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VOLUME 264

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1923

FROM JANUARY 29, 1924, TO AND
INCLUDING APRIL 27, 1924

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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.

HARRY M. DAUGHERTY, Attorney General.[2]
HARLAN F. STONE, Attorney General.[3]
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. iv, *post*.

[2] Resigned, March 28, 1924.

[3] On April 2, 1924, President Coolidge nominated Harlan F. Stone, of New York, as Attorney General, to succeed Mr. Daugherty, resigned. The nomination was confirmed by the Senate on April 7, 1924, and Mr. Stone took the oath of office on April 9, 1924.

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, 1923.

BOARD OF TRADE OF THE CITY OF CHICAGO ET AL. *v.* JOHNSON, TRUSTEE IN BANKRUPTCY OF HENDERSON.

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

No. 90. Argued November 26, 1923.—Decided February 18, 1924.

1. Decisions of state courts defining property rights do not bind the federal courts in bankruptcy, when contrary to the policy and proper construction of the Bankruptcy Act. P. 10.
2. A membership in the Chicago Board of Trade, which, under the rules of the association, the owner may sell to any person eligible to membership approved by the board of directors, subject to the right of his co-members to prevent the sale or transfer until he satisfies his debts to them, is incorporeal property, the possession and control of which, for the purpose of disposition in accordance with the rules, pass to the member's trustee in bankruptcy, under § 70a (5) of the Bankruptcy Act. Pp. 8, 12.
3. The right of the trustee in bankruptcy to have the membership sold, as against the Board and members claiming the right to prevent transfer until debts owed them by the bankrupt are paid —may be determined by the District Court in a summary proceeding. P. 11.
4. Where the rules provided that a membership in an exchange might be transferred with the approval of the directors, if there were no unsettled claims upon the owner, and if the membership was not in any way impaired or forfeited, and directed that, prior

to transfer, the application therefor should be posted 10 days, when, in the absence of objection, " it shall be assumed the member has no outstanding claims against him," *held* that failure of creditor members to object to a proposed transfer, during the 10 days, or withdrawal of objections made, did not estop them from objecting soon after the owner of the membership went into bankruptcy, the directors not having approved the transfer meanwhile. P. 14.

5. Members of an exchange having claims under contract made with a co-member acting as agent of a corporation, *held* entitled under the rules of the exchange, to object to a transfer of the membership by the owner's trustee in bankruptcy until their claims against the corporation were satisfied. P. 15.
6. The right of a member of an exchange under its rules to prevent by objection a transfer of the seat of another member, until satisfaction of a debt owed the one by the other, *held* in the nature of a lien upon the membership at its creation assertable after the membership passed to the debtor's trustee in bankruptcy. P. 15.

283 Fed. 374, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals, which affirmed, upon petition to review, a decree of the District Court in bankruptcy, adjudging that a seat of a member in the Chicago Board of Trade was property passing to his trustee in bankruptcy free of all claims of other members, and ordering that it be held for transfer and sale for the benefit of the general creditors.

Mr. Henry S. Robbins for petitioners.

Jurisdiction in the District Court could not be sustained within the exception in § 23b of the Bankruptcy Act, which permits suits by the trustee in the courts where the bankrupt might have brought them. The ground of diverse citizenship was not available.

The Board and its co-petitioners were adverse claimants. As to them, it was a "controversy in bankruptcy." The membership was not in possession of the trustee. There was no jurisdiction to adjudicate summarily. *Smith* v. *Mason,* 14 Wall. 419; *Marshall* v. *Knox,* 16

Wall. 551; *First National Bank* v. *Title & Trust Co.,* 198 U. S. 280; *Bardes* v. *Hawarden Bank,* 178 U. S. 524; *Mueller* v. *Nugent,* 184 U. S. 1; *Babbitt* v. *Dutcher,* 216 U. S. 102; *Bryan* v. *Bernheimer,* 181 U. S. 188; *Galbraith* v. *Vallely,* 256 U. S. 46; *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18; *Martin* v. *Oliver,* 260 Fed. 89; *In re Bacon,* 210 Fed. 129; *In re Cotton,* 209 Fed. 124; *In re McCrum,* 214 Fed. 207; *In re Rathman,* 183 Fed. 913; *O'Dell* v. *Boyden,* 150 Fed. 731.

The court below erred, on the merits: (1) In holding that the right of the Board of Trade under its rules to suspend a member, and to refuse to transfer his membership, until his debts to other members were paid, ceased upon the appointment of a trustee in bankruptcy, even as respects debts which had accrued before the bankruptcy proceedings; (2) in holding that this membership was an asset in bankruptcy. *Sparhawk* v. *Yerkes,* 142 U. S. 1; *Hyde* v. *Woods,* 94 U. S. 525; *Page* v. *Edmunds,* 187 U. S. 601; *Barclay* v. *Smith,* 107 Ill. 349; *In re Gregory,* 174 Fed. 629; *People* v. *Board of Trade,* 80 Ill. 134.

Mr. Robert N. Erskine, with whom *Mr. F. William Kraft* was on the brief, for respondent.

The property was in the possession and control of the bankruptcy court and its trustee.

The jurisdiction of a District Court to deal with it by summary proceedings is plain, including the right to settle all adverse claims. *Whitney* v. *Wenman,* 198 U. S. 539; *In re Hoey,* 290 Fed. 116; *In re Gottlieb & Co.,* 245 Fed. 139; *Orinoco Iron Co.* v. *Metzel,* 230 Fed. 40; *In re Wegman Piano Co.,* 228 Fed. 60; *O'Dell* v. *Boyden,* 150 Fed. 731; I Collier, Bankruptcy, 12th ed., pp. 541–544.

The contention that under the Board of Trade rules no person can be a member unless accepted by the Board, and therefore neither title nor possession of the bank-

rupt membership can pass to the trustee, has been expressly overruled in *Board of Trade* v. *Weston,* 243 Fed. 332, under the authority of *Hyde* v. *Woods,* 94 U. S. 523, and *Page* v. *Edmunds,* 187 U. S. 596.

A membership in a Board of Trade passes to the custody and possession of the trustee. *O'Dell* v. *Boyden,* 150 Fed. 731; *In re Hoey,* 290 Fed. 116.

The petitioners were not such adverse claimants at the time of the institution of the bankruptcy proceedings as would entitle them to interpose objection to the jurisdiction of the District Court. *Mueller* v. *Nugent,* 184 U. S. 1; *Schweer* v. *Brown,* 195 U. S. 171; *In re Bacon,* 210 Fed. 129; *In re Ransford,* 194 Fed. 658; *In re Davis,* 119 Fed. 950.

Section 70e of the Bankruptcy Act expressly confers jurisdiction on the bankruptcy court, and that section is one of the exceptions named in § 23b. *Weidhorn* v. *Levy,* 253 U. S. 273.

The trustee takes the membership as property subject to the rules of the Board, but also with the advantage of all the privileges and rights which the bankrupt had pursuant to the rules. He took it free and clear of any claims.

Title was transferred by operation of law and is an asset in this bankruptcy estate, regardless of the conditions which affect its value. *Page* v. *Edmunds,* 187 U. S. 596; *Hyde* v. *Woods,* 94 U. S. 523; *In re Hoey,* 290 Fed. 116; *In re Stringer,* 253 Fed. 352; *O'Dell* v. *Boyden,* 150 Fed. 731; *In re Hurlbutt, Hatch & Co.,* 135 Fed. 504; *In re Gaylord,* 111 Fed. 717; *Rogers* v. *Hennepin County,* 240 U. S. 184; *Citizens Natl. Bank* v. *Durr,* 257 U. S. 99.

The cases of *Barclay* v. *Smith,* 107 Ill. 349, and *People* v. *Board of Trade,* 80 Ill. 134, do not hold that such a membership is not property, but that it is not property subject to judicial process under the statutes of Illinois. Cf. *Weaver* v. *Fisher,* 110 Ill. 146.

The question, in any event, is not one of statutory interpretation but a definition of property; and the federal courts are not bound by the Illinois decisions. *Page* v. *Edmunds,* 187 U. S. 601; *In re Page,* 107 Fed. 89; *In re Gaylord,* 111 Fed. 717; *Sessions* v. *Romadka,* 145 U. S. 29; *Board of Trade* v. *Weston,* 243 Fed. 332; *Frazin* v. *Oppenheim,* 174 Fed. 713. Cf. *Gazlay* v. *Williams,* 210 U. S. 41; *In re Adams,* 134 Fed. 142; *Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U. S. 581.

If the trustee complies with the conditions imposed by the rules, there is no limitation, and no power on the part of the Board, to prevent his making a sale and transfer.

Objections to the bankrupt's application to transfer were all disposed of and withdrawn before the petition in bankruptcy was filed.

The rights of the trustee date from the filing of the petition in bankruptcy. *Mueller* v. *Nugent,* 184 U. S. 1; *Acme Harvester Co.* v. *Beekman Lumber Co.,* 222 U. S. 300; *In re Weinger, Bergman & Co.,* 126 Fed. 875; *Page* v. *Edmunds,* 187 U. S. 596; *In re Hurlbutt, Hatch & Co.,* 135 Fed. 504; *Bailey* v. *Baker Ice Machine Co.,* 229 U. S. 268. Creditors can not now complain.

Under § 47 a–2 of the Bankruptcy Act, as amended in 1910, the trustee had the rights of a creditor holding a lien. *In re Seward Dredging Co.,* 242 Fed. 225.

These creditors of the corporation, even granting they had the right to file protests, were under obligation to file them in due course. They knew that if protests were not filed within ten days the member could sell, but they did not file for nearly nine months nor until after the petition in bankruptcy was filed.

There must be express provisions in the rules to justify an impairment of a membership depriving it of all value. *In re Gaylord,* 111 Fed. 717.

There is no basis in the rules for making claims against a corporation personal obligations of its officer holding a membership.

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

We have brought this cause before us by certiorari to review the action of the Circuit Court of Appeals of the Seventh Circuit in affirming, upon petition to review, a decree of the District Court for the Northern District of Illinois, in a summary proceeding dealing with the membership of a bankrupt in the Chicago Board of Trade. The District Court, finding that the membership was property and under the rules of the Board passed to the trustee in bankruptcy free of all claims of the members, ordered that it be held for transfer and sale for the benefit of the general creditors.

The case presents two questions. First—Had the District Court jurisdiction to deal with the case by summary proceedings?

Second—If the District Court had such jurisdiction, was its decree right upon the merits?

The petition and amendment of the trustee asked that the Board of Trade and certain members be required to show cause why the trustee's right to the membership of the bankrupt should not be recognized by the Board of Trade, so as to permit its transfer and sale. Pleas to the jurisdiction, with special appearances, were filed by the respondents, alleging that the membership was not property, or capable of being treated as an asset of the bankrupt, that transfer of it had been duly objected to by respondents as members, and that they had adverse claims creating a controversy which the District Court, under paragraphs a and b of § 23, of the bankrupt law, was denied jurisdiction to hear. The pleas were overruled. Reserving the question of jurisdiction, the Board of Trade filed an answer, which the other respondents adopted. The cause was heard upon the petition, its amendment, and the answer, which disclosed the following:

Wilson F. Henderson, the bankrupt, a citizen of Chicago, was admitted to membership in the Board of Trade in 1899, and for many months prior to March 1, 1919, was president and one of the principal stockholders in a corporation known as Lipsey and Company, and actively engaged in making contracts on its behalf for present and future delivery of grain on the Board of Trade. In March, 1919, Lipsey and Company became insolvent and ceased to transact business, being then indebted to thirty or more members of the Exchange on its contracts in an aggregate amount of more than $60,000. A corporation is not admitted to membership of the Board, but under the rules it may do business on the Exchange if two of its executive officers, substantial stockholders, are members in good standing and give its name as principal in their contracts. The rules further provide that, if the corporation is accepted as a party to a contract and fails to comply with any of its obligations under the rules, its officers, as members, are subject to the same discipline as if they had failed to comply with an obligation of their own.

Any male person of good character and credit and of legal age, after his name has been duly posted for ten days, may be admitted to membership in the Board of Trade by ten votes of the Board of Directors, provided that three votes are not cast against him and that he pays an initiation fee of $25,000, or presents "an unimpaired or unforfeited membership, duly transferred," and signs "an agreement to abide by the Rules, Regulations and By-Laws of the Association." The rules further provide that a member, if he has paid all assessments and has no outstanding claims held against him by members, and the membership is not in any way impaired or forfeited, may, upon payment of a fee of $250, transfer his membership to any person eligible to membership approved by the Board, after ten days posting, both of the proposed transfer and of the name of substitute.

No rule exists giving to the Board of Trade or its members the right to compel sale or other disposition of memberships to pay debts. The only right of one member against another, in securing payment of an obligation, is to prevent the transfer of the membership of the debtor member by filing objection to such transfer with the Directors.

The membership of Henderson was worth $10,500 on January 24, 1920, when the petition in bankruptcy was filed against him. All assessments then due had been paid and the membership was not in any way impaired and forfeited. On May 1, 1919, Henderson had posted on the bulletin of the Exchange a notice and application for a transfer of his membership. Within ten days, two objections were filed, one of them on account of a debt due from Lipsey and Company. The objections were withdrawn, however, in December, 1919. On January 29, 1920, however, five days after the petition in bankruptcy was filed, members, creditors of Lipsey and Company on its defaulted contracts signed by Henderson, lodged with the Directors objections to the transfer. These objectors were respondents in the District Court and are petitioners here.

