems to have had a similar view; but it did vest in the Commissioner of Indian Affairs, subject to the supervision of the Secretary of the Interior, discretion to see that its confidence in the natural parental feeling as a motive for care of the minors' interest in such income should not be abused, and whenever he found misuse or squandering by the parents of the income, he was given authority to withhold payment.

The record shows that the Secretary enlarged this discretion vested in him and his subordinate into a power to lay down regulations, limiting in advance the amount to be paid to the parents to a certain monthly rate, and declaring that no use of the funds would be permitted which

did not inure to the separate benefit of the minor. He was led to take this action, which was a departure from the previous practice of the Department during the decade immediately following the passage of the act, because of the sudden increase in the income of the minors resulting from the bonuses given for mineral leases. However desirable such regulations were, in view of the changed circumstances, we think they were in the nature of legislation beyond the power of the Secretary. Congress has since met the need by an amendment to the Act of 1906 by the Act of March 3, 1921, 41 Stat. 1249.

The direction to the Secretary to pay to the parents the income due to the minors is clear and positive. It is that the income "shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years." The proviso "That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment" did not confer on him a power to determine in advance by general limitation a monthly rate in excess of which what was due minors should not be paid to parents, nor did it enable him to require before payment a showing that the income beyond such limited monthly rate was being used for the specific benefit of each child. Congress evidently intended that the Commissioner should through his agents keep track of the conduct of parents in the use of the income of their children and necessarily vested him and the Secretary with power to require an account of how the income was being used; but this was not a regulatory function to be exercised in advance of payment which is positively enjoined. The proviso imposes on the Commissioner the duty of supervising each case and determining from the circumstances whether there has been, in cases of payments made, misuse or squandering, and if so, of withholding further payment on account of it. No bond is required of the parents as would be in case of a

guardian to whom the income is to be paid in the absence of parents; and it was the evident purpose of Congress, in view of the then comparatively small amount of the probable income, to allow it when there was a family to go into the family funds for the support of the family and of the minors as part of the family. This was the intent in respect to the annual proceeds from the land allotted to the minors, and the same purpose may be inferred as to the income from the funds and royalties, qualified, of course, by the proviso in order to prevent a perversion or squandering of it which would defeat this purpose.

We come, then, in our view of the statute, to consider the correctness of the judgment of mandamus of the District Supreme Court as affirmed by the District Court of Appeals. The opinion of the Supreme Court which was adopted by the Court of Appeals closes as follows:

"The conclusion is that the second question must be answered to the effect that the respondent cannot limit the amount to be paid to the relators as the parents of their minor children from the moneys distributable to them under the law, but can require from them the submission of periodical statements of accounts showing in detail the expenditure of the moneys so received. With this limitation on the scope of the writ of mandamus prayed for, it will issue as prayed.

"And it is so ordered."

But the judgment actually entered and affirmed is as follows:

"Ordered and adjudged that the prayers of the petition be and the same are hereby granted and the writ of mandamus be issued herein directed to the respondent, commanding him to deliver, or cause to be delivered to the plaintiffs all the moneys due their minor children, members of the Tribe of Osage Indians of Oklahoma, by reason of the distributions made in virtue of the act of June 28, 1906 (34 Stat. 539), prior to the filing of the bill in

this cause including their respective shares of bonus moneys distributable as royalties under said Act."

This is broad and unconditional and can not be sustained. The relators had refused and neglected to give an accounting of the funds last paid to them for the minors and the Commissioner and Secretary were entitled to withhold future payments until the Commissioner was by such accounting enabled to determine whether in his judgment there was a misuse or squandering of the income then being expended. The fact that, in the past the relators had satisfactorily accounted for money received is not sufficient. The Commissioner was entitled to the latest information before acting. The principles governing the issuing of the writ of mandamus in such cases have been much considered by us. *Hall* v. *Payne,* 254 U. S. 343; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549; *Ness* v. *Fisher,* 223 U. S. 683; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316. Subject to the construction we have put upon the statute, the discretion is vested in the Commissioner to determine in each case whether in his judgment there has been misuse or squandering, and within the same limitation, to decide what is misuse or squandering. Until he has had a full opportunity to exercise this discretion, neither he nor the Secretary can be compelled by mandamus to make the payment, and if in its exercise, he does not act capriciously, arbitrarily or beyond the scope of his authority, the writ will not issue at all.

Our conclusion is that the petition for the mandamus in this case should be dismissed without prejudice to the filing of another petition after the relators shall have made the requisite accounting of the moneys of the minors paid them down to the date of filing, and shall have submitted the same to the Commissioner, and after the failure, if there be such, of the Commissioner and the Secretary within a reasonable time to exercise the discretion vested in them under the statute as we have con-

strued and limited it in the foregoing opinion. The case is, therefore, reversed and remanded to the Supreme Court of the District with instruction to dismiss the petition accordingly.

Reversed.

UNITED STATES *v.* RIDER.

APPEAL FROM THE COURT OF CLAIMS.

No. 510. Argued February 23, 1923.—Decided March 19, 1923.

1. The Act of June 15, 1917, c. 29, 40 Stat. 188, in making a deficiency appropriation for "pay at $100 per month for enlisted men in training for officers of the Reserve Corps," intended merely to abolish the discrimination existing between the pay then allowed enlisted men and that allowed civilians training in like circumstances; it was not a fixing of base pay. P. 367.
2. Consequently, a first class private in the Aviation Section of the Signal Enlisted Reserve Corps, who, before this act received $33 per month as base pay and 50% additional for flight duty, under the Act of July 18, 1914, c. 186, 38 Stat. 516, was not entitled to any allowance for such duty in addition to the monthly pay of $100. *Id.*
3. This provision for $100 pay was not continued beyond June 30, 1918, the limit of the Act of June 15, 1917, *supra*, making the appropriation. P. 368.

57 Ct. Clms. 323, reversed.

APPEAL from a judgment of the Court of Claims allowing in part a claim for additional Army pay.

Mr. James A. Fowler, with whom *Mr. Solicitor General Beck, Mr. Assistant Attorney General Lovett* and *Mr. John G. Ewing* were on the briefs, for the United States.

Mr. Henry W. Driscoll, with whom *Mr. Harvey D. Jacob* and *Mr. Richard P. Whiteley* were on the brief, for appellee.

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

Nelson W. Rider, the plaintiff below, was a first class private in the Aviation Section of the Signal Enlisted Reserve Corps from the date of his enlistment, November 22, 1917, until September 13, 1918, when he accepted a commission as a Second Lieutenant in Air Service Aeronautics. His suit is for pay additional to that received by him while he was a first class private. He asked in his petition for a judgment for $381.42. The Court of Claims gave him judgment for $326.22. He was paid from February 9, 1913, until June 30, 1918, at the rate of $100 a month, from July 1 to September 13, 1918, at the rate of $49.50 a month, i. e., $33.00 as base pay and $16.50 as additional pay for flight duty. He began flight duty on May 12, 1918. Rider claims first $100 a month down to September 13, 1918, when he became an officer, second, fifty per cent. of that sum in addition while on flight duty from May 12, 1918, until September 13, and, third, $6.00 additional pay per month from February 9 to September 13, and fifty per cent. of that in addition on flight duty from May 12 to September 13. This third claim was disallowed by the Court of Claims and as Rider has taken no appeal from this ruling, we need not consider it.

On the peace establishment first class privates of the Signal Corps received $18.00 a month. Act of May 11, 1908, 35 Stat. 109. This was increased when we entered the war so as to make the pay $33.00. Act of May 18, 1917, 40 Stat. 82. The Aviation Section of the Army was established as a branch of the Signal Corps by the Act of July 18, 1914, 38 Stat. 514, 516, and by its terms the officer in command could instruct twelve enlisted men in the art of flying but no enlisted man could be assigned to duty as a flyer against his will except in time of war, and while on flight duty he was to receive an increase of fifty per

centum in his pay. This increased the pay of enlisted men on flight duty at that time from $18.00 to $27.00 monthly, and when we entered the war in 1917 from $33.00 to $49.50. By the National Defense Act of June 3, 1916, 39 Stat. 166, 174, 175, the Secretary of War under the provisions for the Signal Corps was authorized to cause as many enlisted men to be instructed in the art of flying as he deemed necessary.

To understand how the pay of the plaintiff herein became $100 a month as an enlisted man, we must revert to the history of the training camps. In 1915, the War Department, responding to a popular agitation for preparedness, on its own initiative and without legislative authority organized training camps where civilians were given military instruction. Those who attended were required to pay transportation and subsistence, to buy their uniforms and to serve without pay. Legislative authority was given for these camps in § 54 of the National Defense Act of June 3, 1916, 39 Stat. 194. This provided transportation, uniforms and subsistence but no pay. The Army Appropriation Act of August 29, 1916, 39 Stat. 648, gave funds for future camps for the fiscal year 1917 and authorized reimbursement for transportation and subsistence to persons who had attended camps prior to the Act of June 3, 1916. (See 23 Comp. Dec. 217.) Such was the state of legislation when the war began, April 6, 1917. At this time, civilians and enlisted men of the Regular Army and of the National Guard in federal service were being sent to training camps to become officers. The civilians received no pay. The enlisted men received the pay of their respective grades. By the Appropriation Act of May 12, 1917, 40 Stat. 69, 70, an appropriation of more than three millions of dollars was made to enable the Secretary of War to pay to civilians designated by him for training as officers not exceeding $100 a month as pay, provided they would agree to

accept appointment in the Officers Reserve Corps in such grade as might be tendered.

In the Act of June 15, 1917, 40 Stat. 188, there was, under the heading of "enlisted men of the line" the following:

"For pay of enlisted men of all grades, including recruits, and pay at $100 per month for enlisted men in training for officers of the Reserve Corps, $226,882,560."

This, as said, was a deficiency appropriation and therefore did not authorize pay at the rate of $100 beyond June 30, 1918. It was obviously passed to put enlisted men on a level with civilians going through the same training for commissions in the Reserve Corps.

The training camps for officers to which this appropriation then applied had been established by War Department Special Regulations No. 49, and included only training for commissions in the Infantry, Cavalry and Artillery. Training schools for the Aviation Section were not included within those regulations. In such schools, satisfactory students were recommended for commissions by the Chief Signal Officer but they were not embraced under No. 49 and were likely not to be paid the $100 a month provided by the Act of June 15, 1917. The Chief Signal Officer and the Adjutant General brought this discrimination to the attention of the Secretary of War (26 Comp. Dec. 117) who then directed by order of July 13, 1917, that enlisted men of the Signal Enlisted Reserve Corps admitted to the Signal Corps Aviation Schools, should be considered as designated for training as officers of the Army and put on the same footing as to pay and allowances as enlisted men detailed to training camps for commissions in the Infantry, Cavalry and Artillery.

After we had been a year in the war, and a draft act had been passed, no further necessity existed for inducement to civilians to train as officers, and no further provision after June 30, 1918, was made for pay to them.

Training camps were continued until November 11, 1918, but the appropriations for them were only for arms and ordnance equipment. Army Appropriation Act, July 9, 1918, 40 Stat. 876.

This recital has been necessary to show the surrounding circumstances in view of which this provision for the $100 monthly pay for enlisted men training for commissions should be construed. It makes clear that this legislation of June 15, 1917, was enacted merely to abolish the discriminating difference between civilians and enlisted men who were all training for the same commissions in the same camps, the former receiving three times the pay of the latter. It was a temporary leveling up. It was not the fixing of base pay. It was not a pay to which the fifty per cent. addition for flight duty could reasonably attach. Enlisted men under the Act of 1914 training in flight duty to become officers, before this Act of June 15, 1917, received $49.50, i. e., $33.00 plus $16.50. This increased the pay to $100 on a level with that of civilians engaged in the same duty and training. Such civilians, if any, were not entitled to fifty per cent. increase for flight duty. Why should it be assumed, therefore, that it was intended to pay these enlisted men fifty dollars more a month than civilians in a statute plainly designed to secure uniformity? But it is said that this is to repeal the Act of 1914 giving additional pay for flight duty to enlisted men, and repeals by implication are not favored. This is not to repeal the act. It is merely to hold that it is not applicable to a temporary provision or bonus for a particular purpose. In reaching this conclusion, we are confirmed by the departmental construction of these acts and by that of the accounting officers of the Treasury. We can not agree with the Court of Claims, therefore, that the fifty per centum addition to the regular pay of the enlisted aviation student applies to the $100 monthly pay allowed by the Deficiency Act of June 15, 1917.

But the Court of Claims went further and held that the $100 a month pay for such enlisted men continued beyond June 30, 1918, to which the Act of June 15, 1917, carried it. This conclusion is based on certain general provisions of two statutes. The first is the Act approved July 24, 1917, 40 Stat 243, to authorize temporary increase of the Signal Corps, to purchase and make airships and to appropriate for the same. That act put the temporarily enlisted men in the Signal and Aviation Corps on the same footing as to pay, allowances and pensions as enlisted men of the same grade in the Regular Army, made an appropriation of $640,000,000 for the purposes of the act and provided that enlisted men of the aviation section of the Signal Corps should be paid from funds transferred to their credit from Signal Corps appropriations. The second act relied on is that of July 9, 1918, 40 Stat. 850, in which it was provided that the $640,000,000 appropriated in the foregoing act, and the funds appropriated in the Act of May 12, 1917, 40 Stat. 69, 70, entitled "An Act making appropriations for the support of the Army for the fiscal year" 1918, should be made available until June 30, 1919. These statutes do not sustain the conclusion of the Court of Claims because the $100 pay for enlisted men in training was not provided for in either of these acts but in the Deficiency Act of June 15, 1917, which is not continued in effect until June 30, 1919. It is true that the Act of May 12, 1917, gives the Secretary of War the authority to pay civilians in training for reserve commissions $100 a month, but by the Act of July 9, 1918, no funds are appropriated to enable him to order such pay, and, as a matter of fact, after June 30, 1918, no such pay was allowed to civilians training for commissions. We are unable to see, therefore, in the acts relied on any legislative authority for paying $100 a month to enlisted men in training for commissions after that date. The situation reverted to that preceding the Act of June 15, 1917, and

the enlisted men in the Aviation Section became entitled to $33.00 a month pay and to $49.50 a month while engaged on flight duty.

The plaintiff below thus received all the pay which he was entitled to receive.

The judgment of the Court of Claims is

Reversed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY ET AL. *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 284. Argued March 1, 1923.—Decided March 19, 1923.

An order of a state commission requiring a railroad company to stop a designated interstate train at a city of 2,500 inhabitants for the purpose of taking on and discharging passengers, and to stop another there, on signal, for like purposes, *held,* under the circumstances, void, as an undue interference with interstate commerce. P. 371.

290 Mo. 389, reversed.

ERROR to a judgment of the Supreme Court of Missouri affirming a judgment of the State Circuit Court, which affirmed, upon a writ of review obtained by the plaintiffs in error, an order of the defendant commission requiring the stopping of certain trains. The Director General of Railroads, who was in control of the railroad under the Federal Control Act, was joined in the proceedings with the Railway Company.

Mr. Edward T. Miller and *Mr. William F. Evans,* for plaintiffs in error, submitted. *Mr. Alexander P. Stewart* was also on the brief.

Mr. Frank E. Atwood, with whom *Mr. L. H. Breuer* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The Railway Company conducts an interstate railroad between Kansas City, Missouri, and Birmingham, Alabama, passing through the city of Mountain Grove, Missouri.

Upon the petition of a volunteer organization of the city, the Public Service Commission of Missouri ordered the Railway Company, (1), to provide for the stopping of its southbound train No. 105 at Mountain Grove for the purpose of taking on and discharging passengers at that point, and, (2), provide for the stopping of northbound train No. 106 at the city, on flag or signal, for the purpose of letting off passengers who board the train at points south of the Arkansas state line, and for the purpose of taking on passengers holding tickets for points beyond Springfield, Missouri,—(3), the order to be in full force and effect on and after the 16th day of June, 1919.

The order was attacked by the Railway Company on the ground that it was " in violation of Section 8 of Article I of the Constitution of the United States, in that it constituted a regulation of, interference with, and burden upon interstate commerce." The order, however, was successively affirmed by the circuit court having jurisdiction, and by the Supreme Court of the State. To the judgment of the latter this writ of error is directed.

The Supreme Court expressed the question to be " whether or not the order of the Commission as affirmed by the circuit court imposes an undue burden on interstate commerce." The court considered the question a " vital one to be determined under the facts in this case."

Chicago, Burlington & Quincy R. R. Co. v. *Railroad Commission of Wisconsin,* 237 U. S. 220, was adduced for the conclusion that a State may require of a railroad adequate local facilities, even to the stoppage of interstate

trains or the re-arrangement of their schedules, whether done directly by the legislature or through an administrative body.

It was decided, however, that it was for this Court to determine " the fact of local facilities," that determination being necessary to our power to consider whether the regulation of the State affected interstate commerce to an illegal extent.

The primary principle is that, although interstate commerce is outside of regulation by a State, there may be instances in which a State, in the exercise of a necessary power may affect that commerce. There is, however, no inevitable test of the instances; the facts in each must be considered. In *Gladson* v. *Minnesota,* 166 U. S. 427, it was decided that a state regulation requiring all regular passenger trains running wholly within the State to stop at stations at all county seats long enough to take on and discharge passengers invaded no constitutional right of the railroad, nor was it an infringement of interstate commerce because it was made applicable to interstate connecting trains or trains transporting mails of the United States.

In *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Illinois,* 177 U. S. 514, a statute requiring all regular passenger trains to stop a sufficient length of time at county seats to receive and let off passengers was held invalid as an interference with interstate commerce, there being local trains sufficient for the local business. The case reviewed prior cases including *Gladson* v. *Minnesota,* and declared that while there is no regulatory power in a State over interstate commerce in a proper case, the State may exercise its power to secure local facilities, although some interference with interstate commerce may result.

To the like effect is *Mississippi Railroad Commission* v. *Illinois Central R. R. Co.,* 203 U. S. 335, and *Atlantic Coast Line R. R. Co.* v. *Wharton,* 207 U. S. 328. In this

case, indeed in all of the cases, the admonitory caution is expressed "that any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the interstate commerce clause of the Constitution." There is concession, however, to the requisition of reasonable facilities; necessarily, therefore, the fact of such facilities at, or their absence from, Mountain Grove must be inquired into.

Mountain Grove has a population of 2,500 persons, contains a number of banks, stores of the kind that a population of 2,500 persons would naturally demand and support, with a trade proportionate in volume and value. It has besides, a creamery, a soda water plant, a wholesale grocery business which handles dairy products, and there are shipments of live stock from the city. There is also an overall factory which employs about fifty girls, a State Fruit Experimental station and a State Poultry Experimental station.

The finding of the Commission is that "The trade territory is estimated at from thirty to fifty miles north and northeast, and twenty-five to forty miles south and southwest."

Trains Nos. 105 and 106 are through trains operated in long-distance travel. The order of the Commission requires of one of them the fixed duty of stopping; of the other, stopping on signal, its accommodation presumably being only occasional. The trains are night trains and it is difficult to see how they are necessary to the enterprise of the city, or an essentially contributing factor or adjunct to its business. We say "essentially contributing" as distinguished from some personal convenience or accommodation, which no doubt they are. It is to be borne in mind that interstate commerce and intrastate commerce have different purposes and these purposes are to be considered—the power of the Nation and the power of the States are accommodated to them and delimited by them,

and kept from interference and confusion. Our cases illustrate this and, we think, determine against the power exercised in the order under review. In other words, the order under review transcends the power of the State, the order of the Commission being of detriment to interstate commerce.

Much is made of the experimental stations, and it is said that 700 persons visit them annually who will suffer inconvenience by the discontinuance of the trains. The instance has attractive appeal but any instance of convenience has like appeal. But, as we have said, the distinction between the commerces—state and interstate—and their purposes are to be considered, and the different powers necessary to direct those purposes. Interstate commerce is concerned with the business of States,—States distant often from one another involving, necessarily, a difference in service. And such is the character of the trains in question. They are operated in long-distance traffic, are the instruments of such traffic, and it is a part of their efficiency that they are run at night. They may be a facility in some degree to Mountain Grove. It is to be remembered, however, that the city has four other through interstate passenger trains and any deficiency in their schedules or equipment can be corrected without burdening interstate commerce by stopping the trains in question. This conclusion, we think, is in accordance with our decisions.

We are compelled, therefore, to reverse the judgment and remand the cause for further proceedings not inconsistent with this opinion.

Reversed.

FEDERAL LAND BANK OF NEW ORLEANS *v.* CROSLAND, JUDGE OF PROBATE.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 428. Argued March 7, 1923.—Decided March 19, 1923.

1. A first mortgage executed to a Federal Land Bank is an instrumentality of the Government and cannot be subjected to a state recording tax. P. 377.
2. Payment of a tax made a condition to the recording of a mortgage is not optional where, under the state law, failure to record would override the mortgage in favor of any purchaser without notice. P. 377.

207 Ala. 456, reversed; petition for certiorari dismissed.

ERROR to a judgment of the Supreme Court of Alabama which reversed a judgment of the State Circuit Court, in mandamus, requiring a state recording officer to record a mortgage without exacting the statutory tax.

Mr. William C. Dufour, with whom *Mr. Solicitor General Beck, Mr. John St. Paul, Jr.,* and *Mr. W. A. Gunter* were on the briefs, for plaintiff in error.

Mr. James J. Mayfield, with whom *Mr. Harwell G. Davis,* Attorney General of the State of Alabama, was on the briefs, for defendant in error.

If the recording and registration statutes of Alabama be void, then defendant in error had no authority, and consequently no duty was imposed upon him, to register or record the mortgage tendered him. If the legislature of Alabama has the authority to establish and provide a system of registering and recording instruments evidencing title to property in Alabama, then it has the power and authority to prescribe the manner and terms upon which such instruments may be recorded, and to

prohibit the registration and recording of such instruments upon other terms and conditions than those prescribed in the statutes.

If the constitution, state or federal, or even the common law of Alabama, had imposed a duty upon defendant in error to register and record the mortgage, and the legislature had by a void statute attempted to exempt him from such duty, or to impose unlawful conditions, then a court might compel him by mandamus to discharge the legal duties imposed upon him by the constitution or common law; but when the very statute which confers the authority and imposes the duty also imposes the conditions upon which the mortgage may be registered or recorded, and prohibits the instrument from being registered or recorded unless the conditions and terms prescribed are conformed to, and makes the registration or recording of the instrument without a compliance a misdemeanor, then no court will compel the recording officer to violate the only law which authorizes him to register or record the mortgage.

Congress could not require the State to register and record deeds or mortgages made to the United States or its agencies. If, however, it should be conceded that Congress has such power, Congress has not exercised it.

Recording the mortgages and the payment of the tax by plaintiff in error is voluntary. The plaintiff in error can preserve all securities that it has by virtue of its mortgage or by virtue of the acts of Congress, without recording it or without paying for the privilege of so recording it, but it cannot obtain the benefits or securities which the Alabama statutes confer upon its mortgage unless it records it and pays the price of the privilege of recording it, as provided for in the Alabama statutes.

It is not denied that this is a privilege or license tax; but the important question is, Upon what is the tax imposed? It is not a tax upon property, and it is not a bur-

den or regulation imposed upon any business of the mortgagee; it is a charge or tax for privileges and benefits conferred by the State. 18 Ops. Atty. Gen. 491; *Mutual Benefit Ins. Co.* v. *County of Martin,* 104 Minn. 179; *Wheeler* v. *Weightman,* 96 Kans. 69; *Barnes* v. *Moragne,* 145 Ala. 313.

The Federal Farm Loan Act, 39 Stat. 377–380, § 26, contains no provision exempting or attempting to exempt the Federal Land Bank from the payment of the charge or toll in question. Such a provision would be void. Congress can no more impose a tax or a burden upon the state agencies than the legislature can impose a tax or burden upon the federal agencies.

The Federal Farm Loan Act prohibits a payment of any charge by any one other than the borrower, while the Alabama statute demands that the privilege tax be paid by the lender. This could be met by negotiation. Congress, of course, can regulate the contract which shall be made between the borrower and the lender as to loans made by the Federal Land Bank.

The tax is on the privilege of transfer granted by the state law, and no transferee, whether individual, State or United States, can claim an exemption except as the state law allows one. *United States* v. *Perkins,* 163 U. S. 625; *Schneider* v. *Buttman,* 190 U. S. 249; *Pocahontas* v. *Virginia,* 113 Va. 108.

Mr. Justice Holmes delivered the opinion of the Court.

This is a petition for a writ of mandamus to require the recording officer of Montgomery County, Alabama, to record a first mortgage deed on receiving the fee for recording the same, without payment of an additional sum of fifteen cents for each one hundred dollars of the principal sum secured. The General Revenue Act of the State, approved September 15, 1919, by § 361, Schedule

71, [Acts 1919, p. 420] provides that no mortgage shall be received for record "unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, to-wit: . . . upon all instruments which shall be executed to secure an indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage . . . to be paid for by the lender, and no such paper shall be received for record unless there is filed therewith a certificate that the privilege tax was paid by the lender." Any probate judge who shall receive a mortgage without collecting the "recording or registration tax" &c., is made guilty of a misdemeanor and punished.

On the other hand the Federal Farm Loan Act of July 17, 1916, c. 245, § 26, provides that first mortgages executed to Federal Land Banks shall be deemed "instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation." 39 Stat. 360, 380. The validity of this provision is not questioned. *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 207, 212. Of course therefore it must prevail over any inconsistent laws of a State.

The tax was sustained by the Supreme Court of the State and the petition for mandamus was ordered to be dismissed on the ground that the payment was optional; that the Federal Land Bank was not required to put its deed on record, and that if it did it must pay whatever others were required to pay for the registration of its security. But the case is not quite so simple as that. The law of Alabama does make it practically necessary to record such deeds, because it overrides them if not recorded, in favor of any purchaser without notice. While it does so it cannot say that it leaves the Bank free to

record or not. The Bank has a choice it is true, but so has one who acts under duress. *The Eliza Lines,* 199 U. S. 119, 131.

The State is not bound to furnish a registry, but if it sees fit to do so it cannot use its control as a means to impose a liability that it cannot impose directly, any more than it can escape its constitutional obligations by denying jurisdiction to its Courts in cases which those Courts are otherwise competent to entertain. *Kenney* v. *Supreme Lodge of the World,* 252 U. S. 411, 415. It is not necessary to cite cases to show that an act may become unlawful when done to accomplish an unlawful end.

Of course the State is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case the Legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax. If it attempted to disguise the tax by confounding the two, the Courts would be called upon to consider how far the charge exceeded the requirement of support, as when an excessive charge is made for inspecting articles in interstate commerce. *Foote* v. *Maryland,* 232 U. S. 494. But it has made no such attempt. It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that it is not at liberty to reach. The characterization of the act by the Supreme Court as distinguished from the interpretation of it does not bind this Court. *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362. *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346. It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The statute says that the lender must pay the tax, but whoever pays it it is a tax upon the mort-

gage and that is what is forbidden by the law of the United States.

A petition for certiorari presented by the plaintiff in error for greater caution will be dismissed.

Decree reversed.

ARKANSAS NATURAL GAS COMPANY *v.* ARKANSAS RAILROAD COMMISSION ET AL.

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

No. 500. Argued February 21, 1923.—Decided March 19, 1923.

1. The power of a State to abrogate private contracts touching the rates of public utilities exists only as an incident to the regulation of such utilities and their rates in the public interest. P. 382.
2. A statute will be construed if possible to uphold it as constitutional. P. 383.
3. A statute of Arkansas, transferring to the Railroad Commission jurisdiction formerly possessed by the Corporation Commission, including pending cases, but denying power to modify or impair existing contracts for supplying natural gas, *construed* as not singling out a particular gas company whose claim, that divisional rates fixed by contract between it and distributers were inadequate, was pending before the latter Commission. *Id.*
4. An exception in a statute will not be taken as intended and operating to work an arbitrary discrimination against a particular party, when it may be construed as a general one and nothing appears to prove either that there are not other cases within its purview or that it is based on arbitrary classification. P. 384.

Affirmed.

APPEAL from a decree of the District Court denying, in part, an application for a preliminary injunction.

Mr. W. B. Smith, with whom *Mr. J. M. Moore, Mr. John S. Weller, Mr. John O. Wicks, Mr. J. Merrick Moore* and *Mr. H. M. Trieber* were on the briefs, for appellant.

Mr. E. J. Dimock and *Mr. Ashley Cockrill,* with whom *Mr. Henry M. Armistead, Mr. Max Pam, Mr. Harry*

Boyd Hurd, Mr. William H. Martin and *Mr. Lewis L. Delafield* were on the briefs, for appellees.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The appellant brought suit in the District Court, alleging that an order of the Arkansas Railroad Commission was invalid as establishing confiscatory rates for natural gas furnished to its consuming customers and as maintaining certain divisional rates, (alleged to be wholly inadequate) fixed by contracts between appellant and the Little Rock Gas & Fuel Company and the Consumers' Gas Company. An interlocutory injunction was sought under § 266 of the Judicial Code. The court granted the injunction in respect of the rates to consumers but denied it as to the divisional rates. The appeal brings here for review only the action of the lower court in the latter respect.

By the divisional contracts referred to, appellant, in consideration of the payment to it of a stated proportion of the rates collected, agreed to furnish gas to the two companies named, to be by them distributed to their customers in the cities of Little Rock and Hot Springs, respectively. The gas was to be delivered at the intake of the distributing systems for these cities. Appellant asserts that the income afforded by the rates prescribed by these contracts is so inadequate as to have the effect of a virtual confiscation of its property, and that this result is in large part due to improper and wasteful methods of distribution on the part of the two distributing companies.

The Commission was asked to fix a flat rate, called a city gate rate, for the gas delivered at the city borders, the effect of which, of course, would have been to abrogate the contract rates based upon a percentage of the collections. Appellant's application was made to the Arkansas Corporation Commission, but was decided by the Railroad

Commission, to whom the Legislature in the meantime had transferred jurisdiction. There is no claim that rates to consumers were affected by these contracts; nor does it appear that the public interest is involved in the action which the Commission was asked to take.

The Railroad Commission denied the application primarily upon the ground that the power to grant it had been expressly withheld by the act of the Legislature, known as Act 443, passed on March 25, 1921 (Acts of Arkansas, 1921, p. 429), transferring to it the jurisdiction theretofore possessed by the Corporation Commission, and providing that the Railroad Commission "shall have no jurisdiction or power to modify or impair any existing contracts for supplying gas to persons, firms, corporations, municipalities or distributing companies, and such contracts shall not be affected by this act or the act of which this is an amendment." The act is copied in the margin.[1]

[1] "All records, papers, furniture and stationery under the control of the Arkansas Corporation Commission at the time of the passage of the act of which this is an amendment, shall be turned over to the Arkansas Railroad Commission and remain in its custody, and all investigations, proceedings and hearings that were pending before the Arkansas Corporation Commission at the time of the passage of the act of which this is an amendment, and the hearings of which are embraced within the powers conferred on the Arkansas Railroad Commission, shall be transferred to the Arkansas Railroad Commission for such consideration, orders and determination as may be made by it under the terms of the act of which this is an amendment, and the petitions pending before the Arkansas Corporation Commission at the time of the passage of the act of which this is an amendment, involving regulations of service and rates for natural gas, and numbered 417, 418 and 423 on the records of said Arkansas Corporation Commission, are transferred to the Arkansas Railroad Commission for decision and the making of such orders and rates as may be appropriate, and the Arkansas Railroad Commission shall consider the testimony that has heretofore been taken in said cases and hear such further testimony as may be appropriate to fully present such

The question whether, in the absence of the statute—it being made to appear that the stipulated consideration was grossly inadequate—the commission, under the circumstances disclosed by the record, would have been under a duty to fix gate rates in contravention of the contracts, may be put aside with brief consideration. While a State may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts (*Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U. S. 372, 375; *Producers Transportation Co.* v. *Railroad Comm.*, 251 U. S. 228, 232) there is, quite clearly, no principle

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cases, and such orders and rates as may be made by the Arkansas Railroad Commission in the said gas cases shall apply not only to the service outside of municipalities, but also to the service and rates for supplying natural gas within municipalities or to distributing companies operating within such municipalities, except that the Arkansas Railroad Commission shall have no jurisdiction or power to modify or impair any existing contracts for supplying gas to persons, firms, corporations, municipalities or distributing companies, and such contracts shall not be affected by this act or the act of which this is an amendment.

"From the decisions of the Arkansas Railroad Commission in such cases appeals may be prosecuted to the circuit court and Supreme Court, and such appeals shall be taken, proceeded in, heard and disposed of as provided in sections 20 and 21 of the act of which this is an amendment; *provided, however,* that on the determination of such natural gas cases by the Arkansas Railroad Commission and the decision on any appeals therefrom and the making of orders by the commission in pursuance to orders of the court made on such appeals, the powers and jurisdiction of the Arkansas Railroad Commission to regulate these particular utilities and fix their rates shall be such only as is conferred by other sections of the act of which this is an amendment. In all cases where the Arkansas Corporation Commission made a final decision or order before the act of which this is an amendment became effective and the time for an appeal has not elapsed, any party to said proceedings shall have the right to have the matter heard on appeal as is provided in sections 20 and 21 of the act of which this is an amendment."

which imposes an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist *per se.* It is the intervention of the public interest which justifies and at the same time conditions its exercise.

But the appellant contends that the statute violates the Fourteenth Amendment because it imposes restrictions upon the rate-making power of the commission in respect of the particular contracts of appellant here involved, which, it is said, are not imposed in the case of contracts of other utility corporations. In other words, it is urged that the act singles out the appellant for special restraint in this respect and is, therefore, unequal. While its meaning is not free from doubt, we do not so construe the act. The rule is fundamental that if a statute admits of two constructions, the effect of one being to render the statute unconstitutional and of the other to establish its validity, the courts will adopt the latter. *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 369. The language of this act is general. By its terms jurisdiction over all proceedings and hearings then pending before the Corporation Commission is transferred to the Railroad Commission. There follows a provision particularizing certain petitions numbered 417, 418 and 423, being the cases of appellant, as to which the Railroad Commission is directed to consider the testimony theretofore taken by the Corporation Commission and to hear such further testimony as may be appropriate to fully present such cases. The paragraph then concludes with

the exception, already quoted, to the effect that the Railroad Commission shall have no power to modify or impair existing contracts for supplying gas, etc. Considering the several provisions of the act together, its terms fairly justify the conclusion that the exception was meant to apply to all proceedings pending before the Corporation Commission transferred to the Railroad Commission and not alone to the three specified cases. The record contains nothing to indicate the character or number of these proceedings and nothing to suggest that their grouping or subjection to the rule of the exception constitutes an unreasonable or arbitrary classification. The reasons which influenced the classification are not disclosed on the face of the act, but the mere absence of such disclosure will not justify the Court in assuming that appropriate reasons did not in fact exist. The presumption is that the action of the legislature—which applies alike to all falling within the class—was with full knowledge of the conditions and that no arbitrary selection of persons for subjection to the prescribed rule was intended. See *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews,* 174 U. S. 96, 106.

The state legislature is vested with a wide discretion in the matter and interference by this Court may not be had merely because its exercise has produced inequality—every selection of subjects or persons for governmental regulation does that—but only where it has produced an inequality which is actually and palpably unreasonable and arbitrary. See *Bachtel* v. *Wilson,* 204 U. S. 36, 41; *Orient Insurance Co.* v. *Daggs,* 172 U. S. 557, 563; *Erb* v. *Morasch,* 177 U. S. 584, 586; *Missouri, Kansas & Texas Ry. Co.* v. *May,* 194 U. S. 267, 269; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245.

Applying the rule established by these and other decisions of this Court, the decree below is

Affirmed.

BALTIMORE & OHIO RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 208. Argued March 7, 1923.—Decided March 19, 1923.

1. To permit a recovery under the "Dent Act", c. 94, 40 Stat. 1272, there must have been an agreement express or implied. P. 386.
2. Where, at the insistence of Army officers, a railroad company hastened construction of a branch line to reach an ordnance depot, and in so doing, on its own determination, without notice to the Government or mention of compensation, went to additional expenses, *held*, that no agreement on the part of the Government to repay them could be implied. P. 387.

56 Ct. Clms. 377, affirmed.

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

Mr. John F. McCarron, with whom *Mr. George E. Hamilton* was on the brief, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Railroad Company filed its petition in the Court of Claims asking judgment for the amount of certain "extraordinary expenses" which it claimed to have incurred in constructing a branch railroad to the Ordnance Depot at Curtis Bay, Maryland, under "an informal or implied agreement" with officers of the War Department for the reimbursement of such expenses by the United States. The Dent Act, March 2, 1919, c. 94, 40 Stat. 1272. A demurrer to this petition was sustained. 56 Ct. Clms. 377

The allegations of the petition setting forth specifically "the nature, terms and conditions" of the "agreement", may be thus summarized: Having previously determined to build a branch railroad into the Curtis Bay region, for the purpose of developing new territory, the Railroad Company, in the summer of 1917, at the request of the War Department, changed in part the location of the proposed line so as to pass alongside the Ordnance Depot which the War Department planned to build. The company then contracted with a construction company for the building of the railroad to the site of the Depot, on a unit-price basis. The work was greatly delayed by the relocation of the line, and carried into the winter months. After numerous conferences as to means of expediting the work, the officers of the Department, in December, insisted that the operations at the Depot would be seriously hampered unless the company could greatly increase progress on the construction of the railroad, and that, in order to furnish track facilities for handling construction materials and freight at the Depot, it was very urgent that the railroad be completed at the earliest possible moment. Thereupon, in order to meet the urgent needs of the Department, the company, in January, 1918, determined to and did cancel the contract for constructing the railroad on a unit-price basis, and made a contract with another construction company for completing it on a cost plus basis. By working continuously, day and night, the new contractor completed the railroad to the Depot in the latter part of February, before it would have been completed under the original contract. The excess cost of thus constructing the railroad under the cost plus plan and the extraordinary expense incurred in hurrying its completion, amounted to $85,474.06; for which judgment was prayed.

These allegations show no "agreement, express or implied" for the payment of these expenses, which is essen-

tial to an award in plaintiff's favor under the provisions of the Dent Act. No express agreement is alleged. And manifestly the mere fact that, on the urgent insistence of the officers of the Department that the construction of the railroad be hastened so as to handle construction materials for the Depot and other freight (necessarily yielding revenue to the railroad), the company, on its own determination, substituted the cost plan of construction for the unit-price plan, without any notice to the Department of its intention so to do or of the increased expenses that would result, does not, in the absence of any intimation that it would look to the United States for reimbursement of such increased expenses or of any suggestion by the Department that such reimbursement would be made, afford any substantial basis upon which an agreement for the payment of such expenses can be implied.

The judgment of the Court of Claims dismissing the petition is accordingly

Affirmed.

LAYNE & BOWLER CORPORATION *v.* WESTERN WELL WORKS, INC., ET AL.

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

No. 278. Argued March 5, 1923.—Decided April 9, 1923.

A writ of certiorari, issued to settle a supposed conflict of decision between two circuit courts of appeals concerning the validity and scope of a patent, will be dismissed, as improvidently granted, when later examination proves that such conflict did not exist. P. 392.

Writ of certiorari to review 276 Fed. 465, dismissed.

CERTIORARI to review a decree of the Circuit Court of Appeals reversing a decree of the District Court which enjoined the respondents here from acts found to be in-

fringements of petitioner's patent and directed an accounting. The Court of Appeals found no infringement and for that reason ordered that the bill be dismissed.

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

Mr. Chas. E. Townsend, with whom *Mr. Frederic D. McKenney* and *Mr. Wm. A. Loftus* were on the briefs, for respondents.

Mr. David P. Wolhaupter, Mr. Raymond Ives Blakeslee and *Mr. Charles C. Montgomery,* by leave of court, filed a brief as *amici curiae.*

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

This is an ordinary patent case. There was no reason for granting the application for a writ of certiorari except upon the ground that the Circuit Courts of Appeals for the Fifth and the Ninth Circuits had differed in respect to the validity and scope of the patent and that uniformity required a decision from this Court. The arguments and the briefs have aroused further inquiry in the minds of the Court as to whether there was in fact any conflict between the decisions of the two circuit courts of appeals, and whether the writ of certiorari was not improvidently granted.

The Layne patent, now owned by the Layne & Bowler Corporation, the petitioner, was for apparatus for drawing water from deep wells, driven or artesian, and especially for adjusting a pump in them. In such wells, it is essential that the adjustment, the alignment and the lubrication should be effected from the top because the bore of the well is so small that the operator can not descend to the pump. The Layne patent covered many

different devices for assembling the various parts at the top so that they could be thrust down the well hole and be adjusted in place at the bottom, so that the shaft of the rotary pump should be held in proper alignment as it rotated, so that it should not be clogged with sand and water as the pumping went on, and so that the shaft and the bearings in which it moved, placed at intervals from top to bottom, should be lubricated. To effect these objects the inventor used a casing or cylinder surrounding the shaft, divided them both into sections, united one section to another by a sleeve or screw thread and in these sections pushed the apparatus down the well hole. There was a bearing at each end of each section of the casing in which the shaft was to revolve. Layne assembled with this shaft and casing, wedges and spiders to hold the two in place against the sides of the well hole. The rotary pump was held suspended in alignment by the weight of the casing and was closed from the casing by a packed bushing in which the shaft revolved and which prevented water and sand and other detritus from clogging the shaft and its bearings. The water from the pump was carried to the top by a separate pipe. The lubrication was effected by pouring the oil in at the top of the casing, and allowing it to leak through each bearing to the bottom of the casing whence it was drawn at intervals out of the casing by forcing air through an air vent at the top of the casing. The pump with the rotary shaft was old, the use of sections was old generally though it does not seem to have been applied in this particular field before, and the closed casing or cylinder surrounding the shaft was old. In a prior patent to Crannell for a pump in wells large enough to permit a man to go to the bottom, a rotary shaft with a cylindrical casing closed against the pump is shown.

In practice, Layne did not use packing and bushing but relied on a long sleeve to keep water and sand out of the

casing. Nor did he ever use the wedges and spiders for alignment.

The three claims sued on in this case were Nos. 9, 13 and 20, as follows:

9. In a well mechanism, the combination with a pump casing of a rotary pump of a jointed pump shaft and a closed casing surrounding the pump shaft from the pump to the top of the well.

13. The combination with a pump and its actuating shaft of a sectional casing therefor, provided at each end of each section with a fixed block with bearings for the shaft, the casing being closed at the top and provided with an air vent.

20. The combination of a well casing, a rotary pump therein, and a line shaft for the pump entirely closed off from the water in the well.

In 1912, in an infringement suit the validity of this patent and of claim No. 13 was considered by the Circuit Court of Appeals of the Fifth Circuit and sustained. Infringement by defendant of that claim was found and a decree for damages entered. *El Campo Machine Co.* v. *Layne,* 195 Fed. 83. The decision is a *per curiam* and there is no discussion and no description of the defendant's device in the report.

In 1914, the same Circuit Court of Appeals had to consider the patent again in *Van Ness* v. *Layne,* 213 Fed. 804. The claims relied on were the 4th, the 9th, the 13th and the 20th. The 4th was found not to be infringed, and as we are not concerned with it here, we can disregard it. The court found that Van Ness, the alleged infringer, did not use an air vent to force his oil out of the casing as we are informed by this opinion the infringer El Campo had done in the previous case. So it was held that Van Ness did not infringe claim No. 13. The court held that the jointed feature of the shaft made part of claim 9 added nothing to the novelty or patentability of

the device and that claims No. 20 and No. 9 really covered the same ground. The court held, however, that the use of the entirely closed casing to exclude water and detritus from the shaft and its bearing, to secure lubrication of the bearings from the top and to align the bearings and shaft so as to prevent lateral displacement in the well and keep the shaft in a vertical position was a novelty and did supply a want in the field of deep pumps. As to infringement the court held that the casing of Van Ness's apparatus, although not so completely as the patented device, did keep the water and detritus from all the bearings but one on the shaft; that the lubrication was effected in practically the same way, and, though this was very doubtful in the mind of the court, the alignment was preserved by the downward thrust of the suspended casing and bearings. Accordingly it was held that the 20th claim was infringed.

In *Getty* v. *Lane,* 262 Fed. 141, the same court considered the patent a third time. In its opinion, it said (p. 143):

"The Layne patent too nearly resembles the Crannell patent to be called a pioneer patent, though it did accomplish a revolution in the well-drilling industry. Its merit was in adapting the Crannell type of pump to a narrow and deep well hole, in a way that has been held by us to exhibit novelty. While the substitution of mere mechanical equivalents for the means adopted by Layne could not avoid infringement of his patent, it is also true that the range of equivalents cannot be enlarged upon the idea that his patent was a pioneer one in the pump art. Its advance over Crannell prevented Crannell from being considered by us an anticipation, and was enough to show novelty, but it stops there. The Layne patent must rest, not upon the idea of closure, which would not be patentable apart from the method by which it was accomplished, but upon the means of its accomplishment, as disclosed by the specifications of his patent."

The court then held that alignment in the alleged infringement was secured by resting on the bottom of the well and not by suspension from the top and the downward thrust of the weight. It further held that Layne effected his lubrication by stagnant oil removed by forced air at intervals, whereas the alleged infringer had a circulatory system by which the oil after leaking through the bearings escaped from the bottom into the water around the pump, and that finally the closure of the casing against water and detritus was effected not by a bushing or packing but by the downward flow of the oil. This led to a dismissal of the bill.

The Circuit Court of Appeals of the Ninth Circuit in this case instead of differing from that of the Fifth Circuit, seems, on a careful examination of the opinions and the infringing devices under consideration in the different cases, to have followed the opinions in the Fifth Circuit. It sustained the validity of the 9th, 13th and 20th claims. It did not greatly consider the 13th claim because it was as clearly not infringed by the respondent here, as it was not infringed by the Van Ness device in the Fifth Circuit case. The Ninth Circuit Court held as the Fifth Circuit Court had held in the *Getty Case,* that the scope of the Layne patent claims was much restricted by the prior art and that a circulatory system of lubrication was not the same as a closed stagnant system. The entirely closed casing as an element of the 20th claim furnishing a stagnant lubrication did not, therefore, find its equivalent in the casing of the respondent which was open at the bottom to permit a circulatory lubrication.

It is manifest from this review of the conclusions in the two circuits as to the validity of the Layne patent and the proper construction to be put upon the 9th, 13th and 20th claims, that they were really in harmony and not in conflict and that there was no ground for our allowing the writ of certiorari to add to an already burdened

docket. If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head.

Precedents for dismissing a writ of certiorari improvidently granted are found in *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association,* 242 U. S. 430, and in *United States* v. *Rimer,* 220 U. S. 547.

Writ of certiorari dismissed.

HALLANAN, STATE TAX COMMISSIONER, ET AL. *v.* EUREKA PIPE LINE COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI AND IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

Nos. 569 and 885. Motion to dismiss or affirm, etc., submitted March 12, 1923.—Decided April 9, 1923.

A mandate from this Court reversing a judgment of a state court sustaining a tax here found to have been imposed partly on interstate commerce, leaves the state court free to determine the purely state question whether the statute under which the tax was imposed is separable so that the tax may be sustained in that part which affects only intrastate commerce. P. 397.

Petition for certiorari (No. 569) denied.

Writ of error (No. 885) dismissed.

WRIT of error and petition for certiorari to review a judgment of the Supreme Court of Appeals of West Vir-

ginia, entered after the reversal of the same case by this Court in *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265.

Mr. Edward T. England, Attorney General of the State of West Virginia, *Mr. S. B. Avis, Mr. Fred O. Blue* and *Mr. Wm. Gordon Mathews* for petitioners and plaintiffs in error.

Mr. Frank L. Crawford and *Mr. James M. Beck* for respondent and defendant in error.

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

This is an effort by writ of error, and if that is inappropriate for the purpose, by an application for a writ of certiorari, to review the action of the Supreme Court of Appeals of West Virginia in the judgment which it entered in avowed and attempted compliance with the judgment of this Court in the case on writ of error *sub nomine Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265. It is contended by the state authorities seeking review here that the Supreme Court of Appeals did not enter the judgment required by our mandate and that we should in some appropriate way direct that court specifically what judgment it should enter.

A summary of the litigation must needs be made in order that the controversy may be understood and decided.

The Pipe Line Company filed a bill against the State Tax Commissioner and other state authorities to enjoin them from enforcing a statute of the State which forbade anyone to engage in the business of transporting petroleum in pipe lines without the payment of a tax of two cents for each barrel of oil transported. The Pipe Line Company owned a system of pipe lines by which it transported 22 millions of barrels in the year ending June 30,

1919. Of this, it was admitted that 1,239,000 barrels had their origin in West Virginia, and their destination there, and that the privilege of transporting that amount might be taxed; but it was insisted that the remainder was a stream of interstate commerce, the privilege of conducting which could not be taxed under the commerce clause of the Federal Constitution. The Circuit Court in which the bill was filed and the causes heard held that the remainder was interstate commerce and no privilege tax could be imposed on a pipe line company engaging in it. It conceded that it would be competent for the Legislature to collect a privilege tax for the purely intrastate transportation of the 1,239,000 barrels already mentioned, but it inquired whether the State had done this by the act in question, and said:

"If it can be contended that the tax affects this particular oil it is only incidental to the like tax imposed upon the whole body of oil transported. It is plain the legislature did not mean to distinguish as between the two classes of oil, for the act makes no attempt at a division. We are not able to say from an inspection of the act whether or not the legislature would have imposed the tax upon the privilege of handling this intra-state oil alone, had it been exempting the balance of the oil when framing the law, as we think it should have done. Whether it would have made the tax applicable to the West Virginia oil alone, no one can say; and this we understand to be the test of whether or not the act is divisible. *Eckhart* v. *State*, 5 W. Va. 515; *Robertson* v. *Preston*, 97 Va. 296; *Trimble* v. *Comm.*, 96 Va. 888."

Accordingly the Circuit Court held the whole act bad and granted an injunction against enforcing it against the Pipe Line "in any respect."

On appeal the Supreme Court of Appeals held that the act was to be construed as applying to pipe lines only so far as they were engaged in intrastate commerce, and that

it did not apply to transport of oil in interstate commerce. It held, however, that oil originating in West Virginia, a large part of which was ultimately carried out of the State but the destination of which was undetermined because its owners might withdraw it from the line at any point within the State, was intrastate commerce and was a proper basis for the privilege tax under the law. Accordingly, in so far as the decree of the Circuit Court enjoined collection of a privilege tax measured by intrastate commerce in oil as thus determined, it was reversed. In this Court it was held that oil produced in West Virginia and constituting in fact a stream of oil flowing out of the State was interstate commerce even though those who delivered the oil to the company for transportation might have diverted it from the interstate commerce stream, and though in comparatively small quantities some oil was thus diverted.

Accordingly the decree of the Supreme Court of Appeals was reversed, and the cause was remanded to that court for further proceedings not inconsistent with the opinion of this Court. That court then entered the following decree entitled in the cause:

"Upon an appeal from a decree of the Circuit Court of Kanawha County pronounced on the 8th day of September, 1920.

"The Court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this cause and the record of the decree aforesaid, is of opinion that there is no error in said decree. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 8th day of September, 1920, be and the same hereby is affirmed."

It is now objected by the representatives of the State that this action of the Supreme Court of Appeals was not in accord with the mandate because it was inconsistent

with the opinion of this Court. In the course of that opinion in stating the facts, it was said (257 U. S. 270):

"But all the oil of the same grade was mixed, regardless of source, and of the Pennsylvania grade only 1,239,099.55 barrels were used in West Virginia. It is admitted that the tax may be levied in respect of the last item, but the question before us is whether the tax can be laid upon the whole product of the State upon which was imposed the gathering charge."

It is said that this language imposed the duty upon the Supreme Court of Appeals of so shaping its decree under our mandate as to enable the State to collect a privilege tax from the Pipe Line Company upon the number of barrels above mentioned. We can not agree with this. The statement quoted from the opinion was part of a review of the facts and a classification of the oil according to its interstate and intrastate character. Both the West Virginia courts and the counsel for both parties agreed that this amount of oil was intrastate commerce and subject to such a privilege tax. But the language quoted was not used to indicate the form of the decree to be entered below. This Court gave no consideration to the question whether the invalidity of part of the tax rendered the whole law void because indivisible, as the Circuit Court had held it to be. That was peculiarly a state question and when we reversed the case for the reason that oil in transport which the Supreme Court of Appeals held to be intrastate and so taxable was interstate and immune, and remanded the case for further proceedings, it was entirely within the power and duty of that court to decide what under the state law would be the effect of the invalidity of part of the tax levied by the law as adjudged by this Court upon the validity of the whole tax law. The Supreme Court of Appeals evidently reached the conclusion that the Circuit Court had been right in deciding that if so much of the tax was invalid, it could

not infer that the Legislature would have enacted the law at all. Accordingly it affirmed the decree of that court as it had full power to do.

The application for the writ of certiorari is denied and the writ of error is dismissed.

HALLANAN, STATE TAX COMMISSIONER, ET AL. *v.* UNITED FUEL GAS COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI AND IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

Nos. 570 and 886. Motion to dismiss or affirm submitted March 12, 1923.—Decided April 9, 1923.

Decided on the authority of *Hallanan* v. *Eureka Pipe Line Co.*, *ante*, 393.
Petition for certiorari (No. 570) denied.
Writ of error (No. 886) dismissed.

WRIT of error and petition for certiorari to review a judgment of the Supreme Court of Appeals of West Virginia, entered after the reversal of the same case by this Court in *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277.

Mr. Edward T. England, Attorney General of the State of West Virginia, *Mr. S. B. Avis*, *Mr. Fred O. Blue* and *Mr. Wm. Gordon Mathews* for petitioners and plaintiffs in error.

Mr. Malcolm Jackson and *Mr. R. G. Altizer* for respondent and defendant in error.

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

This is a case like that of *Hallanan* v. *Eureka Pipe Line Co.*, just decided, *ante*, 393, involving the question

whether the Supreme Court of Appeals of West Virginia has complied with the mandate of this Court issued on a judgment entered in the case of *United Fuel Gas Co.* v. *Hallanan,* decided December 12, 1921, 257 U. S. 277. It is in all respects similar to that in *Eureka Pipe Line Co. Case* and requires the same judgment.

The petition for the writ of certiorari is denied and the writ of error is dismissed.

TOLEDO SCALE COMPANY *v.* COMPUTING SCALE COMPANY.

FIDELITY & DEPOSIT COMPANY OF MARYLAND ET AL. *v.* COMPUTING SCALE COMPANY ET AL.

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

Nos. 339 and 388. Argued March 16, 1923.—Decided April 9, 1923.

1. Under the Act of September 6, 1916, this Court has no jurisdiction to review on certiorari the merits of a final decree entered by the Circuit Court of Appeals more than three months before the certiorari was applied for. P. 417.
2. Applications made to the Circuit Court of Appeals after it had affirmed a decree upholding a patent and ordering an accounting, and renewed upon the appeal from the accounting, whereby the defendant sought to reopen the case upon the ground of newly discovered evidence of prior discovery, manufacture, sale and use of the invention, were addressed to the sound discretion of the court and properly overruled where the failure to discover the evidence in time for the original hearing in the District Court was due to the applicant's lack of diligence. P. 419.
3. To justify setting aside a decree for fraud, extrinsic or intrinsic, it must appear that the fraud charged prevented the party complaining from making a full and fair defense. P. 421.
4. A party suing on a patent is under no duty to furnish his opponent evidence of an anticipation of the invention; nor does his silence concerning such evidence, unaccompanied by acts preventing the

opponent from finding and availing himself of it, constitute such a fraud as will sustain a suit to enjoin execution of a decree enforcing the patent. P. 423.

5. A decree of a District Court enjoining obedience to a decree of a Circuit Court of Appeals of another circuit, upon an issue and evidence of fraud, which, except for immaterial adjuncts of malice and conspiracy, had been presented to and rejected by the latter court as a basis for reopening the decree, held an unwarranted review of that court's discretion, and not a decree founded on extrinsic fraud. P. 423.
6. The principle requiring due diligence in discovering and presenting evidence, to avoid protraction of litigation, can not be set aside to avoid hardship in a particular case. P. 424.
7. The fact that the sureties on a supersedeas bond in a Circuit Court of Appeals, and the banks with which their principal made deposits for their indemnification, have been erroneously enjoined from complying with that court's decree by a District Court of another circuit, does not relieve them from obedience to a proper and final order of the former court directing summary judgment against them. Their remedy is by appeal from the decree of the District Court. P. 425.
8. Under Jud. Code, § 262, the Circuit Court of Appeals has power to issue all writs not specifically provided for by statute which may be necessary to the exercise of its appellate jurisdiction. P. 426.
9. To protect the execution of its decree, the Circuit Court of Appeals may direct the District Court to enjoin a party from prosecuting a suit in another jurisdiction. *Id.*
10. A defeated party who seeks by a suit in another jurisdiction to enjoin the sureties on his supersedeas bond and his opponent from executing a decree of the Circuit Court of Appeals, is guilty of contempt of that court which it may punish by directing the District Court to enter a summary decree for expenses occasioned by such injunction suit and a reasonable attorney's fee. P. 426.

281 Fed. 488, affirmed.

This case comes here by writs of certiorari to the Circuit Court of Appeals of the Seventh Circuit granted to review the proceedings of that court in enforcement of a final decree in a suit to enjoin infringement of a patent and for an accounting of profits. The patent had expired pending the litigation, but the accounting resulted

in a decree of the District Court for Northern Illinois for profits of more than $400,000 in favor of the Computing Scale Company against the Toledo Scale Company. The Circuit Court of Appeals, which had sustained the patent (208 Fed. 410) affirmed the decree for profits (279 Fed. 648), but stayed the mandate to permit an application to this Court for a writ of certiorari, which was denied January 9, 1922 (257 U. S. 657). On the same day, the Toledo Company, a corporation of New Jersey, filed a bill in the District Court for the Northern District of Ohio against the Computing Company, a corporation of Ohio, to enjoin it from enforcing the decree of the Circuit Court of Appeals of the Seventh Circuit on the ground that it was obtained by fraud. The Computing Scale Company filed an answer raising first a special plea to the jurisdiction and then responding on the merits denying fraud and pleading *res judicata.* The bill also made parties defendant the sureties on the supersedeas bond in the Circuit Court of Appeals, the Fidelity Deposit Company and the United States Fidelity and Guaranty Company, both corporations of Maryland, as well as three Toledo banks, citizens of Ohio, which held money deposited to the credit of the surety companies by the Toledo Company, as indemnity, and asked that they all be enjoined from in any way satisfying or aiding to satisfy the decree. The Computing Company then filed in the Circuit Court of Appeals a petition for a rule against the Toledo Company to show cause why it should not be enjoined from maintaining the bill in Ohio and why a summary decree should not issue against the sureties. Pending a hearing as to this rule, the Ohio court granted a temporary injunction restraining the Computing Scale Company, and the sureties and the banks as prayed by the Toledo Company. The Circuit Court of Appeals thereafter heard the petition for the rule to which the Toledo Com-

pany had made answer, in which by way of exhibit to its averments it set up as a defense the complete record in the injunction suit in Ohio. The Circuit Court of Appeals then made the order which is here for review. It reads as follows:

"We now receive from the Computing Company the certified copy of the Supreme Court's order denying Toledo Company's petition for writ of certiorari, and we direct the Clerk to file it in this cause.

"Unless the mandate which we now formulate be stayed on Toledo Company's motion filed within five days, the Clerk is directed to issue and transmit to the Court below the following mandate:

"(1) Enter of record our affirmance of the final decree on accounting.

"(2) Enjoin Toledo Company from further maintaining its Ohio bill and from filing elsewhere any similar bill.

"(3) Enter summary decree against the sureties on the supersedeas bonds for the amount due upon the accounting decree, including all costs in both courts, but not exceeding the penalties of the bonds.

"(4) Ascertain Computing Company's expenses in this matter, including reasonable attorney's fees, paid or incurred since the Supreme Court's denial of the petition for writ of certiorari on January 9th, 1922, and enter summary decree therefor against Toledo Company, but not against the sureties on the supersedeas bonds". 281 Fed. 488.

The patent, the subject of controversy in this case, was for an automatic computing scale issued to one Smith in September, 1895, and reissued April 28, 1896. It related to improvements in weighing scales wherein the weight and selling price could be seen by the weigher at a glance without mental calculation. It consisted of a pan weighing device attached to an indicator drum inside of a casing with a slot through which the figures on the drum as it

revolved in response to the effect of the weight would so coördinate with figures on the casing as to show the weight and correct price on the same line. The patentee in his specifications admitted that the general combination was an old one but said that the object of his improvement was to provide scales, extraordinarily sensitive to weights of small amount, and accurately registering them. He explained that an essential feature of the indicator drum in his improvement was that it should be made of very light material because scales of this kind theretofore would not weigh alike successively, due to the inertia of the revolving drum, the force required to operate it, and the difficulty of stopping, and so he had constructed his drum of a skeleton frame of aluminum with a periphery of a thin sheet of paper.

The claims in controversy were:

"5. An indicator-drum for weighing mechanism, consisting of a spindle provided with a plurality of skeleton frames of light material and secured to said spindle, and having secured to their peripheries a sheet of paper forming a cylinder.

"6. An indicator-drum for weighing mechanism consisting of a spindle provided with a plurality of skeleton disks or frames of thin aluminum having a sheet of paper extending around and secured to their peripheries to form a cylinder."

The Computing Scale Company and the Toledo Scale Company were competitors in business. The former had acquired the Smith patent by the purchase of the assets of the Boston Computing Scale Company, and before 1906 was manufacturing scales using the Smith cylindrical drum in competition with scales of the Toledo Company having a fan-shaped registering dial. There had been patent suits between them concerning other parts of the weighing mechanism than the indicator. Each had other patents in this field. In 1906, the Toledo Company

did not give up its fan-shaped scales, but began the manufacture of scales with an indicator drum of skeleton aluminum frame and paper periphery and so increased its sales of them that they ultimately constituted the larger part of its business. This led to two suits by the Computing Scale Company in 1907 against the Toledo Company in the District Court for the Northern District of Ohio. Nothing was done with them until the suit at bar was brought in the District Court for Northern Illinois in 1910. Then, as a condition of getting extension of time to take evidence herein, the Computing Scale Company was required by the court to dismiss the Ohio suits. In its answer to the bill in this case, filed in August, 1910, the Toledo Company alleged that the Smith patent and the claims 5 and 6 had been anticipated by a patent granted to one Phinney in 1870 and further averred anticipation by reason of prior public use and sale "by various persons at various places within the United States, and among others at Pawtucket, Rhode Island, by William H. Phinney, then and now, as defendant is informed and believes residing at said Pawtucket."

On the trial, the Toledo Company's expert testified that he had built a Phinney scale following the patent to Phinney, but that he could not get it to stop twice within an ounce of the same weight, and that a scale which would not weigh within a very small fraction of an ounce was not an instrument of precision and not a commercial article at all. It should be said that the specifications of the Phinney patent made no reference to the material of which the cylinder of the scales was to be made or its weight or the importance of those features. The District Court held that the fifth and sixth claims of the Smith patent were valid and this was affirmed by the Circuit Court of Appeals, April 15, 1913 (208 Fed. 410, 413), holding that Smith had put in the hands of the world's vendors of commodities the first usable computing scale,

that long before the "paper" art, including a patent to Phinney in 1870, had proposed to teach practical scale makers how to build automatic computing scales, but all attempts to make them were failures, that in the 25 years between Phinney and Smith the brightest and most skilful men had sought the necessarily tremendous commercial success of a reliable computing scale but had not found it until Smith had the happy conception that the lightest possible drum would secure the required accuracy of revolution and stopping.

On May 14, 1913, the Toledo Company made a motion in the Circuit Court of Appeals that the court include in its mandate affirming the decree of the District Court for an accounting, leave to rehear the cause and to permit the Toledo Company to introduce proof that computing scales had been made and sold and introduced into use by the patentee Phinney of Pawtucket, Rhode Island, which had a cylinder drum of light wood skeleton covered with thin paper and anticipated the drum of Smith. Three Phinney scales and thirteen supporting affidavits were introduced. These included one of the son of Phinney, the patentee, who had been with his father during his manufacture and sale of the scales until his death and who still lived at Pawtucket, of Phinney's widow, and also those of residents of Pawtucket who said they had bought and used the scales. The affidavits also disclosed that in a suit against the Federal Scale Company for infringement of the Smith patent brought by the Computing Scale Company in Philadelphia, which never came to trial, all this evidence had been taken and was on file. The three Phinney scales which were exhibits there had been in the custody of Church and Church who had been counsel for the Computing Scale Company in Philadelphia. It was also shown that the Computing Scale Company had three or four of these scales and drums in their possession at Dayton. It also appeared from young Phin-

ney's affidavit that the Boston Computing Company, which owned the Smith patent and which subsequently was bought out by the complainant Computing Scale Company was trying to buy the scales which Phinney had. The evidence tended to show that only twenty scales had been made by Phinney, and that no scales were made after 1895. The president of the Toledo Company in his affidavit excused failure earlier to discover this evidence by saying that the company made every effort to learn of prior use. His counsel explained that he had been led away from investigation into manufacture of Phinney scales at Pawtucket which was not visited by agents of the Toledo Company till after June, 1912, by the fact that the model of the Phinney patent at the Patent Office was of only a small one of solid wood and not of light material, and that he only acquired knowledge of Phinney's manufacture and use of scales with indicator drums by accident after June, 1912, from counsel for defendant in a suit brought by the Computing Company against the Standard Company in 1911. There was no direct charge in these 1913 affidavits that the Computing Scale Company was purchasing and gathering in these Phinney scales to conceal them, but there were averments in the affidavits which were only relevant to sustain such a charge and were evidently inserted for that purpose. The 1913 motion for a rehearing was overruled by the Circuit Court of Appeals.

The case went back for an accounting, and in 1917 the Toledo Company took depositions of the witnesses whose affidavits had been filed in 1913 and sought to use the evidence to reduce the damages by showing what kind of a scale might have been constructed by the Toledo Company without infringing the Smith patent, but the evidence was not given weight for that purpose. The expert of the Toledo Company in these depositions said he did not test the Phinney scales of wood and paper cylinders

when they were in the custody of the Toledo Company because he did not think they would weigh properly. The District Court confirmed the master's report of the accounting and made a decree accordingly for $420,000. This was carried on appeal to the Circuit Court of Appeals, which affirmed it in October, 1921. 279 Fed. 648.

The Toledo Company at the same time again made a motion for leave to open up the case that it might introduce the evidence contained in the affidavits presented in May, 1913, and the depositions taken in 1917, and retry the issue of validity of the patent and show its invalidity by reason of the Phinney prior manufacture, sale and use. In brief of counsel urging the granting of this motion for the Toledo Company, it was said " To refuse to consider the evidence in the present record respecting the Phinney scale, as affecting the validity of the patent in suit, would be to permit the plaintiff to take advantage of essential facts known to it and unknown to the defendant or the court and its consequent imposition on both." In the subsequently filed petition for certiorari to this Court, counsel for the Toledo Company, in discussing this same issue, said,

" The affidavits further showed that plaintiff had full knowledge of the Phinney scales for more than ten years, that evidence and numerous samples of them had been introduced in a suit which plaintiff had brought at Philadelphia ten years earlier upon the reissued patent here in suit, that the prosecution of said suit had been abandoned because of such evidence and that plaintiff had suppressed and concealed such fact from the Court and defendant throughout the litigation in the present cause."

The motion to reopen the case was denied by the Circuit Court of Appeals. 279 Fed. 674. An application to review this October, 1921, decree by certiorari was made and was denied by this Court January 9, 1922. 257 U. S. 657.

At once, the Toledo Company filed its bill in the United States Court for the Northern District of Ohio, which is summarized by the Circuit Court of Appeals in its opinion. 281 Fed. 488, 491. It charged that since 1901, the Computing Company had formed a conspiracy with certain of its officers and agents to monopolize the computing scale business of the country and to put the Toledo Company out of business, that in 1902 it built and sold a dishonest scale that the Toledo Company exposed in circulars which the Computing Company sought, but failed, to enjoin, that this increased its malicious hatred toward the Toledo Company, that then the Toledo Company was making a fan scale which on the strength of patents held by it the Computing Company sought unsuccessfully to enjoin, but dismissed the suits without a trial, that in 1901 the Computing Company brought suit in the Eastern Pennsylvania District to enjoin the Federal Scale Company from infringing the Smith patent and introduced three Phinney scales as exhibits in evidence and depositions already referred to, that the suit was dismissed because the Computing Company was advised by counsel that the Phinney defense was dangerous, and that the exhibits were by stipulation retained by counsel for the Federal Company who lent them to counsel for Computing Company in whose custody they were until after the issue of validity had been decided in Chicago in favor of the Computing Company, that a suit brought against one Randall in Pennsylvania in 1901, and against the Standard Company in Wisconsin in 1911, on the Smith patent, by the Computing Company, had been dismissed after production of similar evidence of the Phinney prior use, that after 1906 the Computing Company secretly purchased and took into its possession all the Phinney scales it could get, being all of the twenty which Phinney ever made, except one or two then in the hands of users and except those in the Federal, Randall and Standard

suits, that these purchases were made in pursuance of the conspiracy, secretly and fraudulently for the purpose of preventing the Toledo Company and the District Court of Northern Illinois and the Circuit Court of Appeals of the Seventh Circuit from learning of the Phinney commercial practice, that the Toledo Company made diligent effort and investigation to find the Phinney commercial practice and also evidence of the Computing Company's fraudulent suppression of evidence thereof, that while Toledo Company had had knowledge of the Phinney commercial practice since 1913, it had no knowledge of Computing Company's fraudulent suppression thereof until December 20, 1921, which was after the affirmance of the accounting decree. The bill further averred that counsel for the Computing Company in 1913, in their brief on appeal from the District Court in this case, said that Phinney had never made a successful scale or put it on the market which the Computing Company knew to be false and that this deceived the Toledo Company and its counsel into damaging admissions in the Circuit Court of Appeals as to the material of which Phinney's scales were actually made.

This bill was supported by the same evidence used in the Seventh Circuit applications of 1913 and 1921 and also by the affidavit of one Koehne, who said that as an inventor of spring scales and to develop the same he had been in the employ of the Computing Company for a number of years, that he was privy to the conspiracy charged in the bill, but that the counsel employed to defend the various patent suits referred to in the bill were not, and that the manager of the Computing Company with whom he worked and talked was dead.

Mr. George D. Welles and *Mr. Frederick P. Fish,* with whom *Mr. Edward Rector, Mr. Harry W. Morgan, Mr. Thos. H. Tracy, Mr. Rathbun Fuller* and *Mr. Horace*

Kent Tenney were on the briefs, for Toledo Scale Company.

If the relief sought is against the enforcement of a judgment or decree which plaintiff alleges was obtained by reason of the fraud of the defendant, a United States District Court in which the bill is filed has full power to examine the bill, and the evidence offered in support of it, and to grant such relief as in its judgment the plaintiff is entitled to. The fact that the relief sought is to enjoin the defendant from taking any advantage from the judgment or decree of another court, in no wise affects the power of the District Court in which the bill is filed. The District Court has plenary jurisdiction to entertain such a bill, and to grant relief by way of injunction. *Insurance Co.* v. *Hodgeson,* 7 Cr. 332; *United States* v. *Throckmorton,* 98 U. S. 61; *Barrow* v. *Hunton,* 99 U. S. 80; *Johnson* v. *Waters,* 111 U. S. 640; *Chicago, R. I. & P. Ry. Co.* v. *Callicotte,* 267 Fed. 799; *Graver* v. *Faurot,* 76 Fed. 257; *Marshall* v. *Holmes,* 141 U. S. 589; *Simmons* v. *Southern Ry. Co.,* 236 U. S. 115; *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175; *Ocean Ins. Co.* v. *Fields,* 2 Story, 59; *Sayers* v. *Burkhardt,* 85 Fed. 246; *Dowagiac Co.* v. *McSherry Co.,* 155 Fed. 524; *Hendryx* v. *Perkins,* 114 Fed. 801; *Young* v. *Sigler,* 48 Fed. 182; *Guild* v. *Phillips,* 44 Fed. 461.

Upon such a bill, the court in which it is pending may grant an injunction at any time; the fact that an appeal or writ of error from the fraudulent judgment is pending in a higher court, and that the appellate jurisdiction of the latter has therefore attached, does not affect the right of the party to file a bill, or of the court to grant an injunction. *Parker* v. *The Judges,* 12 Wheat. 561; *Dowagiac Co.* v. *McSherry Co.,* 155 Fed. 524.

A suit to enjoin enforcement of a judgment for extrinsic fraud of the successful party in obtaining it may be brought and maintained without leave of any court; *Hendryx* v. *Perkins, supra; Dowagiac Co.* v. *McSherry*

Co., supra; Ritchie v. *Burke,* 109 Fed. 16; *Griggs* v. *Gear,* 8 Gillman, 3; *Farwell* v. *Great Western Tel. Co.,* 161 Ill. 522.

The defendant cannot, by proceedings in mandamus or prohibition, either in the Circuit Court of Appeals or in the Supreme Court, or otherwise, control the discretion of the District Court in its decision of the question presented in such a bill of complaint. Neither mandamus nor prohibition will lie where there is a plain and adequate remedy by way of appeal. *Ex parte Chicago, R. I. & P. Ry. Co.,* 255 U. S. 273; *Huntington* v. *Laidley,* 176 U. S. 668.

A complete answer to the claim that the Court of Appeals could properly enjoin the Ohio proceedings is found in *Kline* v. *Burke Construction Co.,* 260 U. S. 226; and *Essanay Film Mfg. Co.* v. *Kane,* 258 U. S. 358.

The Circuit Court of Appeals would have had no jurisdiction to entertain a bill of review based upon the fraud of the successful party in secreting and suppressing evidence to support the defeated party's defense. *Dowagiac Co.* v. *McSherry Co.,* 155 Fed. 524; *Hendryx* v. *Perkins,* 114 Fed. 801; *Hill* v. *Phelps,* 101 Fed. 650; Simpkins, A Federal Equity Suit, p. 607; 2 Beach, Mod. Eq. Pr., § 884; Daniell's Ch. Pl. & Pr., 5th ed., p. 1584; 1 Story, Eq. Pl., § 404; *Standard Oil Co.* v. *Missouri,* 224 U. S. 270.

The applications which were made to the Circuit Court of Appeals with respect to leave to apply to the lower court to receive newly discovered evidence were applications purely to the discretion of the Circuit Court of Appeals. If the Toledo Company at the time of making such applications had known of the fraud which had been perpetrated upon it by the Computing Company, and had set forth this fraud in these applications in an effort to move the discretion of the Circuit Court of Appeals to permit the newly discovered evidence to be received, and if the Circuit Court of Appeals had in fact then attempted

to pass upon the questions of materiality of such fraud and had held against the Toledo Company thereon, its decision would still have been purely discretionary and would not have been binding upon Toledo Company as *res judicata* or estoppel in its subsequent suit filed as a matter of right to restrain the enforcement of the judgment because of fraud. *Metcalfe* v. *Williams,* 104 U. S. 95; *Oklahoma City* v. *McMaster,* 196 U. S. 529; *Bucki* v. *Atlantic Lumber Co.,* 116 Fed. 1; 2 Freeman on Judgments, § 511; *Farwell* v. *Great Western Tel. Co.,* 161 Ill. 522, 617; *Credits Commutation Co.* v. *United States,* 177 U. S. 311.

It seems clear that a discretionary application to an appellate court, supported only by such affidavits as the applicant may be fortunate enough to obtain and which that court may grant or deny in its wholly uncontrolled discretion, cannot, if denied, have the effect of adjudicating finally as between the parties that the fraud alleged was not committed or was immaterial or that relief against it is barred by laches. A party who is defrauded has a right to a hearing in a court where he can subpoena witnesses and force them to testify whether they are willing to do so or not, and to have the issues determined in accordance with the rules of law and equity with a right of review if he feels aggrieved by the decision. The Toledo Company has never had a day of this kind in court.

The orders denying the discretionary applications to the Circuit Court of Appeals were not final decrees and only a final decree amounts to *res judicata.*

Moreover, it should not be overlooked that the fraud of which the Toledo Company now complains was not in fact known to it, and hence was not set up or relied upon in its appeals to the discretion of the Circuit Court of Appeals, and that the fraud was still operative at the time of these applications and prevented the Toledo Company's making the full showing with respect to prior use, and any

showing as to fraud such as is now made in the District Court in Ohio.

Obviously a decree which it is claimed was obtained by fraud cannot operate as a bar to an investigation of the fraud. *Adair* v. *Cummins,* 48 Mich. 375; *Walker* v. *Day,* 8 Baxt. (Tenn.) 77.

And, by a parity of reasoning, a party whose only relief against a judgment obtained by fraud is a suit to enjoin its enforcement cannot be guilty of contempt of court in filing his suit for such an injunction.

It is submitted that the litigation in Ohio in no respect interferes with the exercise by the Circuit Court of Appeals for the Seventh Circuit of its appellate jurisdiction in the litigation in that circuit.

The Circuit Court of Appeals is a court of purely appellate jurisdiction. If it has power to issue or to direct the District Court below to issue an injunction with respect to a matter, it may do so only, if at all, by virtue of § 262, Jud. Code. The issuance of injunctions is specifically provided for by § 264. The specific provisions do not authorize the issuance of injunction by the Circuit Courts of Appeals. Probably they have no such power. *North Bloomfield* v. *United States,* 83 Fed. 2; *The Mamie,* 110 U. S. 742; *McClung* v. *Silliman,* 6 Wheat. 598.

If it be granted, however, that they may issue them when so "necessary" for the exercise of their appellate jurisdiction, nevertheless, if that court erroneously determines that a necessity exists when it does not exist, such determination should be reviewed and reversed by the Supreme Court. In the case at bar we submit it is clear that there was no necessity for the Circuit Court of Appeals to issue an injunction in aid of its appellate jurisdiction. All that remained for it to do to fully complete the exercise of its appellate jurisdiction in this case was to send its mandate to the District Court affirming the decree upon the accounting. When that had been done, its

exercise of its power and authority would have been complete.

The ordinary procedure, where it is claimed that vexatious litigation is being maintained by a defeated party, is to file a bill of complaint so alleging either as an ancillary bill in the District Court in which the original proceedings were had as in *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356, or in some other District Court having jurisdiction of the parties, as in *Kessler* v. *Eldred,* 206 U. S. 285, and upon such bill of complaint and after a hearing and determination that the other suit is vexatious the District Court may issue an injunction. In the case at bar the Circuit Court of Appeals has substituted itself for the District Court as a trial court, and upon a petition filed before it, which was never before the District Court, has held that its action upon prior applications to it, which in turn were never before the District Court, are binding upon the parties and has directed the issuance of a mandate to the District Court below it to issue an injunction upon a matter which that District Court has never had before it.

We respectfully submit that the Circuit Court of Appeals, under the guise of informing itself " on the correctness and justice of the mandate to be entered," cannot substitute itself for a District Court and usurp the primary jurisdiction of that court in the manner in which it has been done in this case.

The Circuit Court of Appeals has not stated in terms that it has found the Toledo Company guilty of contempt, but it has attempted to punish it as for a civil contempt. It heard no evidence as to the good faith or lack of it on the part of the Toledo Company in beginning the suit in Ohio. The District Court in Ohio not only held that the suit was brought in good faith but that it was well founded after full hearing upon the motion for preliminary injunction.

The action of the Toledo Company in bringing the Ohio suit was not in contempt of the Circuit Court of Appeals. *Royal Trust Co.* v. *Washburn,* 139 Fed. 865.

The District Court in Ohio was right in granting the injunction. A party who obtains a judgment or decree by extrinsic fraud may be enjoined from enforcing such judgment or decree by any court of equity having jurisdiction of the parties. *Graver* v. *Faurot,* 76 Fed. 257; *Dowagiac Co.* v. *McSherry Co.,* 155 Fed. 524; *United States* v. *Throckmorton,* 98 U. S. 61; *Marshall* v. *Holmes,* 141 U. S. 589; *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175; *Chicago, R. I. & P. Ry. Co.* v. *Callicotte,* 267 Fed. 799; *Ocean Ins. Co.* v. *Fields,* 2 Story, 59; *Sayers* v. *Burkhardt,* 85 Fed. 246; *Young* v. *Sigler,* 48 Fed. 182; *Guild* v. *Phillips,* 44 Fed. 461.

The fraud upon which the Ohio injunction suit rests is that before the patent litigation was begun the Computing Company, for the purpose of preventing an adversary trial of the issues as to whether there had been an anticipation of its patent, gathered up and secreted the evidence bearing upon this point, and that it did this for the express purpose of depriving the Toledo Company of the opportunity of having an actual adversary trial of the issue as to whether Smith or Phinney made the first lightweight computing cylinder and for the express purpose of deceiving and misleading the courts as well as the Toledo Company. This conduct certainly was not conduct practiced during the course of an actual adversary trial of the issues joined.

In the patent suit in the District Court in Illinois, the Toledo Company was prevented by the fraudulent conduct of the Computing Company from fully and fairly presenting its side of the case.

The general rule applies to enjoining the enforcement of a decree on the merits in a patent suit obtained by extrinsic fraud by an original bill in another court of equity.

Arrowsmith v. *Gleason,* 129 U. S. 86; *Johnson* v. *Waters,* 111 U. S. 640.

The general rule applies to enjoining the enforcement of a judgment or decree of one federal court by another federal court, *Carver* v. *Jarvis-Conklin Co.,* 73 Fed. 9; *Chapman & Co.* v. *Montgomery Water Power Co.,* 127 Fed. 839; *Kirk* v. *United States,* 124 Fed. 324; 130 Fed. 112; *Ralston* v. *Sharon,* 51 Fed. 702; and to enjoining the enforcement of a decree of one court of equity by another. *Graver* v. *Faurot,* 76 Fed. 257; *Dowagiac Co.* v. *McSherry Co.,* 155 Fed. 524; *United States* v. *Throckmorton,* 98 U. S. 61; *Toledo Scale Co.* v. *Computing Scale Co.,* 281 Fed. 488; *Carver* v. *Jarvis-Conklin Co.,* 73 Fed. 9; *Ralston* v. *Sharon,* 51 Fed. 702.

The Circuit Court of Appeals erred in holding that the fraud complained of in the District Court of Ohio is not extrinsic fraud. *Graver* v. *Faurot,* 76 Fed. 267; *Chicago, R. I. & Pac. Ry. Co.* v. *Callicotte,* 267 Fed. 799; *Marshall* v. *Holmes,* 141 U. S. 589; *Arrowsmith* v. *Gleason,* 129 U. S. 86; *Johnson* v. *Waters,* 111 U. S. 640.

The Circuit Court of Appeals erred in holding that it had ever passed upon the question of fraud which is raised in the Ohio case.

It was not until December, 1921, that the evidence of the fraud now complained of came to the knowledge of the Toledo Company. What the Circuit Court of Appeals holds, therefore, is that the Toledo Company is not now entitled to relief, notwithstanding the fraud of the Computing Company, because of the fact that Toledo Company had what the court regards as a clue to the fraud of the Computing Company and did not follow it up but instead engaged in a prolonged accounting contest.

This is not, and never has been the law. *Kilbourn* v. *Sunderland,* 130 U. S. 505; *McIntire* v. *Pryor,* 173 U. S. 38.

The Circuit Court of Appeals erred in holding that its refusal to grant the applications of the Toledo Company

for leave to apply to the District Court of Illinois for leave to introduce newly discovered evidence was a final decree barring relief under the Ohio bill based on extrinsic fraud.

The Smith reissued patent in suit is invalid for lack of patentable invention over the prior art. It is completely anticipated by the Phinney commercial scales.

Claims 5 and 6 of the Smith reissued patent are invalid for the reason that they are claims for a different invention from that described and claimed as the patentee's invention in his original patent.

The plaintiff and the court neglected and refused to make, or to attempt to make, any apportionment of defendant's profits on its cylinder scales, and the award of its entire profits to plaintiff was erroneous.

Mr. Charles Markell, with whom *Mr. Edward Osgood Brown* and *Mr. Edwin J. Marshall* were on the brief, for Fidelity & Deposit Company of Maryland et al.

Mr. John M. Zane, with whom *Mr. Charles F. Morse* and *Mr. Drury W. Cooper* were on the briefs, for Computing Scale Company.

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

It is insisted by counsel for the petitioner that it is within our power and it is our duty on this writ to go into the merits of the issue of the validity of the Smith patent and of the correctness of the money decree for profits. We were asked to do this by an application for writ of certiorari which we denied January 9, 1922. 257 U. S. 657. The decree then sought to be reviewed was entered in October, 1921. The application for this second writ of certiorari which we are now considering was not made until May 22, 1922, more than three months after

the final decree in the Circuit Court of Appeals for the payment of profits. Section 6 of Act of September 6, 1916, c. 448, 39 Stat. 726, 727, directs—

"That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of."

This deprives us of jurisdiction to consider the merits of the decree of October, 1921.

The case of *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, is cited to sustain a contrary view, but it fails to do so. In that case, a writ of certiorari had been applied for to this Court to review an interlocutory decree of the Circuit Court of Appeals and denied. The case went back to the District Court for a final accounting for infringement of a trademark and after a final decree for profits came again to the Circuit Court of Appeals and was affirmed. Then a second application was made for a certiorari and it was allowed. The respondent contended that this Court could not review the whole case including the merits of the interlocutory decree because of the denial of the first application for certiorari. We held that the denial constituted no bar because the decree sought then to be reviewed was not final. Our power to grant writs of certiorari extends to interlocutory as well as final decrees; and a mere denial of the writ to an interlocutory ruling of the Circuit Court of Appeals does not limit our power to review the whole case when it is brought here by our certiorari on final decree. In the case before us, the decree of October, 1921, which we declined to review in January, 1922, was a final decree and we are expressly denied power to review it after three months.

What we are to consider on this writ is whether the Circuit Court of Appeals on the petition for a rule against

the Toledo Company had anything presented to it in the record in the Ohio court which required it to stay its hand in using available process to enforce its final decree. We are very clear that it had not. It has been necessary to make an elaborate statement to show the complicated facts; but when they are arrayed in order so as to be understood, there is no escape from the conclusion that the action of the Ohio court could not and should not interfere with or stay the due course of proceedings to enforce the Seventh Circuit decree.

The application to the Circuit Court of Appeals in 1913 to frame its mandate so as to permit that court to rehear the issue on the merits of the validity of the patent already found and affirmed by both courts, was addressed to the discretion of that court and that was exercised to deny the application, presumably because the application showed on its face a lack of the due diligence in not producing the alleged newly discovered evidence in time to have presented it to the trial court at the hearing on the merits in June, 1912. The Toledo Company had been advised of the claim of its infringement of the Smith patent within a year after it began to make and sell the aluminum cylinder scale in 1906 by two suits of the Computing Scale Company and its attention had been directed to the necessity of preparing for a defense. This was further stimulated by the Chicago suit, the one at bar, in 1910, in which the Toledo Company filed an answer averring among other defenses that the Smith patent had been anticipated not only by the Phinney patent itself but by prior manufacture, sale and commercial use by Phinney of scales which embraced the device whose invention was claimed by Smith, and that this prior use was at Pawtucket, Rhode Island.

In spite of this, the agents and counsel of the Toledo Company never visited Pawtucket before the hearing on the validity of the Smith patent in June, 1912. The only

reason for this failure is the suggestion that the model of the cylinder deposited by Phinney in the patent office with his application was a small solid wooden cylinder, not full size, which led counsel to think that no practice under the patent would show lightness of material and weight. It was a matter of equitable discretion for the Circuit Court of Appeals to determine whether this was sufficient excuse. *Hopkins* v. *Hebard,* 235 U. S. 287. Certainly it was not an abuse of its discretion to hold that it was not a good one. The natural and obvious course of one tracing out evidence of prior commercial use of Phinney which was formally averred in the Toledo Company's bill to have taken place at Pawtucket, would have been to go to Pawtucket and look up Phinney, or, if dead, his family and successors. Had this course been pursued, Phinney's widow and son would have been found there and several of those whose affidavits and depositions are now produced who say that they bought and used the Phinney scales made with light wood and paper cylinders. From those witnesses, too, the investigator would have been led directly to the proceedings in Federal Company suit in Philadelphia, the record of which contained all this evidence, and he would have found without difficulty the three original Phinney scales that were exhibits in that case. Nor can we say that it was an abuse of discretion for the Circuit Court of Appeals to refuse a similar application, made in October, 1921, to open up the case to permit a rehearing of an issue, settled nine years before, when the evidence as to the lack of diligence of the Toledo Company was just the same.

It is unnecessary to determine whether the applications of 1913 and 1921 come within the proper definition of a bill of review in a court of chancery. It is enough to say that whether they were merely motions for rehearing, like a motion for new trial at law, or were applications in the nature of a bill of review, they were addressed to the

sound discretion of the Court, and based as they were upon the ground of newly discovered evidence, the indispensable condition of their being granted was that the failure to discover the evidence in time for the trial was not due to a lack of diligence on the part of the applicant. That condition precedent was not fulfilled.

Do the additional facts averred in the bill filed in the Ohio court change the situation? It is said they show extrinsic fraud committed by the Computing Scale Company upon proof of which a court of equity, although in another jurisdiction, having jurisdiction of the parties may enjoin the one guilty of the fraud from profiting by a decree so obtained. There has been much discussion as to whether extrinsic fraud is here alleged, and the case of *United States* v. *Throckmorton,* 98 U. S. 61, is cited and numerous other authorities since that case. We do not find ourselves obliged to enter upon a consideration of the sometimes nice distinctions made between intrinsic and extrinsic frauds in the application of the rule, because in any case to justify setting aside a decree for fraud whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense. If it does not so appear, then proof of the ultimate fact, to wit, that the decree was obtained by fraud, fails. That is the case here.

The allegations of the bill and of the affidavits are of a conspiracy by the inner circle of the Computing Scale Company's agents commenced in 1902, years before the Toledo Company began to make and sell cylinder drum scales, to monopolize the business of making and selling scales, to put the Toledo Company out of business, and after it began to make cylinder scales, to prevent it from so doing by suits brought on the Smith patent which it knew to be invalid because of the Phinney prior use. In pursuance of the conspiracy it is charged that it proceeded to buy up and keep from the Toledo Company knowledge

of, and access to, the Phinney scales. Proof is adduced to show that the Computing Scale Company did buy up as many of the Phinney scales as it could secure. But there is not anywhere in the record, which we can find, or which has been pointed out to us, any real evidence that the Toledo Company was, in the slightest degree, interfered with by acts of the Computing Company in its search for evidence of the Phinney prior use. Had the Toledo Company found, as it might easily have done, the witnesses in Pawtucket, it would have found the oral evidence as to the existence of the Phinney scales and would have been led directly to the Philadelphia suit where it would have found the cylinders it did find after June 1912. Moreover there were the Randall suit in Philadelphia in 1901 and the Standard suit in Wisconsin where other Phinney scales were also exhibits and open to inspection by the Toledo Company before 1912. There is not a scintilla of evidence to show any effort on the part of the Computing Scale Company to induce any witnesses not to testify, or to spirit them away from contact with the Toledo Company. There is nothing to show that if the Computing Scale Company had not bought the Phinney scales, the Toledo Company would have found them any earlier. The passages in the brief on behalf of the Computing Company in the first hearing of the case on appeal in the Circuit Court of Appeals which stated that Phinney had not made scales for commercial use had reference of course to the record before the court, were made after the trial in the District Court and so could not have misled the Toledo Company in its preparation for that trial. The conclusion is unavoidable that the only cause of the failure of the Toledo Company to produce this Phinney evidence was the mistake of the counsel for the Toledo Company in assuming that an inadequate model in the patent office filed by Phinney showed no relevant prior use by him, and the failure of the Toledo Company's agents

to take the ordinary and obvious course to make adequate inquiry at Pawtucket as to the prior use which it had averred in the bill. Certainly the Computing Scale Company was not responsible for the inadequacy of Phinney's model or for the failure of the Toledo Company to make the inquiry before June, 1912. The averments as to conspiracy to monopolize, and to drive the Toledo Company out of business and the details of the purchase of Phinney scales are all irrelevant because they are not shown to have had any causal connection with the failure of the Toledo Company to find out earlier what it did stumble on in 1913.

We do not understand it to be contended that there was any relation between the Computing Scale Company and the Toledo Company which made it the duty of the former to furnish evidence to the latter to weaken its own case or that silence in respect to the Phinney scales constituted that kind of fraud which would invalidate the decree unless it was accompanied by acts which actually prevented the Toledo Company's finding and availing itself of such evidence. Clearly there is no such rule of law in a case like this.