Under par. a, § 70 of the bankrupt law of July 1, 1898, c. 541, 30 Stat. 565, the trustee takes the title of the bankrupt (3) to "powers which he might have exercised for his own benefit," and (5) to "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." Petitioners insist that the membership is not property within (5). The Supreme Court of Illinois, from which State this Board of Trade derives its charter, has held, in *Barclay* v. *Smith*, 107 Ill., 349, that the membership is not property or subject to judicial sale, basing its conclusion on the ground that it can not be acquired except upon a vote of ten Di-

rectors, and can not be transferred to another unless the transfer is approved by the same vote, and that it can not be subjected to the payment of debts of the holder by legal proceedings. It is not possible to reconcile *Barclay* v. *Smith* with the decisions of this Court. In *Hyde* v. *Woods*, 94 U. S. 523, the bankrupt was a member of the San Francisco Stock and Exchange Board, a voluntary association with an elective membership, and with a right in each member to sell his seat subject to an election, by the Directors, of the vendee as a member. This Court held the membership to be an incorporeal right and property which would pass to the trustee of the bankrupt, subject to the rules of the Board, which required first the payment of all debts due to the members. In *Sparhawk* v. *Yerkes*, 142 U. S. 1, the conclusion in *Hyde* v. *Woods* was reaffirmed in respect of seats in the Stock Exchanges of New York and Philadelphia, which were then voluntary unincorporated associations, with the same provision as to membership and preference for the debts of member creditors. In *Page* v. *Edmunds*, 187 U. S. 596, the question was whether a seat of a bankrupt in the Philadelphia Stock Exchange was property passing to the trustee under subdivision 5 of § 70 of the Bankrupt Act. In that association, no member could sell his seat if he had unsettled claims on the Exchange. In case of insolvency, the seat could be sold, and the proceeds distributed to the member creditors. The Supreme Court of Pennsylvania had held, just as in this case the Supreme Court of Illinois has held, that such membership was not property, and could not be seized in execution for debts of its holder. *Thompson* v. *Adams*, 93 Pa. St. 55; *Pancoast* v. *Gowen*, 93 Pa. St. 66. These were the cases relied on by the Supreme Court of Illinois to sustain its view. Referring to the Pennsylvania decisions in *Page* v. *Edmunds* (p. 603), this Court said:

"It is not certain whether the learned court intended to say that the seat was not property at all, or not property

because it could not be seized in execution for debts. If the former, we cannot concur. The facts of this case demonstrate the contrary. If the latter, it does not affect the pending controversy. The power of the appellant to transfer it was sufficient to vest it in his trustee."

The Court thus held that the question was to be determined by reference to the language of the Bankrupt Act and that the seat was property "which prior to the filing of the petition he [the bankrupt] could by any means have transferred." It declined to limit the definition of property under subdivision (5) to such as the state courts might hold could be seized in execution by judicial process. Subdivision (3), vesting in the trustee title to powers which the bankrupt might exercise for his own benefit, manifests a purpose to make the assets of the estate broadly inclusive. By a construction not unduly strained, subdivision (3) might be held to include a power to transfer a seat on the Exchange, subject to its rules, if it were necessary.

In *Citizens National Bank* v. *Durr,* 257 U. S. 99, we held, following the *Hyde, Sparhawk* and *Page Cases, supra,* that membership in the New York Stock Exchange was personal property, whose situs followed that of the owner, and was taxable where he was domiciled.

Congress derives its power to enact a bankrupt law from the Federal Constitution, and the construction of it is a federal question. Of course, where the bankrupt law deals with property rights which are regulated by the state law, the federal courts in bankruptcy will follow the state courts; but when the language of Congress indicates a policy requiring a broader construction of the statute than the state decisions would give it, federal courts can not be concluded by them. *Board of Trade* v. *Weston,* 243 Fed. 332.

Counsel for petitioners urges that the *Hyde, Sparhawk* and *Page Cases* differ from the one before us, in that the

rules of the associations there under consideration provided specifically for a sale of the seat and a preferred distribution of the proceeds to the creditor members, whereas here there is no sale provided for at all, at the instance of the Board or its members who are creditors. Their only protection is in the power to prevent a transfer as long as the member's obligations to them are unperformed. We do not think this makes a real difference in the character of the property which the member has in his seat. He can transfer it or sell it subject to a right of his creditors to prevent his transfer or sale till he settles with them, a right in some respects similar to the typical lien of the common law, defined as "a right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied." *Hammonds* v. *Barclay,* 2 East, 235. *Peck* v. *Jenness,* 7 How. 612, 620. The right of the objecting creditor members differs, however, from the common law lien, in that the latter, to exist and be effective, must deprive the owner of possession and enjoyment, whereas the former is consistent with possession and personal enjoyment by the owner, and only interferes with, and prevents, alienation.

We are brought then to the contention that petitioners are adverse claimants, and are entitled to be heard in a plenary suit. This turns on the question who was in possession of the seat. If the bankrupt was in possession when the petition in bankruptcy was filed, then the authorities leave no doubt that the possession passes to the trustee and that his possession justifies the District Court in determining the validity of the liens claimed in a summary proceeding by a rule to show cause against the claimants. *Hebert* v. *Crawford,* 228 U. S. 204; *Babbitt* v. *Dutcher,* 216 U. S. 102; *Murphy* v. *Hofman Co.,* 211 U. S. 562; *Lazarus* v. *Prentice,* 234 U. S. 263, 266; *Clay* v. *Waters,* 178 Fed. 385, 392.

The petitioners argue that a seat in the Exchange, even if it be property, is incapable of manual possession, that it is really only a chose in action, and that the bankrupt or his trustee is no more in actual possession of it for the purposes of summary jurisdiction than the trustee would be in manual possession of a debt, to enforce the payment of which the trustee must certainly bring a plenary action against the resisting debtor. Membership on the Board of Trade is different from a mere chose in action, like a simple claim or debt asserted against another and only to be enjoyed after its satisfaction or enforcement. It is a continuously enjoyed "incorporeal right". *Hyde* v. *Woods, supra.* The Board of Trade is the member's trustee while it maintains and holds all its facilities for his use and enjoyment. As long as he has these, he may properly be said to be in possession of them. That creditor members may assert a mere restraint of alienation to enforce their claims does not oust the member's possession or personal enjoyment. By operation of the bankrupt law, the membership passes, subject to rules of the Exchange, to the trustee, for his disposition of it. The trustee does not become a member, but he does come into control of the bankrupt's right to dispose of the membership; and, with the aid of the bankruptcy court, can require the bankrupt to do everything on his part necessary under the rules of the Board to exercise this right. The membership is property, in a way attached to the person of the bankrupt and disposable only by his will. It follows him, therefore, into the bankruptcy court, which is given full equitable jurisdiction over his conduct in respect of his estate, and, therefore, it comes into the custody of that court to be administered by it as part of his estate.

The Board is not in an adverse attitude toward the bankrupt. It holds the membership for the bankrupt in conformity to the rules as to his enjoyment and disposi-

tion of it. We think that the principle of *Bryan* v. *Bernheimer,* 181 U. S. 188; *Mueller* v. *Nugent,* 184 U. S. 1; and *Whitney* v. *Wenman,* 198 U. S. 539, applies here, and that, within those cases, the seat is held by the Board for the bankrupt, and that in bankruptcy the right to dispose of it under the rules passes into the control, and therefore into the possession, of the trustee.

A similar question was before the Circuit Court of Appeals for the Sixth Circuit in *O'Dell* v. *Boyden,* 150 Fed. 731. The membership was in the New York Stock Exchange, personal to the holder, and only to be transferred, under the rules of the Exchange, and by consent of its committee on admissions, to a new member satisfactory to them. It was held that, in bankruptcy, the membership passed into possession of the trustee as assets of the estate and that, being thus in the custody of the court, the claim of one to whom the owner of the seat had previously made an assignment of it to secure a debt, was to be settled in a summary proceeding in the bankruptcy court. Judge Lurton, afterwards a Justice of this Court, in passing on the question of possession, said (p. 737):

"The 'seat' or 'membership' continued to be the 'seat' of Henrotin, [the bankrupt] and was a pecuniary asset which passed to his trustee. It was as much in his custody and possession as such a species of property is capable of. . . . Only through a court of equity can the pecuniary value of such an asset be realized to creditors or assignees. Only by decree *in personam* compelling the bankrupt member can such a transfer of membership be effectuated as will put the buyer in the place of Henrotin as a member. Over him for that purpose the bankrupt court has exclusive control and in this sense, also, may it be said that the 'seat' or 'membership' was *in custodia legis* when the trustee sought the aid of the court to adjudicate the claims and liens asserted by O'Dell."

See also *In re Hoey*, 290 Fed. 116; *Orinoco Iron Co.* v. *Metzel*, 230 Fed. 40.

For the reasons given, we hold that the District Court had jurisdiction to determine the issues arising in respect to the membership by summary proceeding.

This brings us to the merits. The District Court ordered the transfer and sale of the seat free from all the claims and objections of the petitioners. The view of the court was that, because Henderson had duly posted his intention to transfer in May, 1919, and all the objections of creditor members then filed against such transfer had been settled or withdrawn before the petition in bankruptcy was filed against him, the right of the member creditors to object to the transfer had been lost. The rule which is applicable (Section 2 of Rule X) reads in part as follows:

"Every member shall be entitled to transfer his membership when he has paid all assessments due, and has against him no outstanding unadjusted or unsettled claims or contracts held by members of this Association, and said membership is not in any way impaired or forfeited, upon payment of two hundred and fifty dollars, to any person eligible to membership who may be approved for membership by the Board of Directors, after due notice by posting, as provided in Section 1 of this rule. . . . Prior to the transfer of any membership, application for such transfer shall be posted upon the bulletin of the exchange for a least ten days when, if no objection is made, it shall be assumed the member has no outstanding claims against him."

We do not think these last words are intended to operate as a statute of limitations against the making of objections before the Board of Directors to such a transfer after the ten days. The effect of the rule is to warrant the Directors in proceeding, after the ten days, to effectuate the transfer on the assumption that no one entitled

opposes it, and, if the transfer is completed before objection, those who have been silent are, of course, estopped. But if, at any time before the Directors act, otherwise valid objections are brought to their attention, it is too drastic a construction to hold that delay for ten days after notice has worked a forfeiture. To give the rule such a meaning, the intent should be more clearly expressed. The objections of most of the petitioners herein were filed within five days after the petition in bankruptcy and the Board never has acted on the application for transfer. The objections are therefore valid.

The claims of the petitioners are also attacked on the ground that they were debts of Lipsey and Company and not of Henderson, the bankrupt. There is nothing in this. The rules make the agent of a corporation who is a member and does business and makes contracts in its name on the Exchange, subject to discipline for a default in the obligations of the corporation. This impairs the membership of the agent and prevents transfer under Section 2, Rule X.

Nor is there any weight to the argument that, as the preference claims of petitioners were not asserted until after bankruptcy proceedings were begun, the transfer to the trustee was rendered free from their objection. Such a claim was negatived in *Hyde* v. *Woods, supra.* The preference of the member creditors is not created after bankruptcy. The lien, if it can be called such, is inherent in the property in its creation, and it can be asserted at any time before actual transfer. Indeed, the danger of bankruptcy of the member is perhaps the chief reason, and a legitimate one, for creating the lien.

We think, therefore, that the District Court and the Circuit Court of Appeals erred on the merits of the case. The claims of the petitioners amount to more than sixty thousand dollars, and these must be satisfied before the trustee can realize anything on the transfer of the seat for the general estate.

The decrees of the Circuit Court of Appeals and the District Court are reversed, and the case is remanded to the District Court to proceed in conformity with this opinion.

Reversed.

BARNETT ET AL. *v.* KUNKEL ET AL.

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

No. 134. Argued January 4, 1924.—Decided February 18, 1924.

1. The Court of its own motion will dismiss an appeal not within its jurisdiction. P. 19.
2. The federal jurisdiction of the District Court must appear in the plaintiff's statement of his case. P. 20.
3. A bill to quiet title, averring diversity of citizenship, and showing that the land in question was allotted Indian lands conveyed to plaintiff under the federal law and generally that the defendant asserts a conflicting title, but not showing that the conflict will involve the validity of conveyances made in virtue of the federal law, invokes the jurisdiction of the District Court on the ground of diverse citizenship only, so that review of the decree on the merits, even though federal issues were brought in by answer and cross bill, or at the trial, and decided, is final in the Circuit Court of Appeals (Jud. Code, § 128,) unless this Court shall grant a certiorari (*Id.* § 240.) Pp. 19–21.
4. Section 3 of the Act of June 25, 1910, authorizing appeals to this Court "in all suits affecting the allotted lands within the eastern district of Oklahoma," etc., was repealed by the Judicial Code. P. 21.

Appeal to review 283 Fed. 24, dismissed.

APPEAL from a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court for the plaintiff Kunkel, and the Prairie Oil and Gas Company, made defendant by a cross bill, and against the defendants and cross plaintiffs, Barnett et al., in a suit brought by Kunkel to quiet title to a piece of land in Oklahoma. Certiorari was refused. 260 U. S. 738. A petition for rehearing was denied.

Mr. Lewis C. Lawson, with whom *Mr. Francis Stewart, Mr. Malcolm E. Rosser* and *Mr. Chas. A. Moon* were on the briefs, for appellants.

Mr. Preston C. West, with whom *Mr. Thomas J. Flannelly* and *Mr. Alexander A. Davidson* were on the brief, for appellees.

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

W. A. Kunkel, a citizen of Indiana, began this suit in the United States District Court for the Eastern District of Oklahoma to quiet title to 160 acres of land in that district, and made defendants Hannah C. Barnett, her husband, Tucker K. Barnett, and others, all citizens of Oklahoma residing in the district. In his amended bill the complainant averred that he deraigned his title from one Mehaley Watson, a Creek citizen, to whom was allotted the land in question, that a patent was issued in her name signed by the principal chief of the Creek Nation and approved by the Secretary of the Interior, that she died in October, 1908, before the issue of the patent in March, 1909, that she was an illegitimate child of the defendant Hannah C. Barnett, a Creek of the full blood, who was her heir and inherited the land in question, that on March 22, 1909, in consideration of $500, the mother executed and delivered a warranty deed for the tract to one B. O. Sims, that on the same day the deed to Sims was approved by the County Court of Hughes County, Oklahoma,—the court having jurisdiction to settle the estate of Mehaley Watson deceased,—that Sims conveyed to Brannan, that Brannan conveyed to Berrian and others from whom by some eleven mesne conveyances, the details of which were set out in the bill, the land was conveyed, in March, 1913, to one R. S.

Litchfield, that, the question then having arisen whether Mehaley Watson was not a resident of Okfuskee County, instead of Hughes County, when she died, Mrs. Barnett and her husband filed their petition in the County Court of Okfuskee County asking approval of her deed of March, 1909, to B. O. Sims, and obtained the approval of that court accordingly in consideration of $2000 paid her by Litchfield; that Sims on the same day made and delivered a quitclaim deed of the land to Litchfield, that, by several mesne conveyances set forth, the tract became ultimately vested in the complainant, and that complainant in May, 1914, leased the land to the Prairie Oil and Gas Company for oil and gas purposes, which entered upon the land and was operating wells thereon and paying complainant rentals and royalties.

The bill then alleged that the defendants and each of them were asserting title adverse to that of the complainant, by leases and conveyances of the land and otherwise, and unless restrained would make others, all of which were or would be clouds upon complainant's title, wherefore he prayed that defendants be required to set forth such right, title or interest as may be asserted by them, and that the title of complainant be adjudged valid, and quieted against defendants' claims.

To the amended bill, the defendants, Hannah C. Barnett and her husband, filed an answer and cross bill in which they attacked the validity of her deed to Sims as violating § 9 of the Act of Congress of May 27, 1908, c. 199, 35 Stat. 312, in three respects: first, it was executed two days before the patent to Mehaley Watson was approved by the Secretary of the Interior; second, the approval of the deed by the Hughes County Court in 1909 was of no effect because Mehaley Watson died a resident of Okfuskee County; and third, the purported approval of the deed by the Okfuskee County Court in 1913 was void for the reason that it was made by the

judge of that court during a vacation of the court, at his residence and not at the court house, and that it was obtained by fraud upon the judge and Hannah Barnett. By cross bill the Prairie Oil and Gas Company, a corporation of Kansas, was made defendant. Mrs. Barnett, asserting ownership in the land in herself, prayed for a decree declaring the Sims deed void, and quieting her title, and for an accounting for the profits made from the land by complainant and the Prairie Oil and Gas Company. Evidence was heard and a decree rendered by the District Court finding for the complainant and quieting title in him. An appeal was taken to the Circuit Court of Appeals, in which the decree of the District Court was reversed (259 Fed. 394), and the case remanded for another hearing because of the exclusion of material evidence. Upon a second hearing, the decree was again for the complainant, and on the second appeal, the decree of the District Court was affirmed. 283 Fed. 24. A petition for certiorari was filed and submitted to this Court, October 23, 1922, and was denied November 13, 1922. 260 U. S. 738.

No question of our jurisdiction to hear this appeal is raised by the appellees. That, however, does not relieve us from the duty of inquiring into it. The jurisdiction of the District Court was invoked on the ground of diverse citizenship of the parties. There was no other ground set forth in the bill. The complainant in deraigning his title disclosed the fact that it rested on the allotment of the land in question to a deceased Creek Indian minor, that the land was inherited by the minor's mother and was conveyed by that mother as a full blood Creek Indian with approval of the County Court, all in accordance with and by virtue of a law of Congress; but there was nothing to show on the face of the bill that the validity of this conveyance was questioned under that law. The averment that the defendants were asserting

a conflicting title or interest did not show that the issues which the assertion of their claims would present for trial, would necessarily involve the validity of the conveyances made under and by virtue of the federal law, any more than the legal sufficiency of the many other conveyances set forth in the bill in the chain of complainant's title. It is true that the issues made by the answer clearly involved a consideration and construction of the effect of the federal statute of May 27, 1908, and perhaps others, but that fact subsequently developed would not furnish a ground for jurisdiction of a Federal District Court. In *Florida Central R. R. Co.* v. *Bell,* 176 U. S. 321, it was said (p. 327):

"It must be regarded as conclusively established by our decisions that the jurisdiction of the Circuit Court must appear in the plaintiffs' statement of their case," citing *Metcalf* v. *Watertown,* 128 U. S. 586; *Colorado Central Mining Co.* v. *Turck,* 150 U. S. 138; *Oregon Short Line Ry. Co.* v. *Skottowe,* 162 U. S. 490; *Hanford* v. *Davies,* 163 U. S. 273; *Press Publishing Co.* v. *Monroe,* 164 U. S. 105.

And (pp. 328–329):

"In view of the frequent and recent decisions of this court on this subject, it is not necessary to argue the proposition that the mere assertion of a title to land derived to the plaintiffs, under and by virtue of a patent granted by the United States, presents no question which, of itself, confers jurisdiction on a Circuit Court of the United States. *Blackburn* v. *Portland Gold Mining Co.,* 175 U. S. 571."

The subject is discussed and cogent reasons for the rule are given in *Shulthis* v. *McDougal,* 225 U. S. 561, 569. See also *Taylor* v. *Anderson,* 234 U. S. 74; *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505; *De Lamar's Nevada Co.* v. *Nesbitt,* 177 U. S. 523.

Had the bill of complaint in this case averred that the suit arose under the laws of the United States, because

Hannah Barnett insisted that her deed to Sims was void under the statutes of the United States and so had created a cloud upon complainant's title by her subsequent leases and contracts, the District Court could have taken jurisdiction on that ground alone. *Hopkins* v. *Walker,* 244 U. S. 486, 490; *Lancaster* v. *Kathleen Oil Co.,* 241 U. S. 551; *Wilson Cypress Co.* v. *Del Pozo,* 236 U. S. 635, 643, 644. But nothing of this kind appeared in the bill, and the development of the real federal issues in the answer or on the trial could not supply the defect in the original jurisdiction of the suit as one arising under the laws of the United States.

It being established that the sole ground for jurisdiction in the District Court was diverse citizenship, the decree of the Circuit Court of Appeals affirming the decree of the District Court on appeal was final, § 128, Judicial Code, and can only be reviewed in this Court by writ of certiorari under § 240, Judicial Code. *Shulthis* v. *McDougal,* 225 U. S. 561.

The appeal is dismissed for lack of jurisdiction.

On March 17, 1924, the Court, through the Chief Justice, made an order in this case, as follows:

The Court orders that there be added to the opinion already filed herein the following:

" The third section of the Act of Congress, approved June 25, 1910, c. 408, 36 Stat. 836, was repealed by the last paragraph of § 297 of the Judicial Code, approved March 3, 1911, c. 231, 36 Stat. 1087, 1169."

The petition for rehearing is denied.

PUGET SOUND POWER & LIGHT COMPANY ET AL. *v.* COUNTY OF KING ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 138. Motion to dismiss or affirm submitted January 2, 1924.—Decided February 18, 1924.

1. The time allowed, by the Act of September 6, 1916, for a writ of error from this Court to review a judgment of a state court, begins to run from entry of the formal judgment of record in the state court, and not from the previous filing of the court's opinion and decision. Procedure in the State of Washington considered. P. 23.
2. A party who did not raise a federal question in the state courts cannot come here by assigning error jointly with another party who raised it. P. 25.
3. The property of a street railway company, in view of its peculiar character, may be classified differently from property of commercial steam railways, for state taxation, without violating the Fourteenth Amendment. P. 26.
4. A law of Washington providing for taxation of all the operating property of street railways, as personalty, though consisting partly of real estate, and thereby depriving the owner of certain advantages as to time of payment, rate of interest and redemption allowed other owners of realty,—*held* not arbitrary. *Id.*
5. The Fourteenth Amendment does not impose on state taxation a requirement of equality so rigid that the legislature may not adjust its measures in view of the practical, as well as theoretical, incidence of taxation. P. 28.

117 Wash. 351, affirmed.

ERROR to a judgment of the Supreme Court of Washington which affirmed a judgment of a lower court dismissing the complaint of the Puget Sound Power & Light Company and the cross complaint filed by City of Seattle against its co-defendants, in a suit by the Power & Light Company to enjoin collection of taxes on its street railway property.

Mr. Howard A. Hanson and *Mr. Malcolm Douglas,* for defendants in error, in support of the motion to dismiss or affirm.

Mr. James B. Howe, Mr. Frederic D. McKenney, Mr. Thomas J. L. Kennedy, Mr. Walter B. Beals and *Mr. Walter F. Meier,* for plaintiffs in error, in opposition to the motion. *Mr. Hugh A. Tait, Mr. Edgar L. Crider, Mr. Norwood W. Brockett* and *Mr. Edwin C. Ewing* were also on the brief.

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

The Puget Sound Power and Light Company owned a street railway, part of which was in Seattle. This part it sold to the City in 1919. In the contract of purchase it was agreed that if when the deed was delivered any lien should have attached to the property for the taxes of 1919, it should not constitute a breach of warranty, and the tax should be paid in amounts proportioned to the parts of the year during which the parties were respectively in possession. The deed was delivered March 31, 1919, and possession then taken. On March 15, 1919, an assessment had been made by the Tax Commissioner of the State on the operating property of the street railway, including that part then contracted to be sold to the city. The Power Company brought this suit in the Superior Court of King County, Washington, against the County and its taxing authorities, the State Tax Commissioner, and the City of Seattle to restrain the collection of taxes under the assessment as illegal. The Superior Court dismissed the complaint. Its action was affirmed by the Supreme Court of the State and this is a writ of error to that court. The case comes before us on a motion to dismiss or affirm.

The first ground for the motion is that the writ of error was not taken within the time allowed by law. By the

Act of September 6, 1916, c. 448, § 6, 39 Stat. 727, it is provided that no writ of error intended to bring any cause for review to this Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of. The Washington Supreme Court sits in two departments and *en banc*. The Second Department filed its opinion October 15, 1921. The case was reargued before the court *en banc*, which in a *per curiam* opinion filed June 12, 1922, approved the decision of the Second Department and affirmed the judgment. On July 10th there was entered on the minutes of the court the following:

"*Judgment.*

"This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, . . . and the Court having fully considered the same, and being fully advised in the premises, it is now, on this 10th day of July, A. D. 1922, . . . considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs."

The contention is that the *per curiam* opinion filed June 12th was under the constitution and laws of Washington the judgment from which the time for allowance of the writ of error from this Court began to run, and that the period thus expired on September 12, 1922, whereas the writ of error herein was not applied for until September 22nd. Under the law of Washington (§§ 10 and 11 of Remington's Compiled Statutes of Washington, 1922) a decision of a department of the Supreme Court does not become final until thirty days after it is filed, during which a petition for rehearing may be filed. If no rehearing is asked for, or no order entered for a hearing *en banc*, in the thirty days, the decision becomes final. If a hearing *en banc* is ordered and had, as here, the decision is

final when filed; but in all cases where the decision is final, there is a specific provision that a judgment shall issue thereon. It is apparent that however final the decision may be, it is not the judgment. It is said that the latter is a mere formal ministerial entry of a clerical character, whereas the real judgment is the final decision. Whatever the effect of the distinction in the procedure of the State, which counsel seek to make, we are in no doubt that that which the Washington statute calls the judgment is the judgment referred to in the Act of Congress of September 6, 1916, *supra,* fixing the time in which writs of error must be applied for and allowed. The motion to dismiss the writ granted the Power Company must be denied

A separate motion to dismiss is directed against the City of Seattle which appears as a plaintiff in error with the Street Railway Company. It was made a defendant in the Superior Court by the Company. It filed an answer supporting the averments of the complaint and a cross complaint against its codefendants, asking the same relief as that asked in the complaint. It took a separate appeal to the Supreme Court of the State. No evidence appears in the record that it raised an objection based on the Fourteenth Amendment to the Federal Constitution or any other federal question in the Superior Court or Supreme Court. It is too late for the City to raise it in the assignment of errors in this Court, even though it joins in the assignment with the Street Railway Company which did raise such an objection in all the courts. *Sully* v. *American National Bank,* 178 U. S. 289, 297. It is difficult to see how, under *Trenton* v. *New Jersey,* 262 U. S. 182, and like cases, the City could have been heard as against the State to complain of state taxes on the ground that they violated the Fourteenth Amendment; but it is not necessary to decide this. The motion to dismiss the writ of the City must be granted for the reason first stated.

We come now to the motion to affirm the judgment against the Power Company. By objections seasonably taken before both state courts and in the assignment of errors, the Power Company questioned the validity of the Act of February 21, 1911, of the Legislature of Washington (Laws of Washington, 1911, p. 62) amending an Act of the same body of March 6, 1907 (§12, c. 78, Session Laws of 1907), under which the taxes complained of were assessed. Before 1911, the laws of Washington provided for a separate assessment of the real estate and of the personalty of a street railway. By the act of that year this was changed and it was provided "that all of the operating property of street railroads shall be assessed and taxed as personal property." The effect of this act, so far as the real estate of the street railway used in its operation was concerned, was, first, to fix the day of payment of the taxes as on March 15th in each year, in accord with the law as to taxes on personalty, instead of May 31st, the day fixed for the payment of real estate taxes, with an option in the real estate taxpayer to postpone payment of one-half of his tax until November 30th; second, to impose 15 per centum as interest after delinquency, instead of 12 per centum interest as on real estate tax delinquency; and, third, to authorize a sale of the property taxed on ten days' notice after delinquency, without any right of redemption, while the sale of real estate for delinquency is longer delayed and a period of redemption is reserved.

It is insisted that to make these differences between the taxation of real estate of a street railway and that of other railroads, other corporations and individuals, is to deny owners of street railway property equal protection of the laws.

The Act of 1911 treated the operating street railway property as a business unit, as a machine consisting of cars, tracks, street easements, wires, power houses and

all the parts of one system. More than half of this total is probably personalty. Much of the realty is mere easements in the streets. The assets of a street railway differ widely from those of the steam commercial railways that own the land upon which their tracks are laid, that have most extensive terminals and whose business is of a radically different character. A separate treatment of these two classes of railroads for taxation has been sustained by this Court because of these manifest differences. *Savannah, etc., Ry. Co.* v. *Savannah,* 198 U. S. 392. *Metropolitan Street Ry. Co.* v. *Board of Tax Commissioners,* 199 U. S. 1. A street railway is *sui generis.* It is not necessarily to be regarded as real estate. Its value is made of uncertain factors. When its franchise to do business expires, its easement in the streets usually terminates, and its rails become but scrap steel. We do not think, considering the very wide discretion a legislature has in such a case, that it was arbitrary to tax the whole street railway unit as personalty. That such a change in this case entailed no real hardship or arbitrary discrimination is shown by the fact that before the new method of treating street railway property was enforced, the tax agent of the street railway company for several years requested that realty and personalty be taxed *in solido.*

We are considering this case only from the standpoint of the Fourteenth Amendment to the Federal Constitution. The objections based on the state constitution of Washington have been settled adversely and conclusively for us by the decision herein of the State Supreme Court. Counsel cite us cases which have little relation to the federal question before us. *Johnson* v. *Wells Fargo & Co.,* 239 U. S. 234; *Ewert* v. *Taylor,* 38 S. D. 124; *State ex rel. Owen* v. *Donald,* 161 Wisc. 188, and like cases involved the application of somewhat stringent provisions of state constitutions as to equality of taxation on

all kinds of property which left but little room for classification. Such restrictions have much embarrassed state legislatures because actual equality of taxation is unattainable. The theoretical operation of a tax is often very different from its practical incidence, due to the weakness of human nature and anxiety to escape tax burdens. This justifies the legislature, where the Constitution does not forbid, in adopting variant provisions as to the rate, the assessment and the collection for different kinds of property. The reports of this Court are full of cases which demonstrate that the Fourteenth Amendment was not intended, and is not be be construed, as having any such object as these stiff and unyielding requirements of equality in state constitutions. No better statement of the unvarying attitude of this Court on this subject can be found than in the often quoted language of Mr. Justice Bradley, in speaking for the Court in *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or of the people of the State in framing their Constitution. But clear and hostile discriminations

against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation."