Another aspect of this record leads to the same conclusion. However nice the distinction between extrinsic and intrinsic fraud, we have been cited to no case where it has been held that fraud is extrinsic when the court rendering the decree attacked had before it the same issue of fraud on the same facts, only a little more elaborated as to the motive of the party charged with committing it. The necessary inference from the affidavits filed in May, 1913, by the Toledo Company, and its depositions in 1917, and its motion and briefs in 1921, in the Circuit Court of Appeals, was that the Computing Scale Company had been securing Phinney scales with a view of concealing them from the Toledo Company, and these were all before the Circuit Court of Appeals when it finally refused

to open the decree on its merits in 1921 to let in the evidence. It did not add to the weight of that evidence for the purpose for which it could be used in either court, that this was the result of a conspiracy to monopolize trade or that it grew out of a malicious feeling toward the Toledo Company. What the District Court for Northern Ohio was doing in hearing the injunction suit and issuing a temporary injunction was merely reviewing the discretion of the Circuit Court of Appeals of the Seventh Circuit in dealing with the same ultimate facts and reaching a different conclusion. This was beyond its province. *Embry* v. *Palmer,* 107 U. S. 3, 11; *Telford* v. *Brinkerhoff,* 163 Ill. 439, 443; *Marine Insurance Co.* v. *Hodgson,* 7 Cranch, 332.

It is pressed upon us that the amount of this decree which by reason of growing interest will considerably exceed half a million dollars, is such that its enforcement may be ruinous to the Toledo Company, and yet that company has never had an opportunity to bring to a hearing this evidence of the Phinney prior commercial use which on the showing and argument is clearly a complete defense to a suit prosecuted by an unscrupulous competitor, conscious all the time of its falsity and injustice. This view of the case is not a fair one. The Toledo Company had a chance to make a defense of the Phinney prior use and failed to do so because of its own lack of diligence. As it did not secure a hearing of the Phinney defense, its opponent had no chance to meet it, as possibly it might have done by showing that the use relied on was a futile one because the Phinney scale as made was not practical or did not weigh accurately or accomplish the purpose of the Smith patent. The fact that but twenty machines were made, and that these ceased to be used years ago or were destroyed, suggests the probability of such an answer. We can not know what the result of the hearing would have been on this

issue if tried, because only one side is presented. We are prevented from knowing it by a most salutary rule of law which after parties have had a full and fair opportunity to prepare their case, refuses to permit them to drag out litigation by bringing in new evidence which with due diligence they ought to have discovered before the hearing. The apparent hardship of particular cases should not and can not weigh against the application of this sound principle. As Mr. Justice Story remarked in *Ocean Insurance Co.* v. *Fields,* 2 Story, 59; 18 Fed. Cas. 532, "It is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal."

The Surety Companies object to the order of the Circuit Court of Appeals directing the District Court to enter summary judgment against them for the amount due on the decree, because it causes them to pay a decree which the Toledo Company, their principal, deposited in Toledo banks enough money to their order to pay, but which a court of competent jurisdiction enjoins them from paying, or from using this money to pay. They say they are to be ground between the upper and the nether millstones. They say they are indifferent between the parties and only wish to be protected. The order which the Circuit Court of Appeals directed against them was within its jurisdiction. *Pease* v. *Rathbun-Jones Engineering Co.,* 243 U. S. 273, 278. It was right, was final, and they must obey it. They can appeal from the order of the Ohio court. Indeed we are advised that the cause is now pending on appeal in the Circuit Court of Appeals of the Sixth Circuit. If they satisfy the decree of the Seventh Circuit, they can be reasonably confident that they will not be required to suffer a double burden. The Circuit Court of Appeals of the Sixth Circuit is not likely to ignore the ruling of this Court in the premises; and the cause pending in the Sixth Circuit can be brought within the jurisdiction of this Court at any time by certiorari.

It is objected that the Circuit Court of Appeals had no power to direct the District Court to enjoin the Toledo Company from further maintaining its Ohio bill or from filing elsewhere any similar bill. It is also objected that it can not direct the District Court to assess the Computing Company's expenses including a reasonable attorney's fee in the matter of the Ohio bill and to enter a summary decree therefor. We think these orders were within the power of the Circuit Court of Appeals. This Ohio proceeding was instituted to halt and defeat the decree of the Circuit Court of Appeals, while that decree was still in that court to be enforced by mandate to the lower court. Under § 262 of the Judicial Code, that court had the right to issue all writs not specifically provided for by statute which might be necessary for the exercise of its appellate jurisdiction. It could, therefore, itself have enjoined the Toledo Company from interfering with the execution of its own decree, *Merrimac River Savings Bank* v. *Clay Center,* 219 U. S. 527, 535; or it could direct the District Court to do so, as it did, *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356; *Hart Steel Co.* v. *Railroad Supply Co.,* 244 U. S. 294, 299; *Kessler* v. *Eldred,* 206 U. S. 285. Moreover, when the character of the proceeding initiated by the Toledo Company, a party before it, to stop the execution of its decree was disclosed on a full hearing on the petition for a rule against the Toledo Company, it had jurisdiction to determine whether the filing and maintenance of the bill was in contempt of its jurisdiction, *New Orleans* v. *Steamship Co.,* 20 Wall. 387, 392; *Swift* v. *Black Panther Oil & Gas Co.,* 244 Fed. 20, 29; and finding it to be so, to punish it by a compensatory imposition, *Merrimac River Savings Bank* v. *Clay Center,* 219 U. S. 527, 535; or to remand it to the District Court to do so.

What we are considering here is the rightful course of a court which having entered a final decree is proceeding

upon the application of the successful party in the decree to put it into lawful execution. It is advised by this party that the *quasi* parties, the sureties who have made themselves directly liable upon summary process for prompt payment of the decree, have been enjoined from complying with their obligation to the court by a court of another jurisdiction, that the successful party has also been enjoined from seeking enforcement of the decree, and all this at the suit of the party condemned in the decree to pay and on the ground of fraud exercised upon the court itself in obtaining the decree. If the successful party though thus enjoined, is willing to risk punishment for contempt by the enjoining court, and applies for enforcement of the decree, the court whose decree it is, is clearly not ousted of jurisdiction to proceed to execute it. The proceeding in the enjoining court is solely *in personam* and does not affect the power or functions of the court whose decree is in question. If advised that there is real ground for impeachment of its decree, it may in its discretion stay its hand until the issue is determined in another court of competent jurisdiction, but if upon examination it finds no such ground advanced, it may properly proceed to secure to the successful party the fruits of his litigation. If the defeated party in his suit in another jurisdiction only seeks to restrain the successful party from prosecuting his decree to payment, there should be unusual circumstances of disrespect to the court entering the decree to justify punishment for contempt. But when he unites in his new suit for an injunction the sureties who, as *quasi* parties, are obliged to respond to the decree in the course of execution, he puts himself in contempt of the court whose decree it is, and may be punished for it. In the former case he is merely restraining a party who, without disobedience or disrespect to any obligation to the court making the decree, has full discretion and liberty to withhold his hand in pressing it to

execution. In the latter case, he is obstructing the process of the court in a proceeding in which its action has been properly and lawfully invoked. The degree of punishment for contempt in such case is in the discretion of the court whose dignity has been offended and whose process has been obstructed. *New Orleans* v. *Steamship Co.*, 20 Wall. 387. Certainly it was not an abuse of discretion in this case to impose as a penalty, compensation for the expenses incurred by the successful party to the decree in defending its rights in the Ohio court.

Decree affirmed.

KELLER ET AL., CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *v.* POTOMAC ELECTRIC POWER COMPANY ET AL.

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

No. 260. Argued February 26, 27, 1923.—Decided April 9, 1923.

1. In a proceeding brought by a public utility against the Public Utilities Commission of the District of Columbia, in the Supreme Court of the District, under par. 64 of § 8 of the Act of March 4, 1913, c. 150, 37 Stat. 974, the court is empowered, not merely to decide legal questions and questions of fact as incident thereto, but also to amend and, if need be, enlarge valuations, rates and regulations established by the Commission, which the court finds upon the record and evidence to be inadequate, and to make such order as in its judgment the Commission should have made. P. 440.
2. This is legislative, as distinguished from judicial, power. *Id.*
3. Under the power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia, (Const. Art. I, § 8, cl. 17,) Congress may vest this jurisdiction in the courts of the District. P. 442.
4. But such power can not be conferred upon this Court; and the provision made by the above act (par. 64) for appeals here from the Court of Appeals of the District is, therefore, void. P. 443.
5. The failure of this provision of the act does not, however, affect the other provisions of par. 64 of the act giving jurisdiction to

the courts of the District, in view of the probable intent of Congress in this regard and the saving clause in par. 92. P. 444.

6. If the provisions of the above act (pars. 65 and 69) seeking to limit the time within which recourse may be had to the courts against orders of the Commission and to put the burden of proof upon the party attacking them, are unconstitutional, the remainder of the act would not be affected, in view of the saving clause of par 92. P. 445.

Appeal to review 51 App. D. C. 77; 276 Fed. 327, dismissed.

APPEAL, under the law creating the Public Utilities Commission of the District of Columbia, from an order or decree of the Court of Appeals of the District reversing a decree of the Supreme Court of the District, which dismissed the bill in a suit against the Commission, and remanding the case for further proceedings.

Mr. Francis H. Stephens, with whom *Mr. Conrad H. Syme* and *Mr. George P. Barse* were on the briefs, for appellants.

This is a "case" within the meaning of § 2 of Art. III of the Constitution. *Smith* v. *Adams,* 130 U. S. 167; *Osborne* v. *Bank,* 9 Wheat. 738, 819; *Ormsby* v. *Webb,* 134 U. S. 47; *Nashville* v. *Cooper,* 6 Wall. 247; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *La Abra Mining Co.* v. *United States,* 175 U. S. 423; *Martin* v. *Hunter,* 1 Wheat. 352; *Cohens* v. *Virginia,* 6 Wheat. 264, 407; *Ex parte Milligan,* 4 Wall. 133; *Railroad Co.* v. *Mississippi,* 102 U. S. 140; *Ex parte Carll,* 106 U. S. 521; *Marbury* v. *Madison,* 1 Cr. 138; *Owings* v. *Norwood's Lessee,* 5 Cr. 348; *Wood Paper Co.* v. *Heft,* 8 Wall. 336; *Irvine* v. *Marshall,* 20 How. 565.

Congress cannot impose a legislative or executive or administrative duty upon a court exercising the judicial power mentioned in Art. III, § 1, of the Constitution. *Hayburn's Case,* 2 Dall. 408; *United States* v. *Ferreira,* 13 How. 40; *Gordon* v. *United States,* 2 Wall. 561; *United States* v. *Jones,* 119 U. S. 477.

It is not believed that the instant case falls within the decision of *Muskrat* v. *United States,* 219 U. S. 246, where the Court had under review the constitutionality of a statute which conferred jurisdiction upon the Court of Claims to examine and pass upon the constitutionality of certain laws passed by Congress affecting the Cherokee Indians and the right of appeal from that court to the Supreme Court of the United States. Neither does it fall within the decision of *Gordon* v. *United States,* 2 Wall. 561; 117 U. S. 699. This Court has on numerous occasions clearly distinguished between functions of the legislature (or a commission acting for the legislature) and the functions of the courts, so far as concerns rate-making and the valuations upon which rates are based. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 397; *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 8; *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287; *Denver* v. *Denver Union Water Co.,* 246 U. S. 178; *Newton* v. *Consolidated Gas Co.,* 258 U. S. 165; *Columbus Ry. Co.* v. *Columbus,* 249 U. S. 399; *Rowland* v. *St. Louis & San Francisco R. R. Co.,* 244 U. S. 106; *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153; *Lincoln Gas Co.* v. *Lincoln,* 250 U. S. 256; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541.

Upon the nature and powers of the courts of the District of Columbia, see: Const., Art. I, § 8, cl. 17; Rev. Stats. D. C., § 760; *United States* v. *Kendall,* 5 Cr. C. C. 164; *Ex parte Norvell,* 20 D. C. 348; 9 Mack. 352; *In re Spencer,* MacA. & M. 433; *Noerr* v. *Brewer,* 1 MacA. 507; *Cohens* v. *Virginia,* 6 Wheat. 264, 424; *Loughborough* v. *Blake,* 5 Wheat. 317; *Embrey* v. *Palmer,* 107 U. S. 3; *Deposit Bank* v. *Frankfort,* 191 U. S. 516; *Moss* v. *United States,* 23 App. D. C. 483.

The case arises under the Constitution. *Hollis* v. *Kutz,* 255 U. S. 482; *Columbus Ry. Co.* v. *Columbus,* 249 U. S. 399; and other cases.

The case also arises under the laws of the United States.

There is nothing in the Constitution which requires a final judgment as a necessary element for the exercise of the appellate power of this Court. This is exemplified by the legislation permitting this Court to review cases from inferior federal courts entering interlocutory orders granting injunctions. *United States Fidelity Co.* v. *Bray,* 225 U. S. 205; *Denver* v. *New York Trust Co.,* 229 U. S. 123.

It is questionable whether this judgment is a final judgment in form, but there cannot be much doubt that it was a final judgment in substance. *Grant* v. *Phoenix Ins. Co.,* 106 U. S. 429; *Winthrop Iron Co.* v. *Meeker,* 109 U. S. 180; *Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362; *Forgay* v. *Conrad,* 6 How. 201.

Mr. John A. Garver, with whom *Mr. S. R. Bowen* and *Mr. John S. Barbour* were on the briefs, for appellee.

The judgment appealed from was final. But this is immaterial.

There is no provision in the Federal Constitution limiting the appellate jurisdiction of this Court to appeals from final judgments.

In the case of the Public Utilities Act, now under consideration, Congress was of the opinion that any decision made by the Commission, pursuant to the powers conferred upon it, was of such great public interest and importance that, in reviewing the exercise of those powers, the decision of the Supreme Court of the District, and, in case of an appeal to the District Court of Appeals, the decision of that court, whether resulting in a final judgment or not, might be carried by appeal to this Court by either party in interest. *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25.

This Court has not hesitated to review appeals from interlocutory orders and decrees, where the right was

expressly conferred by statute. *United States* v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 306; Jud. Code, § 210; Act October 22, 1913, 38 Stat. 220.

An act creating a commission with regulatory powers over public utilities must prescribe the principles and procedure to be observed by the commission in the exercise of such powers. Otherwise, the statute will be invalid, in attempting to confer discretionary legislative powers upon the commission. *Wichita R. R. Co.* v. *Public Utilities Commission*, 260 U. S. 48.

A regulatory act will be declared invalid unless it contains provisions enabling the utilities to review in the courts acts of the commission complained of as affecting their property rights. *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287; *Saratoga Springs* v. *Saratoga Gas Co.*, 191 N. Y. 123.

Under § 2 of Art. III of the Constitution, Congress could not, in the present case, confer appellate jurisdiction upon this Court, unless there is a constitutional question involved or unless a judicial question arises under the act itself, which the courts have power to consider. Only justiciable questions can be considered by the Court under Art. III.

Whether the case now before the Court involves a question which Congress could require this Court to pass upon is a question which is not confined to the jurisdiction of this Court alone, but extends to the original jurisdiction conferred upon the Supreme Court of the District, as well as upon the Court of Appeals. If Congress had the power to confer jurisdiction upon the District Supreme Court in a case of this kind, it also had the power to provide for a review by the District Court of Appeals, and by this Court, of the decision of the lower court.

To deny this power and hold that the case at bar presents no justiciable controversy would be to invalidate the entire act. For Congress clearly intended, as an integral

part of the act, to provide for a prompt review of the determinations and orders of the Commission; and this indeed it was bound to do. *Ohio Valley Water Co.* v. *Ben Avon Borough, supra.* The Court will adopt a construction of the act, if possible, which will sustain it. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366.

In valuing the property, the Commission acted judicially. Under the Interstate Commerce Act, the commissioners, in many instances, necessarily act in a judicial capacity. *Interstate Commerce Commission* v. *Cincinnati, etc., R. R. Co.,* 167 U. S. 479, 501.

Commissioners appointed to appraise property for purposes of taxation or condemnation, or to assess benefits, act judicially. *Hagar* v. *Reclamation District,* 111 U. S. 701; *Central of Georgia Ry. Co.* v. *Wright,* 207 U. S. 127; *Barhyte* v. *Shepherd,* 35 N. Y. 238; *Clark* v. *Norton,* 49 N. Y. 243; *Stuart* v. *Palmer,* 74 N. Y. 183.

Under the District Utilities Act, the Commissioners necessarily act in a judicial capacity in determining what property is used and useful in the business of the utility, in passing upon the numerous questions that arise in ascertaining the value of such property for the purposes of a rate base, such as organization and development expenses entering into the capital account, depreciation, working capital, franchise rights, the weight to be given to the testimony of witnesses, etc. The present record is full of instances where the Commissioners passed upon the admissibility and effect of the evidence; and they entirely disregarded the evidence of value furnished by the Company, on the ground that the Company valued the property as of the time when the valuation was made, rather than as of an earlier date which the Commission thought would represent normal conditions.

The question of valuation is most important. The District Utilities Act, in express terms (par. 65), makes the

valuation of the property found by the Commission final and conclusive, unless an appeal to the courts is taken by the utility within 120 days after the valuation is made.

The right to judicial review of valuation is expressly recognized by this Court. *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission,* 252 U. S. 178; *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287.

Official appraisal of property is universally recognized as constituting a case reviewable by the courts. In the assessment of property for purposes of taxation or benefit, the owner must be given an opportunity to be heard. Failure to afford him such an opportunity invalidates the assessment, as it deprives the owner of his property without due process of law. *Davidson* v. *New Orleans,* 96 U. S. 97, 105, 107; *Hagar* v. *Reclamation District,* 111 U. S. 701, 710; *Security Trust Co.* v. *Lexington,* 203 U. S. 323, 333; *Jewell* v. *Van Steenburgh,* 58 N. Y. 85, 90–1; *Stuart* v. *Palmer,* 74 N. Y. 183.

A tax statute for the assessment of property, which does not provide for notice to the owner, is unconstitutional and void. *Remsen* v. *Wheeler,* 105 N. Y. 573, 579.

The right to be heard upon the valuation of property about to be taken, in whole or in part, for the public benefit, being thus secured by the Constitution, it necessarily follows that the courts have the power and duty to protect it; and, in the protection of this right, it can make no difference whether all of the owner's property is taken under the power of eminent domain, or whether only a small portion of it is taken, as in the case of a general tax or in fixing a limit upon the return of property devoted to the public use.

This right of judicial review, in the case of the official valuation of property, was expressly recognized by this Court in *Hagar* v. *Reclamation District,* 111 U. S. 701.

Congress has power in the exercise of its express powers to invoke the aid of the courts.

Although Art. III of the Constitution limits the jurisdiction of the federal courts, this limitation is subject to the power of Congress to enlarge the jurisdiction, where such enlargement may reasonably be required to enable Congress to exercise the express powers conferred upon it by the Constitution. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 38; *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434.

Clause 17, of § 8, of Art. I, of the Constitution, empowers Congress to exercise exclusive jurisdiction, "in all cases whatsoever", over the District of Columbia. Clause 18 of the same section confers power upon Congress "to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

Congress thus has just as complete power to regulate the public utilities in the District of Columbia as it has to regulate interstate commerce. Indeed, its power in the former respect is clearer, because it is not involved in the conflict which so frequently arises between the federal and state authorities in questions arising under the regulation of commerce.

The power of Congress to confer jurisdiction, in cases where the limitations contained in Art. III of the Constitution might exclude such jurisdiction, was distinctly recognized by this Court in the *Brimson Case, supra.* The power to require the production of books and papers was one which the Court thought was essential to the effective execution of the statute and which might in any particular case result in a difference of opinion or dispute between the Commission and the persons affected by their ruling. The Court recognized that the action of Congress must be regarded as lawful, "unless the incompatibility between

the Constitution and the act of Congress is clear and strong."

The argument in the *Brimson Case* is peculiarly applicable to the case at bar. The District Utilities Act confers broader powers upon the Commission than are conferred by the Interstate Commerce Act; and it was a matter of importance both to the utilities in the District and to the general public that provision should be made for the prompt disposition of any disputes growing out of the exercise of the powers conferred upon the Commission. Under this act, no question is of more vital concern, both to the public and to the utilities, than the value of the property upon which the charge for the service is based. Upon the correct ascertainment of that value depends the power of the company to serve the public properly; and only upon such a basis can the public expect to receive adequate service. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1.

The decision in the *Brimson Case* was followed in the *Baird* and *Ellis Cases, supra.*

This Court has jurisdiction to hear the appeal herein now pending before it.

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

This is an appeal from the Court of Appeals of the District of Columbia. It is an appeal provided for in paragraph 64 of the law creating the Public Utilities Commission of the District. The law is § 8 of an Act approved March 4, 1913, making appropriations for the District for the year ending June 30, 1914. 37 Stat. 938, 974. Paragraph 7 requires the Commission created thereby to value the property of every public utility within the District actually used and useful for the convenience of the public at the fair value thereof at the

time of the valuation. The Commission, after a public hearing, fixed the value of the Potomac Electric Power Company at $11,231,170.43. The company then filed a bill in equity in the Supreme Court of the District against the Commission, seeking to enjoin the order as unlawful, unreasonable and inadequate under paragraph 64 of the law. It made a party defendant to the bill the Washington Railway and Electric Company, because it is the sole stockholder of the Power Company.

The Supreme Court of the District upheld the findings of the Commission in every particular and dismissed the bill. From this decree, the company appealed to the Court of Appeals of the District, on the ground that the Commission and the Supreme Court had found the value as of July 1, 1914, whereas the time of the valuation was December 31, 1916, and between the two dates there had been a sharp rise in values for which the company was not made any allowance in the valuation, and also because under the circumstances of the case, and the challenge by the company that the valuation was arbitrary, the court should disregard the *prima facie* effect given by the statute to the findings of the Commission, and exercise its own independent judgment as to both law and facts so far as it was necessary to determine whether the use of such valuation as a basis of rate making would result in confiscation. The Court of Appeals sustained the appeal on these grounds and remanded the cause for further proceedings not inconsistent with its opinion.

When this appeal was opened by counsel at the bar we declined to hear the merits, and postponed the case to give both sides an opportunity to prepare to discuss the questions, first, whether Congress had the constitutional power to vest the District Courts and this Court with jurisdiction to review the proceedings of the Commission, and, second, whether if the power existed, the appeal to this Court was only intended to apply to a final decree,

and finally whether this was such a decree. Briefs have accordingly been filed and we have had an oral argument upon these questions.

The Public Utilities Law is a very comprehensive one. It applies to all public utilities in the District, except steam railways and steamboat lines. It creates a Commission to supervise and regulate them in the matter of rates, tolls, charges, service, joint rates, and other matters of interest to the public. It directs investigation into the financial history and affairs of each utility and its valuation at a fair value as of the time of valuation. It requires a public hearing on this subject. It also provides that while the utility may fix a schedule of rates, not exceeding the lawful rates at the passage of the act, which it must publish, the Commission may of its own initiative, or upon the complaint of another, or indeed of the utility itself, investigate the reasonableness, lawfulness and adequacy of the rate or service and may change the same. The utility must then adopt the change and publish its schedules accordingly. The law further provides that in such proceedings, the utility shall have notice and a hearing, that a stenographic record of the proceedings shall be kept and produced by the Commission in any court proceeding thereafter instituted to question the validity, reasonableness or adequacy of the action of the Commission.

The relevant part of paragraph 64 is given in full in the margin.[1] In short, it enables the Commission by action

[1] "Par. 64. That if at any time the commission shall be in doubt of the elements of value to be by them considered in arriving at the true valuation under the provisions of this section, they are authorized and empowered to institute a proceeding in equity in the Supreme Court of the District of Columbia petitioning said court to instruct them as to the element or elements of value to be by them considered as aforesaid, and the particular utility under valuation at the time shall be made party defendant in said action.

That any public utility and any person or corporation interest [ed] being dissatisfied with any order or decision of the commission fixing

in equity to invoke the advice of the District Supreme Court upon the elements in value to be by it considered in arriving at a true valuation of the property of a utility. It further grants to any utility or any person or corporate interest dissatisfied with any valuation, rate or rates or regulation or requirement, act, service or other thing fixed by the Commission the right to begin a proceeding in equity in the Supreme Court, to vacate, set aside or modify the order on the ground that the valuation, rate, regulation, or requirement is unlawful, inadequate or unreasonable. Paragraph 65 limits the time within which such a proceeding to vacate, set aside or amend the order of

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any valuation, rate or rates, tolls, charges, schedules, joint rate or rates, or regulation, requirement, act, service or other thing complained of may commence a proceeding in equity in the Supreme Court of the District of Columbia against the commission, as defendants, to vacate, set aside, or modify any such decision or order on the ground that the valuation, rate or rates, tolls, charges, schedules, joint rate or rates, or regulation, requirement, act, service or other thing complained of fixed in such order is unlawful, inadequate, or unreasonable. The answer of the commission, on any such action being instituted against it, or the answer of any public utility on any such action being commenced by said commission against it, shall be filed within ten days, whereupon said proceeding shall be at issue and stand ready for trial.

All such proceedings shall have precedence over any civil cause of a different nature pending in such court, and the Supreme Court of the District of Columbia shall always be deemed open for the trial thereof, and the same shall be tried and determined as are equity proceedings in said court. Any party, including said commission, may appeal from the order or decree of said court to the Court of Appeals of the District of Columbia, and therefrom to the Supreme Court of the United States, which shall thereupon have and take jurisdiction in every such appeal. Pending the decision of said appeal the commission may suspend the decision or order appealed from for such a period as it may deem fair and reasonable under the circumstances: *Provided,* That no appeal, unless the court or the commission shall so order, shall operate to stay any order of the commission. . . ."

the Commission may be begun to 120 days, and thereafter the right to appeal or of recourse to the courts shall terminate absolutely. Paragraph 67 provides that if new evidence is introduced by the plaintiff different from that offered in the hearing before the Commission, unless the parties otherwise agree, the new evidence shall be sent to the Commission to enable it to change its order if it sees fit, and then the court shall proceed to consider the appeal either on the original order or the changed order as the case may be. Paragraph 69 provides that in such proceedings, the burden of proof is upon the party adverse to the Commission to show by clear and satisfactory evidence that the determination, requirement, direction or order of the Commission complained of is inadequate, unreasonable or unlawful as the case may be.

What is the nature of the power thus conferred on the District Supreme Court? Is it judicial or is it legislative? Is the court to pass solely on questions of law, and look to the facts only to decide what are the questions of law really arising, or to consider whether there was any showing of facts before the Commission upon which, as a matter of law, its finding can be justified? Or has it the power, in this equitable proceeding to review the exercise of discretion by the Commission and itself raise or lower valuations, rates, or restrict or expand orders as to service? Has it the power to make the order the Commission should have made? If it has, then the court is to exercise legislative power in that it will be laying down new rules, to change present conditions and to guide future action and is not confined to definition and protection of existing rights. In *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226, we said:

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future

and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind. . . ."

Under the law, the proceeding in the District Supreme Court is of a very special character. The court may be called in to advise the Commission as to the elements of value to be by it considered, at any stage of the hearing before the Commission. To modify or amend a valuation, or a rate, or a regulation of the Commission as inadequate, as the court is authorized to do, seems to us necessarily to import the power to increase the valuation, or rate, or to make a regulation more comprehensive, and to consider the evidence before it for this purpose. In other words, the proceeding in court is an appeal from the action of the Commission in the chancery sense. In the briefs of counsel for the Commission it is so termed. The form which the bill filed is given by the Electric Company is that of a series of exceptions to the rulings of the court on the evidence and at every stage of the hearing and finally to the conclusions of fact as against the weight of the evidence. Paragraph 69 is significant in its indication that issues of fact as to inadequacy of the action by the Commission are to be passed on by the court.

Counsel seek to establish an analogy between the jurisdiction of the District Supreme Court to review the action of the Commission, and that conferred on, and exercised by, the Federal District Courts in respect of the orders of the Interstate Commerce Commission. We think, however, that the analogy fails. The act for the creation of the Commerce Court provided (Judicial Code, § 207) that it should have the jurisdiction of the then Circuit Courts of all cases brought to enjoin, set aside or annul or suspend in whole or in part any order of the Commission. When the Commerce Court was abolished by the

Act of October 22, 1913, 38 Stat. 219, this jurisdiction was conferred on the several District Courts of the United States. This permits these Courts to consider all relevant questions of constitutional power or right and all pertinent questions whether the administrative order is within the statutory authority, or is an attempted exercise of it so unreasonable as not to be within it; but these are questions of law only. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470. Of course the consideration and decision of questions of law may involve a consideration of controverted facts to determine what the question of law is, but it is settled that any finding of fact by the Commission if supported by evidence is final and conclusive on the courts. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547. A similar distinction exists between the jurisdiction here conferred and that vested in circuit courts of appeals in reference to proceedings before the Trade Commission. C. 311, § 5, 38 Stat. 719. The language of the act under discussion is much wider than that of the Interstate Commerce Act or of the Federal Trade Commission provisions. It brings the court much more intimately into the legislative machinery for fixing rates than does the Interstate Commerce Act. We can not escape the conclusion that Congress intended that the court shall revise the legislative discretion of the Commission by considering the evidence and full record of the case and entering the order it deems the Commission ought to have made.

Can the Congress vest such jurisdiction in the courts of the District of Columbia? By the Constitution, clause 17, § 8, Article I, Congress is given power "To exercise exclusive legislation in all cases whatsoever, over" the District of Columbia. This means that as to the District Congress possesses not only the power which belongs to it in respect of territory within a State but the power of

the State as well. In other words, it possesses a dual authority over the District and may clothe the courts of the District not only with the jurisdiction and powers of federal courts in the several States but with such authority as a State may confer on her courts. *Kendall* v. *United States,* 12 Pet. 524, 619. Instances in which congressional enactments have been sustained which conferred powers and placed duties on the courts of the District of an exceptional and advisory character are found in *Butterworth* v. *Hoe,* 112 U. S. 50, 60; *United States* v. *Duell,* 172 U. S. 576, and *Baldwin Co.* v. *Howard Co.,* 256 U. S. 35. Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts. In *Prentis* v. *Atlantic Coast Line Co., supra,* we held that when " a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned." (211 U. S. 225.) *Dreyer* v. *Illinois,* 187 U. S. 71, 83, 84.

It follows that the provisions in the law for a review of the Commission's proceedings by the Supreme Court of the District and for an appeal to the District Court of Appeals are valid. A different question arises, however, when we come to consider the validity of the provision for appeal to this Court. It is contained in the following sentence in paragraph 64:

"Any party, including said commission, may appeal from the order or decree of said court to the Court of Appeals of the District of Columbia, and therefrom to the Supreme Court of the United States, which shall thereupon have and take jurisdiction in every such appeal."

The court proceedings to review the orders of the Commission authorized by paragraph 64 are expressly required

to conform to equity procedure. In that procedure, an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses. This Court is, therefore, given jurisdiction to review the entire record and to make the order or decree which the Commission and the District Courts should have made.

Such legislative or administrative jurisdiction, it is well settled can not be conferred on this Court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the Court in *Muskrat* v. *United States,* 219 U. S. 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this Court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this Court without real parties or a real case, or to administrative or legislative issues or controversies. *Hayburn's Case,* 2 Dall. 410, note; *United States* v. *Ferreira,* 13 How. 40, 52; *Ex parte Siebold,* 100 U. S. 371, 398; *Gordon* v. *United States,* 117 U. S. 697; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission,* 215 U. S. 216.

The fact that the appeal to this Court is invalid does not, however, render paragraph 64 invalid as a whole. Paragraph 92 of the law declares each paragraph to be independent and directs that the holding of any paragraph or any part of it invalid shall not affect the validity of the rest. Moreover, we think Congress would have

given the appeals to the courts of the District even if it had known that the appeal to this Court could not stand.

Some question has been made as to the validity of paragraph 65, which forbids all recourse to courts to set aside, vacate and amend the orders of the Commission after 120 days, and of paragraph 69, which puts the burden upon the party adverse to the Commission to show by clear and satisfactory evidence the inadequacy, unreasonableness or unlawfulness of the order complained of. It is suggested that this deprives the public utility of its constitutional right to have the independent judgment of a court on the question of the confiscatory character of an order and so brings the whole law within the inhibition of the case of *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287. It is enough to say that even if paragraphs 65 and 69 were invalid, the whole act would not fail in view of paragraph 92 already referred to. It will be time enough to consider the validity of those sections when it is sought to apply them to bar or limit an independent judicial proceeding raising the question whether a rate or other requirement of the Commission is confiscatory. Our conclusion that the provision for appeal to this Court in paragraph 64 is invalid makes it unnecessary to decide whether the appeal must be from a final decree, or whether the decree of the Court of Appeals was final.

Appeal dismissed.

THE PAGE COMPANY *v.* MACDONALD, &c., A RESIDENT OF THE PROVINCE OF OTTAWA IN THE DOMINION OF CANADA, &c.

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

No. 308. Argued March 13, 1923.—Decided April 9, 1923.

1. A non-resident defendant to an action in the District Court is immune to service of process therein while present within the District as a party to litigation in a state court attending a hearing before a special master. P. 447.
2. This exemption from service is the privilege of the court before which the party is attending rather than the privilege of the party himself. P. 448.
3. Where the action in which service is attempted is for an alleged libel in his pleadings on file in the case upon which he is attending, he can not be adjudged to have forfeited his immunity upon the theory that the libel was still being committed, through such pleadings, to the time when the attempted service was made. *Id.*

Affirmed.

ERROR to a judgment of the District Court sustaining a plea in abatement to an action for libel.

Mr. Asa P. French for plaintiff in error.

Mr. Weld A. Rollins for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The Page Company brought suit in the District Court of the United States for the District of Massachusetts against the defendant in error for libel, constituted, it was alleged, by allegations in a certain bill of complaint which was filed by her against that company in a Superior Court of Massachusetts.

A question of jurisdiction in the sense of immunity from process is presented. Plaintiff in error is a Massa-

chusetts corporation, defendant in error, a resident and citizen of Leaskdale, Ontario, Canada.

The Page Company brought this suit against defendant in error alleging her suit against it, the Page Company, was a deliberate and malicious libel, its statements having been made "with full information and knowledge that they were false," and for the purpose of injuring the Company's reputation. Damages were prayed.

The facts are stipulated and are condensed by the District Court as follows: "The facts on which this plea is grounded are not in dispute: Mrs. Macdonald brought a suit in equity against the Page Company in the State Court. The Page Company, claiming that certain statements made by her in the bill were libelous and actionable, brought the present action at law against Mrs. Macdonald in this court; and service was made upon her while she was in the District 'in attendance before a Special Master appointed by the Superior Court to hear the parties and their evidence' . . . in the other case. She has pleaded in abatement of this action that she was immune from service while within the District for the purpose stated."

The court decided "that the plea [in abatement] is good and that the action must be abated", citing *Stewart* v. *Ramsay,* 242 U. S. 128; *Larned* v. *Griffin,* 12 Fed. 590; *Diamond* v. *Earle,* 217 Mass. 499.

The Page Company, contesting the ruling and the application of the cases cited to sustain it, contends that immunity cannot be claimed and sustained from the judicial process of a different sovereignty.

In *Diamond* v. *Earle* and *Stewart* v. *Ramsay,* it is said "Both courts were exercising jurisdiction conferred by the same sovereignty". It is, necessarily, a condition of the contention, that the "Federal Court in Massachusetts is a foreign court within the principle."

We are unable to concur. A federal court in a State is not foreign and antagonistic to a court of the State

within the principle and, therefore, as said in *Stewart* v. *Ramsay, supra,* "suitors, as well as witnesses, coming from another State or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going." And we can add nothing to what is said in support of the rule. "It is founded" it is said, "in the necessities of the judicial administration", and the courts, federal and state, have equal interest in those necessities. They are both instruments of judicial administration within the same territory, available to suitors, fully available, neither they nor their witnesses subject to be embarrassed or vexed while attending, the one "for the protection of his rights", the others "while attending to testify."

The next contention of the Page Company is that defendant in error "forfeited her right to claim and obtain immunity from the service here questioned by using the state court as a medium for the publication of a deliberate and malicious libel concerning this plaintiff [the Page Company] as to matters not material to any issue raised by the bill in her suit against this plaintiff, to testify in which she came to Massachusetts." It must be assumed, is the further contention, to be a libel, "a continuing tort, potentially and actually working injury to the plaintiff down to and at the moment of the service upon defendant of the process in this suit."

The contention has strength upon first impression which disappears upon reflection on the purpose of the principle and the necessity of its inflexibility. The service of process is upon the individual but the exemption from its requirement is something more than a privilege to him. It is "the privilege of the court", we have seen, rather than his. "It is founded in the necessities of the judicial administration." Besides, it cannot be assumed as plaintiff in error does, that the pleading in her suit against plaintiff in error was false and a tort, and on that

assumption deny her the immunity to which she is entitled. The truth or falsity of the pleadings is not to be assumed, it is to be established.

Judgment affirmed.

PHIPPS AND PHIPPS, AS DIRECTOR OF THE DEPARTMENT OF COMMERCE OF THE STATE OF OHIO, *v.* CLEVELAND REFINING COMPANY OF CLEVELAND, OHIO.

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

No. 324. Argued March 15, 1923.—Decided April 9, 1923.

A state law applicable to interstate and intrastate commerce, which imposes fees for the inspection of petroleum products in excess of the legitimate cost of inspection, imposes a tax and is void, if not so far separable that the excess may properly be assigned to intrastate commerce alone. P. 451.

277 Fed. 463, affirmed.

APPEAL from an interlocutory decree of the District Court restraining the collection of fees for inspection of petroleum products.

Mr. William J. Meyer, with whom *Mr. John G. Price,* Attorney General of the State of Ohio, *Mr. John M. Parks* and *Mr. Ray Martin* were on the brief, for appellant.

Mr. Charles D. Chamberlin, with whom *Mr. Hubert B. Fuller* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The Cleveland Company is a dealer in petroleum products and brought this suit to restrain the execution of an act passed by the General Assembly of Ohio, May 19,

1915, entitled "An Act to provide for the inspection of petroleum, illuminating oils, gasoline, naphtha; and the repeal of sections 844 to 868, inclusive, of the General Code." Ohio Laws, vol. 105, p. 309.

The case presented by the bill is as follows: The company is engaged in business in East Cleveland and has the necessary instrumentalities for carrying on its business (the bill enumerates them). It buys its products in other States, ships them into Ohio and receives at its place of business large quantities of them. It has contracts for them which it is bound to consummate and which it cannot perform without great loss except through its established business.

By the terms of the statute, oil intended for sale for illuminating purposes must be inspected in Ohio, and it designates the fees to be paid to the State Inspector or his deputy, which are payable on demand and are made a lien upon the articles inspected. And there are provisions which safeguard the quality of the oil.

The quantities of petroleum products are increased year by year and the revenue derived by the State will increase over and above the revenue derived in past years if the enforcement of the act is permitted to continue, and the act is repugnant to Article I, § 10, clause 2, of the Constitution of the United States forbidding States from laying imposts without the consent of Congress upon interstate commerce, except such as may be absolutely necessary for the execution of inspection laws.

The act violates Article I, § 8, giving to Congress the power to regulate commerce, and also violates certain provisions of the constitution of Ohio.

The District Court decided that " the act, except as to the amount of fees charged for inspection " was " in its essential details, and even in nearly all of the language employed, a re-enactment of the law declared unconstitutional in *Castle* v. *Mason,* 91 O. S. 296." Commenting

on the latter case, the court said it found the earlier act did not differ materially from the law pronounced void in *Foote* v. *Maryland,* 232 U. S. 494, and that also held to be void in *Red "C" Oil Manufacturing Co.* v. *North Carolina,* 222 U. S. 380. And observed, "The General Assembly, with at least constructive knowledge that, under the operations of the law, the excess of receipts over expenses was large and annually mounting, permitted the inspection charges to remain undisturbed, and in this respect its conduct has differed from the conduct of the Minnesota legislature with reference to the act considered in *Pure Oil Co.* v. *Minnesota,* 248 U. S. 158."

The conclusion of the court was upon further consideration of the facts pertinent to the purpose and quality of the act, that it was an interference with interstate commerce. The court said, "The fees prescribed by the statute are beyond the cost of legitimate inspection to determine the quality of the articles inspected, and the act is therefore not only a police measure, but a revenue measure also. Such cost by necessary operation unduly burdens and obstructs the freedom of interstate commerce, and, as such commerce cannot be separated from the intrastate shipments, the whole tax is void."

The court was of opinion that the other questions discussed by counsel were not necessary to consider.

Phipps, as an individual, was dismissed from the case except as Director of the Department of Commerce. Against him as such a temporary injunction was ordered to issue.

Appellant contests the conclusion of the court and condenses his assignments of error to the following propositions: "1. The State's cost of interstate inspection is greater than the fees charged therefor. 2. In practical administration, the comparative cost of interstate inspection is ascertainable as distinguished from the cost of intrastate inspection."

It is admitted that these conclusions depend upon an estimate of the evidence, and the District Court adjudged against them. The court found that the fees collected from July 1, 1915, to June 30, 1920, amounted to $639,057.47; the disbursements to $321,188.68. The court further found that "The collections, when least, were sixty-three per cent. greater than the inspection costs" and had "so advanced from year to year that the fees provided by the statute must be held to be unreasonable and disproportionate to the service rendered, and the Act must be declared unconstitutional, as imposing a direct and unlawful burden on interstate commerce, unless interstate shipments under the provisions of the Act are separable from intrastate shipments and the fees collected for the inspection of the former are equal or substantially equal to the cost of inspecting shipments of that character. The defendant's [appellant's] position is that the two classes of shipments are thus separable, and the interstate shipments have in fact been inspected at a loss to the State."

The position was held untenable by the court upon considerations and reasoning which we need not reproduce. It is enough to say we approve of them. It is contended by appellant that whatever defects may exist on the face of the act, may be and will be corrected in its administration, and whatever excess there may be in the fees collected will not be assigned to interstate commerce. There is quite a minute and detailed argument to show how this can be done. The District Court upon consideration in connection with the evidence rejected it, and we affirm its judgment.

Judgment affirmed.

GARDNER, AS TRUSTEE IN BANKRUPTCY OF O'GARA COAL COMPANY, *v.* CHICAGO TITLE & TRUST COMPANY, AS RECEIVER OF LA SALLE STREET TRUST & SAVINGS BANK.

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

No. 317. Argued March 15, 1923.—Decided April 9, 1923.

A state bank, holding a secured note, the maker of which became a bankrupt, itself went into insolvency proceedings under the state law after it had accepted, with knowledge of the bankruptcy, deposits of funds of the bankrupt estate made by the trustees in bankruptcy, who were not shown to have known of the note at the time.

Held that the bankruptcy court should allow the bank's claim for the amount due on the note, above the value of the security, but withhold dividends until the debt due the trustees had been paid. P. 456.

278 Fed. 509, reversed.

CERTIORARI to an order of the Circuit Court of Appeals directing dismissal of a petition for set-off made by a trustee in bankruptcy.

Mr. Arthur M. Cox, with whom *Mr. Henry M. Wolf* and *Mr. A. F. Reichmann* were on the briefs, for petitioner.

Mr. Hiram T. Gilbert for respondent.

The relation of a depositary to the trustees of a bankrupt estate is not fiduciary but is simply that of debtor and creditor.

This point is *res judicata* by the decision of the Circuit Court of Cook County allowing the claim of the trustees in bankruptcy as a general claim.

There is no statute expressly making deposits of trustees in bankruptcy preferred claims, nor is there any rule of construction or other authority for holding that be-

cause depositaries are provided for by law the deposits they receive as such are to be regarded as preferred claims.

As a secured creditor the receiver of the bank occupied a position essentially different from that of an unsecured creditor.

At the time of the adjudication in bankruptcy, the bank had the right to apply the collateral upon the note and present its claim against the bankrupt estate for the balance. This right could not be changed by subsequent events. The case is no different from what it would have been had the bankrupt, at the time of the bankruptcy, had on deposit in the bank an amount of money equal to the value of the collateral.

No right of set-off existed in favor of the trustees in bankruptcy as against the receiver of the Trust & Savings Bank. The right of set-off is reciprocal. 34 Cyc. 723; *In re United Grocery Co.,* 253 Fed. 267.

The rights of the parties were fixed at the time of the suspension of the bank and could not be subsequently changed. If there was a right of set-off at that time it was a mutual right and not a right which only one party could then avail itself of. *People* v. *California Safe Deposit & Trust Co.,* 168 Cal. 241; *In re Harper,* 175 Fed. 412; *In re Siegel-Hillman Dry Goods Co.,* 111 Fed. 980; *Scott* v. *Armstrong,* 146 U. S. 499; *In re Chrystal Spring Bottling Co.,* 100 Fed. 265, distinguished.

The controversy here is not one between the O'Gara Coal Company and the bank, but is one between the creditors of the bankrupt company and the creditors of the insolvent bank.

The rights of the Coal Company's creditors were fixed on the date of the filing of the petition in bankruptcy and those of the Bank were fixed on the date of its suspension.

The maxims " He who seeks equity should do equity," and " He who comes into equity should have clean hands," have no application to this case.

The trustees in bankruptcy having obtained an order of the state court for the payment of the $19,843.62 out of the assets of the Bank in due course of administration *pro rata* with the Trust & Savings Bank's other creditors, and having received dividends thereon, are estopped from now claiming the right to retrace their steps and pay back part of the money which they received and have their right of set-off enforced.

This matter has become *res judicata*. The jurisdiction of the state court was complete. The relief granted by it was entirely inconsistent with the relief now claimed by the trustee in bankruptcy and to grant the relief the trustee now claims would operate as a review of the decree of the state court by the courts of the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case arises in the matter of O'Gara Coal Company, bankrupt, upon a petition for a setoff presented by the trustee of the bankrupt estate. The respondent is the receiver of the La Salle Street Trust and Savings Bank. When the Coal Company became bankrupt in 1913, the Bank held its note for $15,000, with security. Between November 11, 1913, and June 11, 1914, the trustees of the Coal Company in bankruptcy deposited in the Bank, an authorized depositary, and were credited as such trustees with funds of their estate, which amounted to nearly $20,000 on June 12, 1914, when the Bank suspended business, insolvent. A receiver was appointed by a State Court a few days later. The trustees of the Coal Company filed a claim for the amount of their deposit in 1916, and in 1916 and again in 1918 received dividends upon it. On the other side the receiver of the Bank filed a proof of the Bank's claim as unsecured in 1914 but amended it to proof of a secured claim in 1917. The peti-

tion before us seeks to setoff the claim of the petitioner for the deposit in the Bank, less the dividends received, against the claim of the Bank upon the note. The Circuit Court of Appeals denied the setoff and ordered the petition to be dismissed. 278 Fed. 509.