Clearly there is nothing of an unusual character in the method adopted in this case for the assessment and collection of taxes upon street railways. The general practice of providing special methods of estimating the burden of taxation which this peculiar kind of property should bear is well known and proves that it justifies a separate classification.

The judgment of the Supreme Court of Washington is

Affirmed.

FLEMING ET AL. *v.* FLEMING.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 175. Argued January 17, 1924.—Decided February 18, 1924.

1. An objection to a decision of a State Supreme Court that it impaired contract rights, in violation of Art. I, § 10, of the Constitution, by overruling former decisions, was first made to that court by a second petition for rehearing, and was denied upon the ground that the prior decisions were not overruled. *Held,* a consideration of the point sufficient as a basis for assigning error here. P. 31.
2. The impairment of contract obligation forbidden by Art. I, § 10, of the Constitution, is impairment by legislation. The proposition that judicial impairment is included has been so frequently denied that it can not support a writ of error to a State Supreme Court. *Id. Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444.

3. A state statute in force when a contract was made cannot be made a subsequent statute within the meaning of Art. I, § 10, of the Constitution through new interpretation by the state courts. P. 31.

Writ of error to review 194 Iowa, 71, dismissed.

ERROR to a judgment of the Supreme Court of Iowa, which affirmed a judgment for the plaintiff, in her suit to recover her statutory share, as widow, of property left by her deceased husband, and claimed by the defendants as his surviving partners.

Mr. B. I. Salinger, with whom *Mr. A. B. Cummins* was on the briefs, for plaintiffs in error.

Mr. J. M. Parsons, with whom *Mr. Earl C. Mills* was on the briefs, for defendant in error.

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

This is a writ of error to the Supreme Court of Iowa. The suit was begun in Polk County District Court by Anna B. Fleming, widow of Charles Fleming, against three brothers of her husband, one of whom had become his administrator, to secure her dower rights under the state statute in the share of her husband in the property of a partnership of the four brothers, in the business of soliciting and placing life insurance. The defendants' claim was that Charles lost all interest in the partnership upon his death, that by virtue of three contracts the property passed to the survivors, and the partnership of the three continued in possession and title free from any claim by heirs, next of kin, or the widow of Charles. The Supreme Court of Iowa held that these contracts constituted a contract by each partner to make a will to his survivors, were testamentary in character, and were avoided by § 3376 of the Code of Iowa, providing that as between husband and wife the survivor's share can not be affected by any will of the spouse without previous consent of the survivor.

It is assigned for error that in this ruling the Supreme Court of the State reversed its former rulings, under which such a contract of partnership had been held to be valid and not avoided by § 3376 or any other section of the Code; that on the faith of these rulings, the partnership contracts herein had been entered into, and that the new construction of the statute was an impairment of the contracts of partnership in violation of Article I, § 10, of the Federal Constitution. This objection was made in the Supreme Court of the State on the application for a second rehearing, and the court held in its opinion that the point was not well taken because no prior decisions had in fact been overruled. This is a sufficient consideration of the point by the State Supreme Court before its judgment, to justify an assignment of error raising the federal question, if in fact and in law it be one.

In *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, we had occasion to consider the same issue. After a somewhat full examination, we held that, by a score of decisions of this Court, a judicial impairment of a contract obligation was not within § 10, Article I, of the Constitution, since the inhibition was directed only against impairment by legislation, and that such judicial action presented no federal question of which this Court could take jurisdiction on a writ of error from a state court.

It is urged upon us that the impairment here is legislative, in that the case turned on the effect of § 3376 of the Iowa Code; that the subsequent judicial construction of it became part of the statute and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed, before the making of the contract, and has become a new and different act of the legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law but only to hold that the law always meant what the court

now says it means. The court has power to construe a legislative act, but it has no power by change in construction to date its passage as a law from the time of the later decision. A statute in force when a contract was made can not be made a subsequent statute through new interpretation by the courts. Any different view would be at variance with the many decisions of this Court cited in the *Flanagan Case*.

For these reasons, we must hold that the claim of plaintiffs in error does not raise a substantial federal question, and dismiss the writ of error for lack of jurisdiction.

Writ of Error Dismissed.

MAHLER ET AL. *v.* EBY, INSPECTOR IN CHARGE IMMIGRATION SERVICE, U. S. DEPARTMENT OF LABOR, AT CHICAGO, ILLINOIS.

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

No. 184. Argued January 24, 25, 1924.—Decided February 18, 1924.

1. The inhibition of *ex post facto* laws, (Const. Art. I, § 9) applies only to criminal laws, and not to a law for deporting aliens who by conviction of crime are shown to be undesirable as residents of this country. P. 39.
2. The deportation thus provided is not punishment. *Id.*
3. Repeal of the law under which an alien was convicted does not do away with the conviction as a basis of subsequent deportation. *Id.*
4. The Alien Act of May 10, 1920, establishes classes of persons who in the judgment of Congress are eligible for deportation and directs the Secretary of Labor to deport those, of these classes, whom he finds to be undesirable residents. *Held* not invalid as a delegation of legislative power, since the discretion delegated is sufficiently defined by the policy of Congress and the common understanding as to what "undesirable residents" are. P. 40.
5. Greater precision is required of statutes defining and punishing crimes (*Cohen Grocery Co. Case*, 255 U. S. 81) than of those

delegating legislative power to executive boards and officers. P. 41.

6. In deportation proceedings pursuant to the Alien Act of May 10, 1920, against aliens found to have been convicted under the Espionage and Selective Draft Acts, the convictions are sufficient evidence *per se* that the respondents are "undesirable residents." P. 42.
7. Failure of aliens to answer questions, under advice of counsel, *held* also to warrant inferences by the Secretary of Labor against their desirability. *Id.*
8. Under the above Act of 1920, a finding by the Secretary of Labor that an alien is an undesirable resident, is a jurisdictional prerequisite to deportation. P. 43.
9. The finding must appear in the warrant of deportation itself, or the warrant is void, and the finding cannot be inferred from recitals of the warrant that the alien "has been found" in the United States in violation of the Deportation Act, and has been finally convicted of the offenses named in that act. P. 43.
10. It is a general principle that, where a finding of fact is a condition precedent to an act of an executive officer exercising delegated legislative power, the record of his act must show that the finding was made. P. 44. *Wichita R. R. & Light Co.* v. *Public Utilities Comm.*, 260 U. S. 48.
11. This Court, on an appeal, can notice and rectify a plain and serious error in a *habeas corpus* proceeding, though unassigned. P. 45.
12. Where a warrant for deportation, issued under the Act of May 10, 1920, is jurisdictionally defective in not reciting that the alien had been found an undesirable resident, his discharge in *habeas corpus* may be delayed, under Rev. Stats., § 761, for a reasonable time, to give opportunity for the Secretary of Labor to make the finding, if justified, from evidence in the original, or in a new, deportation proceeding, and to issue a new warrant accordingly. P. 46.

Reversed.

THIS is an appeal from a judgment of the District Court of the United States for Northern Illinois, dismissing five writs of *habeas corpus* and remanding the appellants, who are aliens, to the custody of the Immigration Inspector at Chicago for deportation, in pur-

suance to warrants issued by the Secretary of Labor. The cases were consolidated in the court below.

In 1918, all the appellants were tried and found guilty of violation of § 5 of the Selective Service Act of May 18, 1917, c. 15, 40 Stat. 76, 80, and of § 4 of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219. All but Petro Nigra were sentenced to the United States Penitentiary at Leavenworth, Kansas, for a period of five years; and Nigra was sentenced to the same place for 18 months. Upon error to the Court of Appeals these sentences were affirmed and became final.

Pending the imprisonment of appellants, the Secretary of Labor issued warrants for arrest of the appellants under the Act of May 10, 1920, c. 174, 41 Stat. 593.

They were all in the same form. That as to Mahler was as follows:

"WARRANT OF ARREST
No. 54616/151
United States of America
U. S. Department of Labor,
Washington.

"To Harry R. Landis, Inspector in Charge,
Chicago, Illinois.

"Whereas, from evidence submitted to me, it appears that the alien, Herbert Mahler, who landed unknown at the port of Seattle, Wash., on or about the 1st day of April, 1913, has been found in the United States in violation of the Act of May 10, 1920, for the following among other reasons:

"That he is an alien who since August 1, 1914, has been convicted of a violation of or a conspiracy to violate an Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917,

or the amendment thereof, approved May 16, 1918, the judgment on such conviction having become final; and that he is an alien who since August 1, 1914, has been convicted of a violation of or a conspiracy to violate an act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' approved May 18, 1917, or any amendment thereof or supplement thereto; the judgment on such conviction having become final.

"I, Theodore G. Risley, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law," etc.

On June 14 and 15, 1921, each appellant had a hearing before Immigrant Inspector Paul at Leavenworth, at which appellants were examined orally and the indictment, the judgments, and the opinion and judgment of the Circuit Court of Appeals were introduced in evidence. The Secretary of Labor on the records thus made and presented to him issued a warrant of deportation of each appellant in all respects, *mutatis mutandis*, like that in the case of Herbert Mahler, as follows:

"To U. S. Commissioner of Immigration, Montreal, Canada, or to any officer or employee of the U. S. Immigration Service:

"Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector C. H. Paul, held at Leavenworth, Kansas, I have become satisfied that the alien Herbert Mahler, who landed at the port of Seattle, Washington, on or about the 1st day of September, 1913, has been found in the United States in violation of the Act of May 10, 1920; that he is an alien who since August 1, 1914, has been convicted of a violation of or a conspiracy to violate an Act entitled 'An Act to punish acts of

interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917, or the amendment thereof approved May 16, 1918, the judgment on such conviction having become final. That he is an alien who since August 1, 1914, has been convicted of a violation of or a conspiracy to violate an Act entitled 'An Act to authorize the President to increase temporarily the Military establishment of the United States, approved May 18, 1917, or any amendment thereof or supplement thereto, the judgment on such conviction having become final.

"I, E. J. Henning, Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return said alien to Canada the country whence he came, at the expense of the appropriation: 'Expenses of Regulating Immigration, 1922.'

"For so doing, this shall be your sufficient warrant.

"Witness my hand and seal this 10th day of November, 1921.

"(Signed) E. J. Henning,
"Assistant Secretary of Labor."

The Act of Congress enacted May 10, 1920, c. 174, 41 Stat. 593, provides that aliens of certain classes described in the act, in addition to those for whose expulsion authority already exists, shall, upon the warrant of the Secretary of Labor, be taken into his custody and deported in the manner provided in §§ 19 and 20 of the Immigration Act of February 5, 1917, 39 Stat. 889, "if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States." The classes include all aliens interned as enemies by the President's proclamation under Rev. Stats. § 4067, and alien convicts under the Espionage Act, the Explosives

Act, the Act restricting foreign travel, the Sabotage Act, the Selective Draft Act, the Act punishing threats against the President, the Trading with the Enemy Act, and certain sections of the Penal Code. Section 2 makes the decision of the Secretary of Labor in ordering expulsion of an alien under the act final.

The petitions for writs of *habeas corpus* charged that the warrant of deportation under which the petitioners were held were void because, at the time of the issue of the warrants, the Espionage Act and the Selective Draft Act, for convictions under which they were about to be deported, had been repealed, that the Act of May 10, 1920, under which the warrant was issued, was an *ex post facto* law, because the convictions for which they were to be deported were for acts committed before its passage, that there was no legal evidence to establish that petitioners were aliens amenable to deportation under the act, that the hearings and proceedings were without due process of law, and that for these and other reasons the commitment was void.

Counsel for the appellants in their brief and in their argument attacked the constitutionality of the Act of 1920, not only because it was an *ex post facto* law, but because it delegated legislative power to an executive officer, and because the criterion for his finding, i. e., that the persons to be deported should be "undesirable residents of the United States," was so vague and uncertain that it left the liberty of the alien to the whim and caprice of an executive officer in violation of due process required by the Fifth Amendment. They further attacked the validity of the warrants on the ground that they did not show a finding by the Secretary that the appellants were undesirable residents of the United States, a condition precedent to a legal deportation. They further alleged that, as to all the petitioners, there was no evidence to sustain such a finding if it had been made, and that, as

to Petro Nigra, there was also a fatal lack of evidence at his hearing to show that he had been convicted of the violations of the statutes charged in the warrant.

Mr. Walter Nelles, with whom *Mr. Otto Christensen* was on the brief, for appellants.

An act which is so uncertain and indefinite as not to indicate the matter or thing to which it relates, or which furnishes no standard for determining what acts, conduct or persons come within its purview is invalid: (1) Because it constitutes a delegation and surrender of legislative power to the courts or to executive officers; (2) By permitting arbitrary and unjust discrimination on the part of courts or executive officers, it violates due process of law and equal protection of the law; and, if the act be a penal statute, it is also in violation of the constitutional right to be informed of the nature and cause of the accusation.

The effect of repealing specific statutory offenses which form the basis of government proceedings under other acts is to nullify the latter legislation, for it no longer has anything to "feed upon."

A warrant of deportation must be valid upon its face and show that all the statutory requirements have been complied with.

Before any executive officer can deport any alien, the right must be clearly and explicitly conferred by act of Congress. There must be some evidence to sustain the charge upon which the warrant of deportation is based.

Mr. George Ross Hull, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellee.

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

The theory of the draftsman of the petition for the writ and of the assignment of errors was that the same

constitutional restrictions apply to an alien deportation act as to a law punishing crime. It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 730; *Bugajewitz* v. *Adams,* 228 U. S. 585, 591. The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments. *Fong Yue Ting* v. *United States, supra.* The inhibition against the passage of an *ex post facto* law by Congress in § 9 of Article I of the Constitution applies only to criminal laws. *Calder* v. *Bull,* 3 Dall. 386; *Johannessen* v. *United States,* 225 U. S. 227, 242; and not to a deportation act like this, *Bugajewitz* v. *Adams,* 228 U. S. 585, 591. Congress by the Act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society. In *Hawker* v. *New York,* 170 U. S. 189, the validity of a law of New York which forbade, on penalty, any one who had been convicted of a felony from practicing medicine, was upheld as a reasonable exercise of the police power and not an increase of the punishment for the felony. The present is even a clearer case than that.

The brief for appellants insists that as the laws under which the appellants were convicted have been repealed, the fact of their conviction can not be made the basis for deportation. It was their past conviction that put them in the class of persons liable to be deported as undesirable citizens. That record for such a purpose was not affected by the repeal of the laws which they had violated and under which they had suffered punishment. The repeal

did not take the convicted persons out of the enumerated classes or take from the convictions any probative force rightly belonging to them.

Nor is the act invalid in delegating legislative power to the Secretary of Labor. The sovereign power to expel aliens is political and is vested in the political departments of the Government. Even if the executive may not exercise it without congressional authority, Congress can not exercise it effectively save through the executive. It can not, in the nature of things, designate all the persons to be excluded. It must accomplish its purpose by classification and by conferring power of selection within classes upon an executive agency. *Tiaco* v. *Forbes,* 228 U. S. 549, 557. That is what it has done here. It has established classes of persons who in its judgment constitute an eligible list for deportation, of whom the Secretary is directed to deport those he finds to be undesirable residents of this country. With the background of a declared policy of Congress to exclude aliens classified in great detail by their undesirable qualities in the Immigration Act of 1917, and in previous legislation of a similar character, we think the expression "undesirable residents of the United States" is sufficiently definite to make the delegation quite within the power of Congress. As far back as 1802 the naturalization statute of that year, c. 28, 2 Stat. 153, prescribed that no alien should be naturalized who did not appear to the court to have behaved during his residence in this country "as a man of good moral character, attached to the Constitution of the United States, and well disposed to the good order and happiness of the same." Our history has created a common understanding of the words "undesirable residents" which gives them the quality of a recognized standard.

We do not think that the discretion vested in the Secretary under such circumstances is any more vague or

uncertain or any less defined than that exercised in deciding whether aliens are likely to become a public charge, a discretion vested in the immigration executives for half a century and never questioned. Act of August 3, 1882, c. 376, 22 Stat. 214, and Act of February 5, 1917, c. 29, 39 Stat. 874. See *Buttfield* v. *Stranahan,* 192 U. S. 470, 496.

International Harvester Co. v. *Kentucky,* 234 U. S. 216, and *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, are cited on behalf of petitioners. In those cases, statutes were held invalid for vagueness. They were both criminal cases in which the uncertain words of the statute encountered the limitation of the Fifth and Sixth Amendments. They did not inform the accused sufficiently of the nature and cause of the accusation. The rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers. Cases like the one before us were distinguished from the *Cohen Case* by Chief Justice White in his opinion in that case when he said (p. 92) "the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded."

The next objection is that there was no evidence before the immigration inspector and the Secretary upon which a warrant could properly issue. A special objection of this kind is taken in the case of Petro Nigra. It is said that, in the record of the hearing of his case before the inspector, there does not appear any evidence of his conviction under the Espionage and Selective Draft Acts. It is true that the certified copies of the indictment and judgment against all the petitioners do not appear in the hearing of Nigra as shown, but there is a stipulation between the parties in another part of the record herein that such certified copies were used in the hearing of each

petitioner. It is clear that the hearing of Nigra was not properly reported and that his case is like the others.

But it is said there was no evidence in the hearings of any of them as to their being undesirable residents of the United States. There were their convictions. Those were enough to justify the Secretary in finding that they were undesirable. The statute does not expressly require additional evidence. If it did, there was here the circumstance that, after the examination of the petitioners had proceeded to a certain point of inquiry, the petitioners under the advice of counsel declined to answer further questions, an attitude from which the Secretary might well infer that what would be revealed by answers would not add to their desirability as residents. Of course the question how much additional evidence should be required must vary with the class which makes its members eligible for deportation. Alien enemies interned during war may be very good people, and their having been interned may have little bearing on their being good material for residents or citizens when peace returns; but the aliens in this case were convicted of crimes under such circumstances that the Secretary without more might find them undesirable as residents.

But the Secretary made no express finding, so far as the warrant for deportation discloses. It is contended that this renders the warrant invalid. It is answered on behalf of the appellee, that, in *habeas corpus* proceedings, the prisoner is not to be discharged for defects in the original arrest or commitment, because the object of the proceeding is not like an action to recover damages for an unlawful arrest or commitment, but is to ascertain whether the prisoner can lawfully be detained in custody, citing *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 662. What that case really decided was that, even if the arrest was unjustified by the warrant or commitment on its face, yet if the evidence on the hearing of the petition for *habeas*

corpus showed either that facts existed at the time of the arrest or had occurred since, which made the detention legal, the court would not release the prisoner but would do what justice required and would dispose of the prisoner accordingly. *Iasigi* v. *Van De Carr,* 166 U. S. 391; *Stallings* v. *Splain,* 253 U. S. 339, 343; *Bilokumsky* v. *Tod,* 263 U. S. 149, 158; *Mensevich* v. *Tod,* decided this day, *post,* 134.

In the case before us the defect in the warrants of deportation has not been supplied. The defect is jurisdictional. There is no authority given to the Secretary to deport except upon his finding after a hearing that the petitioners were undesirable residents. There is no evidence that he made such a finding except what is found in the warrant of deportation. The warrants recite that upon the evidence the Secretary has become satisfied that the petitioner aliens have been found in the United States in violation of the Act of May 10, 1920, and that they were finally convicted of the offenses named in the act. They could not have been found in the United States in violation of the Act of 1920 until after the Secretary had found that they were undesirable residents. Appellee's argument is that, therefore, this must be taken to mean that he finds them undesirable citizens. But the words "have been found" naturally refer to a time when the warrant of arrest was served on them, and before he had them before him. They exclude a possible meaning that he was then making their stay in the country illegal by implication of a finding that they were undesirable. This conclusion is borne out by the language of the Secretary in the warrant of arrest which before the hearings he issued against the petitioners and in which he directed their arrest on the ground that they had been found in the United States in violation of the Act of May 10, 1920. It would clearly appear from these two documents, which are naturally to be construed *in pari materia,* that the

Secretary did not deem his finding that the petitioners were undesirable citizens essential to enable him to deport them. Indeed, he seems to have used forms applicable to aliens of a fixed excluded class to be deported on identification with the class, without any further finding by him. The natural construction of his language is that he has become satisfied that they are in the country in violation of the act, solely because they have been convicted as stated.

Does this omission invalidate the warrant? The finding is made a condition precedent to deportation by the statute. It is essential that, where an executive is exercising delegated legislative power, he should substantially comply with all the statutory requirements in its exercise and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act. In *Wichita R. R. & Light Co.* v. *Public Utilities Commission,* 260 U. S. 48, a statute of a State required that a public utility commission should find existing rates to be unreasonable before reducing them, but there was no specific requirement that the order should contain the finding. We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government. After pointing out the necessity for such delegation of certain legislative power to executive agencies we said (p. 59):

"In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to

give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.

"It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this."

If the principle thus stated is to be consistently adhered to, it is difficult in any view to give validity to the warrants of deportation before us.

It is said that no exception was taken to the warrant on this account until the filing of the brief of counsel in this Court. There was an averment that the warrant was void without definite reasons in the petition of *habeas corpus*. There was nothing of the kind in the assignment of error. But we may under our rules notice a plain and serious error though unassigned. Rules 21, § 4, and 35, § 1, 222 U. S., Appendix, pp. 27, 37; *Wiborg* v. *United States,* 163 U. S. 632, 658; *Clyatt* v. *United States,* 197 U. S. 207, 221–222; *Crawford* v. *United States,* 212 U. S. 183, 194; *Weems* v. *United States,* 217 U. S. 349, 362. The character of the defect is such that we can not relieve ourselves from its consideration. The warrant lacks the finding required by the statute and such a fundamental defect we should notice. It goes to the existence of the power on which the proceeding rests. It is suggested that if the objection had been made earlier it might have been quickly remedied. There was no chance for objection afforded the petitioners until, after the warrant issued, in the petition for *habeas corpus*. The defect may still be remedied on the objection made in this Court.

We need not discharge the petitioners at once because of the defective warrant. By § 761 of the Revised Statutes, the duty of the court or judge in *habeas corpus* proceedings is prescribed as follows:

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Under this section, this Court has often delayed the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that defects which render discharge necessary may be corrected. *In re Bonner,* 151 U. S. 242, 261; *Medley, Petitioner,* 134 U. S. 160, 174; *Coleman* v. *Tennessee,* 97 U. S. 509; *United States* v. *McBratney,* 104 U. S. 621, 624; *Bryant* v. *United States,* 214 Fed. 51, 53. The same rule should be applied in *habeas corpus* proceedings to test the legality of confinement under the decision of an administrative tribunal like the Secretary of Labor in deportation cases. No time limitation is imposed upon proceedings under the Act of May 10, 1920. If upon the evidence the Secretary finds that these petitioners are undesirable residents and issues warrants of deportation reciting that finding with the other jurisdictional facts, there will then be no reason, so far as this record discloses, why they should not be deported.

Accordingly, the judgment of the District Court is reversed with directions not to discharge the petitioners until the Secretary of Labor shall have reasonable time in which to correct and perfect his finding on the evidence produced at the original hearing, if he finds it adequate, or to initiate another proceeding against them.

Reversed.

YOUNG MEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO, ET AL. *v.* DAVIS ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 249. Argued January 11, 1924.—Decided February 18, 1924.

1. The Estate Tax imposed by the Revenue Act of 1918, c. 18, 40 Stat. 1096, is not a succession tax upon the benefits received by devisees and legatees, but an excise or death duty upon the transfer of the decedent's estate. P. 49.
2. In providing that bequests to religious and charitable corporations shall be deducted in determining the value of the net estate upon which the tax is imposed, § 403, (3), the act does not undertake to exempt the recipients of such charitable gifts from the burden of the tax if placed upon them by the will. P. 50.
3. Hence, where the charitable gifts are residuary, and are duly taken into account in ascertaining the net taxable estate and the amount of the tax, the act offers no obstacle to charging the tax, with other costs and expenses, against the gross estate and satisfying specific devises and bequests in full, before the charitable gifts are satisfied. *Id.*

106 Oh. St. 366, affirmed.

CERTIORARI to a judgment of the Supreme Court of Ohio which affirmed a judgment directing an executor to deduct a federal estate tax from the residuary estate, given by the will to the present petitioners, and not from the specific devises and bequests to the respondents.

Mr. James I. Boulger, with whom *Mr. Frank Davis, Jr., Mr. Henry A. Williams* and *Mr. Guy W. Mallon* were on the brief, for petitioners.

Mr. Arthur I. Vorys, with whom *Mr. James M. Butler* was on the brief, for respondents.

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

Mary J. Sessions, a citizen and resident of Columbus, Ohio, died on April 1, 1919, leaving a will executed Sep-

tember 17, 1914, and disposing of a considerable estate. The executor paid a tax of $31,000 to the United States as the so-called "Estate Tax" under the Revenue Act of 1918, enacted February 24, 1919, c. 18, 40 Stat. 1057, 1096.

The question in the case is what effect this payment shall have in the distribution of the estate among the legatees and beneficiaries under the will. After providing that her just debts and funeral expenses be paid and making a number of specific legacies and devises, the testatrix gave the rest, residue and remainder of all her property of every description, including lapsed legacies, to the Young Men's Christian Association of Columbus, the Young Women's Christian Association of Columbus, Ohio, Berea College and the American Missionary Association, to be divided equally among them.

Section 401 of the estate tax law *ubi supra,* imposes "a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403)" "upon the transfer of the net estate of every decedent dying after the passage of this Act." Then follow the percentages graduated according to value.

Section 403 provides that for the purpose of the tax the value of the net estate shall be determined in the case of a resident of the United States by deducting (1) funeral and administration expenses, claims against the estate, losses from casualties not insured against and amounts which by law of the domicile are required for support of dependents of testator, but not including income taxes or estate, succession, legacy or inheritance taxes, but (2) including property received by decedent by will or descent within five years on which an estate tax was paid, and (3) deducting:

"The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for

the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . ."
and (4) "an exemption of $50,000."

It is admitted that the corporations mentioned in the residuary clause of the will come within the description of subdivision (3).

The executor deducted from the gross estate the debts, losses and charges and the specific devises and bequests, to find the value of the residuary estate, which, together with the debts, losses and charges, and $50,000, he then deducted from the gross estate to get the value of the net estate by a proper percentage of which the tax was measured and fixed. After paying the tax, he brought an action in the Common Pleas Court of Franklin County, Ohio, asking the direction of the court as to whether the tax should be deducted from the amounts which were about to be distributed to the specific legatees and devisees, or from the residuary estate given to the charitable and educational institutions named. All those taking under the will were made defendants. The Common Pleas Court and the Court of Appeals of Franklin County and the State Supreme Court all held that the tax must be paid out of the residuary estate, and a judgment was entered accordingly. We have brought the case here by certiorari because of the federal question, seasonably made in all the courts by the residuary legatees, that, in the payment of the federal estate tax out of their residuum, they are deprived of a federal right of exemption from the tax intended to be secured to them by subdivision (3) of § 403.

The argument of the petitioners is, that as the tax is expressly made equal to a percentage of the value of the net estate and is imposed upon the transfer of that net estate, Congress can not have intended that the tax

should be paid out of the very gifts which by subdivision (3) are excluded from the net estate. It is further urged that the manifest purpose of Congress was to exempt the beneficiaries under subdivision (3) from tax, and the result of the construction by the Ohio courts is in this case that they are the only ones to pay it. These arguments are persuasive, but they derive much of their strength from the special circumstances of the present case. They are pressed from a different standpoint from that of Congress. What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death. *Knowlton* v. *Moore*, 178 U. S. 41, 48, 49.

Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries. It was intending to favor gifts for altruistic objects, not by specific exemption of those gifts but by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death. It said to him "if you will make such gifts, we'll reduce your death duties and measure them not by your whole estate but by that amount, less what you give." In § 408 it is declared to be the intent and purpose of Congress that as far as it is practicable and unless otherwise directed by the testator, the tax is to be paid out of the estate before distribution.

There is nothing in subdivision (3) of § 403 which exempts the recipients of altruistic gifts from taxation; it only requires a deduction of them in calculating the amount of the estate which is to measure the tax. It exempts the estate from a tax on what is thus deducted just

as subdivision (4) exempts in terms the estate from taxation on its first $50,000; but this does not operate to exempt any legatee who may be entitled to the first $50,000 in the distribution, from deduction to contribute to the tax ultimately imposed, if by the law of the State, such should be its incidence.

It was wholly within the power of the testatrix to exempt her altruistic gifts from payment of the tax by specific direction to her executor, if she chose. It must be presumed when she failed to exercise the power, that she intended the incidence of the tax to be where otherwise by law it must be and therefore, that it was her purpose that her residuary legatees were to receive all that was left after paying all charges, including this tax, out of her estate. The donees of the altruistic gifts profit much by the deduction made under subdivision (3) even though they do receive less by the amount of this tax. Had subdivision (3) not been in the statute, the tax would have been much heavier, measured by a higher percentage of the value of the whole estate including their gifts. It is hardly true to say that under the judgment of Ohio courts these residuary gifts are taxed. The gifts are and were intended by the testator to be indefinite in amount and to be what was left after paying funeral expenses, attorneys fees, executor's compensation, debts of the decedent and taxes. These donees do not pay the taxes any more than they pay the funeral expenses, the lawyers, the executors and the testator's debts.

Judgment affirmed.

STANDARD PARTS COMPANY *v.* PECK.

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

No. 160. Argued January 15, 1924.—Decided February 18, 1924.

One who is employed and paid by another to develop a process and machinery for manufacturing a specified product, and who patents an invention made by him in the course of the employment, holds the patent for his employer. P. 58.

282 Fed. 443, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed in part a decree of the District Court in a suit brought by Peck to enjoin the Standard Parts Company from infringing his patent and for an accounting, etc. The District Court adjudged the equities in the company's favor and ordered Peck to assign to it the patent in question and any others, or applications therefor, based on inventions made by him in pursuance of his employment by the company's predecessor. The Court of Appeals allowed the company only certain rights as licensee.

Mr. Bert M. Kent and *Mr. A. V. Cannon,* with whom *Mr. John M. Garfield* and *Mr. James P. Wood* were on the brief, for petitioner, cited and discussed the following cases:

Solomons v. *United States,* 137 U. S. 342; *McAleer* v. *United States,* 150 U. S. 424; *Gill* v. *United States,* 160 U. S. 426; *Bloxam* v. *Elsee,* 1 Carr. & Payne, 558; *McClurg* v. *Kingsland,* 1 How. 202; *Hapgood* v. *Hewitt,* 119 U. S. 226; *Dalzell* v. *Dueber Mfg. Co.,* 149 U. S. 315; *Air Reduction Co.* v. *Walker,* 195 N. Y. S. 120.

Mr. George L. Wilkinson, with whom *Mr. Charles L. Byron* was on the brief, for respondent.

Any right of action which petitioner may have must be based upon an implied contract growing out of the

employment of Peck by the Pontiac Company. Whether or not a contract may be implied depends upon the intentions of the parties.

There was no intention on the part of either Peck or the Pontiac Company that Peck should assign any inventions or patents. The parties did not have in contemplation the making of patentable inventions by Peck in performing the work for which he was employed. Peck's uncontradicted testimony is that it was not until after the contract had been entered into that any question arose as to the possibility of any patentable inventions being made by him in building the machines and in developing the processes, for which he was employed.

Specific performance will only be granted where it is clearly established by evidence that the party seeking it is entitled to it. *Hennessy* v. *Woolworth,* 128 U. S. 438; *Colson* v. *Thompson,* 2 Wheat. 336; *Dalzell* v. *Dueber Mfg. Co.,* 149 U. S. 315.

A license under a patent will only be implied where the circumstances are such as to estop the patentee from denying the existence of such license. *Edison Co.* v. *Peninsula,* 101 Fed. 831. The same rule would seemingly equally apply to an implied agreement to assign a patent to an employer.

An employer is not entitled to a patent covering an invention made by an employee, in the absence of an express agreement to that effect, but only to a shop-right, or nonexclusive, nontransferable license thereunder. *Hapgood* v. *Hewitt,* 119 U. S. 226; *Dalzell* v. *Dueber Mfg. Co.,* 149 U. S. 320; *Pressed Steel Car Co.* v. *Hansen,* 128 Fed. 445; *Morton* v. *Andrews Co.,* 229 Fed. 150; *Niagara Co.* v. *Hibbard,* 179 Fed. 845; *Burpee* v. *Guggenheim,* 226 Fed. 219; *Johnson Co.* v. *Western Co.,* 178 Fed. 823; *Hildreth* v. *Duff,* 139 Fed. 141; *Barber* v. *National Co.,* 129 Fed. 372.

Solomons v. *United States,* 137 U. S. 342, did not refer to *Hapgood* v. *Hewitt,* 119 U. S. 226, doubtless because

the title to the patent in suit was not at issue, but merely the right of the United States to a license thereunder. Subsequently, this Court, in *Dalzell* v. *Dueber Mfg. Co.,* 149 U. S. 315, a case in which was directly involved the title of an employer to a patent covering an invention made by an employee, followed *Hapgood* v. *Hewitt,* and held that the employer was not entitled to an assignment of the patent. *McAleer* v. *United States,* 150 U. S. 424, and *Gill* v. *United States,* 160 U. S. 426, were implied license cases.

No decision of a federal court has been found in which, in the absence of an express agreement, an employer has been held entitled to an assignment of a patent covering an invention made by an employee regardless of whether the employment was general, or for the special purpose of developing or devising certain specific machines, processes or improvements. *Barber* v. *National Co.,* 129 Fed. 370; *Pressed Steel Car Co.* v. *Hansen,* 137 Fed. 403; *Air Reduction Co.* v. *Walker,* 195 N. Y. S. 120.

The suit is barred by laches.

The consideration which Peck received under his contract was for the work which he did for his employer without regard as to whether or not he might make any patentable inventions. No consideration whatever has passed to him to support the assignment. *Dalzell* v. *Dueber Mfg. Co.,* 149 U. S. 315.

The shop-right of an employer is not transferable. *Hapgood* v. *Hewitt,* 119 U. S. 226; *Boston* v. *Allen,* 91 Fed. 248; *Barber* v. *National Co.,* 129 Fed. 370; *Gill* v. *United States,* 160 U. S. 426; *Pressed Steel Car Co.* v. *Hansen,* 137 Fed. 403; *Lane Co.* v. *Locke,* 150 U. S. 193; *Rowell* v. *Rowell,* 122 Wis. 21; *Bowers* v. *Lake Superior Co.,* 149 Fed. 983.

The procedure adopted by the Court of Appeals in this case would permit the piecemeal trial of cases in disregard of the evident intent of Equity Rule 30.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Suit for injunction, preliminary and perpetual, and accounting for profits and damages, upon the ground of infringement of Letters Patent No. 1,249,473, issued to William J. Peck, respondent.

The bill is the usual one in patent cases. For answer to it the Standard Parts Company admits the use of the devices of the patent and alleges they were constructed under the supervision of Peck and under the terms and provisions of a contract dated August 23, 1915, by and between him and the Hess-Pontiac Spring and Axle Company, for and in behalf of the latter company and the Western Spring and Axle Company, and that it, the Standard Company, has succeeded to the entire assets, business and good will of those other companies, including all of their rights in said contract and devices. And the Standard Company avers that Peck was fully compensated for his connection with the devices.

As an offset and counterclaim, the Standard Company avers that all of the invention in the letters patent was made while Peck was in the employ of its predecessors in business, the Axle Companies above mentioned, and that he was so employed for a period of approximately one year and eight months, and paid, while so employed, a salary of $300 per month, and, at the conclusion of the employment, paid a bonus of $660.

In answer to the counterclaim, Peck admits the contract but denies that it raised the contractual relations averred, or that it could be construed as passing any title to any inventions which might be incorporated in machinery built thereunder; and that neither the Axle Companies nor any person who might have purchased their assets, business and good will could have acquired any right, title or interest in the inventions.

Admits the period of employment averred and that he received the compensation averred, and that at the conclusion of his employment he received a bonus of $660, being the amount of $10 for each 10% of reduction of direct labor cost as called for in said contract, the figures compiled by the Hess Company showing a reduction of 66% in direct labor.

Admits that prior to and during the continuance and subsequent to the period of his employment he practiced as an attorney at law and solicitor of patents, but denies ever so acting for either the Hess Company or Western Company, and denies that he ever prepared or filed or executed any applications for either of the companies, or that any of such applications matured into the patent in suit.

He denies the other allegations of the counterclaim.

On the case as thus presented, Peck's testimony and some other testimony was taken, and certain exhibits introduced, and the judgment of the District Court was, after a review of the decisions of this and other courts, "that the property in the invention belonged to the employer" (the Hess-Pontiac Spring and Axle Company), and that this property passed to the Standard Parts Company when it acquired the assets of the Axle Company, and that Peck holds the legal title in trust for the Standard Company. A decree was directed to be entered requiring an assignment of the legal title to the latter Company.

A motion for rehearing was made and denied, and on March 2, 1921, a formal decree was entered, adjudging the equities to be in favor of the Standard Company, and that Peck, within ten days from the date of the decree, assign and transfer to the company the legal title to the letters patent, and also transfer to it all other patents or pending applications for patents for inventions made by him, in connection with the processes and machinery de-

veloped in the performance of the agreement with the Axle Company.

It was further adjudged that, if Peck failed to perform the decree, "then and in that event" the "decree shall have the same force and effect as such assignments and transfers would have had if made."

The Circuit Court of Appeals reversed the decree of the District Court in so far as it decreed an assignment and transfer of the patent in suit and other patents and applications from Peck to the Standard Company.

The court decreed a license to exist in the Standard Company in the machines, distinguishing, however, between the first six and the last four, in that, in the first six, title was in the Standard Company "wholly free from the monopoly of the patent," this being "within the spirit and fairly within the letter of Sec. 4899",[1] and that the Pontiac Company had a right to sell these six machines to the Standard Company free from the patent. As to the last four, it was decided, that the license to construct them was not assignable and could not pass to the Standard Company "by the ordinary purchase and sale of a business."

The court concluded its opinion as follows: "Defendant [Standard Company] may be advised that it can abandon any further claim of license as to these four machines and contest the patent on its merits—a matter about which we express no opinion—and otherwise it is clearly open to defendant to make what effort it can to establish a license on the theory of estoppel by reason of Peck's knowledge of

[1] "Every person who purchases of the inventor, or discoverer, or with his knowledge and consent constructs any newly invented or discovered machine, or other patentable article, prior to the application by the inventor or discoverer for a patent, or who sells or uses one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor."

the building of these four machines without objection—if such knowledge and conduct occurred—or on the theory of a practical consolidation of the Pontiac Company with the present defendant—if their relationship has that character. (*Lane* v. *Locke,* 150 U. S. 193).

"The decree below is reversed and the record remanded for further proceedings in accordance with this opinion."

The courts reached different rulings because of different readings of the cases. That of the District Court was, that while the mere fact that one is employed by another does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor, as his individual property, yet, if he "be employed to invent or devise such improvements his patents therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do."

The Circuit Court of Appeals rejected this test. It conceded, however, that the deduction of the District Court was sustained by *Solomons* v. *United States,* 137 U. S. 342; *McAleer* v. *United States,* 150 U. S. 424, and *Gill* v. *United States,* 160 U. S. 426, and if correct, required the affirmance of the decree of the District Court. And the court admitted that there was no later declaration than that of those cases, nor any criticism of it. The court, nevertheless, dissented from it, subordinating it to other cases and reasoning, they establishing, it was considered, "that an invention does not belong to the employer, merely by virtue of an employment contract, as well when that employment is to devise or improve a specific thing as when the employment is to devise improvements generally in the line of the employer's business." And considering further that Peck's employment was to devise or improve a specific thing, decided that his contract did not "of its own force, convey to the employer the equitable title to the patentable inventions" which he "might make in the course of its execution" but gave "to the employer a license only."

It is going very far to say that the declaration of *Solomons* v. *United States,* repeated in subsequent cases, and apparently constituting their grounds of decision, may be put aside or underrated—assigned the inconsequence of dicta. It might be said that there is persuasion in the repetition. It cannot be contended that the invention of a specific thing cannot be made the subject of a bargain and pass in execution of it. And such, we think, was the object and effect of Peck's contract with the Hess-Pontiac Spring and Axle Company. That company had a want in its business, a "problem", is Peck's word, and he testified that "Mr. Hess thought probably" that he, Peck, "could be of some assistance to him [Hess] in working out" the "problem", and the "thought" was natural. Hess had previous acquaintance with Peck—his inventive and other ability, and approached him, the result being the contract of August 23, 1915, the material parts of which are as follows: "This Agreement Witnesseth, that second party is to devote his time to the development of a process and machinery for the production of the front spring now used on the product of the Ford Motor Company. First party is to pay second party for such services the sum of $300 per month. That should said process and machinery be finished at or before the expiration of four months from August 11, 1915, second party is to receive a bonus of $100 per month. That when finished, second party is to receive a bonus of $10 for each per cent of reduction from present direct labor, as disclosed by the books of first party."

By the contract Peck engaged to "devote his time to the development of a process and machinery" and was to receive therefor a stated compensation. Whose property was the "process and machinery" to be when developed? The answer would seem to be inevitable and resistless—of him who engaged the services and paid for them, they being his inducement and compensation, they

being not for temporary use but perpetual use, a provision for a business, a facility in it and an asset of it, therefore, contributing to it whether retained or sold—the vendee (in this case the Standard Company) paying for it and getting the rights the vendor had (in this case, the Axle Company).