We assume that when money is deposited in a designated bank under § 61 of the Bankruptcy Law of July 1, 1898, c. 541, 30 Stat. 562, it is deposited as other money is, and becomes the property of the bank, leaving the bank a debtor for the amount. But when this money was deposited with this Bank it seems that the Bank had notice that it was part of a fund appropriated to paying the Coal Company's debts, of which the note held by the Bank was one. We think that it would be inequitable to allow the Bank to proceed to diminish that fund without accounting for the portion that it had received. When the Bank accepted deposits from a fund against which it had a credit it must be taken to have known that it could not profit by the fact at the expense of other claimants. The Bank knew the whole situation. There is nothing to show that the Trustees of the Coal Company when they made their deposits knew that the Bank held the Coal Company's note. If they had known this fact it would be going far to say that they altered or could alter the position of their *cestuis que trust* for the worse. On the other hand the creditors of the Bank can stand no better than the Bank.

The Bankruptcy Court may allow the Bank's claim for such sum only as may seem to the Court to be owing above the value of the security, § 57e, and may withhold dividends upon that sum until the debt due to the trustee has been paid. *Western Tie & Timber Co.* v. *Brown,* 196 U. S. 502, 511.

Decree reversed.

WABASH RAILWAY COMPANY *v.* ELLIOTT.

CERTIORARI TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

No. 225. Argued January 16, 1923.—Decided April 9, 1923.

Where a claim for personal injuries occasioned by the operation of a railroad while in the exclusive possession and control of the United States acting through the Director General of Railroads, was compromised and settled between that official and the claimant without participation by the railway company, an attorney who had contracted with the claimant to compromise or enforce the claim for a percentage of the recovery, and who did not consent to the settlement, had no cause of action under a state lien statute (Rev. Stats. Mo., 1919, § 691) against the railway company. P. 460.

208 Mo. App. 348, reversed.

CERTIORARI to a judgment of the Kansas City Court of Appeals affirming a judgment against the Railway Company, in an action to enforce an attorney's statutory lien.

Mr. Frederic D. McKenney, with whom *Mr. N. S. Brown* was on the brief, for petitioner.

Mr. Martin J. O'Donnell, with whom *Mr. George H. Kelly, Mr. Wm. Buchholz* and *Mr. Isaac B. Kimbrell* were on the brief, for respondent.

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

On April 2, 1918, while the railroad of the Wabash Railway Company was in the possession of the United States and operated by the Director General of Railroads, Mern G. Welker, a brakeman on that railroad, was fatally injured and died in circumstances which, under the Employers' Liability Acts of Congress, probably would have made the railway company liable in damages for his

injury and death had the company been operating the railroad at the time. His widow became the administratrix of his estate and as such entered into a contract with Miles Elliott, an attorney at law, under which the latter was to investigate the claim for the injury and death, compromise the same, or enforce it by suit, and have for his service fifty per cent. of all moneys received. Elliott caused a notice, addressed to the railway company and reciting the substance of the contract, to be served on one Stepp, who was the station agent of the Director General at Chillicothe, Missouri. The contract was made and the notice given under a statute of Missouri (§ 691, R. S. 1919) which provides that such a contract shall, after the service of notice, give the attorney a lien on the claim and the proceeds for his portion or percentage, and that—

"any defendant or defendants, or proposed defendant or defendants, who shall, after notice served as herein provided, in any manner, settle any claim, suit, cause of action, or action at law with such attorney's client, before or after litigation instituted thereon, without first procuring the written consent of such attorney, shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement, . . ."

June 5, 1918, Elliott commenced an action by the administratrix against the railway company in the circuit court of Livingston County, Missouri, to enforce the claim. Before there was any appearance by the railway company in that case, the Director General, acting through a claim agent in his employ, compromised the claim with the administratrix, paid to her $4,000 from the funds of the United States Railroad Administration and received from her a written instrument acknowledging the receipt of that sum from him and releasing him and the railway company from all claims and demands by reason of Welker's injury and death. The Director General also paid to her from the same funds the further sum of

$162.85 to cover funeral and burial expenses. As part of the compromise and settlement the administratrix and the claim agent acting for the Director General entered into a stipulation bearing the title of the action against the railway company, reciting that the subject-matter of the action had been fully settled between the parties and consenting that the action be dismissed at defendant's costs. This stipulation was presented and filed in the circuit court by counsel acting for the Director General. The settlement and the stipulation for a dismissal were without the consent of Elliott and no part of the sum paid to the administratrix was paid by her to him.

January 11, 1919, Elliott began a proceeding against the railway company in the circuit court of Livingston County, where the action of the administratrix was pending, to enforce a lien under his contract and the state statute. In his petition he set forth the matters before stated, save that instead of recognizing the federal control and operation of the railroad, he directly charged the railway company with all that was done by the Director General and the representatives, agents and employees of the latter; and he alleged that as part of the compromise and settlement the company promised the administratrix to pay to him, as his compensation or percentage under the contract, the same amount that was paid to her. His prayer was that his lien be enforced by awarding him a judgment against the company for that sum. In an amended petition he made the Director General a party, charged both the railway company and the Director General with what he had before charged against the company alone and prayed judgment against both.

Separate answers were filed, but that of the Director General need not be noticed. The company's answer set up, among other things, (1) that the federal possession, control and operation of the railroad covered all the dates named in the petition and there was no possession or

operation by the company during that period; (2) that the acts charged against the company in the petition, in so far as they had any reality, were solely the acts of representatives, employees and agents of the Director General; and (3) that the suit of the administratrix and the proceeding by Elliott could not be maintained against the company but only against the Director General. As showing the nature of the federal control and the company's freedom from liability for acts or omissions in the course of such control, the answer directed attention to and invoked the application of the acts of Congress, proclamations of the President and orders of the Director General according to which that control was exercised.

On the trial the court found the issues between Elliott and the railway company in favor of the former and those between Elliott and the Director General in favor of the latter. Judgment was then entered that Elliott recover $4,162.85 from the company and nothing from the Director General. The company appealed to the Kansas City Court of Appeals and it affirmed the judgment. 208 Mo. App. 348. That court refused to transfer the case to the Supreme Court of the State and the latter denied a petition asking it to review the judgment on writ of certiorari. After the avenues of review within the State were thus exhausted this Court granted a petition for a writ of certiorari to the Kansas City Court of Appeals to bring the case here.

Complaint is made of several rulings, but only one need be considered. Conformably to the local practice the railway company, at the close of the evidence, requested the court to declare that there was no evidence to sustain a finding against it, and therefore the finding and judgment should be in its favor. This request was based in part on what the company claimed was the right construction and application of the congressional enactments, presidential proclamations, and orders of the Director

General relied on in its answer. The request was refused. We think it plainly should have been granted.

Affirmatively and without contradiction the evidence established that at the time of Welker's injury and death and continually until after Elliott's proceeding was begun the company's railroad was in the exclusive possession and control of the United States and operated by the Director General of Railroads; that Welker's injury and death were not caused by any act or omission of the company or anyone in its employ, and that the company had nothing to do with the compromise and settlement with the administratrix and did not promise to pay her attorney. The courts below apparently assumed that the claim agent who effected the compromise and settlement represented the company as well as the Director General; but the assumption was wholly inadmissible. The evidence was directly and positively to the contrary. The claim agent had been in the company's service prior to the federal control, but during that control was only in the service of the Director General. The payment to the administratrix was made by a check drawn by the Director General on funds of the United States Railroad Administration and the receipt taken from her recited that the payment was by the Director General. Indeed, so far as appeared, the company did not know of the compromise and settlement until after Elliott's proceeding was begun. In all the evidence there were but two matters which, even if separated from the rest, could give any color to what was assumed below. One was the inclusion of the company in the release. But this was explained consistently with the other evidence by an accompanying recital that the sum received by the administratrix from the Director General was the sole consideration for the release, and by the fact that in the circumstances simple justice to the company would suggest its inclusion in the

release. The other matter was that the claim agent signed the stipulation for a dismissal of the pending suit as attorney for the company. But this was made quite negligible by direct evidence that the claim agent had no authority to act or speak for the company and by the fact that the Director General, during whose operation the claim arose and for whom the claim agent was acting, was free to have himself substituted as a party in the company's place and to assume the defense of that suit. See *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554.

To sustain its asserted freedom from liability in such circumstances the company relied particularly[1] on § 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, and General Order No. 50 by the Director General of Railroads, U. S. R. R. Administration Bulletin No. 4 (Revised), p. 334. That statute and order were considered at length in *Missouri Pacific R. R. Co.* v. *Ault, supra,* and were there construed as contemplating and intending that rights of action arising out of acts or omissions occurring in the course of the federal control of a railroad should be against the Director General and not the company owning the road. That decision was followed and applied in *North Carolina R. R. Co.* v. *Lee,* 260 U. S. 16, and its principle was recognized in *Alabama & Vicksburg Ry. Co.* v. *Journey,* 257 U. S. 111, and *Davis* v. *L. N. Dantzler Lumber Co., ante,* 280.

Thus whatever claim the administratrix had for Welker's injury and death was against the Director General, not the company. Elliott's lien, if he had one, was on that claim. The settlement of the claim was strictly an

[1] It also relied incidentally on the Act of August 29, 1916, c. 418, 39 Stat. 619, 645; the President's Proclamation of December 26, 1917, 40 Stat. 1733; General Orders Nos. 18, 18a and 26 by the Director General of Railroads, U. S. R. R. Administration Bulletin No. 4 (Revised), pp. 186, 187, 196, and § 206 of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 456.

act of the Director General done in the course of the federal control. No liability could attach to the company for that act consistently with the federal statute and order just cited. Whether the particular liability defined in the state statute before quoted was of such a nature that it could be applied to the Director General we need not consider, for there was no appeal from the judgment of the circuit court in his favor. See *Missouri Pacific R. R. Co.* v. *Ault*, pp. 563, *et seq.*; *Norfolk-Southern R. R. Co.* v. *Owens*, 256 U. S. 565.

Judgment reversed.

FEDERAL TRADE COMMISSION *v.* SINCLAIR REFINING COMPANY.

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

FEDERAL TRADE COMMISSION *v.* STANDARD OIL COMPANY (NEW JERSEY).

FEDERAL TRADE COMMISSION *v.* GULF REFINING COMPANY.

FEDERAL TRADE COMMISSION *v.* MALONEY OIL & MANUFACTURING COMPANY.

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

Nos. 213, 637, 638, 639. Argued March 8, 9, 1923.—Decided April 9, 1923.

1. The practice, upon the part of a manufacturer of gasoline, of leasing underground tanks with pumps to retail dealers, at nominal rentals and upon condition that the equipment shall be used only with gasoline supplied by the lessor, is not in violation of the Clayton Act. P. 473.

2. Nor is it unfair competition, within the Federal Trade Commission Act, as regards either the trade in gasoline or the trade in such storage and pumping equipment. P. 474.
3. The Federal Trade Commission has no general authority to compel competitors to a common level, to interfere with ordinary business methods, or to restrict competition to arbitrary standards. P. 475.
4. The great purpose of both of the above statutes was to advance the public interest by securing fair opportunity for the play of contending forces engendered by an honest desire for gain; and to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs. P. 476.

276 Fed. 686; 282 Fed. 81, affirmed.

CERTIORARI to four judgments of Circuit Courts of Appeals setting aside as many orders of the Federal Trade Commission.

Mr. Adrien F. Busick and *Mr. Eugene W. Burr,* with whom *Mr. Solicitor General Beck* and *Mr. W. H. Fuller* were on the briefs, for petitioner.

Mr. Roy T. Osborn, with whom *Mr. Edw. H. Chandler* and *Mr. W. Ray Allen* were on the brief, for respondent in No. 213.

Mr. Charles D. Chamberlin, with whom *Mr. Hubert B. Fuller* was on the brief, for respondent in No. 639.

Mr. R. L. Batts, with whom *Mr. W. J. Guthrie* was on the brief, for respondent in No. 638.

Mr. Chester O. Swain and *Mr. James H. Hayes,* for respondent in No. 637, submitted.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In separate proceedings against thirty or more refiners and wholesalers, the Federal Trade Commission condemned and ordered them to abandon the practice of leas-

ing underground tanks with pumps to retail dealers at nominal prices and upon condition that the equipment should be used only with gasoline supplied by the lessor. Four of these orders were held invalid by the circuit courts of appeals for the third and seventh circuits in the above entitled causes—276 Fed. 686; 282 Fed. 81; and like ones have been set aside by the circuit courts of appeals for the second and sixth circuits—*Standard Oil Co.* v. *Federal Trade Commission,* 273 Fed. 478; *Canfield Oil Co.* v. *Federal Trade Commission,* 274 Fed. 571. The proceedings, essential facts and points of law disclosed by the four records now before us are so similar that it will suffice to consider No. 213, as typical of all.

July 18, 1919, the Commission issued a complaint charging that respondent, Sinclair Refining Company, was purchasing and selling refined oil and gasoline and leasing and loaning storage tanks and pumps as part of interstate commerce in competition with numerous other concerns similarly engaged; and that it was violating both the Federal Trade Commission Act, 38 Stat. 717, and the Clayton Act, 38 Stat. 730.

The particular facts relied on to show violation of the Federal Trade Commission Act are thus alleged—

" Paragraph Three. That respondent in the conduct of its business, as aforesaid, with the effect of stifling and suppressing competition in the sale of the aforesaid products and in the sale, leasing, or loaning of the aforesaid devices and other equipments for storing and handling the same, and with the effect of injuring competitors who sell such products and devices, has within the four years last past sold, leased, or loaned and now sells, leases, or loans the said devices and their equipment for prices or considerations which do not represent reasonable returns on the investments in such devices and their equipments; that many such sales, leases, or loans of the aforesaid devices are made at prices below the cost of producing and vend-

ing the same; that many of such contracts for the lease or loan of such devices and their equipments provide or are entered into with the understanding that the lessee or borrower shall not place in such devices, or use in connection with such devices and their equipments, any refined oil or gasoline of a competitor; that only a small proportion of the dealers in gasoline and refined oil under such agreements and understandings deal also in similar products of respondent's competitors and that only a small proportion of such dealers require or use more than a single pump outfit in the conduct of their said business; that there are numerous competitors in the sale of such products who are unable to enter into such lease agreements or understandings because of the large amount of investment required to carry out such lease agreements as a competitive method of selling refined oil and gasoline; that there are numerous other competitors of respondent engaged in the manufacture and sale of devices and their equipments who do not deal in refined oil and gasoline, and therefore do not sell or lease said devices and their equipments for a nominal consideration on a condition or understanding that their products only are to be used therein; that the said numerous competitors who were unable to enter into such lease agreements or understandings, as aforesaid, have lost numerous customers in the sale of refined oil and gasoline to respondent because of the business practices of respondent hereinbefore set forth. That the said numerous other competitors of respondent who manufacture and sell said devices and their equipments, but do not sell refined oil and gasoline, as aforesaid, have lost numerous customers and prospective customers for the purchase of their devices and equipments because of the said business practices of respondent, as hereinbefore set forth."

To show violation of the Clayton Act the complaint alleged—

" Paragraph Three. That the respondent, for four years last past, in the conduct of its business as aforesaid, has leased and made contracts for the lease and is now leasing and making contracts for the lease of said devices and their equipments to be used within the United States, and has fixed and is now fixing the price charged therefor on the condition, agreement, or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent; and that the effect of such leases or contracts for lease, and conditions, agreements, or understandings, may be and is to substantially lessen competition and tend to create a monopoly in the territories and localities where such contracts are operative."

Respondent answered and evidence was taken. In October, 1919, the Commission announced its report, findings and conclusions, the substance of which follows.

" 1. That the respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal business office located at the City of Chicago, in the State of Illinois, and is now and has been engaged in the business of purchasing and selling refined oil and gasoline, hereinafter referred to as products, and is largely engaged in refining crude petroleum, and that it is now and has been since January 25, 1917, in connection with the aforementioned business, engaged in the leasing and loaning, but not in the manufacture, of oil pumps, storage tanks, and containers and their equipment, hereinafter referred to as devices, in various States of the United States, but not in the District of Columbia, in competition with numerous other persons, firms, corporations, and copartnerships similarly engaged; that prior to the 25th day of January, 1917, the corporate name of respondent was the Cudahy Refining Company.

" 2. That the respondent, in the conduct of its business, as aforesaid, and as hereinafter more particularly de-

scribed, extensively refines petroleum and its products and purchases refined oil and gasoline, all hereinafter referred to as 'products,' and also purchases oil pumps, storage tanks or containers, hereinafter referred to as 'devices,' the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and being transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices are leased or loaned by respondent to various persons, firms, corporations, and copartnerships; that in the conduct of its business of purchasing and selling such products and selling, leasing or loaning such devices, the same are constantly moved from one State to another by respondent and there is conducted by respondent a constant current of trade in such products and devices between various States of the United States; that there are numerous competitors of respondent, who, in the conduct of their business in competition with respondent, purchase similar products and purchase and manufacture similar devices, the said devices being used to contain said products, the said products and devices then being handled and stored in the various States of the United States and transported in interstate commerce; that the aforesaid products are sold and the aforesaid devices sold, leased, or loaned by such competitors of respondent to various persons, firms, corporations, and copartnerships, that in the conduct of their business, as aforesaid, competitors of respondent constantly move such products and devices from one State to another and there is conducted by said competitors a constant current of trade in such products and devices between the various States of the United States; that respondent has conducted its said business in a similar manner to that above described since January 25, 1917.

"3. That respondent now leases and loans and has for the period of its business existence leased and loaned

devices and equipment for storing and handling its products, and that the monetary considerations received by respondent do not represent reasonable returns upon the investment in such devices and equipment; and also that such leases and loans of said devices and equipment are made for monetary considerations below the cost of purchasing and vending the same when the business of leasing or loaning said devices and equipment and the returns received thereon are considered separate and apart from the general business and sales policy of the respondent; that respondent's form of contract with the users of such devices and equipment provides in substance that the devices and equipment shall be used for the sole purpose of storing and handling gasoline supplied by respondent, and that the uniform contract used by respondent for leasing such devices and equipment is in form, tenor, and substance as follows." [The ordinary form of contract (printed in the margin [1]) is here set out. It recites the

[1] Equipment Contract.

This agreement, made and entered into this.....day of ....., 19...., between Sinclair Refining Company of ....., party of the first part, and ....., of the City of....., State of ....., party of the second part, witnesseth:

Whereas, party of the second part is now being supplied with gasoline by the party of the first part and desires to install on his premises situated at.....the following equipment for the better storing and handling of such gasoline:.....

Now, therefore, in consideration of the premises and of the sum of one dollar by the party of the second part to the party of the first part (the receipt of which is hereby acknowledged), the above named parties do hereby agree as follows:

1. The above described equipment shall be used by the party of the second part for the sole purpose of storing and handling the gasoline supplied by the party of the first part.

2. The party of the second part agrees, at his own cost, to maintain said equipment in good condition and repair so long as he shall continue to use the same.

3. The party of the second part agrees that he will not encumber or remove said equipment, or do or suffer to be done anything

customer's desire to install certain equipment and, among other things, provides that this shall be used only for storing and handling gasoline supplied by the lessor; that

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whereby said equipment or any part thereof may be seized, taken on execution, attached, destroyed or injured, or by which the title of the party of the first part thereto may in any way be altered, destroyed or prejudiced.

4. In the event party of the second part should at any time use said equipment for any other purpose than the storing and handling of gasoline supplied by the party of the first part, or should cease for.....days to handle gasoline secured from the party of the first part the right or license of the party of the second part to said equipment shall at once terminate, and thereupon the party of the first part shall have the right to enter upon said premises and remove said equipment and every part thereof.

5. The party of the second part shall indemnify and save harmless the party of the first part to and from any liability for loss, damage, injury or other casualty to persons or property caused or occasioned by any leakage, fire or explosion of gasoline stored in said tank or drawn through said pump.

6. This agreement shall terminate forthwith upon the sale or other disposition of said premises by party of the second part, and in any event upon the expiration of.....months from the date hereof; and in the event that by mutual consent said equipment remains in the possession of the party of the second part at the expiration of said period, it is agreed that the same shall be used by party of the second part subject to all of the terms and conditions of this agreement, and such may be terminated at any time after the expiration of.....months from the date hereof by the party of the first part giving ten days' notice to that effect. Upon the termination of this license by whatever means effected, the party of the first part shall have the right to enter upon said premises and remove the said equipment and each and every part thereof; provided, however, that the party of the second part shall have the right and option at such time to purchase said equipment by paying therefor the sum of .....

This contract is executed in triplicate, and it is agreed that the contract held by the party of the first part is to be considered the original and to be the binding agreement in case the duplicate varies from it in any particular.

In witness whereof, the parties hereto have caused this agreement to be executed the day and year first above written.

if put to any other use the lessee's right therein shall terminate; and that upon termination of the lease, by whatever means effected, the lessee may purchase the equipment for a specific sum.]

"4. That the contracts mentioned in the preceding paragraph also provide that such equipments shall be used by the lessee only for the purpose of holding and storing the respondent's petroleum products; that a small proportion of such lessees handle similar products of respondent's competitors; and that only a small proportion of such lessees as handle similar products of respondent's competitors require or use more than a single pump outfit in the conduct of their said business; that the practice of leasing such devices requires a large capital investment; that many competitors of respondent do not possess sufficient capital and are not able to purchase and lease devices as respondent does as aforesaid, partly by reason of which such competitors have lost numerous customers to respondent; that the effect of the practice of leasing by contract such equipments, where such contracts contain the said provision restricting the use of the same to the storage and handling of respondent's products as aforesaid, may be to substantially lessen competition and tend to create for the respondent a monoply in the business of selling petroleum products.

"*Conclusions.* That the methods of competition and the business practices set forth in the foregoing findings as to the facts are, under the circumstances set forth herein, unfair methods of competition, in interstate commerce, in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and are in violation of section 3 of an act of Congress, approved October 15, 1914, entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.' "

Thereupon the Commission ordered that respondent cease and desist from—

"1. Directly or indirectly leasing pumps or tanks or both and their equipments for storing and handling petroleum products in the furtherance of its petroleum business, at a rental which will not yield to it a reasonable profit on the cost of the same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made.

"2. Entering into contracts or agreements with dealers of its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and their equipments the same shall be used only for storing or handling the products of respondent, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited and by reason of which this order is made."

The Clayton Act provides—

"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, sup-

plies 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."

Respondent's written contract does not undertake to limit the lessee's right to use or deal in the goods of a competitor of the lessor, but leaves him free to follow his own judgment. It is not properly described by the complaint and is not within the letter of the Clayton Act. But counsel for the Commission insist that inasmuch as lessees generally—except garage men in the larger places—will not encumber themselves with more than one equipment, the practical effect of the restrictive covenant is to confine most dealers to the products of their lessors; and we are asked to hold that, read in the light of these facts, the contract falls within the condemnation of the statute. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, and *United Shoe Machinery Corporation* v. *United States*, 258 U. S. 451, are relied upon.

In the *Standard Fashion Co. Case* the purchaser expressly agreed not to sell or permit sale of any other make of patterns on its premises. It had a retail store in Boston and sales elsewhere were not within contemplation of the parties. This Court construed the contract as embodying an undertaking not to sell other patterns. In *United Shoe Machinery Corporation* v. *United States*, when speaking of certain "tying" restrictions, this Court said—

"While the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act which cover all condi-

tions, agreements or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly is, we believe, equally apparent. When it is considered that the United Company occupies a dominating position in supplying shoe machinery of the classes involved, these covenants signed by the lessee and binding upon him effectually prevent him from acquiring the machinery of a competitor of the lessor except at the risk of forfeiting the right to use the machines furnished by the United Company which may be absolutely essential to the prosecution and success of his business. This system of 'tying' restrictions is quite as effective as express covenants could be and practically compels the use of the machinery of the lessor except upon risks which manufacturers will not willingly incur."

There is no covenant in the present contract which obligates the lessee not to sell the goods of another; and its language cannot be so construed. Neither the findings nor the evidence show circumstances similar to those surrounding the "tying" covenants of the Shoe Machinery Company. Many competitors seek to sell excellent brands of gasoline and no one of them is essential to the retail business. The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline, with the pump or without the pump, and many competitors seek to supply his needs.

The cases relied upon are not controlling.

Is the challenged practice an unfair method of competition within the meaning of § 5 of the Federal Trade

Commission Act?[1] Reviewing the circumstances, four circuit courts of appeals have answered, no. And we can find no sufficient reason for a contrary conclusion. Certainly the practice is not opposed to good morals because characterized by deception, bad faith, fraud or oppression. *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427. It has been openly adopted by many competing concerns. Some dealers regard it as the best practical method of preserving the integrity of their brands and securing wide distribution. Some think it is undesirable. The devices are not expensive—$300 to $500—can be purchased readily of makers and, while convenient, they are not essential. The contract, open and fair upon its face, provides an unconstrained recipient with free receptacle and pump for storing, dispensing, advertising and protecting the lessor's brand. The stuff is highly inflammable and the method of handling it is important to the refiner. He is also vitally interested in putting his brand within easy reach of consumers with ample assurance of its genuineness. No purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition. Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the crossroads.

The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those en-

[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.

gaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs.

The suggestion that the assailed practice is unfair because of its effect upon the sale of pumps by their makers is sterile and requires no serious discussion.

The judgments below must be

Affirmed.

HARTFORD LIFE INSURANCE COMPANY *v.* DOUDS ET AL., EXECUTORS OF DOUDS.

HARTFORD LIFE INSURANCE COMPANY *v.* LANGDALE.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

Nos. 265 and 271. Argued March 7, 1923.—Decided April 9, 1923.

1. The lack of power in a state court to interfere in the management of an insurance company of another State or to control the discretion of its officers, does not deprive it of jurisdiction to render a pecuniary judgment, in an action by an insured to recover amounts collected through assessments exceeding the *maxima* specified in the contract of insurance. P. 478.

So *held* where the company appeared and contested the jurisdiction, upon the ground that the proceedings involved its internal affairs and the validity of its action relative to its Safety Fund Department, over which matters the courts of its domicile had exclusive jurisdiction, and that the enforcement of the judgment would deprive it of property without due process of law. *Hartford Life Ins. Co.* v. *Ibs*, 237 U. S. 662, distinguished.

103 Ohio St. 398, 433, affirmed.

CERTIORARI to judgments of the Supreme Court of Ohio affirming judgments against the Insurance Company in actions by the respondents to recover money paid under excessive assessments.

Mr. Harry B. Arnold, Mr. James C. Jones, Mr. Frank H. Sullivan and *Mr. James C. Jones, Jr.*, for petitioner, submitted.

Mr. Smith W. Bennett, with whom *Mr. Hugh M. Bennett* was on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

These are separate causes, but the facts are similar and both present the same essential question. A statement based upon record No. 271 will suffice.

Petitioner is a Connecticut corporation with home office at Hartford. For many years it has carried on the business of insurance upon the assessment or mutual plan within the State of Ohio. May 4, 1882, it issued to respondent Langdale, aged forty, a certificate of membership, Safety Fund Department, for three thousand dollars. This recites that in consideration of representations, etc., and " the further payment, in accordance with the conditions hereof, of all mortuary assessments," the Company agrees (among other things) to assess holders of certificates " according to the table of graduated assessment rates given hereon, as determined by their respective ages and the number of such certificates in force," and pay the amount so collected to the assured's legal representatives.

The " Table of graduated assessment rates for death losses for every $1,000 of a total indemnity of $1,000,000 " is printed upon the certificate and shows increasing rates for ages from fifteen to sixty. The highest specified rate

is at sixty—$2.68. Immediately after the table this statement appears: "These rates decrease in proportion as the total indemnity in force increases above one million dollars in amount, and are calculated so as to cover the usual expense for collecting."

During the years 1903 to 1914 the Company made and the insured paid assessments on account of death losses at rates varying from $2.86 to $4.00 per thousand. To recover all above $2.68 per thousand so paid, with interest, respondent brought suit in the Common Pleas Court, Franklin County, Ohio. The Company appeared, demurred and later answered, saving at all times the question of jurisdiction. A judgment against it was affirmed by the Supreme Court. 103 Ohio St. 398, 433.

Petitioner now insists that the trial court lacked jurisdiction of the subject-matter; that the suit involved the management of its internal affairs and the validity of action relative to the Safety Fund Department; that the courts of Connecticut have exclusive jurisdiction over such matters; and that enforcement of the Ohio judgment will deprive it of property without due process of law.

The court below confined its ruling concerning jurisdiction to the trial court's power to render the above mentioned money judgment. And it held that to determine the issue did not require exercise of visitorial power over the foreign corporation; that the judgment did not interfere with the discretion of petitioner's officers or the management of its internal affairs. This conclusion, we think, is plainly right.

By a written contract petitioner had agreed that no mortuary assessment should exceed $2.68 per thousand. It demanded and received more, and respondent sued to recover the excess. All parties came before the court; the necessary facts were established; and he obtained judgment for a definite sum of money. This cannot interfere with the management of the Company's internal affairs.

In the recent cause of *Frick* v. *Hartford Life Insurance Co.*, 119 Atl. 229, instituted to enforce an Iowa judgment (179 Iowa, 149) against petitioner based upon facts essentially like those here disclosed, the Supreme Court of Connecticut considered the precise point now urged upon us. In harmony with *Dresser* v. *Hartford Life Insurance Co.*, 80 Conn. 681, 709, it held that the membership certificate constituted a contract not to demand of the assured more than $2.68 per thousand for any mortuary assessment; and also that the jurisdiction of the Iowa court to render judgment for excess payments was clear.

Hartford Life Insurance Co. v. *Ibs*, 237 U. S. 662, is not in point. That controversy related to the effect of the decree in *Dresser* v. *Hartford Life Insurance Co., supra*, a class suit instituted to determine the status and proper use of the mortuary fund. The causes now under consideration present no such problem.

The judgments below are

Affirmed.

GREAT LAKES DREDGE & DOCK COMPANY *v.* KIEREJEWSKI, ADMINISTRATRIX OF KIEREJEWSKI.

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

No. 633. Argued February 27, 1923.—Decided April 9, 1923.

The District Court has admiralty jurisdiction over a libel to recover damages, in accordance with a local death statute, for a death occurring on navigable waters while the decedent was there performing maritime service to a completed vessel afloat, and occasioned by a tort then and there committed. P. 480.

Affirmed.

ERROR to a judgment of the District Court recovered by the defendant in error in her libel for damages for the death of her husand.

Mr. George Clinton, Jr., with whom *Mr. Ulysses S. Thomas* was on the briefs, for plaintiff in error.

Mr. Irving W. Cole for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The sole question propounded upon this direct writ of error is whether the District Court rightly held that it had jurisdiction to entertain the libel by which defendant in error sought to recover damages for the death of her husband. 280 Fed. 125.

Plaintiff in error, a corporation engaged in dredging, pile driving, etc., maintains a yard at Buffalo, New York, and also keeps there scows and tugs. Leo Kierejewski, a master boiler maker, was employed by it to perform services as called upon. Acting under this employment, he began to make repairs upon a scow moored in the navigable waters of Buffalo River. He stood upon a scaffold resting upon a float alongside. One of the Company's tugs came near, negligently agitated the water, swamped the float and precipitated him into the stream where he drowned.

While performing maritime service to a completed vessel afloat, he came to his death upon navigable waters as the result of a tort there committed. The rules of the maritime law supplemented by the local death statute applied and fixed the rights and liabilities of the parties. *Western Fuel Co.* v. *Garcia,* 257 U. S. 233.

"The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled." *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, 476.

In the cause last cited neither Rohde's general employment nor his activities had any direct relation to naviga-

tion or commerce—the matter was purely local—and we were of opinion that application of the state statute, as between the parties, would not work material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity.

Here the circumstances are very different. Not only was the tort committed and effective on navigable waters, but the rights and liabilities of the parties are matters which have direct relation to navigation and commerce. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255; *State Industrial Commission of New York* v. *Nordenholt Corporation,* 259 U. S. 263.

Affirmed.

THOMAS, SHERIFF AND COLLECTOR, ET AL. *v.* KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL.

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

No. 303. Argued March 9, 12, 1923.—Decided April 9, 1923.

1. The legislature of a State may, if consistent with its constitution, establish a drainage district, set the boundaries, and apportion the cost by fixing the bases of assessment and taxation; and its conclusion that lands will be benefited cannot be assailed under the Fourteenth Amendment unless palpably arbitrary or discriminatory. P. 483.
2. A portion of the franchise of a railroad may be included as real estate within such a district; and, to justify its assessment, the benefit need not be direct, and may consist of gains to be derived from increased traffic due to the improvement. *Id.*
3. But vague speculation as to future increased traffic receipts will not justify a basis of taxation which necessarily produces manifest inequality. P. 484.

277 Fed. 708, affirmed.

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APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court permanently enjoining the appellant drainage district and state officials from enforcing a special drainage improvement tax, levied upon property of the appellee railroad companies.

Mr. James D. Head and *Mr. Otis Wingo*, with whom *Mr. Henry Moore, Jr.*, was on the brief, for appellants.

Mr. S. W. Moore and *Mr. James B. McDonough*, with whom *Mr. F. H. Moore* and *Mr. A. F. Smith* were on the briefs, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Legislature of Arkansas created, by a special law, the Little River Drainage and Levee District of Sevier County, No. 1, a body corporate, and defined its boundaries. Act 186 of Acts of 1915, p. 747, amended by Act 79 of Acts of 1917, p. 348. This suit was brought in the federal court for the Western District of Arkansas, Texarkana Division, by two railroad companies to restrain enforcement of a tax levied in the year 1918 under that act. The defendants below were the district, its officers, and the sheriff and collector of Sevier County. The statute named a board of directors; imposed upon it the duty of constructing drainage works; empowered it to raise the necessary money by construction notes and an issue of bonds to the amount of $100,000; and directed it: "to assess and levy annually a tax upon the valuation as it shall appear each year on the assessment book of Sevier County, Arkansas, upon all lands and . . . upon the railroad tracks of companies in said district, as appraised by the Board of Railroad Commissioners . . . ; not to exceed, however, in any one year, the sum of six per cent, of the assessed valuation of the said property within the district."

The estimated cost of the improvement was about $75,000. For the purpose of defraying a part of this cost the directors levied, in the year 1918, a tax of $7,346.12, being 6 per cent. of the assessed value of all real estate within the district. Of this amount it levied upon the railroads $4,194.60, being 6 per cent. of the assessed value of their property. Upon the 12,000 acres of land, being all the other real estate in the district, the directors laid, in the aggregate, taxes of $3,151.52, being 6 per cent. of its assessed value. Thus, 57 per cent. of the burden was imposed upon the railroads and 43 per cent. upon the owners of all the other real estate. Plaintiffs claimed that the tax was void. After a hearing, at which much evidence was introduced, the District Court entered a decree for a permanent injunction. Its decree was affirmed by the Circuit Court of Appeals, on the ground that the facts reveal an instance of discrimination so palpable and arbitrary as to amount to a denial of equal protection of the laws. 277 Fed. 708. The case is here on appeal.

The applicable rules of law are settled. The legislature of a State may, if consistent with its constitution, establish a drainage district; may set the boundaries; and may apportion the burden by fixing the basis of assessment and of taxation. The legislature's determination that lands will be benefited by a public improvement for which it authorizes a special tax, is ordinarily conclusive. Its action in so doing cannot be assailed under the Fourteenth Amendment, unless it is palpably arbitrary or discriminatory. *Houck* v. *Little River Drainage District,* 239 U. S. 254, 262; *Valley Farms Co.* v. *County of Westchester, ante,* 155. A proportion of the franchise of a railroad may, consistently with the Federal Constitution, be included as real estate within the district. To justify an assessment upon property the benefit from the improvement need not be a direct one. It may, in case of a railroad, consist of gains derived from increased traffic.

Branson v. *Bush,* 251 U. S. 182. But vague speculation as to future increased traffic receipts will not justify a basis of taxation which necessarily produces manifest inequality. Compare *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6,* 256 U. S. 658, 661. In the case at bar the lower courts concurred in their findings of controverted facts. We accept these findings. *Dun* v. *Lumbermen's Credit Association,* 209 U. S. 20. The question for decision is whether facts, admitted and found, establish that the tax levied upon plaintiffs violates rights guaranteed by the Fourteenth Amendment.

The district is wholly rural. Little River bounds it on the west and south. It contains about 12,000 acres of rich land. Only one-tenth is under cultivation. The rest is wild and untillable, because marshy or subject to overflow. The aggregate assessed value of the 12,000 acres was in 1918 only $52,525.33. The lands were then worth from $8 to $40 an acre. The proposed improvement would increase their value at least $250,000.00. Along the northerly part of its western boundary the district is traversed for a distance of about two miles, by a single-track railroad. The total length of track within the district, including a detour line and sidings, is 3.61 miles. The railroad is owned by the Texarkana and Fort Smith, and is operated by the Kansas City Southern, as part of its line from Missouri to the Gulf. The railroad property is 40.43 acres in area; and is assessed at $69,910.00. It would derive no direct benefit from the construction of the ditches and embankment designed to drain and to protect the district from overflow; because the tracks are laid upon a fill or dump (with the exception of one trestle) and are above flood level. The railroad would derive some measure of indirect benefit; because the drained land would doubtless be cultivated, and more extensive cultivation would probably increase traffic over the line.

The tax laid imposes upon the railroad, which can receive no direct or immediate benefit, a very heavy burden; and the lands which will receive a large direct (and possibly immediate) benefit, are required to bear only a very small part of the burden. The market value of the 12,000 acres may increase largely before any additional land is cultivated, or even before the improvement is made. The railroad can derive the indirect benefit, through increased traffic, only after the drainage of the wild lands has been effected and the reclaimed lands are being cultivated. The work of reclamation had not even begun. Obviously there could not be any increase in traffic receipts during the year 1918, in which the tax is laid. Appellants argue that the assessed valuation of the lands would probably be greatly raised in later years; that the assessment upon the railroad property would probably not be raised; that the proportion of the annual burden imposed upon the railroad would diminish from year to year; and that, in course of time, the aggregate of the taxes levied upon each piece of property would be thus adjusted so as to correspond to the benefits received. This argument is relied upon to save the scheme of apportionment. But it rests wholly upon prophecy. The fact is that the tax levied is grossly discriminatory. The best that can be said of the scheme of taxation (so far as it concerns the railroad) is that the burdens imposed will grow less, as its ability to bear them grows greater.

Affirmed.

ROBINSON, ADMINISTRATOR OF ROBINSON, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 335. Argued March 16, 1923.—Decided April 9, 1923.

1. Stipulations in construction contracts obliging the contractor to pay liquidated damages for each day's delay, are appropriate means of inducing due performance and of affording compensation in case of failure to perform, and are to be given effect according to their terms. P. 488.
2. Where a public building contract obliged the contractor to pay liquidated damages for each day's delay not caused by the Government, and delays were attributable to both parties, *held* that the Government was entitled to the damages for the part of the delay specifically found by the Court of Claims to have been due wholly to the fault of the contractor. *Id.*
3. Where defects in a building result partly from the character of materials expressly required by the building contract and partly from the fault of the contractor, the fact that the contractor pointed out the unsuitability of the material specified and suggested a substitute, after the contract was made, does not relieve him of the obligation to repair the defects under his guaranty of the condition of the work for a stated period after its acceptance. P. 489.

57 Ct. Clms. 7, affirmed.

APPEAL from a judgment of the Court of Claims sustaining, in part only, the appellant's claim for moneys due under a building contract.

Mr. Chas. H. Merillat, with whom *Mr. Chas. J. Kappler* was on the brief, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On August 30, 1905, claimant's intestate entered into a contract with the United States to instal the interior fin-

ish in the custom house building then being constructed in New York City pursuant to Act of March 2, 1899, c. 337, 30 Stat. 969. The contract price was $1,037,281.69; and the time for completion of the work, October 15, 1906. Before it had been completed, but after that date, a supplemental agreement was made, which provided for additional work; increased the contract price $200,041.01; and extended the time for completion to June 1, 1907. The work was not completed until 121 days after that date. The Government insisted that only 12 days of this delay were chargeable to it; and that the contractor was liable in liquidated damages for $420 for each of the remaining 109 days' delay. It, therefore, deducted $45,780 from the amount otherwise payable to the contractor.

To recover that sum (and others) the contractor brought this suit in the Court of Claims. He contended that, since the Government had caused some of the delay, the provision for liquidated damages became wholly inapplicable and was unenforceable; and that, since the Government had failed to prove actual damage, it was not entitled to any damages whatsoever. The court found that of the 121 days of delay, only 61 days were chargeable to the contractor; and that the remainder were caused by the Government, after the date of the supplemental contract. It accordingly gave the claimant judgment (among other things) for $20,160, being that part of the amount withheld which represented the delay in excess of 61 days. 57 Ct. Clms. 7. The case is here on claimant's appeal. Whether on these facts the provision for liquidated damages governs is the main question for decision.

The original contract provided that the contractor " shall be allowed one day, additional to the time herein stated, for each and every day of . . . delay [that may be caused by the Government] "; " that no claim shall be

made or allowed to . . . [the contractor] for any damages which may arise out of any delay caused by . . . [the Government] "; and that the contractor shall pay $420 for each and every day's delay not caused by the United States. The supplemental contract provided that the extension then granted was in lieu of all additional time which had accrued to that date " on account of delays by the Government." The construction of the contract and the findings of fact are clear. If the provision for liquidated damages is not to govern, it must be either because, as matter of public policy, courts will not, under the circumstances, give it effect (even as a defense) or, because in spite of the explicit finding, no day's delay can, as matter of law, be chargeable to the contractor, where the Government has caused some delay. Neither position is tenable.

The provision is not against public policy. The law required that some provision for liquidated damages be inserted. Act of June 6, 1902, c. 1036, § 21, 32 Stat. 310, 326. In construction contracts a provision giving liquidated damages for each day's delay is an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform; and courts give it effect in accordance with its terms, *Sun Printing & Publishing Association* v. *Moore,* 183 U. S. 642, 673, 674; *Wise* v. *United States,* 249 U. S. 361; *J. E. Hathaway & Co.* v. *United States,* 249 U. S. 460, 464. The fact that the Government's action caused some of the delay, presents no legal ground for denying it compensation for loss suffered wholly through the fault of the contractor. Since the contractor agreed to pay at a specified rate for each day's delay not caused by the Government, it was clearly the intention that it should pay for some days' delay at that rate, even if it were relieved from paying for other days, because of the Government's action. If it had appeared that the first 61 days' delay had been due wholly

to the contractor's fault, and the Government had caused the last 60 days' delay, there could hardly be a contention that the provision for liquidated damages should not apply. Here the fault of the respective parties was not so clearly distributed in time; and it may have been difficult to determine, as a matter of fact, how much of the delay was attributable to each. But the Court of Claims has done so in this case. Its findings are specific and conclusive. Compare *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 121; *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 163, 164. The case is wholly unlike *United States* v. *United Engineering Co.*, 234 U. S. 236, upon which claimant relies. The question there was one of construction. The lower court found as a fact that, but for the Government's action, the work would have been completed within the contract period; and this Court construed the provision for liquidated damages as not applicable to such a case. Here the question is not properly one of construction.

It is also assigned as error that the court sustained a deduction by the Government from the contract price of the amount paid by it for certain repairs. The contract contained a guarantee by the contractor of the condition of the work for one year after acceptance. The specifications provided for window sashes of solid oak. After the contract had been signed, and before putting in the windows, the contractor called the architect's attention to the fact that solid oak is not well suited for a damp climate and locality, like that of lower New York City; and he suggested a modification of the specifications to avoid warping. The suggestion was not accepted. By reason, in part, of warping which occurred within a year after acceptance of the work, extensive repairs became necessary. He was requested by the Government to make the repairs, but refused to do so. Then the Government had them made by others. The Court of Claims found that

owing partly to the fact that oak is not suitable to the climate and partly " to the further facts that the materials of some of the sash were not of the best quality, nor thoroughly seasoned, and that the workmanship in their construction and installation was in some instances not of first-class character, there occurred . . . much warping . . . which required extensive repairs of an expensive character."

The contractor contends that the Government's refusal to adopt the modification proposed relieved him from the obligation under the guarantee. The contention is unsound. He entered into a contract plain and comprehensive in terms. There was no finding of mutual mistake, or of fraud, misrepresentation or concealment on the part of the Government or any of its officers or employees. Under such circumstances, the contractor cannot be relieved from an obligation deliberately assumed. *Wells Brothers Co.* v. *United States,* 254 U. S. 83; *MacArthur Brothers Co.* v. *United States,* 258 U. S. 6. If the warping had been caused entirely by the adoption of wood unsuitable to the climate, it may be that, as a matter of construction, the guarantee would not extend thereto. But the findings do not present such a case. The case is wholly unlike *United States* v. *Spearin,* 248 U. S. 132; *United States* v. *Atlantic Dredging Co.,* 253 U. S. 1; *United States* v. *Smith,* 256 U. S. 11.

Affirmed.

THE PUSEY & JONES COMPANY *v.* HANSSEN.

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

No. 431. Argued February 27, 1923.—Decided April 9, 1923.

1. In the absence of a statute, a suit for a receiver of an insolvent corporation cannot be maintained in the District Court by an unsecured simple contract creditor. P. 497.
2. A remedial right to proceed in a federal court in equity cannot be enlarged by a state statute. P. 497.
3. Section 3883 of the Revised Code of Delaware, 1915, empowering the Chancellor to appoint a receiver for an insolvent corporation, "on the application and for the benefit of any creditor," etc., does not confer upon the creditor a substantive right but merely provides a new remedy, which cannot affect proceedings of the federal courts in equity. P. 498.
4. A decree confirming and continuing a receivership of a corporation, entered without equity jurisdiction on the application of a simple unsecured contract creditor, could not be cured by the mere intervention afterwards of another party claiming to be a creditor with a mortgage lien on the corporation's property. P. 501.

279 Fed. 488, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court confirming and continuing a receivership.

Mr. Lindley M. Garrison, with whom *Mr. Charles H. Tuttle, Mr. Selden Bacon* and *Mr. Saul S. Myers* were on the briefs, for petitioner.

Mr. William H. Button, with whom *Mr. John P. Nields* and *Mr. Wm. G. Mahaffy* were on the brief, for respondent.

The Delaware statute justifies the procedure herein and the action of the court below.

The appointment of the receivers was well within the discretion of the District Court.

The question of the jurisdiction of a federal court to proceed under the Delaware statute at the instance of a creditor who has not reduced his claim to judgment is not determinative of this proceeding, for two reasons: (1) The respondent was a stockholder, as well as a creditor, and, as such, could proceed unhampered by any of the obstacles urged by the petitioner; (2) the intervention of the United States Shipping Board Emergency Fleet Corporation injected a party that had a direct lien upon all of the valuable real estate owned by the petitioner.