Other meaning to the contract would confuse the relation of the parties to it—take from the Axle Company the inducement the company had to make it—take from the company the advantage of its exclusive use and subject the company to the rivalry of competitors. And yet, such, we think, is the contention of Peck. He seems somewhat absorbing in his assertion of rights. He yields to the Axle Company a shop right only, free from the payment of royalty but personal and temporary—not one that could be assigned or transferred. Peck, therefore, virtually asserts, though stimulated to services by the Hess Company and paid for them—doing nothing more than he was engaged to do and paid for doing—that the product of the services was so entirely his property that he might give as great a right to any member of the mechanical world as to the one who engaged him and paid him—a right to be used in competition with the one who engaged him and paid him.

We cannot assent to this nor even to the limitation the Court of Appeals put upon Peck's contention. We concur with the District Court and therefore reverse the decree of the Circuit Court of Appeals.

Reversed.

EDWARDS, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK, *v.* SLOCUM ET AL.

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

No. 276. Argued January 10, 1924.—Decided February 18, 1924.

In assessing the "Estate Tax" under the "Revenue Act of 1918," 40 Stat. c. 18, Title IV, charitable bequests which are deductible from the gross estate in fixing the net taxable estate should be deducted without any diminution on account of the tax itself, even though, being residuary, they will ultimately bear the tax burden. P. 62. Cf. *Young Men's Christian Assn.* v. *Davis, ante,* 47.

287 Fed. 651, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court for the plaintiffs in their action to recover from the Collector the amount of a tax paid under protest.

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

Mr. Robert Thorne for respondents.

Mr. Harlan F. Stone and *Mr. Edward H. Green,* by leave of Court, filed a brief on behalf of the Executors of the Estate of Joseph R. DeLamar, as *amici curiae.*

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the respondents, executors of the will of Mrs. Sage, to recover the amount of a tax paid under protest. The tax was levied under the Act of February 24, 1919, c. 18, § 400; 40 Stat. 1057, 1096,

which imposes upon "the transfer of the net estate of every decedent dying after the passage of this Act" taxes equal to specified percentages of the net estate determined as provided in § 403. Mrs. Sage left an estate of $49,129,256.99. She bequeathed specified sums amounting to $1,285,000 for charitable purposes, $8,618,079.55 for purposes other than charitable, and the residue to charitable and educational institutions named. It is admitted that in estimating the tax now in question there is to be deducted from the gross estate the sum of $3,789,321.74 for debts and expenses and the charitable gifts of $1,285,000. These with the gifts to individuals above stated would leave a residue of $35,436,855.70, which the executors contend is exempt by the statute. Adding to the sums admitted to be exempt the residue thus arrived at and the statutory exemption of $50,000, the amount for which exemption is claimed will be $40,561,177.44, leaving a taxable remainder of $8,568,079.55. The Government required the payment of an additional sum reached by deducting from the exempted estate the amount of the tax to be paid, or in other words, adding the amount of the tax to the taxable estate. The suit is to recover this additional sum. The executors prevailed in the District Court and Circuit Court of Appeals after a discussion with which the Government well might have remained satisfied. 287 Fed. 651.

The Government's argument turns largely upon the consideration that a residue is only what is left after the payment of paramount claims. But this is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton* v. *Moore,* 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage

cited in 178 U. S. 49, "not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death." It levies a sum equal to a certain percentage of the value of the net estate, and provides the criteria by which the net estate shall be ascertained. It thus manifestly assumes that the net estate will be ascertained before the tax is computed. The Government offers an algebraic formula by which it would solve the problems raised by two mutually dependent indeterminates. It fairly might be answered, as said by the Circuit Court of Appeals, that "algebraic formulae are not lightly to be imputed to legislators," but it appears to us that the structure of the statute is sufficient to exclude the imputation. As further remarked below, the theory departs from the long established practice of the law not to regard the incidence of a tax in the levying of a tax, and the position of the Government is contrary to the expressed intent of the statute to encourage charitable bequests. It is inconsistent with itself also in maintaining that while the distribution of the burden of taxation among the several beneficiaries is a matter of state regulation, the residue is not to be diminished by the state inheritance tax but only by the estate tax of the United States.

Judgment affirmed.

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

UNITED STATES AT THE RELATION OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION ET AL.

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

No. 398. Argued January 23, 24, 1924.—Decided February 18, 1924.

1. Congress may make one fact *prima facie* evidence of another if the inference is not so unreasonable as to be a purely arbitrary mandate. P. 77.
2. Under § 19a of the Act to Regulate Commerce, as amended, directing the Commission to investigate, ascertain and report the value of the properties of common carriers, and to hear the protests of any carrier against a valuation tentatively made; declaring a final valuation *prima facie* evidence of the value of the carrier's property in all proceedings under the act and in various judicial proceedings, and providing that, unless otherwise ordered by the Commission, its records and data shall be open to the inspection and examination of the public. *Held:*

(*a*) That an order of the Commission denying inspection of records by others than its employees, unless and until offered in evidence at hearings upon protests or before a court, was valid against an interested carrier in so far as the claim to examine them might be based upon the naked ground of their being public documents. P. 78.

(*b*) Subject to the right of the Commission to prevent undue interference with the work in its offices, and undue protraction of hearings, manifest justice requires that the carrier be enabled to examine and meet the data upon which preliminary valuation of its property is founded, and, to this end, be given such information in advance of the hearing as will enable it to point out errors. *Id.*

(*c*) This claim of the carrier should not be denied upon the ground of public policy, nor upon the ground that the evidence was given the Commission in confidence. *Id.*

(*d*) The carrier is not entitled to subpoenas from the Commission not presently needed. P. 79.

290 Fed. 264, affirmed.

ERROR to a judgment of the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of the District, which dismissed a petition for a mandamus against the Interstate Commerce Commission and some of its officials.

Mr. J. R. Turney, with whom *Mr. C. D. Drayton* was on the brief, for plaintiff in error.

The Valuation Act did not empower the Commission to abrogate relator's right, as a party litigant, to examine records and data in the possession of the Commission containing evidence material to the prosecution of relator's protest.

The value reported in the tentative valuation is a mathematical calculation based upon three subordinate findings, (1) the so-called cost of reproducing the physical property, (2) the amount of depreciation in the physical property, and (3) the present value of relator's lands. The reproduction cost is based entirely upon certain average unit prices obtained from statistical data gathered and compiled by the employees of the bureau. The amount of depreciation deducted was determined primarily by the service life of the several physical units also shown by the averages of data similarly gathered and compiled by the Commission's employees. The present value of the lands of relator was determined by the assessment for tax purposes of certain other property in the vicinity, by the sales of like property in the vicinity and by the opinion of certain unnamed persons as to the value of lands lying in the vicinity of relator's lands.

Assuming, but not conceding, that this is the correct method of valuing railroad property, the burden cast upon a protestant can be sustained only by showing that these underlying data are incorrect in one or more of the following particulars: (1) because the facts contained in the data are untrue; (2) because the projects from

which the statistical data were compiled were unfairly selected or were inapplicable to the case in which the average is to be used; (3) because other and material relevant data which would have affected the result materially were either not considered or were excluded in making the compilation; and finally, (4) because the actual analyses and compilations of the data were incorrect mathematically, in theory, application or arithmetic.

The Commission states that the statistical data above described were gathered from nation-wide sources, embracing, not only all carriers, but innumerable manufacturers, etc. In order to make the foregoing tests of the accuracy and applicability of the facts stated in these data, it will be necessary to investigate the original records from these many sources. To ascertain whether the statistical data are complete it will be necessary to compare and analyze the compilations used by the Commission with the results of similar studies of other data made by the protestant. To test the experiential qualifications of the men upon whose opinion various facts are based, it will be necessary to investigate the education, mental habit, the environment and objective point of the person giving the facts, the motive prompting his opinion or his selection, as well as the extent of his information. With respect to the sales of land used as a basis for fixing the land values, it will be necessary to investigate whether or not the property sold was comparable with that of the property of the railroad; whether the sale was voluntary or made under duress or coercion; whether the consideration shown was in fact actually paid; whether the area reported was the correct area, and finally, what effect the inclusion of other sales omitted by the Commission would have had on the unit price. When these facts have been investigated, it will then be necessary to recompile and analyze the data to determine whether or not the analysis used by the Bureau's employees was correct mathematically.

There is a fundamental difference between the evidence to which access is sought in this case and that which ordinarily forms a predicate of judicial action. The time required to make such examination and analysis means that unless the relator has the opportunity to examine the data in advance of the hearing, its right to contest the tentative valuation will be denied for all practical purposes.

The data sought consist of statistics and records gathered from a large number of different sources by means of questionnaires, circulars and personal interviews purporting to show the cost and values of railroad property. They were gathered, compiled and analyzed by officers of the Government at public expense in performance of a statutory duty and are now preserved in the Commission's files as a permanent memorial of how that duty was performed. They are, therefore, public records, which a litigant has a right to examine. *People* v. *Peck,* 138 N. Y. 386; *Coleman* v. *Commonwealth,* 25 Gratt. 865; *Robinson* v. *Fishback,* 135 Ind. 132.

Under paragraph (j) of the valuation section the final value fixed by the Commission is made *prima facie* evidence of the value in all judicial proceedings, in which the data would be material evidence on behalf of the relator and to impeach this *prima facie* showing. It is not necessary in order for the right to examine a public record to arise, that the litigation be pending. The right exists if the data contain evidence material to the prosecution of a claim or a defense in a case which may arise. *Citronelle* v. *Skinner,* 60 Ala. 812; *Ferry* v. *Williams,* 41 N. J. L. 332; *Ex parte Uppercu,* 239 U. S. 435.

The discretion which the statute (par. e) gives the Commission to seal its records is limited to the general public, and does not refer to litigants or other persons who have the right of access to the evidence independent of the statute. See *Palacios* v. *Corbett,* 172 S. W. 777; *Wellford* v. *Williams,* 110 Tenn. 549; *Colescot* v. *King,* 154 Ind. 621.

The Commission's construction of the statute does not foreclose judicial action. *Work* v. *McAlester-Edwards Co.*, 262 U. S. 200; *Roberts* v. *United States,* 176 U. S. 221; *Lane* v. *Hoglund,* 244 U. S. 174.

Denial of the right was in any event outside the discretion of the Commission, and arbitrary and void.

The statement that opening the records would be detrimental to the public interest, conveys no reason.

The statement that disclosure would make it impossible to secure reliable and uninfluenced opinions, means that justice will more likely be done in a proceeding *in camera* than it will in one in which the parties can hear and be heard. See *Jackson* v. *Mobley,* 157 Ala. 108; *Re Egan,* 205 N. Y. 147.

That it would prolong the work, increase the expense and interfere with performance of duties of the Commission's employees, are reasons upon their face without legal force. The statute declares that the records shall be open to the public, except for good cause shown. The Commission has no more right to decline to perform a duty placed upon it by Congress, because the performance of the duty will require time and expense, than it has to decline to perform it upon the ground that it is impossible of performance, or that it would be futile to do so. *Kansas City Southern Ry. Co.* v. *Interstate Commerce Comm.,* 252 U. S. 178.

The reasons which Congress had in mind that would warrant the sealing of the records were those which would apply to some particular case or some particular record, but not these which would apply to the opening of all records in all cases.

Since the statute relied upon by the defendants requires that the records shall be public, in the absence of an order based upon lawful reasons, an order sealing the records which does not meet this requirement is utterly null and void.

Mandamus is the proper remedy. *Ex parte Bradley,* 7 Wall. 364; *Mauldin* v. *Matthews,* 81 S. Car. 414; *Kelleher* v. *School Board,* 134 Mo. 296; *Yeargin* v. *Maschke,* 90 Wash. 249; *California Pine Box Co.* v. *Superior Court,* 13 Cal. App. 65.

Relator was entitled to a subpoena *duces tecum* requiring the production of the documentary evidence underlying the tentative valuation and, for the purpose of cross examination, the attendance of the employees of the Bureau of Valuation who gathered, compiled and analyzed such evidence. *Omaha* v. *Omaha Water Co.,* 218 U. S. 180, distinguished.

The valuation proceeding is a quasi judicial one, and therefore, in accordance with the principles laid down in *Interstate Commerce Comm.* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, relator, as a party litigant, was entitled to be apprised as to all evidence considered. The Interstate Commerce Act expressly provides (§ 17) that "proceedings before it [the Commission] . . . shall conform as nearly as may be to those in use in courts of the United States." Congress intended the Commission to administer § 19a of the act in precisely the same manner that it had administered others—by giving all parties, including its own employees, an opportunity to introduce evidence, and then deciding the issues upon the evidence thus introduced.

Any judgment reached by a court with respect to the value of a carrier's property in a case involving the Act to Regulate Commerce must be entirely based upon the very evidence which the Commission considered in making the finding. How could the court make such a finding if there were no record of a substantial part of the evidence considered by the Commission, or, especially, if the Commission made its tentative finding without evidence? This paragraph (j) of the act of necessity restricts the Commission to a proceeding which determines

value upon evidence which a court can consider, when under the act it becomes necessary for a court to pass upon that question.

That Congress intended that the valuation proceeding should be of a judicial nature is shown by the effect which it gives to the order of the Commission made as a result of the proceeding, not only in making such order *prima facie* evidence of the valuation of relator's property in all proceedings (including judicial proceedings), but in authorizing the Commission to use the valuation and the data supporting it for determining (1) reasonable charges under paragraph 5, § 1; (2) amount of sale price and security issues upon the purchase by one carrier of the property of another under paragraph 6b, § 5; (3) reasonableness of aggregate level of rates of the country as a whole, paragraphs 2 and 4, § 15a; (4) amount of excess earnings to be recaptured from carriers under paragraph 6, § 15a; (5) amount and conditions of security issues by carriers under § 20a of the act.

A proceeding where one's property rights may be taken through administrative action without anything more than a mock hearing in which he is neither apprised of the evidence considered nor given opportunity to introduce relevant evidence, would constitute a failure of due process under the Fifth Amendment. *Bratton* v. *Chandler*, 260 U. S. 110.

Paragraph (i) gives the carrier the right to a hearing, including the right to introduce evidence. Of what value is this right if the carrier be denied the right not only to show that evidence upon which the tentative valuation is based is false, but even to know what that evidence is?

No claim is made by the carrier to a right to a hearing prior to the time the tentative valuation is announced. Nor is such a hearing essential to the protection of its rights.

The provisions of the Act to Regulate Commerce which relate to rate hearings are almost identical in terms with

those in § 19a. In both the governing words are "investigate" and "hearing." Some years ago the Commission took the position that it could base its findings in rate cases upon evidence not received at the hearing, and which was undisclosed to the carrier. But this Court in *Interstate Commerce Comm.* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, overruled the contention.