It is claimed that the proceedings were so defective that they could not be perfected by a subsequent intervention. But the lower court had full jurisdiction over the original parties and over the subject-matter of the proceeding, any defect arising from the fact that the complainant had not reduced his claim to judgment being one that could be waived. And the proceeding was legitimately in court, if for no other purpose than that of enforcing the transfer of the preferred stock to the complainant's name. The petitioner's contention in this behalf seems to be in effect that there was no proceeding and therefore none in which the Emergency Fleet Corporation could intervene. This is not the situation for the above reasons, if for no others.

Furthermore, it is not true that a defect of jurisdiction arising from the lack of capacity of a party may not be cured by the intervention of a party properly qualified. This was a class action, brought for the benefit of all stockholders and creditors. If the original complainant cannot qualify, the proceedings are perfected by the intervention of one of the prescribed class who can qualify. *Hanna* v. *Lyon,* 179 N. Y. 107.

The federal court has jurisdiction in equity to appoint a receiver under the Delaware statute at the instance of a simple contract creditor. *Ex parte McNiel,* 13 Wall. 236; *Davis* v. *Gray,* 16 Wall. 203; *Case of Broderick's*

Will, 21 Wall. 503; *Louisville & Nashville R. R. Co.* v. *Western Union Tel. Co.,* 234 U. S. 369; *Greeley* v. *Lowe,* 155 U. S. 58. The only inquiry here is whether this statute creates a new right or remedy, equitable in character, applicable to a situation for which there was no adequate and complete legal remedy.

The statute creates a new right, namely, the right to a receivership solely upon the insolvency of a corporation. *Jones* v. *Mutual Fidelity Co.,* 123 Fed. 506.

The right to a receivership is a substantial right and oftentimes constitutes the only means of saving both the creditors and stockholders immense values in the possession of insolvent corporations. The argument that no such relief is permissible as the only and ultimate relief prayed for in a proceeding, is sufficiently answered by reference to the many cases in the federal courts in which that relief only has been requested and granted. The right is, of course, equitable. *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371; *Williamson* v. *Wilson,* 1 Bland's Ch. (Md.) 418.

The District Court in the District of Delaware has proceeded for many years upon the above principles in the enforcement of this statute. *Wheeler* v. *Walton & Whann Co.,* 64 Fed. 664; *Maxwell* v. *Wilmington Dental Mfg. Co.,* 82 Fed. 214; *Jones* v. *Mutual Fidelity Co.,* 123 Fed. 506; *Hitner* v. *Diamond State Steel Co.,* 176 Fed. 384; *Adler* v. *Campeche Laguna Corporation,* 257 Fed. 789; *Spackman* v. *Swan Creek Co.,* 274 Fed. 107; *Hanssen* v. *Pusey & Jones Co.,* 276 Fed. 296.

Many of the Circuit Courts of Appeals have upheld similar statutes. *Darragh* v. *Wetter Mfg. Co.,* 78 Fed. 7; *McGraw* v. *Mott,* 179 Fed. 646; *Land Title & Trust Co.* v. *Asphalt Co.,* 127 Fed. 1; *Kessler* v. *William Necker, Inc.,* 258 Fed. 654; *Lion Bonding & Surety Co.* v. *Karatz,* 280 Fed. 532,

United States v. *Sloan Ship Yards Corporation,* 270 Fed. 613; *Davidson-Wesson Implement Co.* v. *Parlin & Orendorff Co.,* 141 Fed. 37; *Jacobs* v. *Mexican Sugar Co.,* 130 Fed. 589; *Harrison* v. *Farmers' Loan & Trust Co.,* 94 Fed. 728; *Tompkins Co.* v. *Catawba Mills,* 82 Fed. 780; *Morrow Shoe Co.* v. *New England Shoe Co.,* 57 Fed. 685; *Atlanta & Florida R. R. Co.* v. *Western Ry. Co.,* 50 Fed. 790; *Mathews Slate Co.* v. *Mathews,* 148 Fed. 490, distinguished.

A review of these cases, relied upon by the petitioner, shows that they add nothing to the discussion. Those that apply at all simply rely upon the cases of *Scott* v. *Neely,* 140 U. S. 106; *Cates* v. *Allen,* 149 U. S. 451; and *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, which do not govern this question.

The complainant had no adequate remedy at law and the decision affording him relief was correct.

Mr. Justice Brandeis delivered the opinion of the Court.

Section 3883 of the Revised Code of Delaware, 1915 (which embodies the Act of March 25, 1891, c. 181, 19 Del. Laws, p. 359) provides:

"Whenever a corporation shall be insolvent, the Chancellor, on the application and for the benefit of any creditor or stockholder thereof, may, at any time, in his discretion, appoint one or more persons to be receivers of and for such corporation, to take charge of the estate, effects, business and affairs thereof, and to collect the outstanding debts, claims, and property due and belonging to the company, with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, to appoint an agent or agents under them, and to do all other acts which might be done by such corporation and may be necessary and proper; the powers of such receivers to be such and continued so long as the Chan-

cellor shall think necessary; provided, however, that the provisions of this Section shall not apply to corporations for public improvement."

Whether the federal court sitting in equity has, by reason of the above statute, jurisdiction to appoint a receiver of an insolvent Delaware corporation upon application of an unsecured simple contract creditor is the main question presented.[1]

Invoking the power conferred by the statute, Hanssen, a subject of Norway, brought in the federal court for the District of Delaware this suit in equity against The Pusey & Jones Company, a corporation organized under the general laws of that State. The bill, which was prosecuted on behalf of all creditors and stockholders, alleged that the corporation was insolvent; that plaintiff was a creditor, holding promissory notes issued by it; and that he was also a stockholder. It prayed that a receiver be

[1] It will be assumed that the words "any creditor" as used in the statute include an unsecured simple contract creditor. It was so held by the District Court and by the Circuit Court of Appeals in this case, 276 Fed. 296; 279 Fed. 488; and it had been previously so held in the District Court. *Jones* v. *Mutual Fidelity Co.*, 123 Fed. 506. The question, which is one of construction, does not appear to have been expressly decided by the courts of Delaware. The reported cases do not disclose that it has been raised in the state courts. In those cases in which jurisdiction was taken, the plaintiff was apparently a stockholder, *Thoroughgood* v. *Georgetown Water Co.*, 9 Del. Ch. 84; *Ross* v. *South Delaware Gas Co.*, 10 Del. Ch. 236; *Sill* v. *Kentucky Coal & Timber Development Co.*, 11 Del. Ch. 93; *Hopper* v. *Fesler Sales Co.*, 11 Del. Ch. 209; *Badenhausen Co.* v. *Kidwell*, 107 Atl. (Del.) 297; see also *Du Pont* v. *Standard Arms Co.*, 9 Del. Ch. 315; *Mark* v. *American Brick Manufacturing Co.*, 10 Del. Ch. 58; *In re D. Ross & Son, Inc.*, 10 Del. Ch. 434; *Fell* v. *Securities Company of North America*, 11 Del. Ch. 101; *Whitmer* v. *Wm. Whitmer & Sons, Inc.*, 11 Del. Ch. 185; *Jones* v. *Maxwell Motor Co.*, 115 Atl. (Del.) 312; *Wheeler* v. *Walton & Whann Co.*, 64 Fed. 664; *Maxwell* v. *Wilmington Dental Mfg. Co.*, 82 Fed. 214; *Hitner* v. *Diamond State Steel Co.*, 176 Fed. 384; *Adler* v. *Campeche Laguna Corporation*, 257 Fed. 789.

appointed.[2] The bill was filed on June 9, 1921; receivers were appointed *ex parte;* and an order issued that the defendant show cause, on June 18, why the receivers should not be continued during the pendency of the cause. On June 11, the defendant moved to vacate the receivership. The motion was denied. Then, by answer, the defendant objected that the court had no jurisdiction either at law or in equity; denied that plaintiff was either a creditor or a stockholder; denied that defendant was insolvent; and asserted that defendant was entitled under the Federal Constitution to have determined in an action at law the question whether plaintiff was a creditor.

Upon a hearing of the order to show cause, had on bill, answer, affidavits and exhibits, a decree was entered confirming the appointment of the receivers and continuing them *pendente lite,* 276 Fed. 296. This decree was affirmed by the Circuit Court of Appeals for the Third Circuit, 279 Fed. 488. Neither the District Court, nor the Circuit Court of Appeals, passed upon the question whether Hanssen was a stockholder. Both courts held that, by reason of the state statute, the federal court sitting in equity had jurisdiction and power to appoint a receiver of a Delaware corporation upon application of a simple contract creditor, whose claim had not been reduced to judgment and who had no lien upon the corporate property. Both courts held that the controverted question whether the plaintiff was a creditor could be determined in the equity suit. And both held (upon the evidence submitted by affidavit) that the plaintiff was a creditor. The case is here on writ of certiorari.

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[2] It prayed, also, that the defendant be directed to issue to plaintiff a certificate for the stock which he claimed to own; and that the receiver be directed to institute appropriate proceedings to set aside a large judgment recently entered against defendant in that court, which was alleged to have been recovered collusively. The answer denied the collusion.

That this suit could not be maintained in the absence of the statute is clear. A receiver is often appointed upon application of a secured creditor who fears that his security will be wasted. *Kountze* v. *Omaha Hotel Co.,* 107 U. S. 378, 395. A receiver is often appointed upon application of a judgment creditor who has exhausted his legal remedy. See *White* v. *Ewing,* 159 U. S. 36. But an unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. This is true, whatever the nature of the property; and, although the debtor is a corporation and insolvent. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. After execution upon a judgment recovered at law has been returned unsatisfied he may proceed in equity by a creditor's bill. *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371; Compare *Swan Land & Cattle Co.* v. *Frank,* 148 U. S. 603; *National Tube Works Co.* v. *Ballou,* 146 U. S. 517; *Pierce* v. *United States,* 255 U. S. 398, 403. He may, by such a bill, remove any obstacle to satisfying his execution at law; or may reach assets equitable in their nature; or he may provisionally protect his debtor's property from misappropriation or waste, by means either of an injunction or a receiver. Whether the debtor be an individual or a corporation, the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right; nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights.

That a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute is likewise clear, *Scott* v. *Neely,* 140 U. S. 106; *Cates* v. *Allen,*

149 U. S. 451. Nor can it be so narrowed, *Mississippi Mills* v. *Cohn,* 150 U. S. 202; *Guffey* v. *Smith,* 237 U. S. 101, 114. The federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have secured in a state court.[3] Hanssen's contention is that the statute does not enlarge the equitable jurisdiction or remedies; and that it confers upon creditors of a Delaware corporation, if the company is insolvent, a substantive equitable right to have a receiver appointed. If this were true, the right conferred could be enforced in the federal courts, *Scott* v. *Neely,* 140 U. S. 106, 109; [4] since the proceeding is in pleading and practice conformable to those commonly entertained by a court of equity. But it is not true that this statute confers upon the creditor a substantive right.[5] The Bankruptcy Act of July 1, 1898, c. 541, §§ 3, 18, 30 Stat. 544, 546, 551, does confer upon

[3] The oft-quoted statement in *Davis* v. *Gray,* 16 Wall. 203, 221: "A party by going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality", must be taken with this qualification. See also *Ex parte McNiel,* 13 Wall. 236, 243; *Case of Broderick's Will,* 21 Wall. 503, 520.

[4] See also *Brine* v. *Insurance Co.,* 96 U. S. 627, 639; *Gormley* v. *Clark,* 134 U. S. 338, 348; *Bardon* v. *Land & River Improvement Co.,* 157 U. S. 327, 330; *Cowley* v. *Northern Pacific R. R. Co.,* 159 U. S. 569, 582; *Lawson* v. *United States Mining Co.,* 207 U. S. 1, 9; *Grether* v. *Wright,* 75 Fed. 742, 746.

[5] The same contention was made in the lower federal courts in cases brought under similar statutes enacted in other States. In some of these cases the court took jurisdiction under varying conditions. *Darragh* v. *Wetter Mfg. Co.,* 78 Fed. 7; *Land Title & Trust Co.* v. *Asphalt Co.,* 127 Fed. 1; *McGraw* v. *Mott,* 179 Fed. 646; *Kessler* v. *William Necker, Inc.,* 258 Fed. 654. In others it refused to do so. *Atlanta & Florida R. R. Co.* v. *Western Ry. Co.,* 50 Fed. 790, 794; *Morrow Shoe Mfg. Co.* v. *New England Shoe Co.,* 60 Fed. 341; *Harrison* v. *Farmers' Loan & Trust Co.,* 94 Fed. 728; *Davidson-Wesson Implement Co.* v. *Parlin & Orendorff Co.,* 141 Fed. 37. Compare *Mathews Slate Co.* v. *Mathews,* 148 Fed. 490.

creditors of a corporation (or individual) the right, under certain conditions, to have the property of an insolvent debtor taken possession of and administered by an officer of the court. Compare *Acme Harvester Co.* v. *Beekman Lumber Co.,* 222 U. S. 300, 309, 310; *Vulcan Sheet Metal Co.* v. *North Platte Valley Irrigation Co.,* 220 Fed. 106. The Delaware statute does not confer upon creditors the right to have a receiver appointed, although the insolvency of the corporation may be palpable, hopeless and attended by indisputable fraud or mismanagement. Insolvency is made a condition of the Chancellor's jurisdiction; but it does not give rise to any substantive right in the creditor. *Jones* v. *Maxwell Motor Co.,* 115 Atl. (Del.) 312, 314, 315. It makes possible a new remedy because it confers upon the Chancellor a new power. Whether that power is visitorial, (as the petitioner insists) or whether it is strictly judicial, need not be determined in this case. Whatever its exact nature, the power enables the Chancellor to afford a remedy which theretofore would not have been open to an unsecured simple contract creditor. But because that which the statute confers is merely a remedy, the statute cannot affect proceedings in the federal courts sitting in equity.

The case is wholly unlike *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.,* 234 U. S. 369; and other cases in which federal courts, because of a state statute, entertained suits to remove a cloud upon title, which otherwise must have been dismissed. In those cases, as pointed out in *Clark* v. *Smith,* 13 Pet. 195, 203, the statute changed a rule of substantive law. For instance, a statute provides that a deed, void on its face, shall be deemed a cloud, whereas theretofore it was not. It declares " what shall form a cloud on titles." As stated in *Reynolds* v. *Crawfordsville First National Bank,* 112 U. S. 405, 410, the federal court looks " to the legislation of the State in which the court sits [and the land is situated] to ascer-

tain what constitutes a cloud upon the title, and what the state laws declare to be such the courts of the United States sitting in equity have jurisdiction to remove." In such cases, as the statute confers upon the landowner a substantive right, he is entitled to the aid of the federal court for its enforcement. But where a state statute relating to clouds upon title is held merely to enlarge the equitable remedy, it will not support a bill in equity in the federal court. Thus, in *Whitehead* v. *Shattuck*, 138 U. S. 146, the statute relied upon authorized a suit in equity by one out of possession against one in possession. As an action at law in the nature of ejectment afforded an adequate legal remedy, the bill to quiet title was dismissed.

The case at bar is also unlike *Re Metropolitan Railway Receivership*, 208 U. S. 90, 109, 110, and many others, in which there was express consent by the corporation to the appointment of the receiver, or where the indebtedness to plaintiff and the corporation's insolvency were admitted, or the lack of jurisdiction in equity was waived. The objection that the bill does not make a case properly cognizable in a court of equity does not go to its jurisdiction as a federal court. *Smith* v. *McKay*, 161 U. S. 355; *Blythe* v. *Hinckley*, 173 U. S. 501. The objection may, as pointed out in *Reynes* v. *Dumont*, 130 U. S. 354, 395, be taken by the court of its own motion. But, unlike lack of jurisdiction as a federal court, *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 382, lack of equity jurisdiction (if not objected to by a defendant) may be ignored by the court, in cases where the subject-matter of the suit is of a class of which a court of equity has jurisdiction. And where the defendant has expressly consented to action by the court or has failed to object seasonably, the objection will be treated as waived. *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530, 535, 536; *Southern Pacific R. R. Co.* v. *United States* (*No. 1*), 200

U. S. 341, 349. In cases relied upon by respondent there was such waiver. But, here, the company strenuously insisted throughout upon the absence of jurisdiction and denied every material allegation on which it is sought to support the bill.

Respondent contends that, even if there was originally lack of equity jurisdiction, the defect was cured on October 8, 1921, when the intervention of the United States Shipping Board Emergency Fleet Corporation was filed and allowed. That corporation claimed to be a creditor and to have a mortgage lien on all the real estate of The Pusey & Jones Company. The contention is that the original defect in jurisdiction was thus cured, because the existence of a direct lien gives equity jurisdiction for the appointment of receivers, unhampered by the obstacles that confront unsecured simple contract creditors. The contention is clearly unsound; among other reasons, because the intervention did not occur until two months after entry of the decree here under review.

Respondent contends, also, that even if there was no jurisdiction of the suit as a creditor's bill, it should be sustained now as a stockholder's bill. The answer denied that Hanssen was or ever had been a stockholder; denied that any certificate of stock ever had been assigned or transferred to him; denied that any certificate ever became his property; and denied that he was the holder or owner of any stock. The bill prayed that the corporation be directed to issue to plaintiff a certificate for the stock which he claims to own. Both the District Court and the Circuit Court of Appeals left undetermined this claim that he was or should be made a stockholder. We do not decide it. And we have no occasion to consider whether the bill could be sustained, if Hanssen proved to be a stockholder.

Reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE SUTHERLAND dissent.

OMNIA COMMERCIAL COMPANY, INC., *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 229. Argued March 1, 1923.—Decided April 9, 1923.

1. A valuable contract right is property within the meaning of the Fifth Amendment, and when taken for public use must be paid for by the Government; but when it is lost or injured as a consequence of lawful governmental action not a taking, the law affords no remedy. P. 508.
2. When the Government, for war purposes, requisitioned the entire production of a steel manufacturer, rendering impossible and unlawful of performance an outstanding contract between the manufacturer and a customer, the customer's rights were not taken by the Government, but frustrated by its lawful action. P. 511.

56 Ct. Clms. 392, affirmed.

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

Mr. George Maurice Morris, with whom *Mr. Frederick N. Watriss, Mr. Melvin G. Palliser* and *Mr. William S. Thompson* were on the briefs, for appellant.

In the year 1916, five associated individuals owned machinery, mill equipment, structural steel, real property, water and rail rights, all in condition for the erection and operation of a steel plate mill. After months of negotiations, the associates sold, in May, 1917, all their rights in these assets to the Allegheny Steel Company of Pittsburgh, Pennsylvania. The agreed value of these properties was $3,705,000. The consideration moving from the Allegheny Steel Company was to be paid, $500,000 in cash and the remainder in 58,000 tons of steel plate to be delivered to the associates' order in equal monthly instalments during 1918 upon the payment by the associates of a price $3,205,000, below the minimum market value of such plates.

The associates then formed two corporations in which they were the sole stockholders, officers and directors. These corporations succeeded to the rights of the associates in their contract with the Allegheny Steel Company for 1918. To the appellant corporation was conveyed the right to receive 18,000 tons of the total 58,000 tons.

The contract between the appellant and the Allegheny Steel Company required the posting of letters of credit in favor of the Allegheny Steel Company. The appellant posted $2,370,000 in such letters in due season and form. These letters of credit enabled the Allegheny Steel Company to procure and it did procure the raw materials necessary to perform its contract with the appellant. The appellant then sold the entire 18,000 tons of plate due under its contract to responsible parties who established satisfactory credits.

By reason of the subsequent taking by the United States, the loss of the appellant was $990,000. This was the value of the consideration paid by the assignors of the appellant to the Allegheny Steel Company for the appellant's contract with that company.

Rights under a lawful and binding contract constitute property in the holder and are property within the Fifth Amendment.

By reason of its contract, the appellant acquired, in addition to those rights common to all purchasers under a contract, the right to receive the finished product; the right to specify, within the capacity of the seller's mills, the gauge and size of the steel plate rolled; the right to inspect the product as it should be manufactured; the right to pay for the plate delivered at the times and in the manner provided; the right to specify the place of delivery; and, finally and most important, the right to have the plate delivered during the year 1918 in approximately equal monthly quantities. To the appellant was assigned 18/58 of the expected entire production of the Allegheny Steel Company for the year 1918.

It should be apparent that, by reason of its contracts with the assignors of the appellants, the Allegheny Steel Company was richer in equipment capacity and credit to the extent of $3,200,000. By reason of the preliminary performance by the appellant of its contract with the Allegheny Steel Company the latter had purchased sufficient raw materials to manufacture the steel plate for the appellant. The Court is as capable as the appellant of visioning the material benefit these performances by the appellant and its assignors brought to the United States when the officers requisitioned the producing capacity of the Allegheny Steel Company's plant.

These benefits, which the appellant had purchased and the returns from which it was due to receive from the Allegheny Steel Company, were as verily taken by the United States as though the officers of the United States had caused to be substituted in the appellant's contract with the Steel Company the name of the United States wherever there appeared the name of the appellant.

Not only, however, did the officers of the United States take the benefits for which the appellant had paid, but they destroyed whatever benefit there was in the rights which the appellant had in its contract, saving only the right to be fairly compensated for its loss. From the appellant was taken the use, possession and disposal of the steel plates it had a right to receive from the Steel Company and which it had already sold. With that went the entire material benefit of all the appellant's rights under its contract. What had been valuable, worth nearly a million dollars, was gone; taken for the public use; lawfully taken, yes, but lawfully compensated for, no.

In practically every case where the taking of intangible rights has been alleged, the plea has been made by the sovereign power that it actually took nothing from the owner; often that it received no benefit from the owner's loss. A good deal of loose thinking has been cloaked

under the charge that the injuries were "consequential." These arguments, or their equivalent, were raised in the two leading cases of *Pumpelly* v. *Green Bay & Mississippi Canal Co.,* 13 Wall. 166, and *United States* v. *Lynah,* 188 U. S. 445. Yet the decisions in those cases stand for the proposition that, where real property, while not actually reduced to possession by the Government, has necessarily had its actual usefulness destroyed by reason of the exercise of the power of eminent domain, a taking has resulted and compensation is due. These conclusions are built upon the principle that, where the sovereign power considers the general result to be accomplished is for the public good, the interest of the individual which must be sacrificed for the community purpose is to be measured, not by the direct value to the public, but by the value to the individual of the right taken. This, it is submitted, is the universal doctrine.

Monongahela Navigation Co. v. *United States,* 148 U. S. 312, announced the proposition that, where an exercise of the sovereign power of appropriation at the same time necessarily destroys the value to the owner of an intangible contract right which depends for its value upon the free use, possession and disposition of the tangible property upon which it is founded, there also we have a taking of property for which compensation must be made.

In *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, a water company was possessed of its physical equipment, franchises to operate, and in addition a contract with the city to supply the city with water. See also Award of the Tribunal of Arbitration between the United States of America and the Kingdom of Norway, under the special agreement of June 30, 1921, p. 31; *Cornwall* v. *Louisville & Nashville R. R. Co.,* 87 Ky. 72; *Trustees* v. *Atlanta,* 93 Ga. 468; *Cincinnati* v. *Louisville & Nashville R. R. Co.,* 223 U. S. 390; *West River Bridge* v. *Dix,* 6 How. 507; *Richmond, etc., R. R. Co.* v. *Louisa*

R. R. Co., 13 How. 71; *Greenwood* v. *Union Freight R. R. Co.*, 105 U. S. 13.

Where A is the owner and B the lessee, an appropriation by the State of A's property is a taking of B's property and B must be compensated as well as A. *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *Inlots*, Fed. Case No. 15,441a; *Matter of City of New York*, 120 App. Div. 700. A lessee is entitled to compensation when by the appropriation of the freehold his right of renewal is destroyed. *Matter of City of New York*, 118 App. Div. 865, affd. 189 N. Y. 508. Here we have a value in the lessee which is over and above the total value of the property; and no attention paid the city's contention that it does not seek to use the lessee's property.

An even closer analogy is to be found in *Meade* v. *United States*, 2 Ct. Clms. 224; *Gray* v. *United States*, 21 Ct. Clms. 340; and *Cushing* v. *United States*, 22 Ct. Clms. 1. In these cases the claimants were the owners of valid claims against foreign governments which this Government surrendered by treaties. See also *Morris Canal & Banking Corporation* v. *Townsend*, 24 Barb. 658.

The facts are that the United States seized the appellant's rights to priority in a definitely assigned portion of the entire manufacturing capacity of the Allegheny Steel Company for the year 1918, and then devoted that capacity to producing the very same plates of steel for which the appellant had contracted, and produced this steel from the very raw material which had been purchased by the Steel Company for the performance of the appellant's contract,—a purchase which had been made possible by reason of the appellant's performance of its initial obligation under the contract. We stand upon the proposition that the United States, by reason of prohibiting the performance of the appellant's contract with the Steel Company and devoting the manufacturing capacity of the plant for 1918 to the purposes of the United States,

took for the public use the property of the appellant; that the United States received a benefit from this property of the appellant; and that, whether or not it received such benefit, the destruction of the appellant's rights by the action of the United States constituted a taking, within the meaning of the Fifth Amendment, and compensation should be made therefor.

If the property right existed, and if it was taken for public use, then, on the authority of the following cases, the United States is under an implied contract to pay reasonable compensation. *United States* v. *Lynah,* 188 U. S. 445; *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645; *Hollister* v. *Benedict & Burnham Mfg. Co.,* 113 U. S. 59; *United States* v. *Palmer,* 128 U. S. 262; *United States* v. *Berdan Fire-Arms Mfg. Co.,* 156 U. S. 552.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. H. L. Underwood* were on the brief, for the United States.

Mr. Justice Sutherland delivered the opinion of the Court.

The appellant, on May 19, 1917, by assignment, became the owner of a contract, by which it acquired the right to purchase a large quantity of steel plate from the Allegheny Steel Company, of Pittsburgh, at a price under the market. The contract was of great value and if carried out would have produced large profits.

In October, 1917, before any deliveries had been made, the United States Government requisitioned the Steel Company's entire production of steel plate for the year 1918, and directed that company not to comply with the terms of appellant's contract, declaring that if an attempt was made to do so the entire plant of the Steel Company would be taken over and operated for the public use.

Appellant brought an action in the Court of Claims alleging, in addition to the foregoing, that by the orders

of the Government the performance of the contract by the Steel Company had been rendered unlawful and impossible; that the effect was to take for the public use appellant's right of priority to the steel plate expected to be produced by the Steel Company and thereby appropriate for public use appellant's property in the contract. As a result it alleged that it had incurred losses in a large sum which it sought to recover, as just compensation, by virtue of Article V of the Constitution. To this petition the United States interposed a demurrer, which was sustained and the petition dismissed. From this judgment the case comes here by appeal.

A question is raised as to the statutory authority of the officer, who made the order of requisition and gave the directions respecting non-compliance with the contract, to bind the Government, but, for the purposes of the case, we assume he was authorized, as he could have been under 39 Stat. 1193, c. 180; or 40 Stat. 182–183, c. 29. We also pass, without deciding, a contention challenging the sufficiency of the complaint and come to the case on the merits.

The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 690; *Cincinnati* v. *Louisville & Nashville R. R. Co.,* 223 U. S. 390, 400, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a "taking" in the constitutional sense. To prevent the spreading of a fire, property may be destroyed without compensation to the owner, *Bowditch* v. *Boston,* 101 U. S. 16, 18; a doctrine perhaps to some extent resting on tradition. *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393. There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of buildings, destruction of diseased

cattle, trees, etc., to prevent contagion—but for which no remedy is afforded. Contracts in this respect do not differ from other kinds of property. See *Calhoun* v. *Massie,* 253 U. S. 170, where an act of Congress invalidating contracts made with attorneys for compensation exceeding a certain percentage for the prosecution of claims against the Government, was sustained, although it had the effect of putting an end to an existing contract. This Court said (pp. 175–176):

"An appropriate exercise by a State of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results. *Lottery Case,* 188 U. S. 321, 357; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 58; *Hoke* v. *United States,* 227 U. S. 308, 323; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146. The sovereign right of the Government is not less because the property affected happens to be a contract. *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, 484; *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* 248 U. S. 372."

In *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, it was held that an act of Congress, prohibiting the issuance of free transportation by interstate common carriers which invalidated a contract for transportation previously entered into and valid when made, did not have the effect of taking private property without compensation. The Court, speaking through Mr. Justice Harlan, said (p. 484):

"It is not determinative of the present question that the commerce act as now construed will render the contract of no value for the purposes for which it was made. In *Knox* v. *Lee,* 12 Wall. 457, above cited, the court, refer-

ring to the Fifth Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: 'That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts.'"

The conclusion to be drawn from these and other cases which might be cited is, that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material. *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners,* 200 U. S. 561, 583–585, 592–593. If, under any power, a contract or other property is *taken* for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable. What was here requisitioned was the future product of the Steel Company, and, since this product in the absence of governmental interference would have been delivered in fulfillment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former, *ipso facto,* took the latter. This, however, is to confound the contract with its subject-matter. The essence of every executory contract is the obligation which the law imposes upon the parties to perform it. "It [the contract] may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other." *Dartmouth College* v. *Woodward,* 4 Wheat. 629, 656. Plainly, here there was

no acquisition of the obligation or the right to enforce it. If the Steel Company had failed to comply with the requisition, what would have been the remedy? Not enforcement of the contract but enforcement of the statute. If the Government had failed to pay for what it got what would have been the right of the Steel Company? Not to the price fixed by the contract but to the just compensation guaranteed by the Constitution.

In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended.

Parties and a subject-matter are necessary to the existence of a contract, but neither constitutes any part of it—the contract consists in the agreement and obligation to perform. If one makes a contract for the personal services of another or for the sale and delivery of property, the Government, by drafting one of the parties into the army, or by requisitioning the subject-matter, does not thereby take the contract. In *Marshall* v. *Glanvill,* [1917], 2 K. B. 87, the plaintiff had been employed by the defendants upon a contract of service. While the agreement was in force the former was called into the military service. It was held that this put an end to the contract. The court said:

"Here the parties clearly made their bargain on the footing that it should continue lawful for the plaintiff to render and for the defendants to accept his services. The rendering and acceptance of these services ceased to be lawful in July, 1916, and thereupon the bargain came to an end."

The American and English cases all agree that the result is the same where the subject-matter of the contract

is requisitioned. *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619, 629-631; *The Claveresk*, 264 Fed. 276, 282-284; *The Frankmere*, 262 Fed. 819, 822; *In re Shipton, Anderson & Co.* [1915], 3 K. B. 676; *Steamship Co.* v. *Le Nickel Societé Anonyme*, 8 British Ruling Cases, 546; *Bank Line, Limited*, v. *Arthur Capel & Co.* [1919], A. C. 435, 445.

In *The Frankmere, supra*, where a ship under charter was requisitioned by the British Government, the court said that

". . . the contract was thereby frustrated when the government took possession of the ship, and the rights of the charterer were absolutely ended and terminated, and those of the owner, subject, however, to the paramount power of the government to use the ship, without consulting the desire of the owner, revived, as though the charter had never been entered into."

In *In re Shipton, Anderson & Co., supra*, a parcel of wheat then lying in a warehouse was sold, for future payment and delivery. The wheat was subsequently requisitioned by the English Government, and, in consequence, the sellers were unable to deliver. A claim for damages was put forward against the sellers, but the Court of King's Bench Division held that they were not liable, upon the ground that performance had become impossible without their fault. Darling, Justice, agreeing with the opinion of Lord Reading, said (pp. 683–684):

"If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it cannot be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy. It must be here presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject-matter of this contract

has been seized by the State acting for the general good. Salus populi suprema lex is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it."

In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government.

The Government took over during the war railroads, steel mills, ship yards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

There is nothing in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, or in the other cases cited by appellant, which in any way conflicts with what we have said.

In the *Monongahela Case* the property which was taken was a lock and dam, built by the company, pursuant to the invitation of the United States and the State of Pennsylvania, the latter, in consideration, giving the company a franchise to exact tolls. The franchise, therefore, was not merely a contract in respect of the property taken, but was an integral part of it, and this Court (p. 329) said:

"So, before this property can be taken away from its owners, the whole value must be paid; and the value depends largely upon the productiveness of the property, the franchise to take tolls."

The lock and dam constituted, in effect, a going concern, whose value was of course affected by what it would produce. Moreover, the case rested primarily upon the doctrine of estoppel, as this Court has in several cases since

pointed out. *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 264; *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U. S. 82.

In *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, the statute providing for condemnation expressly included contracts, and these were in fact taken and compensation therefor specifically allowed. This was pointed out in the opinion of this Court (p. 691):

"In other words, the condemnation proceedings did not repudiate the contract but appropriated it and fixed its value."

We have examined the other cases relied upon but find nothing to justify a conclusion other than that which we have reached.

The judgment of the court below is

Affirmed.

RUSSELL MOTOR CAR COMPANY *v.* UNITED STATES.

FREYGANG ET AL., PARTNERS DOING BUSINESS UNDER THE NAME OF MIDLAND BRIDGE COMPANY *v.* UNITED STATES.

ALBERT & J. M. ANDERSON MANUFACTURING COMPANY *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 485, 480, 740. Argued March 6, 1923.—Decided April 9, 1923.

1. The Act of June 15, 1917, c. 29, 40 Stat. 182, empowered the President, within the limits of amounts appropriated, "to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material," and to exercise the authority "through such agency or agencies as he shall determine from time to time," "material" being defined as including stores, supplies and equipment for ships and everything required for or in connection with the production thereof.

Held: (*a*) The word "material" included anti-aircraft gun-mounts for the Navy. P. 518.

(*b*) The power "to modify, suspend, cancel, or requisition," any contract, etc., extends to the cancelation of the Government's own contracts. P. 519.

(*c*) An executive order delegating power under this clause in sweeping terms to the Secretary of the Navy, should be construed broadly, and included the power to cancel government contracts. P. 523.

(*d*) An order of the Secretary canceling a contract need not refer to the statute. *Id.*

(*e*) The just compensation to which a party is entitled, upon cancelation of his contract under the statute, does not include anticipated profits. *Id.*

2. The maxim *noscitur a sociis* is used only to solve ambiguity. Verbs in an enumeration whose meaning, when they are separately applied to their common object, is plain, should be interpreted distributively. P. 519.

3. Where the meaning of a statute may be ascertained without extrinsic aid, debates in Congress will not be considered. P. 522.

57 Ct. Clms. 464, 244 and 626, affirmed.

APPEALS from three judgments of the Court of Claims fixing just compensation for the cancelation of claimants' contracts with the Government. In the first and third cases the contracts for the manufacture of anti-aircraft gun carriages, and brass shell cases, were entered into through the Navy Department and were canceled by the Secretary of the Navy, by authority delegated under the Act of June 15, 1917. In the second case (No. 480) the contract was with the Emergency Fleet Corporation, for the construction of barges, and was canceled through that agency, under like authority.

Mr. Lyman M. Bass for appellant in No. 485.

Mr. George A. King, Mr. William B. King and *Mr. George R. Shields,* for appellants in No. 480, submitted.

Mr. Chapman W. Maupin and *Mr. Arthur H. Russell,* for appellant in No. 740, submitted.

Mr. Solicitor General Beck, with whom *Mr. Assistant Attorney General Lovett, Mr. Alfred A. Wheat* and *Mr. Alexander H. McCormick,* Special Assistants to the Attorney General, were on the briefs, for the United States.

Mr. Louis Titus, by leave of court, filed a brief as *amicus curiae* in No. 485.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases, here on appeal from the Court of Claims, differ in details of fact, but are controlled by the same principles of law and depend alike upon the construction and application of the same statutory provisions.

The salient facts in the case of the Motor Car Company are as follows: That company, on May 14, 1918, entered into a contract, numbered 1498, with the United States, acting through the Secretary of the Navy, to make two hundred and fifty anti-air-craft gun mounts, at an agreed price of $7,860 each, to be delivered at stipulated periods, the last being the sixty days ending April 30, 1919.

Prior to the making of the foregoing contract, viz: in November, 1917, a similar contract, numbered 949, had been entered into by the same parties, the last period for delivery being the sixty days ending January 15, 1919. The actual work under contract 949 was begun about March, 1918; and some time later, and after the making of contract 1498, at the request of the company, the Secretary consented to allow all shipments of mounts to be applied upon contract 949 until its completion. Deliveries under that contract were finished in June, 1919.

On November 18, 1918, the Navy Department expressed a desire that the manufacture of gun mounts under both contracts be greatly decreased and that the company resume production of peace time products as soon as possible "so that a minimum of economic dis-

turbance will be felt during the transition." In its communication the Navy Department requested that immediate arrangements be made for the reduction and eventual stoppage of production of materials under these contracts and the substitution therefor of commercial products, and that the company "initiate preparations for cancellation along the lines indicated." On November 23, 1918, the company was notified that the Secretary had authorized the cancellation of contract 1498, directed to cease work in connection therewith not later than December 2, 1918, and informed that a just and fair settlement would be made as provided by contract and in accordance with the statute covering such cases. Extended negotiations followed in an effort to bring about a settlement and the Secretary finally fixed the sum of $444,847.68 as just compensation for the cancellation of the contract. Seventy-five per cent. of this amount was paid and accepted by the company expressly without prejudice to its rights.

The Court of Claims, after hearing the case, found that just compensation for the cancellation of the contract was the sum of $495,250.34, which amount included a number of elements and items not necessary to be set forth. The court further found that if the company had been permitted to complete the contract according to its terms it could and would have earned a profit, in round figures, of $960,000, but held that the action of the Secretary of the Navy in cancelling the contract was within the authority conferred by the statute, presently to be mentioned, and that the company consequently was not entitled to an award including anticipated profits.

The statute upon which this determination rested was the Act of June 15, 1917, c. 29, 40 Stat. 182, making deficiency appropriations for the military and naval establishments on account of war expenses, and for other purposes. This act contained a provision, authorizing and

empowering the President, within the limits of the amounts appropriated ". . . (b) to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material." The President was authorized to exercise the authority conferred upon him by the act and expend the money therein and thereafter appropriated "through such agency or agencies as he shall determine from time to time." The authority so far as it concerned the Navy, was by him delegated to the Secretary of the Navy in an order dated August 21, 1917, "in so far as applicable to and in furtherance of the construction of vessels for the use of the Navy and of contracts for the construction of such vessels, and the completion thereof, and all powers and authority applicable to and in furtherance of the production, purchase and requisitioning of materials for construction of vessels for the Navy and for war materials, equipment, and munitions required for the use of the Navy, and the more economical and expeditious delivery thereof." The word "material", the act provided, should include stores, supplies and equipment for ships and everything required for or in connection with the production thereof, and in our opinion included the articles contracted for in this as well as in the other two cases. The act provided that whenever the United States should cancel, modify, suspend, or requisition any contract just compensation should be made therefor to be determined by the President. If the amount so determined should be unsatisfactory the person entitled to receive it could accept seventy-five per cent. thereof and bring suit to recover such further sum as added to the seventy-five per cent. would make just compensation. By the terms of the act the authority granted to the President or delegated by him was to "cease six months after a final treaty of peace is proclaimed between this Government and the German Empire."

The Motor Car Company contends that subdivision (b) of the statute above quoted applies to private contracts alone and affords no authority for the cancellation by the Government of its own contracts. The Court of Claims held otherwise and whether its holding or the company's contention is correct presents the principal question for our consideration.

It must be apparent, we think, that the words of the provision, "*any* existing or future contract," read with literal exactness, include all contracts, whether private or governmental. But it is pointed out that the power to "requisition" cannot apply to a governmental contract; and this may be conceded, since the Government cannot requisition what it already has. Then it is said that inasmuch as the application of the word "requisition" must be confined to private contracts, the other words associated with it must be likewise restricted by virtue of the maxim *Noscitur a sociis.* That a word may be known by the company it keeps is, however, not an invariable rule, for the word may have a character of its own not to be submerged by its association. Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity. *Hamilton* v. *Rathbone,* 175 U. S. 414, 421; *United States* v. *Barnes,* 222 U. S. 513, 518–519. They may not be used to create but only to remove doubt. *Id.* Moreover, in cases of ambiguity the rule here relied upon is not exclusive. The problem may be submitted to all appropriate and reasonable tests, of which *Noscitur a sociis* is one. Here we have one word which it may be conceded applies only to private contracts, but the other three words standing alone, it likewise must be conceded, naturally apply to governmental contracts as well. Indeed, they more naturally apply to such contracts. The

power to modify the obligations of a private contract is, to say the least, a most unusual one for governmental exercise. To modify a contract is in effect to make a new one, and it puts something of a strain on our conception of the functions of government to concede its power to make contracts between private parties to which neither may assent and which, consequently, neither will be bound to perform.

We do not mean to deny the power of Congress, in time of war, to authorize the President to modify private contracts (leaving the parties free, as between themselves, to accept or not), nor do we suggest that Congress has not done so by the present statute; but the contention here is not that the power in question extends to private contracts but that it is limited to them. This cannot be conceded. The meaning of the four predicate words is not doubtful;—in that respect, as well as in their operative scope, they obviously differ from one another. The question we are called upon to answer is whether, because the words "*any . . . contract*" must be given a narrower meaning when qualified by the predicate "requisition," their meaning must be limited in like manner when qualified by one of the other three predicates. *Noscitur a sociis* is a well established and useful rule of construction where words are of obscure or doubtful meaning; and then, but only then, its aid may be sought to remove the obscurity or doubt by reference to the associated words. *Virginia* v. *Tennessee,* 148 U. S. 503, 519; *Benson* v. *Chicago, etc., Ry. Co.,* 75 Minn. 163. But here the meaning of the words considered severally is not in doubt, and the rule is invoked not to remove an obscurity but to import one. There is nothing in the rule or in the statute which requires us to assimilate the words "modify" and "cancel" to the scope of the word "requisition," simply because the latter has a necessarily narrower application. The

meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, *diverso intuitu,* giving to each its natural value and appropriate scope when read in connection with the object (any contract) which they are severally meant to control. Thus, the predicate "requisition" will be limited to private contracts, while the other words may be appropriately extended to include governmental contracts as well. An illustration is afforded by the Commerce Clause of the Constitution. The power to regulate interstate and foreign commerce is found in the same clause and conferred by the same words, but the scope of the power when applied to the former may be narrower than when applied to the latter. *Groves* v. *Slaughter,* 15 Pet. 449, 505.

This disposition of the question also accords with the broad purposes of the legislation. When the act was passed we were in the midst of a great war, which called for the utilization of all our resources. The necessities were great, beyond the power of statement. The Government was confronted with the vital necessity not only of producing ships and supplies in unprecedented quantities but of producing them with the utmost haste. Hence it was necessary that everything which stood in the way of or hindered such production should be put aside. But this was a necessity which Congress, of course, realized must sooner or later come to an end, suddenly and completely. With the termination of the war the continued production of war supplies would become not only unnecessary but wasteful. Not to provide, therefore, for the cessation of this production when the need for it had passed would have been a distinct neglect of the public interest. The situation, it is plain, required that production should proceed while the war lasted to the utmost limit of the Nation's power, but that it should come to an end as soon as possible upon the passing of the emer-

gency. In the light of these circumstances, it is not unreasonable to regard the statute now under consideration as intended to accomplish both results, that is: (1) to enable the President, during the emergency, to utilize his powers over contracts to stimulate production to the utmost, and then, (2) upon the passing of the emergency, to enable him to utilize these same powers to stop that production as quickly as possible. To the latter accomplishment authority to modify and cancel government war contracts would contribute most effectively. These considerations lend support to the judgment of the court below construing the statute as having this effect.

In this connection it is not without significance that the authority granted to the President was to cease six months after a final treaty of peace. Obviously, the powers granted to him—among them to modify and cancel contracts—were to continue during the six months' period not for the purpose of forwarding war production but, on the contrary, for the purpose of stopping it. To that end, we conclude, he was authorized to cancel the Government's own contracts such as the one here involved, upon making just compensation to the parties concerned.

We are referred to the utterances of certain members of Congress in debate, which it is argued show that the provision under consideration was meant to cover private contracts. Whether they come within the rule forbidding resort to legislative debates, *Lapina* v. *Williams,* 232 U. S. 78, 90; *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission,* 230 U. S. 324, 333; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 50; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 318, or within the exception, *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563, 588, we need not consider, since, for reasons already stated, extrinsic aid for ascertaining the meaning of the language here under review is not required. Besides, though they

may tend to show that the statute was meant to apply to private contracts, these utterances do not justify the conclusion that the statute was not meant to apply to governmental contracts also.

Certain other contentions of the Car Company may be briefly disposed of. In the first place, it is said that the President did not delegate his power respecting contracts to the Secretary of the Navy, and it is suggested that that officer did not in fact pretend to cancel this contract under the statute. The order of the President delegating his authority to the Secretary is in sweeping terms and it is impossible to conclude otherwise than that it was intended to cover the whole field of power in so far as it pertained to the Navy. Executive power, in the main, must of necessity be exercised by the President through the various departments. These departments constitute his peculiar and intimate agencies and in devolving authority upon them meticulous precision of language is neither expected nor required. In cancelling the contract it was not necessary that the statute should be expressly referred to. It was public law of which everyone was bound to take notice.

It is contended, further, that even if the action of the Secretary of the Navy was warranted by the statute the Car Company was nevertheless entitled to have included as just compensation its anticipated profits.

This contention confuses the measure of damages for breach of contract with the rule of just compensation for the lawful taking of property by the power of eminent domain. In fixing just compensation the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the Car Company if it had been fully performed. It is evident that no prudent person, desiring to acquire this contract, would have paid for it the full amount which could be realized upon completion, leaving no chance of

return to himself upon the investment or for the risk and labor incident to its performance. The contract, we must assume, was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties. The lower court was right in refusing to allow anticipated profits and, there being nothing in the findings to justify the contrary, we must accept the amount fixed on the basis of just compensation as adequate.

Our attention is directed to the fact that prior to the cancellation of contract No. 1498, the Car Company had manufactured twenty-five mounts, which it would have delivered under that contract except for the fact that they were made applicable to the former contract, No. 949; and it is insisted that the profit which the Car Company would have made upon these mounts should have been included in the amount of its compensation in any event. It is sufficient to say that the Car Company was permitted to deliver these mounts under its former contract at its own request. Presumably the full contract price therefor was paid in the adjustment of that contract.

It is unnecessary to burden this opinion with a statement of the facts in the Freygang and Anderson Manufacturing Company cases. They are not differentiated in any essential respect from the case of the Motor Car Company and are governed by the same reasons and conclusions.

The judgments of the Court of Claims are severally

Affirmed.

ADKINS ET AL., CONSTITUTING THE MINIMUM WAGE BOARD OF THE DISTRICT OF COLUMBIA, *v.* CHILDREN'S HOSPITAL OF THE DISTRICT OF COLUMBIA.

SAME *v.* LYONS.

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

Nos. 795, 796. Argued March 14, 1923.—Decided April 9, 1923.

1. The Court of Appeals of the District of Columbia, while constituted of two of the three Justices of that court and one Justice of the Supreme Court of the District, affirmed decrees of the latter court dismissing bills; thereafter, at the same term, (the Supreme Court Justice having been replaced by the third Justice of the Court of Appeals) it granted rehearings and reversed the decrees, and, thereafter, on second appeals, it affirmed decrees entered pursuant to the reversals. *Held* that objections to the jurisdiction to grant the rehearings did not go to the jurisdiction over the second appeals, and need not be decided here upon review of the decrees of affirmance. P. 543.
2. Every possible presumption stands in favor of an act of Congress until overcome beyond rational doubt. P. 544.
3. But when, in the exercise of the judicial authority to ascertain and declare the law in a given case, it is clear and indubitable that an act of Congress conflicts with the Constitution, it is the duty of the Court so to declare, and to enforce the Constitution. *Id.*
4. This is not to exercise a power to review and nullify an act of Congress, for no such power exists; it is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law. *Id.*
5. That the right to contract about one's affairs is part of the liberty of the individual protected by the Fifth Amendment, is settled by repeated decisions of this Court. P. 545.
6. Within this liberty are contracts of employment of labor. In making these, generally speaking, the parties have equal right to obtain from each other the best terms they can by private bargaining. *Id.*

7. Legislative abridgment of this freedom can only be justified by the existence of exceptional circumstances. P. 546.
8. Review of former decisions concerning interferences with liberty of contract, by
(*a*) Statutes fixing the rates and charges of businesses affected by a public interest. P. 546.
(*b*) Statutes relating to the performance of contracts for public work. P. 547.
(*c*) Statutes prescribing the character, methods and time for payment of wages. *Id.*
(*d*) Statutes fixing hours of labor. *Id.*
9. Legislation fixing hours or conditions of work may properly take into account the physical differences between men and women; but, in view of the equality of legal status, now established in this country, the doctrine that women of mature age require, or may be subjected to, restrictions upon their liberty of contract which could not lawfully be imposed on men in similar circumstances, must be rejected. P. 552.
10. The limited legislative authority to regulate hours of labor in special occupations, on the ground of health, affords no support to a wage-fixing law,—the two subjects are essentially different. P. 553.
11. The Minimum Wage Act of Sept. 19, 1918, c. 174, 40 Stat. 960, in assuming to authorize the fixing of minimum wage standards for adult women, in any occupation in the District of Columbia, such standards to be based wholly upon what a board and its advisers may find to be an adequate wage to meet the necessary cost of living for women workers in each particular calling and to maintain them in good health and protect their morals, is an unconstitutional interference with the liberty of contract. P. 554.

284 Fed. 613, affirmed.

Appeals from decrees of the Court of Appeals of the District of Columbia, affirming two decrees, entered, on mandate from that court, by the Supreme Court of the District, permanently enjoining the appellants from enforcing orders fixing minimum wages under the District of Columbia Minimum Wage Act.

Mr. Felix Frankfurter, with whom *Mr. Francis H. Stephens* was on the brief, for appellants.

The presumption to be accorded an act of Congress—that it be respected unless transgression of the Constitution is shown "beyond a rational doubt"—amply sustains the District of Columbia Minimum Wage Law, particularly in view of the circumstances of its enactment. Congress, under Art. I, § 8, cl. 17, is possessed of the same power and charged with the same duty of legislating within the District as belongs to the States within their respective boundaries. Congress, in dealing with a practical problem, followed the example of many States in passing the act in question. Such legislation has uniformly been sustained by the courts. *State* v. *Crow,* 130 Ark. 272; *Holcombe* v. *Creamer,* 231 Mass. 99; *Williams* v. *Evans,* 139 Minn. 32; *Miller Telephone Co.* v. *Minimum Wage Commission,* 145 Minn. 262; *Stettler* v. *O'Hara,* 69 Ore. 519; and *Simpson* v. *O'Hara,* 70 Ore. 261, affirmed by divided court in 243 U. S. 629; *Larson* v. *Rice,* 100 Wash. 642; *Spokane Hotel Co.* v. *Younger,* 113 Wash. 359; *Poye* v. *State,* 89 Tex. Crim. Rep. 182. Congress did not, however, rely upon a body of state laws sustained by the courts and vindicated by experience. Senate and House Committees held hearings on the needs of this legislation, in view of the conditions prevailing in the District. No one appeared to oppose the bill. An organized body of employers endorsed the bill and urged its passage. The Committees unanimously recommended the legislation. H. Rep. No. 571, 65th Cong., 2d sess.; S. Rep. No. 562, 65th Cong., 2d sess. And the bill was passed without opposition in the House, and only twelve "nays" in the Senate. Moreover, the judgment of Congress has now been vindicated by the results of over four years in the actual operation of the law, and ten years of extensive experience with such legislation in California, Massachusetts, Minnesota, Oregon, Washington and Wisconsin. Unfair depression in the wages of many women workers has been significantly reduced, without adversely affecting

industry or diminishing appreciably employment for employables. The legislation has also successfully weathered the severest strains of "hard times." It is urged with confidence that no such body of laws "attesting a widespread belief in the necessities of such legislation," *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530, supported by uniform judicial approval, subjected to so long, extensive, fair and favorable a test of actual experience, has ever been before this Court, to vindicate the reasonableness of the legislative intervention and to negative the claim that Congress was guilty of "a purely arbitrary or capricious exercise of that [legislative] power." *Truax* v. *Corrigan,* 257 U. S. 312, 329.

Congress aimed at "ends" that are "legitimate and within the scope of the Constitution." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421. Charged with the responsibility of safeguarding the welfare of the women and children of the District of Columbia, it found that alarming public evils had resulted, and threatened in increasing measure, from the widespread existence of a deficit between the essential needs for decent life and the actual earnings of large numbers of women workers of the District. In the judgment of Congress, based upon unchallenged facts, these conditions impaired the health of this generation of women and thereby threatened the coming generation through undernourishment, demoralizing shelter and insufficient medical care. In its immediate effects, also, financial burdens were imposed upon the District, involving excessive and unproductive taxation, for the support of charitable institutions engaged in impotent amelioration rather than prevention. Here, if ever, was presented a community problem of a most compelling kind, calling for legislation "greatly and immediately necessary to the public welfare." *Noble State Bank* v. *Haskell,* 219 U. S. 104, 111. The purpose of the act was to provide for the deficit between the cost of women's

labor, i. e., the means necessary to keep labor going—and any rate of women's pay below the minimum level for living, and thereby to eliminate all the evils attendant upon such deficit upon a large scale. There is no dispute that Congress was acting in good faith, after mature deliberation, in avowing the purposes which it did in the enactment of this law, to wit: "To protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of life." Having regard to the concrete situation, the judgment of Congress that such legislation was necessary cannot in reason be stigmatized as unreasonable.

The means selected by Congress "are appropriate" and "plainly adapted" (*McCulloch* v. *Maryland, supra*) to accomplish the legitimate ends. The possible alternatives open to Congress in this situation were: (1), to submit to the evils as inevitable human misfortunes, subject only to alleviation through public and private charity; (2), provide a direct subsidy out of the public treasury to pay a wage equal to the necessary cost of living; (3), adopt the Massachusetts method, which seeks to compel for women workers a minimum wage through the pressure of public exposure of offending employers; or, (4), take the method it did take, which involved a prohibition of the use of women's labor for less than its cost except by special license from the Board.

There was cumulative testimony, both in the belief of those entitled to express an opinion and in the actual record of experience, that these evils are not inevitable human misfortune. Congress was entitled to disprove that lazy gospel of fatalism as other English-speaking countries equally jealous of safeguarding liberty and property, and many American States, had disproved it. From the point of view of effectiveness in accomplishing its purposes, the choice of Congress, among the three re-

medial methods, surely was not "arbitrary" or "unreasonable." It had the support of a great body of public opinion, (see *Jacobson* v. *Massachusetts,* 197 U. S. 11, 31, 34–35; *Muller* v. *Oregon,* 208 U. S. 412, 420; *McLean* v. *Arkansas,* 211 U. S. 539, 548–9; *Tanner* v. *Little,* 240 U. S. 369, 385–6), crystallized in the extensive and successful experience of English countries with such legislation, in the fact of such legislation in other States, in the successful working of such legislation. In other words, Congress rested upon the appeal "from judgment by speculation to judgment by experience." *Tanner* v. *Little,* 240 U. S. 369, 386.

Where a law has been long on the statute books, speculative claims of injustice must yield to the results of actual experience. Cf. *National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71.

No rights of plaintiffs secured under the Constitution prohibit the use of the means adopted by Congress in the Minimum Wage Law to accomplish legitimate public ends. It is for the plaintiff to show some explicit withdrawal of the legislative power as exercised in this case. The only alleged obstruction is the "due process" clause. And the only point for consideration is whether the deprivation of "liberty" or "property" which is involved is "without due process of law."

This Court has consistently recognized the futility of defining "due process." The "due process" clauses embody a standard of fair dealing to be applied to the myriad variety of facts that are involved in modern legislation. That is why this Court has refused to draw lines in advance. The impact of facts must establish the line in each case. The application of "due process" clauses is, in the last analysis, a process of judgment by this Court. In the application of the varying facts to the test of fair dealing the ultimate question in this Court is, does legislation, or its actual operation, "shock the sense of fairness

the Fourteenth Amendment was intended to satisfy in respect to state legislation "? *Chicago & N. W. Ry. Co.* v. *Nye Schneider Fowler Co.,* 260 U. S. 35. During the fifty years of extensive judicial unfolding, the central ideas that inhere in this constitutional safeguard have become manifest. A careful study of the long line of cases especially dealing with the " due process " clause, beginning with the *Slaughter-House Cases,* 16 Wall. 36, shows two dominant ideas conceived to be fundamental principles: (1) Freedom from arbitrary or wanton interference, and (2) protection against spoliation of property. "Arbitrary," " wanton " and " spoliation " are the words which are the motif of the decisions under the " due process " clauses. That is as close as we can get to it; it is close enough when dealing with the great questions of government. What it means is that the Fourteenth Amendment intended to leave the States the free play necessary for effective dealing with the constant shift of governmental problems, and not to hamper the States except where it would be obvious to disinterested men that the action was arbitrary and wanton, and therefore spoliative and unjustified. Of course exactly the same freedom of action, the same scope for legislation, belongs to Congress when dealing with the District.

It is not arbitrary, wanton or spoliative for Congress to require the consent of the Board before allowing a wage contract affecting women at below cost, but a valid exercise of the " police power," because of the actual handicaps of women in industry. This was one of the principal grounds of the state courts in sustaining this legislation. This is legislation of the same nature as that revealed by a long line of cases upholding limitations placed upon freedom of contract with women in various ways. They rest upon a realization of the fact that the mass of women workers cannot secure terms of employment needful from the point of view of public welfare

without the weight of legislation being thrown into the scales. *Muller* v. *Oregon,* 208 U. S. 412; *Riley* v. *Massachusetts,* 232 U. S. 671; *Hawley* v. *Walker,* 232 U. S. 718; *Miller* v. *Wilson,* 236 U. S. 373; *Bosley* v. *McLaughlin,* 236 U. S. 385.

It is not arbitrary, wanton or spoliative for Congress to require employers to pay the cost of women's labor. The employer, and the employer alone, receives the benefit of the woman's working energy, which cannot be produced or maintained by less than the reasonably ascertained minimum cost of her labor. Since he has her product he ought to pay for its cost, unless and until the employer, by special license, is given the right to use labor at less than its usual cost.

The action of Congress is not arbitrary, wanton, or spoliative; because the direct interest of the District in these particular wage contracts affecting women gave it a special justification for controlling them. A contract for labor below its cost must inevitably rely upon a subsidy from outside or result in human deterioration. To the extent of the subsidy or the deterioration the public is necessarily concerned. The employer has no constitutional right to such an indirect subsidy or to cause such deterioration. Nor has a woman any absolute "right" to give her energies to the employer if she cannot keep her side of the bargain without indirect subsidy or without incurring physical or moral impairment.

It is not arbitrary, wanton or spoliative to require the employer to obtain a license from the Board before he can buy a woman's labor at less than cost; because that is a reasonable means of preventing cut-throat and unfair competition between manufacturers. Congress legislated in the light of actual industrial conditions which denied the abstract equality of bargaining power among women. Congress found that women, in substantial numbers, were under a handicap because they were women. Therefore

by legislation it sought to fill the gaps caused by the ignorance or helplessness of women workers, and the ignorance or avarice of some employers. In this it merely followed a long line of legislation which has restricted the field of unregulated competition by prohibitions enforced through a great variety of remedies. The Constitution does not require that right standards should prevail solely through their inherent reasonableness or through enlightened self-interest.

It is not arbitrary, wanton or spoliative for Congress to require the consent of the Board before allowing a woman employee to sell labor below cost; because that is a reasonable means for preventing unfair competition between women employees. The underlying principle is the same as that which eliminates prison labor from competition against free labor. The essential purpose is to compel employers to pay the living cost to all their women employees whose product is worth it, and thereby correspondingly protect the efficient against ruinous competition.

It is not arbitrary, wanton or spoliative for Congress to require the consent of the Board before allowing wage contracts to women workers at below cost; because that is a reasonable exercise of power to foster the productivity of industry. This is a measure of conservation and preservation of the human resources of the State, which is of even more primary importance than the conservation of natural resources. And so its constitutionality follows *a fortiori* from the line of cases which support statutes passed for the preservation and effective utilization of natural resources. *Hudson Water Co.* v. *McCarter,* 209 U. S. 349; *Mt. Vernon Co.* v. *Alabama Power Co.,* 240 U. S. 30; *Pacific Live Stock Co.* v. *Oregon Water Board,* 241 U. S. 440; *Walls* v. *Midland Carbon Co.,* 254 U. S. 300.

The majority opinion of the District Court of Appeals erects its own notions of policy into constitutional prohi-

bitions. It assumes a specific constitutional prohibition against interference with the wage contracts. But there is no specific prohibition against dealing with a wage contract, as such. There is only the general guarantee of fair dealing,—the satisfaction of a "sense of fairness" of the "due process" clauses; and so we find that the wage contract has been interfered with frequently by legislation with the sanction of this Court—legislation which directly affected the money value of the wage contracts, which operated to the financial advantage of one side and was of alleged cost to the other. Payment in cash as against store orders, *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13; *Dayton Coal Co.* v. *Barton,* 183 U. S. 24; *Keokee Co.* v. *Taylor,* 234 U. S. 227; payment on basis of coal mined before being screened, *McLean* v. *Arkansas,* 211 U. S. 539; *Rail and River Co.* v. *Yaple,* 236 U. S. 338; semi-monthly cash payments, *Erie R. R. Co.* v. *Williams,* 233 U. S. 685—all these requirements affected money terms, cash value, dollars and cents; all involved legislative interferences with wage contracts; all were sustained because each was found a not unreasonable means to safeguard a public interest. Each case was dealt with, not on any absolutist assumption of immunity of wage contracts from legislative interference, but quite the opposite; the concrete circumstances of each case were found to negative arbitrary restraint.

The great fact that this legislation applies solely to women has no relevance for the Court of Appeals. "If it [Congress] may regulate wages for women, it may by the exercise of the same power establish the wages to be paid men." This argument is founded upon the Nineteenth Amendment. But the political equality of woman is an irrelevant factor. The argument was long ago anticipated and answered, in classic language, by this Court. Men and women remain men and women forever. *Muller* v. *Oregon,* 208 U. S. 412, 422–23.

Adair v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1, are wholly inapplicable. The considerations of public health, morals and the general welfare which are the basis and immediate aims of the Minimum Wage Law for women are not presented by the statutes involved in the earlier cases. The restricted scope of these cases, dealing with a purpose " to favor the employee at the expense of the employer and to build up the labor organizations " was carefully pointed out in a recent decision by the Justice who wrote for the court in the *Coppage Case. Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530.

Neither in reason nor in experience does the Minimum Wage Law for women imply, as the court below indicated, power " to fix the prices of all commodities entering into the determination of an equitable wage." Nor is there any basis for the claim that " experience has demonstrated that a fixed minimum wage means in the last analysis a fixed wage."

On all these questions we appeal from " judgment by speculation " to " judgment by experience." *Tanner* v. *Little,* 240 U. S. 369, 386.

Mr. Wade H. Ellis and *Mr. Challen B. Ellis,* with whom *Mr. Joseph W. Folk* was on the brief, for appellees.

The Minimum Wage Law of the District of Columbia is unconstitutional because it is a price-fixing law, directly interfering with freedom of contract, which is a part of the liberty of the citizen guaranteed in the Fifth Amendment, and no exercise of the police power justifies the fixing of prices either of property or of services in a private business, not affected with a public interest, and as a permanent measure.

The protection of liberty and property guaranteed in the Fifth and Fourteenth Amendments includes freedom of contract, embracing contract for personal services.

Coppage v. *Kansas,* 236 U. S. 1, 14; *Truax* v. *Raich,* 239 U. S. 33; *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530. These principles apply to legislation by Congress for the District of Columbia. *Callan* v. *Wilson,* 127 U. S. 540, 550; *Wight* v. *Davidson,* 181 U. S. 371.

That a law fixing wages generally in private employment would be beyond legislative power is uniformly assumed or indicated in the decisions of this Court. Cooley, Const. Lim., 7th ed., p. 870; Labatt, Master and Servant, 2nd ed., § 846; *Frisbie* v. *United States,* 157 U. S. 160, 166; *Coppage* v. *Kansas,* 236 U. S. 1; *Bunting* v. *Oregon,* 243 U. S. 426. In decisions of this Court where wage laws or price-fixing laws have been sustained, such laws were sustained solely on the ground that they were to tide over a temporary emergency and in business affected with a public interest. *Wilson* v. *New,* 243 U. S. 332; *Ft. Smith & Western R. R. Co.* v. *Mills,* 253 U. S. 206; *Block* v. *Hirsh,* 256 U. S. 135; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393.

There is a clear distinction between "hours-of-service," and similar laws directly promoting health or safety or preventing fraud and only indirectly affecting the cost of labor, on the one hand, and on the other hand "wage laws," directly fixing the price in the bargain between employer and employee, and only indirectly or remotely effecting some other purpose. The distinction is pointed out in *Coppage* v. *Kansas,* 236 U. S. 1; *Frisbie* v. *United States,* 157 U. S. 160, 166. The mere freedom to contract secured in the constitutional guaranty cannot itself be said to be inimical to the public welfare and restricted under the guise of an exercise of the police power, for the police power cannot be used to amend the Constitution. *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393; *Truax* v. *Corrigan,* 257 U. S. 312.

If a law fixing prices or wages is not a health law, because the mere freedom to determine the amount that

should be charged in the exchange of property or services for money cannot itself be dangerous to health, morals or safety, then manifestly it is not a health law for women any more than it would be for men, and it does not become valid by having it apply to women only. "Hours-of-service" laws are distinguishable in this respect. "Hours-of-service" laws, being clearly health laws within the police power, permit the exercise of legislative discretion to determine the extent to which they shall go and to take into account the differences in physical nature of the persons to whom they shall apply. They may be in a particular instance justified as to women, where they might not be as to men. *Muller* v. *Oregon,* 208 U. S. 412. But, being proper exercises of the police power, as health laws, they would also be valid when appropriately applied to men. *Bunting* v. *Oregon,* 243 U. S. 426. But the general rule that a person has the right to sell his labor upon such terms as he deems proper, is a fundamental rule applying to men and women alike. *Adair* v. *United States,* 208 U. S. 161, 174.

The contention that this Court must consider only the reasonableness of the law, so as to determine whether it is arbitrary, wanton or spoliative, and cannot consider the power of Congress to deal at all with the subject, is answered in the decisions. *Holden* v. *Hardy,* 169 U. S. 366; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; *Coppage* v. *Kansas,* 236 U. S. 1; *Truax* v. *Raich,* 239 U. S. 33; *Mugler* v. *Kansas,* 123 U. S. 623; *Child Labor Tax Case,* 259 U. S. 20. If every law which expedience may suggest may be called a health law, or a public welfare law, and thus become an exercise of the police power, the constitutional limitations break down, and no action of the legislative body is in any way restricted by the positive guaranties of the fundamental law. *Truax* v. *Corrigan,* 257 U. S. 312; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393; *Child Labor Tax Case, supra.*

The contention that the consequences of sustaining the power of the legislative body to fix wages for women cannot be considered, is wholly at variance with the decisions of this Court in numerous cases. In testing the constitutionality of any legislative act, we have the right to inquire, as this Court did, in *Adair* v. *United States,* 208 U. S. 161; *Coppage* v. *Kansas,* 236 U. S. 1; *Truax* v. *Raich,* 239 U. S. 33; *Truax* v. *Corrigan,* 257 U. S. 312; *Child Labor Tax Case,* 259 U. S. 20, to what distance and in what direction the departure from familiar standards may lead us, and what precedents may be established by sustaining the power claimed, which may be cited hereafter as authority for further legislation of wider scope or more extended character.

Requirement of a minimum wage, without corresponding requirement of amount or efficiency of service in return, is the taking of property without just compensation, and not even for a public purpose, but for private purpose, contrary to the Fifth Amendment and the Ninth Amendment.

The requirement that wages shall be fixed at a sum to maintain health and protect morals, provides a vague and uncertain standard incapable of application and renders the act void for this reason alone. 40 Stat. 960, §§ 9, 11.

The contention that employer or employee are not deprived of property rights because special licenses for defectives are provided for in the act, is unsound, because special licenses can not be obtained by the employer, nor by the employee as such, and, in any event, the wage is still fixed by the Board. 40 Stat. 960, 963, § 13.

The assignment of error in the action of the Court of Appeals in granting a rehearing on the first appeal from the Supreme Court of the District is without merit, because the present review is from the second appeal in the lower court, and not from the first appeal, and no question can be raised as to the authority of the court below to

hear and determine the second appeal. *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114. Further it is elementary that the granting or refusing of a rehearing in an equity suit is not the subject of review. *Steines* v. *Franklin County,* 14 Wall. 15; *Roemer* v. *Neumann,* 132 U. S. 103.

Mr. William L. Brewster, by leave of court, on behalf of the States of Oregon, New York, California, Kansas, Wisconsin and Washington, as *amicus curiae.*

By leave of court, briefs were filed by counsel, appearing as *amici curiae,* as follows: *Mr. Isaac H. Van Winkle,* Attorney General of the State of Oregon, *Mr. Joseph N. Teal* and *Mr. William L. Brewster,* on behalf of the Industrial Welfare Commission of Oregon. *Mr. Carl Sherman,* Attorney General of the State of New York, and *Mr. Edward G. Griffin,* Deputy Attorney General, on behalf of that State. *Mr. Hiram Johnson* and *Mr. Jesse Steinhart,* on behalf of the Industrial Welfare Commission of California. *Mr. John G. Egan,* Assistant Attorney General of the State of Kansas, on behalf of that State. *Mr. Herman L. Ekern,* Attorney General of the State of Wisconsin, *Mr. J. E. Messerschmidt,* Assistant Attorney General, and *Mr. Fred M. Wilcox,* on behalf of that State. *Mr. Edward Clifford* and *Mr. Kenneth Durham* on behalf of the Minimum Wage Committee of the State of Washington.

Mr. Justice Sutherland delivered the opinion of the Court.

The question presented for determination by these appeals is the constitutionality of the Act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia. 40 Stat. 960, c. 174.

The act provides for a board of three members, to be constituted, as far as practicable, so as to be equally repre-

sentative of employers, employees and the public. The board is authorized to have public hearings, at which persons interested in the matter being investigated may appear and testify, to administer oaths, issue subpoenas requiring the attendance of witnesses and production of books, etc., and to make rules and regulations for carrying the act into effect.

By § 8 the board is authorized—

"(1), To investigate and ascertain the wages of women and minors in the different occupations in which they are employed in the District of Columbia; (2), to examine, through any member or authorized representative, any book, pay roll or other record of any employer of women or minors that in any way appertains to or has a bearing upon the question of wages of any such women or minors; and (3), to require from such employer full and true statements of the wages paid to all women and minors in his employment."

And by § 9, "to ascertain and declare, in the manner hereinafter provided, the following things: (a), Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals; and (b), standards of minimum wages for minors in any occupation within the District of Columbia, and what wages are unreasonably low for any such minor workers."

The act then provides (§ 10) that if the board, after investigation, is of opinion that any substantial number of women workers in any occupation are receiving wages inadequate to supply them with the necessary cost of living, maintain them in health and protect their morals, a conference may be called to consider and inquire into and report on the subject investigated, the conference to be equally representative of employers and employees in

such occupation and of the public, and to include one or more members of the board.

The conference is required to make and transmit to the board a report including, among other things, "recommendations as to standards of minimum wages for women workers in the occupation under inquiry and as to what wages are inadequate to supply the necessary cost of living to women workers in such occupation and to maintain them in health and to protect their morals." § 11.

The board is authorized (§ 12) to consider and review these recommendations and to approve or disapprove any or all of them. If it approve any recommendations it must give public notice of its intention and hold a public hearing at which the persons interested will be heard. After such hearing, the board is authorized to make such order as to it may appear necessary to carry into effect the recommendations, and to require all employers in the occupation affected to comply therewith. It is made unlawful for any such employer to violate in this regard any provision of the order or to employ any woman worker at lower wages than are thereby permitted.

There is a provision (§ 13) under which the board may issue a special license to a woman whose earning capacity "has been impaired by age or otherwise," authorizing her employment at less than the minimum wages fixed under the act.

All questions of fact (§ 17) are to be determined by the board, from whose decision there is no appeal; but an appeal is allowed on questions of law.

Any violation of the act (§ 18) by an employer or his agent or by corporate agents is declared to be a misdemeanor, punishable by fine and imprisonment.

Finally, after some further provisions not necessary to be stated, it is declared (§ 23) that the purposes of the act are "to protect the women and minors of the District

from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living; and the Act in each of its provisions and in its entirety shall be interpreted to effectuate these purposes."

The appellee in the first case is a corporation maintaining a hospital for children in the District. It employs a large number of women in various capacities, with whom it had agreed upon rates of wages and compensation satisfactory to such employees, but which in some instances were less than the minimum wage fixed by an order of the board made in pursuance of the act. The women with whom appellee had so contracted were all of full age and under no legal disability. The instant suit was brought by the appellee in the Supreme Court of the District to restrain the board from enforcing or attempting to enforce its order on the ground that the same was in contravention of the Constitution, and particularly the due process clause of the Fifth Amendment.

In the second case the appellee, a woman twenty-one years of age, was employed by the Congress Hall Hotel Company as an elevator operator, at a salary of $35 per month and two meals a day. She alleges that the work was light and healthful, the hours short, with surroundings clean and moral, and that she was anxious to continue it for the compensation she was receiving and that she did not earn more. Her services were satisfactory to the Hotel Company and it would have been glad to retain her but was obliged to dispense with her services by reason of the order of the board and on account of the penalties prescribed by the act. The wages received by this appellee were the best she was able to obtain for any work she was capable of performing and the enforcement of the order, she alleges, deprived her of such employment and wages. She further averred that she could not secure any other position at which she could make a living, with

as good physical and moral surroundings, and earn as good wages, and that she was desirous of continuing and would continue the employment but for the order of the board. An injunction was prayed as in the other case.

The Supreme Court of the District denied the injunction and dismissed the bill in each case. Upon appeal the Court of Appeals by a majority first affirmed and subsequently, on a rehearing, reversed the trial court. Upon the first argument a justice of the District Supreme Court was called in to take the place of one of the Appellate Court justices, who was ill. Application for rehearing was made and, by the court as thus constituted, was denied. Subsequently, and during the term, a rehearing was granted by an order concurred in by two of the Appellate Court justices, one being the justice whose place on the prior occasion had been filled by the Supreme Court member. Upon the rehearing thus granted, the Court of Appeals, rejecting the first opinion, held the act in question to be unconstitutional and reversed the decrees of the trial court. Thereupon the cases were remanded, and the trial court entered decrees in pursuance of the mandate, declaring the act in question to be unconstitutional and granting permanent injunctions. Appeals to the Court of Appeals followed and the decrees of the trial court were affirmed. It is from these final decrees that the cases come here.

Upon this state of facts the jurisdiction of the lower court to grant a rehearing, after first denying it, is challenged. We do not deem it necessary to consider the matter farther than to say that we are here dealing with the second appeals, while the proceedings complained of occurred upon the first appeals. That the lower court could properly entertain the second appeals and decide the cases does not admit of doubt; and this the appellants virtually conceded by having themselves invoked the jurisdiction. See *Rooker* v. *Fidelity Trust Co., ante,* 114.

We come then, at once, to the substantive question involved.

The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity; and that determination must be given great weight. This Court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt. But if by clear and indubitable demonstration a statute be opposed to the Constitution we have no choice but to say so. The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A congressional statute, on the other hand, is the act of an agency of this sovereign authority and if it conflict with the Constitution must fall; for that which is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of the judicial power—that power vested in courts to enable them to administer justice according to law. From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law.

The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question. *Allgeyer* v. *Louisiana,* 165 U. S. 578, 591; *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357, 373-374; *Coppage* v. *Kansas,* 236 U. S. 1, 10, 14; *Adair* v. *United States,* 208 U. S. 161; *Lochner* v. *New York,* 198 U. S. 45; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746; *Muller* v. *Oregon,* 208 U. S. 412, 421. Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.

In *Adair* v. *United States, supra,* Mr. Justice Harlan (pp. 174, 175), speaking for the Court, said:

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . In all such particulars the employer and employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

In *Coppage* v. *Kansas, supra* (p. 14), this Court, speaking through Mr. Justice Pitney, said:

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this

right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

"An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State."

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest.

(1) *Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest.* There are many cases, but it is sufficient to cite *Munn* v. *Illinois,* 94 U. S. 113. The power here rests upon the ground that where property is devoted to a public use the owner thereby, in effect, grants to the public an interest in the use which may be controlled by the public for the common good to the extent of the interest thus created. It is upon this theory that these statutes have been upheld and, it may be noted in passing, so upheld even in respect of their incidental and injurious or destructive effect upon preëxisting contracts. See *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467. In the case at bar the statute does not depend upon

the existence of a public interest in any business to be affected, and this class of cases may be laid aside as inapplicable.

(2) *Statutes relating to contracts for the performance of public work.* *Atkin* v. *Kansas,* 191 U. S. 207; *Heim* v. *McCall,* 239 U. S. 175; *Ellis* v. *United States,* 206 U. S. 246. These cases sustain such statutes as depending, not upon the right to condition private contracts, but upon the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it, or, in the case of a State, for its municipalities. We may, therefore, in like manner, dismiss these decisions from consideration as inapplicable.

(3) *Statutes prescribing the character, methods and time for payment of wages.* Under this head may be included *McLean* v. *Arkansas,* 211 U. S. 539, sustaining a state statute requiring coal to be measured for payment of miners' wages before screening; *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13, sustaining a Tennessee statute requiring the redemption in cash of store orders issued in payment of wages; *Erie R. R. Co.* v. *Williams,* 233 U. S. 685, upholding a statute regulating the time within which wages shall be paid to employees in certain specified industries; and other cases sustaining statutes of like import and effect. In none of the statutes thus sustained, was the liberty of employer or employee to fix the amount of wages the one was willing to pay and the other willing to receive interfered with. Their tendency and purpose was to prevent unfair and perhaps fraudulent methods in the payment of wages and in no sense can they be said to be, or to furnish a precedent for, wage-fixing statutes.

(4) *Statutes fixing hours of labor.* It is upon this class that the greatest emphasis is laid in argument and therefore, and because such cases approach most nearly the line of principle applicable to the statute here involved, we shall consider them more at length. In some instances

the statute limited the hours of labor for men in certain occupations and in others it was confined in its application to women. No statute has thus far been brought to the attention of this Court which by its terms, applied to all occupations. In *Holden* v. *Hardy,* 169 U. S. 366, the Court considered an act of the Utah legislature, restricting the hours of labor in mines and smelters. This statute was sustained as a legitimate exercise of the police power, on the ground that the legislature had determined that these particular employments, when too long pursued, were injurious to the health of the employees, and that, as there were reasonable grounds for supporting this determination on the part of the legislature, its decision in that respect was beyond the reviewing power of the federal courts.

That this constituted the basis of the decision is emphasized by the subsequent decision in *Lochner* v. *New York,* 198 U. S. 45, reviewing a state statute which restricted the employment of all persons in bakeries to ten hours in any one day. The Court referred to *Holden* v. *Hardy, supra,* and, declaring it to be inapplicable, held the statute unconstitutional as an unreasonable, unnecessary and arbitrary interference with the liberty of contract and therefore void under the Constitution.

Mr. Justice Peckham, speaking for the Court (p. 56), said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power

would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint."

And again (pp. 57–58):

"It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

Coming then directly to the statute (p. 58), the Court said:

"We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris,* as employer or employé, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go."

And, after pointing out the unreasonable range to which the principle of the statute might be extended, the Court said (p. 60):

"It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must

be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature."

And further (p. 61):

"Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employés, if the hours of labor are not curtailed."

Subsequent cases in this Court have been distinguished from that decision, but the principles therein stated have never been disapproved.

In *Bunting* v. *Oregon,* 243 U. S. 426, a state statute forbidding the employment of any person in any mill, factory or manufacturing establishment more than ten hours in any one day, and providing payment for overtime not exceeding three hours in any one day at the rate of time and a half of the regular wage, was sustained on the ground that, since the state legislature and State Supreme Court had found such a law necessary for the preservation of the health of employees in these industries, this Court would accept their judgment, in the absence of facts to support the contrary conclusion. The law was attacked

on the ground that it constituted an attempt to fix wages, but that contention was rejected and the law sustained as a reasonable regulation of hours of service.

Wilson v. *New,* 243 U. S. 332, involved the validity of the so-called Adamson Law, which established an eight-hour day for employees of interstate carriers for which it fixed a scale of minimum wages with proportionate increases for overtime, to be enforced, however, only for a limited period. The act was sustained primarily upon the ground that it was a regulation of a business charged with a public interest. The Court, speaking through the Chief Justice, pointed out that regarding "the private right and private interest as contradistinguished from the public interest the power exists between the parties, the employers and employees, to agree as to a standard of wages free from legislative interference" but that this did not affect the power to deal with the matter with a view to protect the public right, and then said (p. 353):

"And this emphasizes that there is no question here of purely private right since the law is concerned only with those who are engaged in a business charged with a public interest where the subject dealt with as to all the parties is one involved in that business and which we have seen comes under the control of the right to regulate to the extent that the power to do so is appropriate or relevant to the business regulated."

Moreover, in sustaining the wage feature, of the law, emphasis was put upon the fact (p. 345) that it was in this respect temporary "leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time." The act was not only temporary in this respect, but it was passed to meet a sudden and great emergency. This feature of the law was sustained principally because the parties, for the time being, could not or would not agree. Here they are forbidden to agree.

The same principle was applied in the *Rent Cases* (*Block* v. *Hirsh,* 256 U. S. 135, and *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170), where this Court sustained the legislative power to fix rents as between landlord and tenant upon the ground that the operation of the statutes was temporary to tide over an emergency and that the circumstances were such as to clothe "the letting of buildings . . . with a public interest so great as to justify regulation by law." The Court said (p. 157):

"The regulation is put and justified only as a temporary measure [citing *Wilson* v. *New, supra*]. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

In a subsequent case, *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 416, this Court, after saying "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," pointed out that the *Rent Cases* dealt with laws intended to meet a temporary emergency and "went to the verge of the law."

In addition to the cases cited above, there are the decisions of this Court dealing with laws especially relating to hours of labor for women: *Muller* v. *Oregon,* 208 U. S. 412; *Riley* v. *Massachusetts,* 232 U. S. 671; *Miller* v. *Wilson,* 236 U. S. 373; *Bosley* v. *McLaughlin,* 236 U. S. 385.

In the *Muller Case* the validity of an Oregon statute, forbidding the employment of any female in certain industries more than ten hours during any one day was upheld. The decision proceeded upon the theory that the difference between the sexes may justify a different rule respecting hours of labor in the case of women than in the case of men. It is pointed out that these consist in differences of physical structure, especially in respect

of the maternal functions, and also in the fact that historically woman has always been dependent upon man, who has established his control by superior physical strength. The cases of *Riley, Miller* and *Bosley* follow in this respect the *Muller Case.* But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller Case* (p. 421) has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris,* require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. In passing, it may be noted that the instant statute applies in the case of a woman employer contracting with a woman employee as it does when the former is a man.

The essential characteristics of the statute now under consideration, which differentiate it from the laws fixing hours of labor, will be made to appear as we proceed. It is sufficient now to point out that the latter as well as the statutes mentioned under paragraph (3), deal with incidents of the employment having no necessary effect upon

the heart of the contract, that is, the amount of wages to be paid and received. A law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalize whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages. Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health. This Court has been careful in every case where the question has been raised, to place its decision upon this limited authority of the legislature to regulate hours of labor and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that these decisions afford no real support for any form of law establishing minimum wages.

If now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect. It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for

which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee.[1] The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment; and, while it has no other basis to support its validity than the assumed necessities of the employee, it takes no account of any independent resources she may have. It is based wholly on the opinions of the members of the board and their advisers—perhaps an average of their opinions, if they do not precisely agree—as to what will be necessary to provide a living for a woman, keep her in health and preserve her morals. It applies to any and every occupation in the District, without regard to its nature or the character of the work.

The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy. What is sufficient to supply the necessary cost of living for a woman worker and maintain her in good health and protect her morals is obviously not a precise or unvarying sum—not even approximately so. The amount will depend upon a variety of circumstances: the individual temperament, habits of thrift, care, ability to buy necessaries intelligently, and whether the woman live alone or with her family. To those who practice economy, a given sum will afford comfort, while to those of contrary habit the same sum will be wholly inadequate. The coöperative economies of the family group are not taken into account

[1] This is the exact situation in the Lyons case, as is shown by the statement in the first part of this opinion.

though they constitute an important consideration in estimating the cost of living, for it is obvious that the individual expense will be less in the case of a member of a family than in the case of one living alone. The relation between earnings and morals is not capable of standardization. It cannot be shown that well paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages; and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is without reasonable basis. No distinction can be made between women who work for others and those who do not; nor is there ground for distinction between women and men, for, certainly, if women require a minimum wage to preserve their morals men require it to preserve their honesty. For these reasons, and others which might be stated, the inquiry in respect of the necessary cost of living and of the income necessary to preserve health and morals, presents an individual and not a composite question, and must be answered for each individual considered by herself and not by a general formula prescribed by a statutory bureau.

This uncertainty of the statutory standard is demonstrated by a consideration of certain orders of the board already made. These orders fix the sum to be paid to a woman employed in a place where food is served or in a mercantile establishment, at $16.50 per week; in a printing establishment, at $15.50 per week; and in a laundry, at $15 per week, with a provision reducing this to $9 in the case of a beginner. If a woman employed to serve food requires a minimum of $16.50 per week, it is hard to understand how the same woman working in a printing establishment or in a laundry is to get on with an income lessened by from $1 to $7.50 per week. The board prob-

ably found it impossible to follow the indefinite standard of the statute, and brought other and different factors into the problem; and this goes far in the direction of demonstrating the fatal uncertainty of the act, an infirmity which, in our opinion, plainly exists.

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there

rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding

more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.

We are asked, upon the one hand, to consider the fact that several States have adopted similar statutes, and we are invited, upon the other hand, to give weight to the fact that three times as many States, presumably as well informed and as anxious to promote the health and morals of their people, have refrained from enacting such legislation. We have also been furnished with a large number of printed opinions approving the policy of the minimum wage, and our own reading has disclosed a large number to the contrary. These are all proper enough for the consideration of the lawmaking bodies, since their tendency is to establish the desirability or undesirability of the

legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide. The elucidation of that question cannot be aided by counting heads.

It is said that great benefits have resulted from the operation of such statutes, not alone in the District of Columbia but in the several States, where they have been in force. A mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of this statement, all of which we have found interesting but only mildly persuasive. That the earnings of women now are greater than they were formerly and that conditions affecting women have become better in other respects may be conceded, but convincing indications of the logical relation of these desirable changes to the law in question are significantly lacking. They may be, and quite probably are, due to other causes. We cannot close our eyes to the notorious fact that earnings everywhere in all occupations have greatly increased—not alone in States where the minimum wage law obtains but in the country generally—quite as much or more among men as among women and in occupations outside the reach of the law as in those governed by it. No real test of the economic value of the law can be had during periods of maximum employment, when general causes keep wages up to or above the minimum; that will come in periods of depression and struggle for employment when the efficient will be employed at the minimum rate while the less capable may not be employed at all.

Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes, by like course of reasoning, the power to fix low wages. If, in the face of the guaranties of the Fifth

Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. If, for example, in the opinion of future lawmakers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains the minimum wage will be invoked to support a maximum wage for building laborers and artisans, and the same argument which has been here urged to strip the employer of his constitutional liberty of contract in one direction will be utilized to strip the employee of his constitutional liberty of contract in the opposite direction. A wrong decision does not end with itself: it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other.

It has been said that legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint. The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable but may be made to move, within limits not well defined, with changing need and circumstance. Any attempt to fix a rigid boundary would be unwise as well as futile. But, nevertheless, there are limits to the power, and when these have been passed, it becomes the plain duty of the courts in the proper exercise of their authority to so declare. To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

It follows from what has been said that the act in question passes the limit prescribed by the Constitution, and, accordingly, the decrees of the court below are

Affirmed.

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

MR. CHIEF JUSTICE TAFT, dissenting.

I regret much to differ from the Court in these cases.

The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments to the Constitution is not easy to mark. Our Court has been laboriously engaged in pricking out a line in successive cases. We must be careful, it seems to me, to follow that line as well as we can and not to depart from it by suggesting a distinction that is formal rather than real.

Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known. Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound.

Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large.

The right of the legislature under the Fifth and Fourteenth Amendments to limit the hours of employment on the score of the health of the employee, it seems to me, has been firmly established. As to that, one would think, the line had been pricked out so that it has become a well formulated rule. In *Holden* v. *Hardy,* 169 U. S. 366, it was applied to miners and rested on the unfavorable environment of employment in mining and smelting. In *Lochner* v. *New York,* 198 U. S. 45, it was held that restricting those employed in bakeries to ten hours a day was an arbitrary and invalid interference with the liberty of contract secured by the Fourteenth Amendment. Then followed a number of cases beginning with *Muller* v. *Oregon,* 208 U. S. 412, sustaining the validity of a limit on maximum hours of labor for women to which I shall hereafter allude, and following these cases came *Bunting* v. *Oregon,* 243 U. S. 426. In that case, this Court sustained a law limiting the hours of labor of any person, whether man or woman, working in any mill, factory or manufacturing establishment to ten hours a day with a proviso as to further hours to which I shall hereafter advert. The law covered the whole field of industrial employment and certainly covered the case of persons employed in bakeries. Yet the opinion in the *Bunting Case* does not mention the *Lochner Case.* No one can

suggest any constitutional distinction between employment in a bakery and one in any other kind of a manufacturing establishment which should make a limit of hours in the one invalid, and the same limit in the other permissible. It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case* and I have always supposed that the *Lochner Case* was thus overruled *sub silentio*. Yet the opinion of the Court herein in support of its conclusion quotes from the opinion in the *Lochner Case* as one which has been sometimes distinguished but never overruled. Certainly there was no attempt to distinguish it in the *Bunting Case*.

However, the opinion herein does not overrule the *Bunting Case* in express terms, and therefore I assume that the conclusion in this case rests on the distinction between a minimum of wages and a maximum of hours in the limiting of liberty to contract. I regret to be at variance with the Court as to the substance of this distinction. In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand.

If it be said that long hours of labor have a more direct effect upon the health of the employee than the low wage, there is very respectable authority from close observers, disclosed in the record and in the literature on the subject quoted at length in the briefs, that they are equally harmful in this regard. Congress took this view and we can not say it was not warranted in so doing.

With deference to the very able opinion of the Court and my brethren who concur in it, it appears to me to exaggerate the importance of the wage term of the contract of employment as more inviolate than its other terms. Its conclusion seems influenced by the fear that the

concession of the power to impose a minimum wage must carry with it a concession of the power to fix a maximum wage. This, I submit, is a *non sequitur.* A line of distinction like the one under discussion in this case is, as the opinion elsewhere admits, a matter of degree and practical experience and not of pure logic. Certainly the wide difference between prescribing a minimum wage and a maximum wage could as a matter of degree and experience be easily affirmed.

Moreover, there are decisions by this Court which have sustained legislative limitations in respect to the wage term in contracts of employment. In *McLean* v. *Arkansas,* 211 U. S. 539, it was held within legislative power to make it unlawful to estimate the graduated pay of miners by weight after screening the coal. In *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13, it was held that store orders issued for wages must be redeemable in cash. In *Patterson* v. *Bark Eudora,* 190 U. S. 169, a law forbidding the payment of wages in advance was held valid. A like case is *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348. While these did not impose a minimum on wages, they did take away from the employee the freedom to agree as to how they should be fixed, in what medium they should be paid, and when they should be paid, all features that might affect the amount or the mode of enjoyment of them. The first two really rested on the advantage the employer had in dealing with the employee. The third was deemed a proper curtailment of a sailor's right of contract in his own interest because of his proneness to squander his wages in port before sailing. In *Bunting* v. *Oregon, supra,* employees in a mill, factory or manufacturing establishment were required if they worked over ten hours a day to accept for the three additional hours permitted not less than fifty per cent. more than their usual wage. This was sustained as a mild penalty imposed on the employer to enforce the limitation as to hours; but it neces-

sarily curtailed the employee's freedom to contract to work for the wages he saw fit to accept during those three hours. I do not feel, therefore, that either on the basis of reason, experience or authority, the boundary of the police power should be drawn to include maximum hours and exclude a minimum wage.

Without, however, expressing an opinion that a minimum wage limitation can be enacted for adult men, it is enough to say that the case before us involves only the application of the minimum wage to women. If I am right in thinking that the legislature can find as much support in experience for the view that a sweating wage has as great and as direct a tendency to bring about an injury to the health and morals of workers, as for the view that long hours injure their health, then I respectfully submit that *Muller* v. *Oregon,* 208 U. S. 412, controls this case. The law which was there sustained forbade the employment of any female in any mechanical establishment or factory or laundry for more than ten hours. This covered a pretty wide field in women's work and it would not seem that any sound distinction between that case and this can be built up on the fact that the law before us applies to all occupations of women with power in the board to make certain exceptions. Mr. Justice Brewer, who spoke for the Court in *Muller* v. *Oregon,* based its conclusion on the natural limit to women's physical strength and the likelihood that long hours would therefore injure her health, and we have had since a series of cases which may be said to have established a rule of decision. *Riley* v. *Massachusetts,* 232 U. S. 671; *Miller* v. *Wilson,* 236 U. S. 373; *Bosley* v. *McLaughlin,* 236 U. S. 385. The cases covered restrictions in wide and varying fields of employment and in the later cases it will be found that the objection to the particular law was based not on the ground that it had general application but because it left out some employments.

I am not sure from a reading of the opinion whether the Court thinks the authority of *Muller* v. *Oregon* is shaken by the adoption of the Nineteenth Amendment. The Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in *Muller* v. *Oregon* rests. The Amendment did give women political power and makes more certain that legislative provisions for their protection will be in accord with their interests as they see them. But I don't think we are warranted in varying constitutional construction based on physical differences between men and women, because of the Amendment.

But for my inability to agree with some general observations in the forcible opinion of MR. JUSTICE HOLMES who follows me, I should be silent and merely record my concurrence in what he says. It is perhaps wiser for me, however, in a case of this importance, separately to give my reasons for dissenting.

I am authorized to say that MR. JUSTICE SANFORD concurs in this opinion.

MR. JUSTICE HOLMES, dissenting.

The question in this case is the broad one, Whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress has no power to meddle with the matter at all. To me, notwithstanding the deference due to the prevailing judgment of the Court, the power of Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of Congress, of many States, and of those governments from which we have learned our greatest

lessons. When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price, it seems to me impossible to deny that the belief reasonably may be held by reasonable men. If the law encountered no other objection than that the means bore no relation to the end or that they cost too much I do not suppose that anyone would venture to say that it was bad. I agree, of course, that a law answering the foregoing requirements might be invalidated by specific provisions of the Constitution. For instance it might take private property without just compensation. But in the present instance the only objection that can be urged is found within the vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law. To that I turn.

The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us. Usury laws prohibit contracts by which a man receives more than so much interest for the money that he lends. Statutes of frauds restrict many contracts to certain forms. Some Sunday laws prohibit practically all contracts during one-seventh of our whole life. Insurance rates may be regulated. *German Alliance Insurance Co.*

v. *Lewis,* 233 U. S. 389. (I concurred in that decision without regard to the public interest with which insurance was said to be clothed. It seemed to me that the principle was general.) Contracts may be forced upon the companies. *National Union Fire Insurance Co.* v. *Wanberg,* 260 U. S. 71. Employers of miners may be required to pay for coal by weight before screening. *McLean* v. *Arkansas,* 211 U. S. 539. Employers generally may be required to redeem in cash store orders accepted by their employees in payment. *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13. Payment of sailors in advance may be forbidden. *Patterson* v. *Bark Eudora,* 190 U. S. 169. The size of a loaf of bread may be established. *Schmidinger* v. *Chicago,* 226 U. S. 578. The responsibility of employers to their employees may be profoundly modified. *New York Central R. R. Co.* v. *White,* 243 U. S. 188. *Arizona Employers' Liability Cases,* 250 U. S. 400. Finally women's hours of labor may be fixed; *Muller* v. *Oregon,* 208 U. S. 412; *Riley* v. *Massachusetts,* 232 U. S. 671, 679; *Hawley* v. *Walker,* 232 U. S. 718; *Miller* v. *Wilson,* 236 U. S. 373; *Bosley* v. *McLaughlin,* 236 U. S. 385; and the principle was extended to men with the allowance of a limited overtime to be paid for " at the rate of time and one-half of the regular wage," in *Bunting* v. *Oregon,* 243 U. S. 426.

I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. I fully assent to the proposition that here as elsewhere the distinctions of the law are distinctions of degree, but I perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate. *Muller* v. *Oregon,* I take it, is as good law today as it was in 1908. It will

need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account. I should not hesitate to take them into account if I thought it necessary to sustain this act. *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 63. But after *Bunting* v. *Oregon,* 243 U. S. 426, I had supposed that it was not necessary, and that *Lochner* v. *New York,* 198 U. S. 45, would be allowed a deserved repose.

This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld. I see no greater objection to using a Board to apply the standard fixed by the act than there is to the other commissions with which we have become familiar, or than there is to the requirement of a license in other cases. The fact that the statute warrants classification, which like all classifications may bear hard upon some individuals, or in exceptional cases, notwithstanding the power given to the Board to issue a special license, is no greater infirmity than is incident to all law. But the ground on which the law is held to fail is fundamental and therefore it is unnecessary to consider matters of detail.

The criterion of constitutionality is not whether we believe the law to be for the public good. We certainly cannot be prepared to deny that a reasonable man reasonably might have that belief in view of the legislation of Great Britain, Victoria and a number of the States of this Union. The belief is fortified by a very remarkable collection of documents submitted on behalf of the appellants, material here, I conceive, only as showing that the

belief reasonably may be held. In Australia the power to fix a minimum for wages in the case of industrial disputes extending beyond the limits of any one State was given to a Court, and its President wrote a most interesting account of its operation. 29 Harv. Law Rev. 13. If a legislature should adopt what he thinks the doctrine of modern economists of all schools, that "freedom of contract is a misnomer as applied to a contract between an employer and an ordinary individual employee," *ibid.* 25, I could not pronounce an opinion with which I agree impossible to be entertained by reasonable men. If the same legislature should accept his further opinion that industrial peace was best attained by the device of a Court having the above powers, I should not feel myself able to contradict it, or to deny that the end justified restrictive legislation quite as adequately as beliefs concerning Sunday or exploded theories about usury. I should have my doubts, as I have them about this statute—but they would be whether the bill that has to be paid for every gain, although hidden as interstitial detriments, was not greater than the gain was worth: a matter that it is not for me to decide.

I am of opinion that the statute is valid and that the decree should be reversed.

WATKINS, TRUSTEE, ET AL. *v.* SEDBERRY ET AL.

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

No. 248. Argued January 19, 1923.—Decided April 9, 1923.

1. The amount of attorney's fees to be charged against a bankrupt estate as an expense of administration is subject to examination and approval by the Court (Bankruptcy Act, § 62a); the trustee is not authorized to dispose of property of the estate by contract with an attorney on a contingent basis. P. 574.

2. A contract by which an attorney undertook to recover property of a bankrupt estate, indemnifying the trustee against damages and expenses, and the trustee agreed that any property so recovered should be first chargeable with the expenses incurred by the attorney and the balance be then equally divided between them,—*held* grossly excessive, champertous and invalid. P. 575.
3. The contract here involved is not *malum in se*, and the attorney is not debarred from recovering on *quantum meruit*. P. 576.
4. A bankrupt who resisted recovery of property belonging to the bankrupt estate, has no standing to oppose payment of a reasonable fee to the attorney who recovered the property, upon the ground that a champertous contract existed between the attorney and the trustee. *Id.*
5. Where the purpose and result of a suit brought by a trustee in bankruptcy in a state court are to remove a cloud from property of the bankrupt and vest it all in the trustee (Bankruptcy Act, § 70), and not merely to assert his right as a creditor to set aside a fraudulent conveyance under the state law for the satisfaction of debts, (*Id.*, §§ 67e, 70e), the attorney's allowance for service in the litigation is chargeable against a surplus of the property remaining after paying all the bankrupt's debts, and not against the debts, as it might be under the state law if the suit were of the latter character. P. 577.
6. Where property vested in a trustee in bankruptcy, through litigation, as part of the bankrupt's assets exceeds in value the amount of the bankrupt's debts, the amount of the recovery, for the purpose of fixing the attorney's fee, is not the whole property, but the sum of the debts and attorney's fee and expenses. P. 580.

275 Fed. 894, reversed.

CERTIORARI to an order of the Circuit Court of Appeals revising an order of the District Court in bankruptcy fixing attorney's fees.

Mr. C. C. Calhoun, with whom *Mr. John R. Aust, Mr. Clarence T. Boyd, Mr. Jordan Stokes, Jr.,* and *Mr. Jos. R. West* were on the brief, for petitioners.

Mr. Norman Farrell, with whom *Mr. Charles S. Lawrence* was on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This case involves fees and expenses of an attorney for a trustee in bankruptcy. Claims therefor are made on a written contract between the trustee and the attorney, Jordan Stokes, Jr.[1] The amount claimed for fees is about $49,000 [2] and for expenses $1,127.28. The debts, existing at the time of the filing of the petition in bankruptcy and since proved and allowed, amount to $21,000 with interest. The services were rendered in the prosecution of a suit brought by the trustee in the State Chancery Court against the respondents, the bankrupt and his family, to recover a farm and personal property thereon. The suit was successful, and the value of the property is $99,743.01. After the recovery of that judgment, the respondents petitioned in the bankruptcy case for an order, fixing the amount of indebtedness of the bankrupt, as finally allowed, and the expenses of administration, including a reasonable fee for the attorney of the trustee to the end that all debts and expenses might be fully paid out of money raised by mortgage of the land so recovered, and that the bankruptcy proceedings be dismissed. After hearing, the referee decided that the trustee had no authority to contract in advance for the amount to be paid for legal services, and that the attorney be allowed a fee of $10,000 and $750 for expenses, and that both items be paid out of the property so recovered. The petitioners and re-

[1] The attorneys interested are the petitioners, Jordan Stokes, Jr., Joseph R. West, and R. H. Crockett. The contract of employment was between the trustee and Stokes. As authorized by the contract, Stokes employed West and Crockett as assistants. There is no matter here in dispute between the attorneys. The word "attorney" is used in the opinion to include all the petitioners other than Watkins, the trustee.

[2] All figures stated in the opinion are approximate and intended only to identify the sum involved, not to fix it.

spondents both petitioned for review. The District Court held that the contract was invalid; allowed a fee of $7,500 and $750 expenses, and directed that these sums be paid as a part of the expenses of administration of the bankrupt estate before return of surplus to respondents. Both sides petitioned to revise and also appealed to the Circuit Court of Appeals. That court (275 Fed. 894) dismissed the appeals and dealt only with the petitions to revise. It held that the attorney's fee should be paid out of the debts—i. e., should be borne by the creditors—and not out of the surplus remaining after the payment of debts in full. The award of the District Judge of $7,500 attorney's fees was vacated on the ground that the amount of the recovery in the Chancery Court, which was deemed a material element to be considered in fixing the fee, was in the lower court erroneously taken to be $29,000, instead of $21,500, and the District Judge was left at liberty to use his discretion in again fixing the amount " with due regard to the modified character of the recovery and the change in the source from which payment must be made."

The validity of the contract between the trustee and attorney is first to be considered. The bankrupt filed a voluntary petition in bankruptcy, August 24, 1917. He scheduled unsecured debts amounting to $18,260. Many years before any of these debts were contracted, he purchased a farm and caused the deed to be made to his wife as " trustee " for the use and benefit of herself, her husband and their children; on the advice of counsel, he did not schedule it; and he did not schedule any property applicable to the payment of such debts. The trustee made a preliminary investigation and caused the bankrupt and his family to be examined. The attorney, Mr. Stokes, who had for collection two of the largest claims against the bankrupt, acted for the trustee in these matters. On October 24, 1917, the trustee and attorney made the contract; the attorney agreed to institute such suits as might

be necessary and proceed generally to recover property that he might be able to locate belonging to the bankrupt; he agreed to bear the necessary expenses and to indemnify the trustee against all damages and expenses growing out of his employment; it was provided that any property recovered should be first chargeable with the amounts that the attorney expended in prosecuting the claims and that the balance should be divided equally between the trustee and the attorney. The contract was made without notice to or the authority of the creditors, and without the knowledge of the respondents. On the same day, the trustee presented a petition to the referee, showing that the bankrupt scheduled no property and that none had come to the trustee; that after investigation he believed that a large amount might be recovered for the creditors, and that the attorney was willing to bear all expenses and undertake the matter. The referee made an order authorizing the trustee to enter into a contract of employment with the attorney " on a contingent basis ", and providing that the attorney should be personally responsible for and pay all expenses incurred in the prosecution of any suits. Neither the petition nor the order disclosed what proportion of the property was agreed to be given to the attorney for his services. The probable value of the property proposed to be recovered was not shown. The amount or kind of professional services required could not be known in advance. The amount of attorney's fees to be charged against the estate as an expense of administration is subject to the examination and approval of the court. § 62a, Bankruptcy Act. *In re Stotts,* 93 Fed. 438, 439; *Davidson & Co.* v. *Friedman,* 140 Fed. 853; *Page* v. *Rogers,* 149 Fed. 194, 195. The trustee was not authorized so to dispose of property of the estate. The amount claimed under the contract is grossly excessive. The contract is invalid.

The attorney claims compensation on *quantum meruit,* if recovery under the contract is denied. The respondents

contend that the contract is champertous and that the attorney is not entitled to any compensation.

The essential provisions of the contract have been stated. There is no ground for the claim that the attorney had an interest in the proposed litigation that would make it proper for him to pay the expenses of the suit and indemnify the trustee. It is true, as contended by the petitioners, that the severity of the old rule of the English common law against champerty, regarding it as an offense *malum in se,* has been somewhat relaxed. *Burnes* v. *Scott,* 117 U. S. 582, 589; *Roberts* v. *Cooper,* 20 How. 467, 484; *Byrne* v. *Kansas City, &c. R. R. Co.* 55 Fed. 44, 47; *Courtright* v. *Burnes,* 13 Fed. 317, 320.

No statute of Tennessee authorizes such a contract. C. 66, Acts of 1821 (Shannon's Code, §§ 3171-3184) denounced champerty and required the dismissal of suits, whenever it was made to appear they were prosecuted pursuant to champertous arrangements. *Heaton* v. *Dennis,* 103 Tenn. 155, 160; *Robertson* v. *Cayard,* 111 Tenn. 356, 367; *Staub* v. *Sewanee Coal Co.,* 140 Tenn. 505, 508. By c. 173, Acts of 1899, this requirement was eliminated; but no decision of the Supreme Court of that State has been called to our attention which would sustain this contract. It is champertous under the rule generally prevailing in this country. *Peck* v. *Heurich,* 167 U. S. 624, 630, and cases there cited; *Jones* v. *Pettingill,* 245 Fed. 269, 275; *Casserleigh* v. *Wood,* 119 Fed. 308, 312-315; *Stearns* v. *Felker,* 28 Wis. 594, 596; *Butler* v. *Legro,* 62 N. H. 350; *Huber* v. *Johnson,* 68 Minn. 74; *Moreland* v. *Devenney,* 72 Kan. 471.

As to the attorney's right to compensation on *quantum meruit:* It was the duty of the trustee to employ counsel to bring suit to recover the property belonging to the bankrupt. The fact that the contract between him and his attorney was champertous, even if its terms had been known, could not have been interposed by respondents to

defeat the trustee's suit. *Burnes* v. *Scott, supra; Staub* v. *Sewanee Coal Co., supra,* 509; *Robertson* v. *Cayard, supra,* 365; *Boone* v. *Chiles,* 10 Pet. 177, 219. They should have handed over the property to the trustee without suit because, as it was adjudged in that case, the bankrupt was the real owner. After judgment went against them in the Chancery Court, they petitioned the bankruptcy court to fix a reasonable fee for the trustee's attorney. They did not then know of the existence of the contract, and, while they may successfully oppose payment of the amount therein provided for, they have no standing now to object to a reasonable fee. The attorney rendered valuable services in the prosecution of a proper and legitimate suit. Through his efforts there was recovered more than enough to pay expenses and debts in full. The trustee joins the attorney in asking that a reasonable fee be allowed. The making of the contract was not *malum in se.* The attorney's right to fair and reasonable compensation is not forfeited. *Brush* v. *City of Carbondale,* 229 Ill. 144, 152; *Stearns* v. *Felker,* 28 Wis. 594, 597; *In re Snyder,* 190 N. Y. 66, 75; *Gammons* v. *Johnson,* 69 Minn. 488; *Rust* v. *Larue,* 4 Litt. (Ky.) 412, 428; *Elliott* v. *McClelland,* 17 Ala. 206, 209; *Holloway* v. *Lowe,* 1 Ala. 246, 248.

The respondents cite cases which hold that champerty defeats the attorney's right to recover on *quantum meruit,*[3] but we think that they are not applicable to the facts of this case hereinbefore stated.

The District Court held that the attorney's fee should be paid out of the surplus as an expense of administration. It was decided that the suit was not brought under or to enforce the right conferred by the Tennessee stat-

[3] *Roller* v. *Murray,* 112 Va. 780; *Moreland* v. *Devenney, supra; Butler* v. *Legro, supra; Gammons* v. *Gulbranson,* 78 Minn. 21; *Taylor* v. *Perkins,* 171 Mo. App. 246.

utes (Shannon's Code, §§ 6097, 6099),[4] but was prosecuted under the provisions of § 70 of the Bankruptcy Act, and especially under subsections a(4)[5] and (5), and that under these provisions the trustee was entitled to recover the entire property for the purpose of administration in the bankruptcy court as general assets of the estate, citing *Globe Bank* v. *Martin,* 236 U. S. 288, 304; *Bunch* v. *Smith,* 116 Tenn, 201, 216. The Circuit Court of Appeals held that the payment should be made out of the amount of debts, and thus be borne by the creditors. Its decision went upon the ground that under the laws of Tennessee (Shannon's Code, §§ 6097, 6099) where a conveyance is set aside as fraudulent to creditors, counsel fees must be paid out of the debts recovered and cannot be charged against the surplus; that the suit was brought under §§ 67e[6] and 70e of the Bankruptcy Act,

[4] 6097.—"Any creditor, without first having obtained a judgment at law, may file his bill in chancery for himself, or for himself and other creditors, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering and delaying creditors, and subject the property, by sale or otherwise, to the satisfaction of the debt." (1851–52, c. 365, § 10.)

6099.—" If the bill is filed by one creditor for himself and others, the other creditors may make themselves parties at any time before final decree, by petition, agreeing to join in the bonds required in the case, and giving bond, with good security, to the original complainant, and in a sufficient penalty, to pay their proportional part of the recovery on such bonds." (*Ib.*)

[5] " Sec. 70. Title to Property.—a The trustee . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, . . . to all . . . (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: . . ."

[6] Section 67e confers upon state courts jurisdiction of suits by the trustee in bankruptcy to recover property fraudulently conveyed by the bankrupt within four months prior to the filing of the petition.

conferring upon the trustee the rights of creditors under the state statute, and that where a bankrupt fraudulently conveys property more than four months before bankruptcy, the attorney's fee must be paid out of the debts recovered, and cannot be charged against the surplus, and held the recovery of the trustee in the Chancery Court so limited.

That ruling cannot be sustained. The final decree in the suit in the Chancery Court adjudged and determined that the real title to the land and personal property thereon was and had been in the bankrupt from January 1, 1902, and that upon his bankruptcy it vested in the trustee. It is urged that the decree should be read in the light of the purposes of the suit and the laws of Tennessee, and should be deemed to be a judgment only for the amount of the debts. The purposes of the suit are disclosed by the complaint which, among other things, alleged that on January 1, 1902, the bankrupt procured a conveyance of the farm to be made by one Zellner to the bankrupt's wife, "Z. C. Sedberry, Trustee"; that there is a provision in the deed to the effect that she was to hold the land for the use and benefit of herself, her husband and their children; that she did not pay any part of the purchase price; that the bankrupt at all times was the owner thereof; that the wife and children were made parties in order to remove all clouds from the title; and the complaint, among other things, prayed judgment

Section 70e. "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy . . . and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

that the trustee be declared the owner of the property. At the time of the entry of judgment granting relief as prayed, it was stipulated that none of the parties would prosecute an appeal or seek any revision of it. The decree following the allegations and prayer vested in the trustee the property in question, and he holds it for the purposes of administration of the bankrupt estate. It is true that it was alleged that the bankrupt procured the farm to be conveyed on January 1, 1902, to his wife as trustee for the purpose of defrauding his existing and subsequent creditors, and that the complaint contains allegations that would be suitable in an action by creditors to set aside a fraudulent conveyance under the state statute, but these constitute no ground for cutting down the terms of the decree or for limiting the recovery to the amount of the debts, leaving the creditors to pay the attorney's fee for services made necessary by the respondent's failure to turn over to the trustee the property of the bankrupt. The value of the property affected by the decree being in excess of the amount required, the recovery must be deemed to be sufficient to pay all expenses, including a reasonable attorney's fee and the debts in full.

The evidence is sufficient to support the allowance made in the District Court of $7,500 as reasonable compensation for the services of the attorney for the trustee. The debts, plus the attorney's fee and expenses, amount to $29,000, and, in fixing the attorney's fee, that amount is properly to be regarded as the recovery in the chancery suit.

The attorney claims $1,127.28 for expenses. The referee held that the statement was not properly itemized, and allowed $750 as a lump sum and gave him opportunity, if unwilling to accept that amount, to furnish a statement properly setting forth the claim in detail. No further statement of the claim was made. The attorney

failed to establish his right to any greater sum on account of expenses.

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

ALBERT HANSON LUMBER COMPANY, LTD., v. UNITED STATES.

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

No. 300. Argued February 28, March 1, 1923.—Decided April 9, 1923.

1. Authority from Congress to condemn a particular canal for use as part of a specified waterway, includes by implication so much land on either side as is essential to that purpose. P. 584.
2. The Secretary of War, having been authorized to purchase the Hanson Canal for use as part of the intracoastal waterway project (Act of July 25, 1912, c. 253, 37 Stat. 212), could acquire it by condemnation, under the general authority given government officers by the Act of August 1, 1888, c. 728, 25 Stat. 357, so to proceed when authorized to procure real estate for the erection of a public building or for other public uses. P. 585.
3. The Act of April 24, 1888, c. 194, 25 Stat. 94, authorizing the Secretary of War to acquire by condemnation land, etc., needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors, does not operate to exclude the field to which it relates from the purview of the Act of August 1, 1888, *supra*. *Id.*
4. The fact that an act authorizing purchase of specific property limits the price to be paid, does not preclude resort to condemnation under a general statutory authority to proceed in that way, subject to the owner's constitutional right to have just compensation judicially ascertained and paid before his title passes and to retain his right to possession until reasonable, certain and adequate provision has been made for obtaining just compensation. P. 586.
5. In a proceeding by the United States to condemn a canal with land on each side,—*Held:*

(*a*) That resolutions of the board of directors of the corporate owner, reciting the necessity for the taking and an agreement with

the United States for a sale at a specified price and authorizing a conveyance, with certain reservations, upon payment of that sum, were not privileged, as an attempt to compromise, but admissions, admissible as evidence of the Government's right to take, decided by the court, and of the value of the property, decided by the jury. P. 588.

(*b*) That instructions that the jury should consider the original cost of the canal, the cost of reproducing it, and the reasons of the owner for contracting to sell it at a certain price, but might find a greater or less amount,—were unobjectionable. P. 589.

(*c*) That evidence of the original cost, of a much larger reproduction cost, and of the size, suitability for use, and condition of the canal, sustained a verdict for the amount of the original cost. *Id.*

277 Fed. 894, affirmed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court in a condemnation case.

Mr. E. Howard McCaleb, with whom *Mr. Emmet Alpha* was on the briefs, for plaintiff in error.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, 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 BUTLER delivered the opinion of the Court.

The United States instituted condemnation proceedings in the District Court for the Eastern District of Louisiana to acquire the so-called Hanson Canal and a strip of land three hundred feet wide including the canal. Plaintiff in error was the owner and objected to the taking on grounds hereinafter stated. Judgment was given condemning the property and vesting title in the United States when the amount found in favor of the owner shall have been paid. The case was taken by the owner to the Circuit Court of

Appeals, and there the judgment was affirmed. The case is here on writ of error to that court.

The owner contends that the District Court and Circuit Court of Appeals erred in holding that the acts of Congress relied upon by the Government confer authority to condemn the canal proper and the land adjacent to and outside the limits thereof within a strip of a total width of three hundred feet inclusive of the canal.

The property is sought to be taken to constitute a part of the intracoastal canal projected by the Government extending from Boston to the Rio Grande. A number of acts of Congress[1] must be considered. Prior to the Act

[1]Act approved March 2, 1907, c. 2509, 34 Stat. 1089, makes appropriation for: "Improving Inland Waterway Channel from Franklin to Mermentau, Louisiana, . . ."

Act approved March 3, 1909, c. 264, 35 Stat. 815, 816, provides: "That appropriations or authorizations for appropriations heretofore made may . . . be diverted or applied upon modified projects for the rivers and harbors hereinafter named, as follows: . . .

"Inland waterway between Franklin and Mermentau, Louisiana: To secure a suitable right of way for the proposed inland waterway channel from Franklin to Mermentau, adopted by Congress in the river and harbor Act of March second, nineteen hundred and seven, the location of the eastern terminus of said channel may be changed from the town of Franklin, on Bayou Teche, to such other point on said bayou as the Secretary of War may select: *Provided*, That the modification herein authorized shall not be made unless a valid title to the necessary right of way be secured to the United States free of cost."

Act approved February 27, 1911, c. 166, 36 Stat. 942, 943, makes appropriation for: "Inland waterway between Franklin and Mermentau, Louisiana: To insure the selection of the most suitable route for the inland waterway channel from Franklin to Mermentau adopted by Congress in the river and harbor act of March second, nineteen hundred and seven, the Secretary of War is hereby authorized, on the recommendation of the Chief of Engineers, to make such changes in the location of said channel as may be considered desirable: *Provided*, That no change shall be made under this authorization unless the necessary right of way is secured to the United States free of cost."

approved July 25, 1912, it was contemplated that the right of way necessary for the enterprise would be secured to the United States free of cost. That act authorized the Secretary of War to purchase the Hanson Canal for use as a part of the waterway from Franklin to Mermentau, Louisiana, included in the intracoastal project, at a cost not to exceed $65,000. September 29, 1913, the board of directors of the owning company adopted resolutions which referred to the pertinent provisions of the Acts of Congress respectively approved March 2, 1907, and July 25, 1912, and recited that "it is necessary for the United States to have and own a right of way three hundred feet in width in order to improve and enlarge said canal and make the same a part of the said Inland Waterway;" that the United States has proposed and agreed to purchase the canal, including a three hundred feet wide strip of right of way and certain locks and other constructions thereon, and authorized and empowered the vice president who was the chief executive officer of the corporation, upon the payment of $65,000 as compensation, to convey the property to the United States.

These resolutions and the other circumstances disclosed by the record make it sufficiently clear that the land on either side of the canal is essential to the enterprise. It

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Act approved July 25, 1912, c. 253, 37 Stat. 201–212.

Act approved April 24, 1888, c. 194, 25 Stat. 94—an act to facilitate the prosecution of works projected for the improvement of rivers and harbors—provides: "That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: . . ."

Act approved August 1, 1888, c. 728, 25 Stat. 357.

follows that if the condemnation of the canal proper is authorized, the land may also be taken.

For authority to condemn, the United States relies on the Acts of July 25, 1912, and August 1, 1888. The pertinent provisions are:

"Improving waterway from Franklin to Mermentau, Louisiana: The Secretary of War is hereby authorized to purchase, for use as a part of said waterway, the so-called Hanson Canal . . . at a cost not to exceed $65,000, . . ." (c. 253, 37 Stat. 212.)

"That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, . . ." and jurisdiction is conferred upon the District Courts of proceedings for such condemnation, and the practice, pleadings, forms and proceedings are made to conform as near as may be to those existing in like cases in the courts of the State within which such District Courts are held (c. 728, 25 Stat. 357.)

Plaintiff in error argues that the Act of April 24, 1888, cited in the margin, conferring power upon the Secretary of War to condemn land, right of way and material needed to enable him to carry on work in connection with improvement of rivers and harbors, is exclusive and evidences an intention that the Act of August 1, 1888, shall not apply in that field, and that the Acts of 1907, 1909, 1911, and 1912, engraft an exception on the Act of April 24, 1888, to the effect that, as to the Hanson Canal property here sought to be taken, no power to condemn exists, and that it must be acquired, if at all, by contract of purchase at a price not in excess of the sum specified. It is

true that the authority granted by the Act of August 1, 1888, to some extent overlaps that granted by the earlier statute, (April 24, 1888) but there is no conflict between them. The earlier does not operate to limit the effect of the later act. The Act of 1912 specifically authorizes the purchase of the property because deemed necessary for public use. It would have been futile to authorize the purchase of an essential part of a great project, withholding power to condemn, and so leave it within the power of the owner to defeat the program by demanding a price in excess of $65,000 or by refusing to sell at all. The argument is without force.

Another contention of plaintiff in error is that the provision of the Act of July 25, 1912, limiting the authorized purchase price to $65,000, negatives and necessarily excludes authority to condemn. This is not a case where attempt is made by legislation to fix or limit the just compensation to be paid for private property condemned. It is not like *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, where Congress sought to exclude the value of the owner's franchise right to exact tolls for service performed, thereby violating the Fifth Amendment. The provision authorizing the Secretary to purchase at a cost not to exceed a specified amount has nothing to do with the judicial ascertainment of just compensation for the property condemned. *Shoemaker* v. *United States,* 147 U. S. 282, 302. Neither the right of the owner to be put in as good position pecuniarily as he would have been if his property had not been taken,[2] nor the right to have ascertainment and payment of just compensation as a condition of the taking,[3] is attempted to be impaired by

[2] *Seaboard Air Line Ry. Co.* v. *United States, ante,* 299, and cases there cited.

[3] *United States* v. *Jones,* 109 U. S. 513, 518; *Searl* v. *School District, Lake County,* 133 U. S. 553, 562; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 337; *United States* v. *Sargent,* 162 Fed. 81, 83.

legislation here under consideration. It is not necessary that the exact amount required shall be appropriated or that legislation shall indicate no limit upon the expenditure for property to be taken. There is no declaration or evidence of legislative purpose to violate the just compensation clause or to secure the property in question for less than the full amount to which the owner was entitled.[4] The power of eminent domain is not dependent upon any specific grant; it is an attribute of sovereignty, limited and conditioned by the just compensation clause of the Fifth Amendment. The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain and adequate provision is made for obtaining just compensation. *Cherokee Nation* v. *Southern Kansas Ry. Co.,* 135 U. S. 641, 659; *Bauman* v. *Ross,* 167 U. S. 548, 598, 599; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 568, 569; *United States* v. *Jones,* 109 U. S. 513, 518; *Boom Co.* v. *Patterson,* 98 U. S. 403, 406.[5] The authority to condemn is not negatived or affected by the limit set upon cost in the authorization of the Secretary to purchase.

The Acts of July 25, 1912, and of August 1, 1888, make it obvious that the Secretary of War was authorized to acquire the property by purchase or condemnation. The authority to condemn conferred by the last mentioned act extends to every case in which an officer of the Government is authorized to procure real estate for public uses. See *United States* v. *Beaty,* 198 Fed. 284 (reviewed in 203 Fed. 620, but not overruled on this point, and writ of error dismissed in 232 U. S. 463); *United States* v. *Graham & Irvine,* 250 Fed. 499.[6]

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[4] *In re Manderson,* 51 Fed. 501.

[5] Cf. *In re Military Training Camp,* 260 Fed. 986, 990; Act of July 2, 1917, c. 35, 40 Stat. 241.

[6] For legislative history of the act, see 19 Cong. Rec. part 2, p. 1387; part 7, pp. 6401, 6505.

Plaintiff in error contends that the court erred in receiving in evidence the resolutions of the directors, in giving to the jury the instructions following:

"Coming to consider the value. You have heard what it cost to dig, what it would cost to dig it now, this contract that they made to sell it, and the reasons that induced them to make the contract. All that evidence you will consider. . . .

"Now you are not bound by the $65,000 that they agreed to; if you think they ought to get more than that, why you can award them more than that. If you think they ought to get less than that, you can award them less."

and also in holding that the verdict is supported by the evidence.

There were two principal issues of fact: (1) the necessity of taking the strip of land three hundred feet wide, inclusive of the canal, and (2) the amount of compensation to which the owner was entitled.

The resolutions hereinbefore mentioned stated that it is necessary for the United States to have and own a right of way three hundred feet in width in order to improve and enlarge said canal and make the same a part of the said inland waterway, that the United States had agreed to purchase the property from the company for $65,000, and authorized the conveyance of the same to the United States upon payment of that sum, possession to be retained until the purchase price was actually paid, and the right to cut trees thereon for a specified time, and right of ingress and egress from lateral canals to be reserved.

Two grounds of objection are urged: (1) that the issue of necessity was cognizable in equity and that the court, sitting as a chancellor, should have determined the equity issue prior to the trial of the law issue, and (2) that the resolutions offered in evidence constitute, and tend

merely to prove, an attempt to compromise. The resolutions contained a distinct admission of fact that it was necessary to take the strip of land in question. This admission was made for the purpose of showing the right of the Secretary of War to purchase the property. They were admissible in evidence for that purpose. The judge rightly decided at the trial that the taking was for a public purpose and the Government had a right to take.

The only question submitted to the jury was the amount the owner was entitled to receive for the property. At the time of the adoption of the resolutions, condemnation proceedings had not been commenced; they were voluntarily adopted; the specified price was fixed with perfect freedom; they show a completed agreement of purchase and sale; and there is no reason why they should not be considered as the owner's admission of the then value of the property. The company had opportunity to and did introduce evidence in explanation of the circumstances attending the adoption and the fixing of the price therein. The court did not err in receiving the evidence on the question of fact submitted to the jury. *Seaboard Air Line Ry.* v. *Chamblin,* 108 Va. 42; *O'Malley* v. *Commonwealth,* 182 Mass. 196; *Montana Tonopah Mining Co.* v. *Dunlap,* 196 Fed. 612, 617; *Spring Valley Waterworks* v. *San Francisco,* 192 Fed. 137, 164; *City of Springfield* v. *Schmook,* 68 Mo. 394; *Froysell* v. *Lewelyn* (Eng.), 9 Price, 122; 147 Reprint, 41.

The court instructed the jury to consider what it did cost and what it would cost now to dig the canal, the reasons that induced the company to make the contract, and that in reaching a verdict they were not bound by the $65,000 agreed upon and might find an amount greater or less than that. The objections urged against the charge are not well founded.

The evidence tended to show that the original cost of the canal was $65,000, and that it would cost $152,000 to

reproduce it. There was evidence disclosing the size of the canal, and its suitability for use, together with the condition of the property. It cannot be said the verdict for $65,000 is without support. *Erie R. R. Co.* v. *Winter,* 143 U. S. 60, 75.

The judgment of the Circuit Court of Appeals is affirmed.

PEOPLE OF THE STATE OF NEW YORK EX REL. DOYLE ET AL. *v.* ATWELL, ACTING CHIEF OF POLICE OF THE CITY OF MOUNT VERNON, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 306. Submitted March 12, 1923.—Decided April 9, 1923.

This Court is without jurisdiction to review a judgment of a state court based not only upon a ground involving a federal question, but also upon an independent ground of state procedure involving no federal question and broad enough to sustain the judgment. P. 592.
Writ of error to review 197 App. Div. 225; 232 N. Y. 96, dismissed.

ERROR to a judgment of the Supreme Court of New York, entered on mandate from the Court of Appeals, dismissing petitions for *habeas corpus.*

Mr. Arthur Garfield Hays for plaintiffs in error.

Mr. Frederick E. Weeks for defendants in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The record presents a preliminary question as to our jurisdiction under the writ of error.

The relators were arrested by the police of the City of Mt. Vernon, N. Y., while holding a street meeting, on the charge of violating an ordinance which prohibited, under

penalty of fine, the gathering or assembling of persons or the holding of public meetings upon the public streets of the city, without special permit of the mayor. Before trial the relators obtained writs of habeas corpus from the Supreme Court of the State, at Special Term; which, being heard together, resulted in an order sustaining the writs and discharging the relators. The Appellate Division of the Supreme Court, on appeal, reversed this order and dismissed the writs [197 App. Div. 225]; and the Court of Appeals of the State, on a further appeal, affirmed the order of the Appellate Division [232 N. Y. 96,] and remitted the record and proceedings to the Supreme Court to be proceeded upon according to law. Thereafter this writ of error was granted by the Chief Judge of the Court of Appeals to review the judgment of that court.

It is urged, in substance, that the Court of Appeals denied the contention of the relators that the ordinance, both by its provisions and through the alleged discriminatory manner in which it was enforced, deprived them of their rights of freedom of speech and assembly in violation of the Fourteenth Amendment. The Court of Appeals, however, held not only that the ordinance was a valid and constitutional exercise of the police power, but also that the writ of habeas corpus was not, under the state practice, the proper method of contesting its validity. In the opinion of that court, after passing upon the constitutional question, it was said: "A writ of habeas corpus cannot take the place of (or) perform the functions of an appeal from a judgment of conviction. The court before which a person is brought under such writ simply inquires whether the court rendering the judgment had jurisdiction to do so. If that fact appears, and the mandate under which the defendant is held be regular upon its face, the writ must be dismissed. (*People ex rel. Hubert* v. *Kaiser,* 206 N. Y. 46.) The magistrate before

whom the relators were taken had jurisdiction to try them for a violation of the ordinance in question, and they are now legally in custody. The Appellate Division, therefore, properly held that the order of the Special Term was erroneous, reversed the same, dismissed the writs and remanded the relators."

It is settled law, that where the record discloses that the judgment of a state court was based, not alone upon a ground involving a federal question, but also upon another and independent ground, broad enough to maintain the judgment, this Court will not take jurisdiction to review such judgment and will dismiss a writ of error brought for that purpose. *Eustis* v. *Bolles,* 150 U. S. 361, 366; *Dibble* v. *Bellingham Bay Land Co.,* 163 U. S. 63, 69; *Allen* v. *Arguimbau,* 198 U. S. 149, 155; *Adams* v. *Russell,* 229 U. S. 353, 358; *Cuyahoga River Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 304.

Hence, as the decision of the Court of Appeals as to the effect of the writs of habeas corpus was broad enough to maintain the judgment, independently of its decision as to the constitutional question, the writ of error is

Dismissed.

BALTIMORE & OHIO RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 305. Argued March 12, 1923.—Decided April 9, 1923.

1. The Dent Act, c. 94, 40 Stat. 1272, was intended to remedy irregularities and informalities in the mode of entering into the agreements to which it relates; not to enlarge the authority of the agents by whom they were made. P. 596.
2. The "implied agreement" contemplated by this act is not an agreement "implied in law," or *quasi* contract, but an agreement "implied in fact," founded on a meeting of minds inferred, as a fact, from conduct of the parties in the light of surrounding circumstances. P. 597.

3. Findings of fact showing that the claimant railway company constructed temporary barracks for troops, who were guarding its property as well as that of the Government, and undertook this without any order from their commanding officer, but voluntarily and without mentioning compensation, apparently from its own desire to provide for the comfort of the troops—*held* an insufficient basis for implying an agreement that the Government would pay the cost of construction. P. 599.

57 Ct. Clms. 140, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition, after a hearing upon the merits, in an action to recover compensation under the Dent Act.

Mr. John F. McCarron, with whom *Mr. George E. Hamilton* was on the brief, for appellant.

Mr. Solicitor General Beck and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, appeared for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Railway Company filed its petition, under the Dent Act (March 2, 1919, c. 94, 40 Stat. 1272), to recover compensation for constructing temporary barracks for the use of United States troops under an "implied agreement" alleged to have been entered into by it with the United States, in December, 1917, through Col. Kimball, Expeditionary Quartermaster of the War Department, at Locust Point, Baltimore, Maryland, acting under the authority of the Secretary of War. The Court of Claims, after a hearing on the merits, and upon its findings of fact, dismissed the petition. 57 Ct. Clms. 140.

The material facts shown by the findings are these: The Railroad Company owned at Locust Point, a suburb of Baltimore, eight piers, which were guarded by its civilian employees. At the request of Col. Kimball, who was

in charge of the expeditionary depot at Baltimore and of the supplies arriving for shipment to Europe, the company, in October, 1917, leased one of these piers to the Government. Two of the other piers with much other property belonging to the company were destroyed or damaged by a fire supposed to be of incendiary origin. Thereupon Col. Kimball and the president of the company separately requested the Secretary of War to send a guard; the vice president of the company offering to supply a wrecking train as quarters for them. Two companies of the National Guard were sent to Locust Point, with sufficient tentage. They were quartered for a time in the wrecking train furnished by the company. Their duty was primarily to protect the government property and the piers leased by it, sending patrols throughout the railroad yard to guard cars containing its property, and generally to guard all the piers and property at Locust Point. The company, however, also maintained the civilian guards and a fire department for all of its property, whether leased or not. Later, the wrecking train having been moved away by the company, the troops moved into tents. The weather during the fall and winter was very cold and inclement. Most of the soldiers were Baltimoreans and were frequently visited by their relatives. There was some sickness among them. Their relatives complained to the railroad officials of the hardships they had to undergo in the tents; and these officials were anxious to make them as comfortable as possible. Several times in very cold weather Col. Kimball remarked to the company's agent at Locust Point, whose duty it was to confer with him on railroad matters, that the troops ought to have better quarters. On one occasion this agent suggested fitting up an unused transfer shed belonging to the company, standing near the pier that had been leased to the Government. Col. Kimball agreed that it would be a fine thing to make the men as com-

fortable as possible. He did not, however, ask that this work be done; and nothing was said about compensation. This agent having taken up with the company's officials the matter of fitting up the transfer shed, its chief engineering draftsman was directed to see as to the adaptability of the transfer shed for barracks. He made blue print plans for remodeling the shed; which he showed to the officer in command of the troops, to learn whether, in his opinion, they would satisfactorily house the troops. This officer, while not undertaking to approve the plans, suggested the amount of facilities that would be required. Nothing was said to him, however, about expense or compensation for the work. The construction of the temporary barracks was completed in the latter part of December; and the troops moved in. Two more piers were afterwards leased by the company to the Government. The barracks were occupied by the troops until May, 1919; and the piers were returned to the company in June, 1919. No government officials connected with the work at Locust Point had any authority to order the construction of the temporary barracks; and no orders were given by any of them for such construction. The subject of compensation was not mentioned in any conversations between these officers and the railroad officials until more than a week after the barracks had been completed, when the chief draftsman told the officer in command of the troops that he thought the Government should reimburse him for some of his trouble.

The Court of Claims made no finding as to the amount expended by the company in constructing the temporary barracks; the company having, as the court stated, submitted no evidence to establish the different items of its claim. In the absence of a finding as to the amount of the expenditures, as to which the company had the burden of proof, the judgment of the Court of Claims might be properly affirmed upon that ground. *Crocker* v. *United*

States, 240 U. S. 74, 82. However, as the Government does not here question the amount of the claim, we pass to its further consideration upon the merits.

Upon the findings of fact we conclude that the petition was rightly dismissed, without reference to the amount of the claim, for two reasons:

1. The Dent Act authorizes the award of compensation for expenditures connected with the prosecution of the war when they were made by the claimant upon the faith of an "agreement, express or implied," entered into by him with an officer or agent acting under the authority of the Secretary of War or of the President, and such agreement was not executed in the manner provided by law. 40 Stat. 1272, 1273; *American Smelting & Refining Co.* v. *United States,* 259 U. S. 75, 79. The act was intended to remedy irregularities and informalities in the mode of entering into such agreements; not to enlarge the authority of the agents by whom they were made. To entitle the claimant to compensation under such an agreement it is essential that the officer or agent with whom it was entered into should not merely have been holding under the Secretary of War or the President, but that he should have been acting within the scope of his authority. It was not intended, for example, that an officer in one branch of the military service or one of inferior rank could bind the Government by an agreement as to matters relating to an entirely different branch of the service or within the control of his superior officers, as to which he had no authority whatever; or that an agreement into which he entered, although beyond his authority, should become binding upon the Government because it was made in the form of an express agreement not executed within the legal manner or of an implied agreement merely—that is, that his authority should be enlarged by the irregularity or informality with which it was exercised. See *United States* v. *North American Transportation &*

Trading Co., 253 U. S. 330, 333; and *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327.

Here, however, there is no finding that Col. Kimball had any authority to enter into the alleged agreement; and, on the contrary, such authority is negatived by the finding that none of the government officials connected with the work at Locust Point had any authority to order the construction of a temporary barracks.

Hence an essential element in the establishment of the company's claim is lacking.

2. The " implied agreement " contemplated by the Dent Act as the basis of compensation, is not an agreement " implied in law," more aptly termed a constructive or *quasi* contract, where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress, but an agreement " implied in fact," founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. See, by analogy, as to the construction of similar jurisdictional statutes, *United States* v. *Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 566; *Russell* v. *United States*, 182 U. S. 516, 530; *Harley* v. *United States*, 198 U. S. 229, 234; *United States* v. *Anciens Etablissements*, 224 U. S. 309, 311, 320; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, 232; *Tempel* v. *United States*, 248 U. S. 121, 129; and *Sutton* v. *United States*, 256 U. S. 575, 581; and, generally, *Railway Co.* v. *Gaffney*, 65 Ohio St. 104, 113; *Woods* v. *Ayres*, 39 Mich. 345, 350; *Hertzog* v. *Hertzog*, 29 Pa. St. 465, 468; *Knapp* v. *United States*, 46 Ct. Clms. 601, 643; and 1 Bouv. Dict. (Rawle's 3d Rev.) 660. That this provision of the Dent Act relates only to such actual agreements, implied in fact from the circumstances, is not only indicated by its purpose, as expressed in the caption, of providing relief in cases of " contracts " connected

with the prosecution of the war, but is conclusively shown by the fact that the "agreement" is described as one "*entered into,* in good faith," by the claimant, with an officer or agent of the Government, upon the faith of which expenditures have been made or obligations incurred, and which has not been executed as prescribed by law; this language aptly describing an actual agreement implied in fact, but being manifestly inapplicable to a constructive agreement implied in law.

Such an agreement will not be implied unless the meeting of minds was indicated by some intelligible conduct, act or sign. *Woods* v. *Ayres, supra,* p. 351; and cases there cited. And so an agreement to pay for services rendered by the plaintiff will not be implied when they were rendered spontaneously, without request, as an act of kindness (*Woods* v. *Ayres, supra,* p. 351); when the plaintiff did not expect payment, or under the circumstances did not have reason to entertain such expectation (*Coleman* v. *United States,* 152 U. S. 96, 99; *Lafontain* v. *Hayhurst,* 89 Maine, 388, 391); when the defendant understood that the plaintiff would neither expect nor demand remuneration (*Harley* v. *United States, supra,* p. 235); when unusual expenses were incurred, without special request or previous notice, and without any intimation or suggestion that compensation would be looked for or made (*Baltimore & Ohio R. R. Co.* v. *United States, ante,* 385); when the defendant neither requested the services nor assented to receiving their benefit under circumstances negativing any presumption that they would be gratuitous (*Railway Co.* v. *Gaffney, supra,* p. 116; 2 Abb. Tr. Ev., 3d ed., 912, and cases there cited);[1] and

[1] But an agreement to compensate the plaintiff for the use of his property will be implied when it was used by the defendant without claim of right, and the plaintiff consented to such use with the expectation of receiving compensation. *United States* v. *Palmer,* 128 U. S. 262, 269; *United States* v. *Berdan Fire-Arms Mfg. Co.,* 156

when the circumstances account for the transaction on a ground more probable than that of a promise of recompense (*Woods* v. *Ayres, supra,* p. 351.)[2]

In the present case the findings of fact show that Col. Kimball did not order the construction of the barracks; which was voluntarily undertaken by the company, without saying anything whatever about compensation, apparently from its own desire to provide for the comfort of the troops, who were guarding its property as well as that of the Government, after it had removed the wrecking train which it had offered to supply as their quarters. It does not appear from the findings that Col. Kimball requested the construction of the barracks; that the company intimated that it would expect payment from the Government or that Col. Kimball suggested that such payment would be made; or that the company in fact expected compensation. It is clear that these findings furnish no substantial basis for implying an agreement that the Government would pay the cost of the construction.

Hence, a second essential element in the establishment of the company's claim is lacking.

And the judgment of the Court of Claims is

Affirmed.

U. S. 552, 567; *United States* v. *Anciens Etablissements, supra,* p. 320. And see, as to the implied agreement to pay for property appropriated by legislative authority for a public use, without condemnation proceedings, *United States* v. *North American Transportation & Trading Co.,* 253 U. S. 330, and cases there cited.

[2] As to the character of evidence by which an implied agreement to pay for services is generally established, see 2 Abb. Tr. Ev. 913, and cases there cited.

HODGES ET AL. *v.* SNYDER ET AL., AS MEMBERS OF THE BOARD OF EDUCATION OF THE ERWIN INDEPENDENT CONSOLIDATED SCHOOL DISTRICT NO. 1, OF KINGSBURY COUNTY, SOUTH DAKOTA, ET AL.

ERROR TO THE CIRCUIT COURT OF KINGSBURY COUNTY, NINTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA.

No. 432. Motion to dismiss or affirm submitted February 26, 1923.—Decided April 9, 1923.

1. Where, under the local practice, the original papers sent to the State Supreme Court as the record on appeal are remitted by that court with copies of its judgment and opinion to a lower court, without retaining a copy of such record, a writ of error from this Court to review the judgment of the State Supreme Court is properly directed to the lower court in which the record then is found. P. 601.
2. The right of a taxpayer in a decree enjoining the maintenance of an illegal school district and issuance of bonds therefor, is not private but public in character; and its loss through an act of the legislature validating the district but not affecting his right to costs, does not deprive him of property without due process of law. P. 601.

45 S. Dak. 149, affirmed.

ERROR to review a judgment of the Supreme Court of South Dakota reversing, except as to costs, a decree of the State Circuit Court (to which the record was remitted), which permanently enjoined the defendants in error from maintaining a consolidated school district and issuing bonds therefor.

Mr. Samuel Herrick, Mr. Philo Hall and *Mr. Wallace E. Purdy* for plaintiffs in error.

Mr. T. H. Null and *Mr. Max Royhl* for defendants in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The defendants in error move to dismiss the writ of error or affirm the judgment.

1. The ground of the motion to dismiss is that there is want of jurisdiction because the writ is not directed to the Supreme Court of the State. It was sued out to review a final judgment of that court reversing, on appeal, an order of the Circuit Court, and remanding the cause with direction to vacate the same. Under the local practice the original papers that had been transmitted to the Supreme Court as the record on the appeal, were remitted to the Circuit Court, with copies of the judgment and opinion of the Supreme Court (Rev. Code, S. Dak., 1919, § 3170); no copy of such record being retained by the Supreme Court. The rule of practice has been long established that in such case, in order to bring up the record which is essential to a review of the judgment of the appellate court, the writ of error is properly directed to the lower court in which the record is then found. *Gelston* v. *Hoyt,* 3 Wheat. 246, 304, 335; *McGuire* v. *Commonwealth,* 3 Wall. 382, 386; *Atherton* v. *Fowler,* 91 U. S. 143, 148; *Polleys* v. *Black River Co.,* 113 U. S. 81, 82; *McDonald* v. *Massachusetts,* 180 U. S. 311, 312; *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 200 (involving a similar writ of error to another circuit court of South Dakota); and other cases therein cited. Hence the motion to dismiss is denied.

2. The ground of the alternative motion to affirm the judgment of the Supreme Court is that the writ was taken for delay only and presents no substantial question for review. It should be granted if the questions on which the decision depends are so wanting in substance as not to need further argument. Rule 6, § 5; *Missouri Pacific Ry. Co.* v. *Castle,* 224 U. S. 541, 544; *Chicago, Rock Island & Pacific Ry. Co.* v. *Devine,* 239 U. S. 52, 54; *City of Boston* v. *Jackson,* 260 U. S. 309.

A single question is presented, which arises as follows: The plaintiffs in error, as resident taxpayers, filed a complaint in the Circuit Court challenging the validity of a consolidated school district which had been organized by

the merger of several smaller districts, and praying that the defendants in error, as its officers, be enjoined from further maintaining schools or erecting school buildings therein, or issuing bonds thereof. The Supreme Court, on an appeal from the Circuit Court, held that the attempted organization of the consolidated district "was not authorized by any law then in force . . . and was wholly futile" (43 S. Dak. 166, 176), and entered judgment remanding the cause for further proceedings in accordance with its decision. The legislature thereupon passed a curative act legalizing and validating all proceedings relating to the organization of any consolidated school district attempted to be made as this had been, as of the date when such district was organized. Laws S. Dak., Spec. Sess., 1920, c. 47. Before this curative act went into effect the Circuit Court, in accordance with the decision of the Supreme Court, entered judgment adjudging the invalidity of the consolidation, permanently enjoining the defendants from conducting the consolidated district, as prayed in the complaint, and awarding costs to the plaintiffs. At a later day of the term, after the curative act had gone into effect, a motion by the defendants to set aside this injunction was denied. Thereafter, on a second appeal, the Supreme Court held that the curative act had validated the defective organization of the consolidated district (45 S. Dak. 149), and entered the judgment now sought to be reviewed, reversing the order of the Circuit Court granting the permanent injunction and remanding the cause with direction to vacate so much of its judgment as awarded such injunction; but not reversing its judgment as to costs.

The plaintiffs in error concede that the legislature, in the general exercise of its inherent power to create and alter the boundaries of school districts, may create new districts by the consolidation of others. *Stephens* v. *Jones,* 24 S. Dak. 97, 100. And they likewise recognize that, since the legislature had the power to ratify that

which it might have originally authorized, there would have been no violation of due process if the curative act had been enacted and become effective before any adjudication had been made in the pending litigation as to the invalidity of the consolidated district. *United States* v. *Heinszen & Co.,* 206 U. S. 370, 386; *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226, 232; *Charlotte Harbor & Northern Ry. Co.* v. *Welles,* 260 U. S. 8. And see, generally as to giving effect to acts passed *pendente lite* but before the hearing, *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331; *Mills* v. *Green,* 159 U. S. 651, 656; and *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 464.

Their sole contention is that as the curative act was not enacted until after the Supreme Court had decided, on the first appeal, the consolidated district was invalid, and did not go into effect until after the Circuit Court had entered judgment adjudging its invalidity and enjoining the defendants from further conducting its affairs, it deprived them, as applied by the Supreme Court, without due process, of the private property rights which had been vested in them under these adjudications.

It is true that, as they contend, the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. *Pennsylvania* v. *Wheeling Bridge Co.,* 18 How. 421, 429; *The Clinton Bridge,* 10 Wall. 454, 463; *United States* v. *Klein,* 13 Wall. 128, 146; *McCullough* v. *Virginia,* 172 U. S. 102, 124 (in which the repealing act was passed after judgment by the trial court).

This rule, however, as held in the *Wheeling Bridge Case,* does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally

established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away. *Pennsylvania* v. *Wheeling Bridge Co., supra,* pp. 431, 439. This case has been cited with approval in *The Clinton Bridge, supra,* p. 463 (likewise involving a public, as distinguished from a private, right of action), *United States* v. *Klein, supra,* p. 146, *Stockdale* v. *Insurance Companies, supra,* p. 332, and *Mills* v. *Green, supra,* p. 655. And so a judgment for the restitution of taxes collected under the ostensible authority of a general statute will be reversed when, after the rendition of such judgment, a statute has been passed legalizing and ratifying such taxation. *Rafferty* v. *Smith, Bell & Co., supra,* p. 232.

In the *Wheeling Bridge Case,* as in the *Clinton Bridge Case,* the public right involved was that of abating an obstruction to the navigation of a river. The right involved in the present suit, of enjoining the maintenance of an illegal school district and the issuance of its bonds, is likewise a public right shared by the plaintiffs with all other resident taxpayers. And while in the *Wheeling Bridge Case* the bill was filed by the State, although partly in its proprietary capacity as the owner of certain canals and railways (9 How. 647, 648), the doctrine that a judgment declaring a public right may be annulled by subsequent legislation, applies with like force in the present suit, although brought by individuals primarily for their own benefit; the right involved and adjudged, in the one case as in the other, being public, and not private.

The judgment of the Supreme Court in this case affected merely the public right involved—the plaintiffs' judgment for costs not being impaired,—and was clearly in accordance with the doctrine of the *Wheeling Bridge Case.* And since the question does not require further argument, the alternative motion of the defendants in error is granted, and the judgment is

Affirmed.

DECISIONS PER CURIAM, FROM JANUARY 30, 1923, TO AND INCLUDING APRIL 9, 1923, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. —. SERGIUS APOSTOLOFF, APPELLANT, *v.* CONRAD HUBERT ET AL. Submitted February 20, 1923. Decided February 26, 1923. Motion to docket this cause, and for leave to proceed in forma pauperis, denied. *Mr. Henry E. Davis* for appellant.

No. —, Original. *Ex parte:* IN THE MATTER OF FRANCE & CANADA STEAMSHIP CORPORATION, PETITIONER. Submitted February 20, 1923. Decided February 26, 1923. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. J. Culbert Palmer* and *Mr. Carroll G. Walter* for petitioner.

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. February 26, 1923. On consideration of the petition for a rehearing or to remand this cause to the Circuit Court of Appeals for the Eighth Circuit, it is ordered by the Court that said cause be, and the same is hereby, transferred to the said Circuit Court of Appeals, pursuant to the Act of Congress of September 14, 1922. *Mr. Otto A. Schlobohm, Mr. Wm. J. Hughes* and *Mr. Ephrim Caplan* for appellants. *Mr. Edward W. Foristel* for appellees. [See 260 U. S. 694.]

No. 749. CENTRAL COAL & COKE COMPANY *v.* JACOB OCEPEK. Certiorari to the Supreme Court of the State of Arkansas. Submitted February 20, 1923. Decided

February 26, 1923. *Per Curiam.* Reversed with costs, upon the authority of *Baltimore & Ohio R. R. Co.* v. *Koontz,* 104 U. S. 5, 15; *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co.,* 260 U. S. 261; *Lee* v. *Chesapeake & Ohio Ry. Co.,* 260 U. S. 653. *Mr. L. C. Boyle* for petitioner. No brief filed for respondent.

No. 18, Original. STATE OF OKLAHOMA *v.* STATE OF TEXAS. Leave to file stipulation and petition in intervention submitted February 26, 1923. Order entered March 5, 1923. It is ordered that the petition in intervention of John Tah Hah et al. be filed in accordance with the stipulation that the evidence introduced in said cause by any of the parties shall be taken as evidence as to these interveners, and that the rights of said interveners may be determined by the decree to be rendered herein. *Mr. Henry E. Asp* for interveners. *Mr. W. W. Dyar,* Special Assistant to the Attorney General, for the United States.

No. 716. AMERICAN TRUST COMPANY *v.* S. S. MCNINCH ET AL. Error to the Supreme Court of the State of North Carolina. Motion to dismiss or affirm submitted February 20, 1923. Decided March 5, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Thomas* v. *Iowa,* 209 U. S. 258, 263; *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.,* 228 U. S. 326, 331, 333; *Bowe* v. *Scott,* 233 U. S. 658, 664–665; (2) *McCorquodale* v. *Texas,* 211 U. S. 432, 437; *St. Louis & San Francisco R. R. Co.* v. *Shepherd,* 240 U. S. 240, 241; *Mergenthaler Linotype Co.* v. *Davis,* 251 U. S. 256, 258–259; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 6–7. *Mr. John M. Robinson* for plaintiff in error. *Mr. William P. Bynum, Mr. W. Cleveland Davis* and *Mr. John J. Parker* for defendants in error. [See *post,* 618.]

No. 498. JAMES K. COCHRAN ET AL. *v.* COULTON M. BECKER. Error to the Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted February 26, 1923. Decided March 5, 1923. *Per Curiam.* Dismissed for want of jurisdiction, upon authority of § 6, Act of September 6, 1916, c. 448, 39 Stat. 726, 727. *Mr. Harris Kobey,* pro se. *Mr. Oliver J. Miller* for defendant in error.

No. 130. HARRIET STOCKER ET AL. *v.* NEMAHA VALLEY DRAINAGE DISTRICT No. 2. Error to the Supreme Court of the State of Nebraska. Submitted February 28, 1923. Decided March 5, 1923. *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. Halleck F. Rose, Mr. George N. Foster* and *Mr. T. R. P. Stocker* for plaintiffs in error. *Mr. Fred A. Wright* for defendant in error.

No. 653. PUGET SOUND POWER & LIGHT COMPANY ET AL. *v.* COUNTY OF KING ET AL. Error to the Supreme Court of the State of Washington. Submitted February 26, 1923. Order entered March 5, 1923. Motion to reinstate this cause on the docket granted. *Mr. James B. Howe, Mr. Walter F. Meier, Mr. Thomas J. L. Kennedy* and *Mr. F. D. McKenney* for plaintiffs in error. *Mr. Howard A. Hanson* and *Mr. Malcolm Douglas* for defendants in error. [See *post,* 626.]

No. 314. BRASHER LUMBER COMPANY, FOR THE USE OF ITSELF, ET AL. *v.* SOUTHERN RAILWAY COMPANY. Appeal from the District Court of the United States for the Southern District of Alabama. Submitted March 9, 1923.

Decided March 12, 1923. *Per Curiam.* Affirmed upon the authority of *Baltimore & Ohio R. R. Co.* v. *Koontz,* 104 U. S. 5, 15; *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co.,* 260 U. S. 261; *Lee* v. *Chesapeake & Ohio Ry. Co.,* 260 U. S. 653. *Mr. T. M. Stevens* and *Mr. Edgar Watkins* for appellants. *Mr. Gregory L. Smith* for appellee.

No. 522. Jay Burns Baking Company et al. *v.* Samuel R. McKelvie, as Governor of the State of Nebraska, et al. Error to the Supreme Court of the State of Nebraska. Submitted March 12, 1923. Order entered March 19, 1923. Motion to reinstate cause on the docket granted, but a rule is ordered to issue to show cause why the case should not be dismissed for lack of statutory authority to substitute the new governor for the ex-governor, in view of *Irwin* v. *Wright,* 258 U. S. 219, and *United States ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600. *Mr. Matthew A. Hall* and *Mr. Carroll S. Montgomery* for plaintiffs in error. No appearance for defendants in error. [See *post,* 625.]

No. 313. J. M. MacDonald Coal Mining Company *v.* United States. Appeal from the Court of Claims. Argued March 12, 1923. Decided March 19, 1923. *Per Curiam.* Affirmed upon the authority of *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188. *Mr. William S. Hammers,* for appellant, submitted. *Mr. Assistant Attorney General Riter,* with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

No. 326. Jewel Redwine *v.* State of Texas. Error to the Court of Criminal Appeals of the State of Texas. Submitted March 15, 1923. Decided March 19, 1923. *Per Curiam.* Affirmed with costs upon the authority of

Ughbanks v. *Armstrong,* 208 U. S. 481. *Mr. Joe Burkett* and *Mr. A. H. Carrigan* for plaintiff in error. *Mr. W. A. Keeling* and *Mr. L. C. Sutton* for defendant in error.

No. 327. VIRGINIA HUEY ET AL. *v.* D. A. BROCK ET AL. Error to the Supreme Court of the State of Alabama. Argued March 15, 16, 1923. Decided March 19, 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. George H. Lamar,* with whom *Mr. Theodore J. Lamar* was on the brief, for plaintiffs in error. No appearance for defendants in error.

No. 756. SOUTHERN RAILWAY COMPANY *v.* A. D. WATTS, INDIVIDUALLY, ETC., ET AL.;

No. 724. ATLANTIC COAST LINE RAILROAD COMPANY *v.* A. D. WATTS, COMMISSIONER OF REVENUE, ETC., ET AL.;

No. 744. SEABOARD AIR LINE RAILWAY COMPANY *v.* A. D. WATTS, INDIVIDUALLY, ETC., ET AL.; and

No. 727. NORFOLK SOUTHERN RAILROAD COMPANY *v.* A. D. WATTS, COMMISSIONER OF REVENUE, ETC., ET AL. Appeals from the District Court of the United States for the Eastern District of North Carolina. Motion for substitution submitted March 19, 1923. Order entered April 9, 1923. *Per Curiam.* The motion to substitute the new Commissioner of Revenue, R. A. Daughton, for the ex-Commissioner of Revenue, A. D. Watts, is granted, on the ground that such substitution is authorized by § 461, Consol. Stats. N. Car. 1919, as construed by the Supreme Court of North Carolina in *Davenport* v. *McKee,* 98 N. Car. 500. *Mr. S. R. Prince, Mr. Thomas W. Davis, Mr. James F. Wright, Mr. Murray Allen* and *Mr. W. B. Rodman,* for appellants, in support of the motion.

No. 121. UNITED STATES *v.* MASON & HANGER COMPANY; and

No. 122. UNITED STATES *v.* NORTHEASTERN CONSTRUCTION COMPANY. Appeals from the Court of Claims. Reargued March 2, 5, 1923. Decided April 9, 1923. *Per Curiam.* Upon rehearing, the former opinions, as well as the judgments heretofore rendered, are affirmed. *Mr. Ralph E. Moody*, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States. *Mr. George A. King, Mr. William B. King* and *Mr. George R. Shields,* for appellees, submitted. [For the former opinions, see 260 U. S. 323, 326.]

PETITIONS FOR CERTIORARI GRANTED, FROM JANUARY 30, 1923, TO AND INCLUDING APRIL 9, 1923.

No. 820. GREAT NORTHERN RAILWAY COMPANY *v.* MCCAULL-DINSMORE COMPANY. February 26, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Mr. F. G. Dorety* and *Mr. Reuben J. Hagman* for petitioner. *Mr. Frederick M. Miner* for respondent.

No. 823. FARMERS AND MERCHANTS BANK OF MONROE, NORTH CAROLINA, ET AL. *v.* FEDERAL RESERVE BANK OF RICHMOND, VIRGINIA. February 26, 1923. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted. *Mr. Alex W. Smith* and *Mr. John J. Parker* for petitioners. *Mr. M. G. Wallace, Mr. H. W. Anderson* and *Mr. H. G. Connor, Jr.,* for respondent.

No. 846. HARRY T. GRAHAM, INDIVIDUALLY, ETC., *v.* ALFRED I. DUPONT. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Solicitor General Beck* for petitioner. *Mr. Wm. A. Glasgow, Jr.*, and *Mr. Henry P. Brown* for respondent.

No. 731. SPERRY OIL & GAS COMPANY ET AL. *v.* PEARL CHISHOLM ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. March 5, 1923. Petition for a writ of certiorari herein granted. *Mr. Preston C. West* and *Mr. Alvin Richards,* for appellants, in support of the petition. *Mr. J. Howard Langley* for appellees.

No. 827. EDWARD A. THURSTON, SOLE SURVIVING TRUSTEE, ETC., *v.* BENJAMIN BROWN ET AL. March 5, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. William R. Sears* for petitioner. No appearance for respondents.

No. 835. JOSEPH PHIPPS ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY. March 5, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. John G. Parkinson* for petitioners. *Mr. W. F. Dickinson, Mr. John E. Dolman* and *Mr. M. L. Bell* for respondent.

No. 855. COMMISSIONER OF IMMIGRATION OF THE PORT OF NEW YORK *v.* GITTEL GOTTLIEB ET AL. March 5, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for petitioner. *Mr. Joseph G. M.*

Browne, Mr. Barnett E. Kopelman and *Mr. J. Philip Berg* for respondents.

No. 889. Liberty National Bank of Roanoke, Virginia, *v.* James A. Bear, Trustee, etc. March 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. James D. Johnston* for petitioner. *Mr. G. A. Wingfield* for respondent.

No. 877. Atchison, Topeka & Santa Fe Railway Company *v.* Edmund R. Wells et al. April 9, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Alexander Britton, Mr. A. H. Culwell, Mr. J. W. Terry* and *Mr. Gardiner Lathrop* for petitioner. *Mr. George E. Wallace* for respondents.

No. 897. Nassau Smelting & Refining Works *v.* Brightwood Bronze Foundry Company. April 9, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Joseph B. Jacobs* for petitioner. *Mr. Harry M. Ehrlich* and *Mr. Henry Lasker* for respondent.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED, FROM JANUARY 30, 1923, TO AND INCLUDING APRIL 9, 1923.

No. 751. Emanuel Wallin *v.* Rose Everett. February 19, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Halvor Steenerson* and *Mr. Charles R. Fowler* for petitioner. *Mr. Marshall A. Spooner* and *Mr. Patrick H. Loughran* for respondent.

No. 762. C. DALE WOLFE, TRUSTEE, ETC. *v.* G. F. KILLINGSWORTH ET AL. February 19, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. C. Dale Wolfe* for petitioner. No appearance for respondents.

No. 789. J. C. TURNER LUMBER COMPANY ET AL. *v.* WILSON & BENNETT ET AL. February 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Samuel Silbiger* for petitioners. *Mr. Max Isaac* for respondents.

No. 797. CLOSTER NATIONAL BANK *v.* FEDERAL RESERVE BANK OF NEW YORK. February 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edmund W. Wakelee* for petitioner. *Mr. L. R. Mason* for respondent.

No. 806. CENTRAL RAILROAD COMPANY OF NEW JERSEY *v.* ANITA PELUSO, ADMINISTRATRIX, ETC. February 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles E. Miller* for petitioner. *Mr. Sidney A. Syme* for respondent.

No. 808. L. E. SMITH GLASS COMPANY *v.* MACBETH-EVANS GLASS COMPANY. February 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William O. Belt* and *Mr. Arthur O. Fording* for petitioner. *Mr. Frederick W. Winter* and *Mr. Edward Rector* for respondent.

No. 817. AMERICAN RAILWAY EXPRESS COMPANY ET AL. *v.* M. F. BRABHAM. February 19, 1923. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied. *Mr. Charles W. Stockton* and *Mr. K. E. Stockton* for petitioners. No appearance for respondent.

No. 818. ROBERT J. MCBRIDE *v.* UNITED STATES. February 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry T. Smith* and *Mr. Joseph M. McAleer* for petitioner. *Mr. Aubrey Boyles* for the United States.

No. 781. TAUBEL-SCOTT-KITZMILLER COMPANY, INC., *v.* DAVID J. FOX ET AL., TRUSTEES, ETC. Certiorari to the Circuit Court of Appeals for the Second Circuit. February 26, 1923. Ordered that the motions to vacate the writ of certiorari granted herein or to advance this cause be, and they are hereby, denied. *Mr. Frank J. Hogan* and *Mr. Herman Goldman* for petitioner. *Mr. Irving L. Ernst* for respondents. [See 260 U. S. 719.]

No. 738. WAGNER ELECTRIC MANUFACTURING COMPANY *v.* LAMAR LYNDON ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. February 26, 1923. Petition for a writ of certiorari herein denied. *Mr. Charles A. Houts,* for appellant, in support of the petition. *Mr. Lawrence C. Kingsland* and *Mr. John D. Rippey* for appellees.

No. 776. SOPHIA CHARLES ET AL., ETC., *v.* ROXANA PETROLEUM CORPORATION. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the

Eighth Circuit denied. *Mr. Robert F. Blair* and *Mr. George S. Ramsey* for petitioners. No appearance for respondent.

No. 798. J. E. BARRACK ET AL. *v.* TOWN OF FAIRBANKS, ALASKA. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John E. Alexander* for petitioners. *Mr. Alfred Sutro, Mr. E. S. Pillsbury, Mr. Frank D. Madison, Mr. H. D. Pillsbury* and *Mr. Oscar Sutro* for respondent.

No. 803. ROBERT DOLLAR COMPANY *v.* AMERICAN ASIATIC COMPANY. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ira S. Lillick* and *Mr. Farnham P. Griffiths* for petitioner. *Mr. R. M. Fitzgerald* for respondent.

No. 807. E. I. HORSMAN ET AL., ETC. *v.* ALFRED A. KAUFMAN ET AL. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. O. Ellery Edwards* for petitioners. No appearance for respondents.

No. 811. FRANCE AND CANADA STEAMSHIP CORPORATION *v.* FRENCH REPUBLIC. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Carroll G. Walter* and *Mr. J. Culbert Palmer* for petitioner. *Mr. W. H. McGrann* for respondent.

No. 812. W. EVERETT ET AL. *v.* UNITED STATES ET AL. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied.

Mr. William H. Gorham and *Mr. James Kiefer* for petitioners. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. J. Frank Staley* for respondents.

No. 813. DIRECTOR GENERAL OF RAILROADS *v.* THOMAS KEENAN. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Daniel M. Beach* for petitioner. *Mr. Joseph A. Wechter* for respondent.

No. 822. BENJAMIN KALMANSON *v.* UNITED STATES. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Max D. Steuer* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

No. 828. FRANK N. SNELL ET AL. *v.* J. C. TURNER LUMBER COMPANY. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick Seymour* and *Mr. William M. Toomer* for petitioners. *Mr. Samuel Silbiger* for respondent.

No. 831. STANDARD OIL COMPANY OF NEW YORK *v.* CLYDE STEAMSHIP COMPANY. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Rufus S. Day* and *Mr. P. M. Brown* for petitioner. *Mr. Chauncey I. Clark* for respondent.

No. 834. ALUMINUM COMPANY OF AMERICA *v.* FEDERAL TRADE COMMISSION. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the

Third Circuit denied. *Mr. George W. Wickersham* and *Mr. George B. Gordon* for petitioner. *Mr. Solicitor General Beck* and *Mr. W. H. Fuller* for respondent.

No. 836. Lottie I. Kern, Administratrix, etc., *v.* John Barton Payne, Director General, etc. February 26, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Montana denied. *Mr. Frederick M. Miner* for petitioner. *Mr. H. H. Field* for respondent.

No. 838. Timothy D. Murphy *v.* United States;

No. 839. Vincenzo Cosmano *v.* United States; and

No. 840. Edward C. Gierum *v.* United States. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James J. Barbour, Mr. Benjamin P. Epstein, Mr. Lawrence Y. Sherman* and *Mr. Noah C. Bainum* for petitioners. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

No. 847. Utah Consolidated Mining Company *v.* Utah Apex Mining Company. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John P. Gray* and *Mr. A. C. Ellis, Jr.,* for petitioner. *Mr. J. A. Marshall* and *Mr. W. E. Colby* for respondent.

No. 848. W. V. Smith et al. *v.* United States. February 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John H. Atwood, Mr. James M. Johnson* and *Mr. Donald W. Johnson* for petitioners. No brief filed for the United States.

No. 850. National Bank of Commerce of St. Louis *v.* David R. Francis et al. February 26, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. George L. Edwards, Jr.,* and *Mr. Edward J. White* for petitioner. *Mr. P. Taylor Bryan, Mr. Sam B. Jeffries* and *Mr. Thomas Bond* for respondents.

No. 716. American Trust Company *v.* S. S. McNinch et al. Error to the Supreme Court of the State of North Carolina. March 5, 1923. Petition for a writ of certiorari herein denied. *Mr. John M. Robinson,* for plaintiff in error, in support of the petition. *Mr. William P. Bynum, Mr. W. Cleveland Davis, Mr. Plummer Stewart, Mr. John A. McRae* and *Mr. John J. Parker,* for defendants in error, in opposition to the petition. [See *ante,* 606.]

No. 799. Ward Grandpre *v.* Chicago, Milwaukee & St. Paul Railway Company. March 5, 1923. Petition for a writ of certiorari to the Supreme Court of the State of South Dakota denied. *Mr. Tom Davis, Mr. Ernest A. Michel* and *Mr. Wade H. Ellis* for petitioner. *Mr. O. W. Dynes* for respondent.

No. 821. Hannah Levine *v.* Pennsylvania Railroad Company. March 5, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John L. Wilkie* for petitioner. *Mr. Van Vechten Veeder* for respondent.

No. 826. William Lucking *v.* Detroit & Cleveland Navigation Company. Appeal from the Circuit Court of Appeals for the Sixth Circuit. March 5, 1923. Peti-

tion for a writ of certiorari herein denied. *Mr. William Lucking,* for appellant, in support of the petition. *Mr. Henry I. Armstrong, Jr.,* for appellee, in opposition to the petition.

No. 830. EDMOND C. FLETCHER *v.* ISAIAH S. COOMES ET AL. March 5, 1923. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Camden R. McAtee* for petitioner. No appearance for respondents.

No. 844. JACKSONVILLE FORWARDING COMPANY *v.* COUNTY OF NASSAU, STATE OF FLORIDA. March 5, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Florida denied. *Mr. George C. Bedell* for petitioner. *Mr. Martin H. Long* for respondent.

No. 867. FRANK N. SNELL ET AL. *v.* FRANK SNELL SAWMILL COMPANY ET AL. March 5, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William M. Toomer* for petitioners. *Mr. Samuel Silbiger* for respondents.

No. 805. LEHIGH & HUDSON RIVER RAILWAY COMPANY *v.* FLORENCE M. OTTERSTEDT, ON BEHALF OF HERSELF AND MINOR CHILDREN. March 12, 1923. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Department, of the State of New York, denied for failure to submit the petition within the time prescribed by the rule. *Mr. John J. Beattie* for petitioner. *Mr. E. Clarence Aiken* for respondent.

No. 764. TIDAL OIL COMPANY ET AL. *v.* J. P. FLANAGAN. Error to the Supreme Court of the State of Oklahoma. March 12, 1923. Petition for a writ of certiorari herein denied. *Mr. Preston C. West, Mr. A. A. Davidson, Mr. Wallace C. Franklin* and *Mr. Arthur J. Biddison,* for plaintiffs in error, in support of the petition. *Mr. Edward H. Chandler* and *Mr. William O. Beall,* for defendant in error, in opposition to the petition.

No. 829. GEORGE H. SEVER *v.* DIRECTOR GENERAL OF RAILROADS. March 12, 1923. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. John E. Benton* for petitioner. *Mr. Edwin W. Lawrence* for respondent.

No. 837. HENRY M. GOLDFOGLE, PRESIDENT, ET AL. *v.* HANOVER NATIONAL BANK OF THE CITY OF NEW YORK. March 12, 1923. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. William H. King, Mr. George P. Nicholson, Mr. Frank B. Kellogg, Mr. Eugene Fay* and *Mr. Charles L. Pierce* for petitioners. *Mr. E. F. Colladay, Mr. Martin Saxe, Mr. Percy S. Dudley, Mr. Frank M. Patterson* and *Mr. Merton E. Lewis* for respondent.

No. 842. NORFOLK SOUTHERN RAILROAD COMPANY *v.* THOMAS V. GORDON. March 12, 1923. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied. *Mr. Robert N. Simms* and *Mr. C. M. Bain* for petitioner. *Mr. William C. Douglass* and *Mr. Clyde A. Douglass* for respondent.

No. 849. NATHANIEL P. LESUEUR ET AL., ETC., *v.* MANUFACTURERS' FINANCE COMPANY. March 12, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James S. Pilcher* for petitioners. *Mr. John J. Vertrees* for respondent.

No. 857. JAMES C. DAVIS, AS AGENT, ETC. *v.* MARGUERITE CLARK, ADMINISTRATRIX, ETC. March 12, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Bruce Scott, Mr. A. A. McLaughlin* and *Mr. O. M. Spencer* for petitioner. *Mr. Tom Davis* and *Mr. Ernest A. Michel* for respondent.

No. 858. CITY OF NEW YORK *v.* RODGERS & HAGERTY, INC. March 12, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edmund L. Mooney* and *Mr. Terence Farley* for petitioner. *Mr. C. C. Calhoun* for respondent.

No. 860. SAMUEL C. PANDOLFO *v.* UNITED STATES. March 12, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Patrick J. Lucey, Mr. Gerald G. Barry* and *Mr. Bernhardt Frank* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

No. 861. ALABAMA GROCERY COMPANY *v.* L. P. HAMMOND, TRUSTEE, ETC. March 12, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lee C. Bradley* for petitioner. *Mr. Forney Johnston* for respondent.

No. 410. MARY PARTRIDGE *v.* J. E. CROSBIE ET AL. Error to the Supreme Court of the State of Oklahoma. March 19, 1923. Writ of error dismissed pursuant to the 10th Rule, and petition for a writ of certiorari herein dismissed for failure to comply with the rule as to printing record. *Mr. Burt E. Barlow* and *Mr. Henry B. Martin* for plaintiff in error. *Mr. A. A. Davidson* and *Mr. Preston C. West* for defendants in error. [See *post,* 626, 629.]

No. 854. WALTER BURKE *v.* UNITED STATES. March 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Willet M. Spooner* and *Mr. S. R. Rush* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States.

No. 879. GEORGE P. CLARK COMPANY *v.* KUEBLER FOUNDRIES, INC. March 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Willard Paff* and *Mr. Calvin F. Smith* for petitioner. *Mr. A. Mitchell Palmer* and *Mr. Frank Davis, Jr.,* for respondent.

No. 902. PETER RULOVITCH ET AL. *v.* UNITED STATES. March 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John J. O'Brien* for petitioners. No brief filed for the United States.

No. 898. ROBERT W. HUNT ET AL. *v.* D. L. GILLESPIE. April 9, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. H. G. Stone* and *Mr. W. W. Gurley* for petitioners. *Mr. David A. Reed* and *Mr. George H. Calvert* for respondent.

No. 843. DEAN SHERRY, TRUSTEE, ETC., ET AL. *v.* J. B. LUCAS. April 9, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. J. Butts* for petitioners. No appearance for respondent.

No. 856. JOHN W. TALBOT *v.* UNITED STATES. April 9, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Cassius C. Shirley* and *Mr. Larz A. Whitcomb* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. H. S. Ridgely* for the United States. *Mr. J. C. Risk,* by leave of court, as *amicus curiæ.*

No. 868. WINDOW GLASS MACHINE COMPANY ET AL. *v.* PITTSBURGH PLATE GLASS COMPANY. April 9, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Clarence P. Byrnes, Mr. Livingston Gifford* and *Mr. David A. Reed* for petitioners. *Mr. Marshall A. Christy* and *Mr. George B. Gordon* for respondent.

No. 872. THE PUSEY & JONES COMPANY *v.* WILLARD SAULSBURY ET AL., AS RECEIVERS, ETC., ET AL. April 9, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lindley M. Garrison, Mr. Charles H. Tuttle* and *Mr. Saul S. Myers* for petitioner. *Mr. William H. Button, Mr. John P. Nields* and *Mr. William G. Mahaffy* for respondents.

No. 882. HERBERT W. BACON, ADMINISTRATOR, ETC., *v.* JOHN BARTON PAYNE, DIRECTOR GENERAL, ETC. April 9, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Frank S.*

Monnett for petitioner. *Mr. J. Walter Dohany* and *Mr. Frank E. Robson* for respondent.

No. 891. FREIBERG MAHOGANY COMPANY *v.* BATESVILLE LUMBER & VENEER COMPANY. April 9, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Murray Seasongood* for petitioner. *Mr. Judson Harmon* and *Mr. George Hoadly* for respondent.

No. 900. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY *v.* MCKINLEY C. MYERS. April 9, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Bruce Scott* for petitioner. *Mr. William Buchholz, Mr. I. B. Kimbrell* and *Mr. Martin J. O'Donnell* for respondent.

No. 904. SAM M. SALIBA ET AL. *v.* UNITED STATES. April 9, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Forney Johnston* for petitioners. *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 JANUARY 30, 1923, TO AND INCLUDING APRIL 9, 1923.

No. 87. MCLANE TILTON *v.* FELIX M. DRENNEN, AS RECEIVER, ETC. Appeal from the Circuit Court of Appeals for the Fifth Circuit. February 19, 1923. Dismissed with costs, pursuant to the 10th Rule. *Mr. Forney Johnston* for appellant. *Mr. H. L. Stevens* and *Mr. Joseph E. Johnson* for appellee.

No. 233. PORTO RICO COAL COMPANY, INC. *v.* WILLIAM H. EDWARDS, COLLECTOR OF UNITED STATES INTERNAL REVENUE, ETC. Error to the District Court of the United States for the Southern District of New York. February 19, 1923. Dismissed with costs, pursuant to the 10th Rule. *Mr. Francis W. Aymar* for plaintiff in error. *The Attorney General* for the defendant in error.

No. 252. JUDSON KNOX *v.* UNITED STATES. Error to the District Court of the United States for the Western District of South Carolina. February 19, 1923. Dismissed, pursuant to the 10th Rule. *Mr. Charles A. Douglas* and *Mr. Hugh H. Obear* for plaintiff in error. *The Attorney General* for the United States.

No. 395. ROY YOUMAN *v.* COMMONWEALTH OF KENTUCKY. Error to the Court of Appeals of the State of Kentucky. February 19, 1923. Dismissed with costs, pursuant to the 10th Rule. *Mr. H. L. James* for plaintiff in error. No appearance for defendant in error.

No. 491. FRANK J. LEVENE *v.* STATE OF ALABAMA. Error to the Supreme Court of the State of Alabama. February 19, 1923. Dismissed with costs, pursuant to the 10th Rule. *Mr. Alex. T. Howard* for plaintiff in error. No appearance for defendant in error.

No. 522. JAY BURNS BAKING COMPANY ET AL. *v.* SAMUEL R. MCKELVIE, AS GOVERNOR OF THE STATE OF NEBRASKA, ET AL. Error to the Supreme Court of the State of Nebraska. February 19, 1923. Dismissed with costs, pursuant to the 10th Rule. *Mr. Matthew A. Hall* and *Mr. Carroll S. Montgomery* for plaintiffs in error. No appearance for defendants in error. [See *ante*, 608.]

No. 537. FRANK DILLON *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. February 19, 1923. Dismissed with costs, pursuant to the 10th Rule. *Mr. Rush B. Johnson* for plaintiff in error. No appearance for defendant in error.

No. 634. STEFANO SANGUINETTI *v.* UNITED STATES. Appeal from the Court of Claims. February 19, 1923. Dismissed, pursuant to the 10th Rule. *Mr. Benjamin Carter* for appellant. *The Attorney General* for the United States.

No. 640. UNITED STATES EX REL. CATONI TISI, ALIAS LISTA CORTINA, *v.* ROBERT E. TOD, COMMISSIONER OF IMMIGRATION, ETC. Appeal from the District Court of the United States for the Southern District of New York. February 19, 1923. Dismissed with costs, pursuant to the 10th Rule. *Mr. Walter Nelles* and *Mr. Isaac Shorr* for appellant. *The Attorney General* for appellee.

No. 653. PUGET SOUND POWER & LIGHT COMPANY ET AL. *v.* COUNTY OF KING ET AL. Error to the Supreme Court of the State of Washington. February 19, 1923. Dismissed with costs, pursuant to the 10th Rule. *Mr. James B. Howe, Mr. Walter F. Meier, Mr. Thomas J. L. Kennedy,* and *Mr. F. D. McKenney* for plaintiffs in error. *Mr. Howard A. Hanson* and *Mr. Malcolm Douglas* for defendants in error. [See *ante,* 607.]

No. 389. JOHN H. BREDE *v.* JAMES M. POWERS, UNITED STATES MARSHAL. Appeal from the District Court of the United States for the Eastern District of New York.

No. 410. MARY PARTRIDGE *v.* J. E. CROSBIE ET AL. Error to the Supreme Court of the State of Oklahoma.

No. 418. SAMUEL HOMER WOODBRIDGE ET AL., EXECUTORS, ETC., *v.* UNITED STATES. Appeal from the Court of Claims.

No. 651. STATE OF ARKANSAS EX REL. JEFFERSON BLACK *v.* BOARD OF DIRECTORS OF SCHOOL DISTRICT 16, MONTGOMERY COUNTY, ARKANSAS. Error to the Supreme Court of the State of Arkansas. February 19, 1923. These cases will severally stand dismissed under the 10th Rule unless the deposit for printing the record is made on or before March 5 next. *Mr. Morris Kamber* and *Mr. Robert H. Elder* for appellant, and *The Attorney General* for appellee, in No. 389. *Mr. Henry B. Martin* for plaintiff in error, and *Mr. A. A. Davidson* and *Mr. Preston C. West* for defendants in error, in No. 410. *Mr. H. P. Doolittle* and *Mr. Rufus S. Day* for appellants, and *The Attorney General* for the United States, in No. 418. *Mr. R. G. Davies* for plaintiff in error; no appearance for defendant in error, in No. 651. [See *post*, 629, as to No. 410.]

No. 293. RATON WATER WORKS COMPANY *v.* CITY OF RATON. Appeal from the District Court of the United States for the District of New Mexico. February 19, 1923. This case will stand dismissed under the 10th Rule unless the deposit for printing the record is made on or before May 1 next. *Mr. Abram J. Rose* for appellant. No appearance for appellee.

No. 277. WELLS-ELKHORN COAL COMPANY *v.* OTIS STEEL COMPANY. Error to the District Court of the United States for the Eastern District of Kentucky. February 20, 1923. Dismissed with costs, per stipulation. *Mr. Simeon S. Willis, Mr. John F. Hager* and *Mr. J. W. M. Stewart* for plaintiff in error. *Mr. George B. Martin* for defendant in error.

No. 253. M. FRANK ANDREWS *v.* UNITED STATES. Error to the District Court of the United States for the Western District of South Carolina. February 26, 1923. Judgment reversed, upon confession of error by the defendant in error, on motion of *Mr. Hugh H. Obear* for plaintiff in error, with consent thereto by *Mr. Solicitor General Beck* for the United States. *Mr. Hugh H. Obear, Mr. Charles A. Douglas, Mr. Richard A. Ford* and *Mr. H. C. Miller* for plaintiff in error. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Blackburn Esterline,* Assistant to the Solicitor General, for the United States.

No. 686. SOUTHERN RAILWAY COMPANY *v.* A. D. WATTS, ETC., ET AL. Appeal from the District Court of the United States for the Western District of North Carolina. February 26, 1923. Dismissed with costs, on motion of counsel for appellant. *Mr. S. R. Prince* for appellant. No appearance for appellees.

No. 713. CHARLES A. HOUTS ET AL. *v.* W. E. MCKINNEY, AS GUARDIAN, ETC., ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. March 5, 1923. Dismissed with costs, per stipulation. *Mr. Charles A. Houts* for appellants. No appearance for appellees.

No. 687. ATLANTIC & YADKIN RAILWAY COMPANY *v.* A. D. WATTS, ETC., COMMISSIONER OF REVENUE, ET AL. Appeal from the District Court of the United States for the Western District of North Carolina. March 12, 1923. Dismissed with costs, on motion of counsel for appellant. *Mr. S. R. Prince* for appellant. No appearance for appellees.

No. 410. MARY PARTRIDGE *v.* J. E. CROSBIE ET AL. Error to the Supreme Court of the State of Oklahoma. March 19, 1923. Writ of error dismissed pursuant to the 10th Rule, and petition for a writ of certiorari herein dismissed for failure to comply with the rule as to printing record. *Mr. Burt E. Barlow* and *Mr. Henry B. Martin* for plaintiff in error. *Mr. A. A. Davidson* and *Mr. Preston C. West* for defendants in error. [See *ante,* 622, 626.]

No. 912. VINCENTE GORDERO ET AL. *v.* UNITED STATES. Error to the District Court of the United States for Porto Rico. March 19, 1923. Docketed and dismissed, on motion of *Mr. Solicitor General Beck* for the United States. No appearance for plaintiffs in error.

No. 172. FEDERAL TRADE COMMISSION *v.* FRUIT GROWERS' EXPRESS, INC. On writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. April 9, 1923. Dismissed with costs, per stipulation, on motion of *Mr. Solicitor General Beck* in that behalf. *Mr. Charles J. Faulkner, Jr.,* and *Mr. R. F. Feagans* for respondent.

No. 866. UNITED STATES *v.* PENINSULAR STOVE COMPANY. Appeal from the Court of Claims. April 9, 1923. Dismissed, on motion of *Mr. Solicitor General Beck* for the United States. No appearance for appellee.

No. 683. SEABOARD AIR LINE RAILWAY COMPANY *v.* A. D. WATTS, ETC., COMMISSIONER OF REVENUE, ETC., ET AL. Appeal from the District Court of the United States for the Eastern District of North Carolina. April 9, 1923. Dismissed with costs, per stipulation. *Mr. Thomas W. Davis* and *Mr. Murray Allen* for appellant. No appearance for appellees.

No. 684. ATLANTIC COAST LINE RAILROAD COMPANY *v.* A. D. WATTS, ETC., COMMISSIONER OF REVENUE, ETC., ET AL. Appeal from the District Court of the United States for the Eastern District of North Carolina. April 9, 1923. Dismissed with costs, per stipulation. *Mr. Thomas W. Davis* for appellant. No appearance for appellees.

No. 688. NORFOLK SOUTHERN RAILROAD COMPANY, *v.* A. D. WATTS, ETC., COMMISSIONER OF REVENUE, ETC., ET AL. Appeal from the District Court of the United States for the Eastern District of North Carolina. April 9, 1923. Dismissed with costs, per stipulation. *Mr. W. B. Rodman* for appellant. No appearance for appellee.

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