This evidence constitutes an integral part of a "proceeding" under the Interstate Commerce Act. *Deere Plow Co.* v. *Jones,* 68 Kans. 650; *American Shipbuilding Co.* v. *Whitney,* 190 Fed. 109. And such proceedings under the express terms of paragraph (1) of § 17 "shall be public at the request of any party interested."

The excuse that these data are private and confidential information either of third persons, the Government or of the Commission or its employees, ought to have no standing whatever in a court of justice. *Boston & Maine R. R.* v. *State,* 75 N. H. 513; *Wertheim* v. *Continental Ry. Co.,* 21 Blatchf. 246.

No officer of the Government, as such, has any privilege as a witness. *Gugy* v. *Maguire,* 13 Sou. Can. 33; *Hartranft's Appeal,* 83 Pa. St. 433; Wigmore, Evidence, par. 2375; II Robertson's "Trials of Burr," pp. 517–519; I *id.,* p. 182.

The Commission had no discretion to refuse to issue a subpoena, under § 12 of the Act to Regulate Commerce.

If the relator is entitled to have the records produced its right to have a subpoena therefor should not be denied upon the assumption that the Commission will require its employees to be present at the hearing.

The data were sufficiently described.

Mandamus is the proper remedy to compel the issuance of the subpoena. The duty is ministerial. *Ex parte Peterson,* 253 U. S. 300; *San Francisco Gas Co.* v. *Superior Court,* 155 Cal. 30.

The Supreme Court of the District of Columbia had jurisdiction.

This is not a suit to set aside or annul an order of the Interstate Commerce Commission. *Ex parte Uppercu,* 239 U. S. 435.

The order in question is an ex parte administrative one which does not relate to anyone except the Commission. Neither the relator nor any other person, outside of the Commission's own employees, is required "to do or abstain from doing any act." The order, therefore, is not reviewable in a direct proceeding to annul or set it aside. *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82; *Procter & Gamble Co.* v. *United States,* 225 U. S. 282.

The jurisdiction which the Commerce Court obtained was only "that now possessed by the Circuit Courts of the United States." Jud. Code, § 207; *Procter & Gamble Co.* v. *United States, supra.* Therefore, unless the words "Circuit Courts" include the Supreme Court of the District of Columbia, the jurisdiction of the latter court which undoubtedly existed prior to the establishment of the Commerce Court was not vested in the Commerce Court, but has continued in the Supreme Court of the District. If the words "Circuit Courts of the United States" are to be construed as vesting the jurisdiction of the Supreme Court of the District in the Commerce Court, then, in the similar provision of the Urgent Deficiency Appropriations Act, "District Courts" is sufficiently broad to include the Supreme Court of the District of Columbia when that jurisdiction is reinvested.

In several mandamus cases, each embracing orders of the Commission, jurisdiction arising subsequent to the enactment of the Urgent Deficiency Appropriations Act has been upheld by this Court. *Interstate Commerce Comm.* v. *Humboldt S. S. Co.,* 224 U. S. 474; *Kansas City Southern Ry. Co.* v. *Interstate Commerce Comm.,* 252 U. S. 178; *Louisville Cement Co.* v. *Interstate Commerce Comm.,* 246 U. S. 638.

Mr. P. J. Farrell for defendants in error.

The District Courts of the United States have exclusive original jurisdiction of the subject matter, under the Commerce Court Act and the Act of October 22, 1913, 38 Stat. 219. The real purpose is to annul the Commission's order of October 9, [the substance of which is given in the Court's opinion, *infra,* 75,] made under the Interstate Commerce Act, particularly § 19a, par. (e).

The petition does not allege facts showing illegal acts or breach of legal duty by the defendants in error, or any of them.

The petition does not show that the Commission has refused to issue subpoenas requiring the other defendants to appear at a hearing before the Commission and testify concerning the valuation of the property referred to in the petition.

Congress intended to leave the Commission free to exercise its own discretion as to the issuance of subpœnas; and it would not be proper for the Court, by mandamus, to interfere. *Interstate Commerce Comm.* v. *Waste Merchants Assn.,* 260 U. S. 32.

No particular record or datum is mentioned, or designated.

Plaintiff's motion to the Commission was an attempt to secure a search warrant to enter upon a fishing expedition in the Commission's Bureau of Valuation for the purpose of ascertaining whether there is anything in the working papers of the Commission's employees which, in the opinion of plaintiff, can profitably be used by it in any hearing before the Commission which may hereafter be held upon its protest. Representatives of the plaintiff and employees of the Commission could not at the same time use the records and data mentioned, and this, we submit, clearly demonstrates the correctness of reasons for denying the motion set forth in the Commission's order of October 9. See *Jenkins* v. *Bennett,* 40 S. Car. 393.

The theory of the plaintiff appears to be that the Commission cannot perform properly the appraisal duties under § 19a unless, upon demand, it exhibits to plaintiff for criticism all information the Commission may obtain concerning costs and values in the investigation. This ignores the difference between the duties of the Commissioners as appraisers under said § 19a, and the duties they perform in determining disputed questions of fact in rate and similar cases. *Omaha* v. *Omaha Water Co.*, 218 U. S. 180.

If the Commission, in fixing final values, commits errors of law, they can be corrected in suits instituted in District Courts of the United States; but they cannot be corrected, either before or after the final values are so fixed, in mandamus proceedings.

If, after plaintiff has introduced evidence in support of its protest, in a hearing before the Commission, evidence of a contrary import is introduced at the hearing, plaintiff will then have a right to test the accuracy, competency and relevancy of the latter evidence, but, in advance of the introduction by it of its own evidence, it may not properly insist upon being given an opportunity to examine all matters in the Commission's Bureau of Valuation for the purpose of ascertaining whether, in its opinion, such evidence of contrary import is therein contained. And what is said here about the introduction of evidence before the Commission will be equally applicable to the introduction of evidence in court, if plaintiff challenges in court the validity of action the Commission may finally take in determining the value of the property.

Mr. Justice Holmes delivered the opinion of the Court.

This proceeding arises under what is now § 19a of the Interstate Commerce Act. Act of February 4, 1887, c. 104, 24 Stat. 379, as amended by Act of March 1, 1913, c. 92, 37 Stat. 701, and Act of February 28, 1920, c. 91,

§ 433, 41 Stat. 456, 474, 493. Obeying this section the Interstate Commerce Commission made a tentative valuation of the relator's property and served it upon the relator, the St. Louis Southwestern Railway Company, in July, 1921. In due time the relator filed its protest against the valuation, as provided by the act, especially against the findings of the final value of the property, the cost of reproduction new, the cost of reproduction less depreciation, present value of relator's lands, and the present cost of condemnation and damages or of purchase of lands in excess of present value. In July, 1922, the Commission, as required, made an order setting the matter down for hearing in Washington on September 26, 1922. On July 20 the relator filed a motion with the Commission praying for an order allowing it to examine the underlying data upon which the valuation was based, and for a *subpœna duces tecum* to named officers of the Commission directing them to bring with them to the hearing all the data in any way relating to the matter in issue. In August the Commission canceled the hearing and in October made an order to the following effect. It recited that the opening of certain records to inspection before they were offered in evidence before the Commission in hearings upon protests or before a Court of competent jurisdiction, would be detrimental to the public interest; would make it impossible to secure as uninfluenced opinions upon land values and price and cost information as the Commission could otherwise; would unnecessarily prolong the work, and greatly increase the expense; and would seriously interfere with due performance of the regular duties of the Commission's employees. It therefore ordered that, until further order, office or field notations, &c., in the Bureau of Valuation; opinions and correspondence from or to any employee thereof; land field notes; land computation sheets; cost information secured from others than the carrier in question; cost studies and

cost analyses prepared by the Bureau of Valuation, should not be open to inspection by other than the employees of the Commission unless and until offered in evidence at hearings or before a Court as above.

Thereupon the relator filed the present petition for mandamus in the Supreme Court of the District of Columbia. It sets forth the foregoing facts in detail and annexes a copy of the valuation, with the Commission's statement of the kinds of proof and methods used in making its findings, and further statement that those findings were based upon certain underlying facts compiled by the employees of the Bureau of Valuation, these underlying facts being indicated at some length. They embraced contracts for materials made over the whole country for the ten years ending June 30, 1914; contracts for constructing railroads or parts during the same time; actual expenditures for various classes of construction work in unidentified projects selected by the Bureau; books, vouchers and invoices of materials, &c., used in construction during the same time; undisclosed records purporting to show the service life of various classes of material, &c., together with an inspection report by the Bureau's engineers showing the age of the materials, &c., in relator's railroad. From such data, classified and selected, compilations and analyses were made purporting to show average cost of materials, &c., &c., and the average ratios of engineering and general expenses during construction and interest during construction to cost of construction in selected projects, and the average service, life, age, &c., of the various units of property in relator's railroad. These compilations were used as the basis for finding cost of reproduction new and cost of reproduction less depreciation in the relator's case. Similarly the present value of relator's lands is said to have been reached upon uncommunicated data which it is not necessary to repeat, and the present cost of condemnation or damage or of

purchase in excess of the present value of relator's land is said to have been reached in the same general way. The foregoing data are alleged to have been reduced to writing and to be within the control of the Commission. It is alleged that much of the information gathered was not under oath and that many statements were made orally and that many opinions were taken from persons not qualified to express the same.

The relators prayed for an order directing the Commission to allow it to examine these underlying data, contracts, reports, compilations and records of the Bureau of Valuation so far as in any way related to valuation of the relator's property, and to make written and photographic copies of the same. It also asked that the Commission be directed to issue subpœnas to named officers as in the motion made to the Commission stated above. On a motion to that effect the petition was dismissed by the Supreme Court and the judgment was affirmed by the Court of Appeals. We are of opinion that the judgment was right, and will indicate not only the grounds of our decision but what we think that the relator reasonably may demand.

The relator's claim of right has for its broadest basis the fact that the valuation when made final by the Commission will be *prima facie* evidence in various judicial proceedings in which the value of the property is material to the decision of the case. But the legislature may make one fact *prima facie* evidence of another if the inference is not "so unreasonable as to be a purely arbitrary mandate." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 82. If Congress had given no hearing before the Commission but still had made its conclusion *prima facie* evidence of value, it would be hard to say that any constitutional rights of the railroads had been infringed. *Reitler* v. *Harris*, 223 U. S. 437; *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 430. The strongest basis for the relator's claim is the statute itself.

The statue provides that "Unless otherwise ordered by the commission, with the reasons therefor, the records and data of the commission shall be open to the inspection and examination of the public." The Commission has ordered otherwise as we have stated and the order puts an end to the claim to examine the data on the naked ground that they are public documents. But as the statute provides for a hearing before the Commission it does not follow necessarily that the parties to the proceeding are subject to the same rule when the data are desired as evidence. The hearing to be sure is not of the ordinary kind. The railroads have no adversary. The Commission of course has no object except to arrive at the truth. It is not to be cross examined for bias or otherwise as to its capacity to decide or modes of deciding what is entrusted to it, but on the other hand, since it must grant a hearing, manifest justice requires that the railroads should know the facts that the Commission supposes to be established, and we presume that it would desire the grounds of its tentative valuation to be subjected to searching tests. But there are necessary limits. While there can be no public policy or relation of confidence that should prevail against the paramount claim of the roads, the work of the Commission must go on, and cannot be stopped as it would be if many of the railroads concerned undertook an examination of all its papers to see what they could find out. We need not now consider whether the statute authorizes the order if it be construed to apply to cases like the present, for we cannot doubt that this Commission will do all in its power to help the relator to whatever it justly may demand. As yet it has made no just demand, for we accept the Commission's statement that a general examination in the Commission's offices would interfere too much with its work. Moreover, at the hearing there will be limits, at the discretion of the Commission, to the right to delay the sittings by minute in-

quiries that might protract them indefinitely. See *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 175. But subject to that discretion, we think that, in such way as may be found practicable, the relator should be enabled to examine and meet the preliminary data upon which the conclusions are founded and to that end should be given further information in advance of the hearing, sufficient to enable it to point out errors, if any there be. No present need is shown for the issue of subpœnas; and with this intimation of our views of the Railroad's rights we repeat our opinion that the judgment should be affirmed.

Judgment affirmed.

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

RAILROAD COMMISSION OF TEXAS ET AL. *v.* EASTERN TEXAS RAILROAD COMPANY ET AL.

STATE OF TEXAS *v.* EASTERN TEXAS RAILROAD COMPANY ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Nos. 145 and 146. Argued March 8, 1923.—Decided February 18, 1924.

1. The usual permissive charter of a railroad company does not oblige the company to operate its railroad at a loss; nor is such obligation to be implied from acceptance of the charter and operation under it. P. 85.
2. In the presence of a reasonable certainty that future operation will be at a loss, a railroad company, in the absence of a contract, may cease operation, dismantle its road and realize its salvage value. *Id.*
3. Were the railroad to be compelled by the State in such circumstances to continue operation at a loss, it would be deprived of its property without due process of law. *Id.*

4. The principle allowing a railroad company to withdraw its property from public use that can be kept up only at a loss, is consistent with the State's power to regulate while the company continues to exercise the privileges of its charter. P. 85.
5. The mere presence of a particular provision in the statutes of a State relating to railroads, or even in a special act incorporating a railroad company, does not suffice to show that the provision is a part of the charter contract. P. 86.
6. When it becomes necessary to consider whether a State is attempting to deprive a litigant of property without due process, and the question turns on the existence and terms of an asserted contract, this Court determines for itself whether there is a contract and what are its terms. *Id.*
7. Article 6676, Rev. Civ. Stats. 1911, of Texas, requiring all railroads "carrying passengers for hire," to run certain passenger trains and make certain stops, etc., is a mere regulation of passenger service on roads in operation, and does not subject a railroad company, through charter contract or otherwise, to an absolute duty to operate for its full charter period in face of a reasonable certainty of pronounced loss. P. 87.
8. Article 6625, Rev. Civ. Stats. 1911, of Texas, (Act of March 29, 1889, c. 24) relates to the organization, rights and duties of corporations formed to take over, maintain and operate railroads sold under judicial decree, etc., and the clause, in its proviso, "nor shall the main track of any railroad once constructed and operated be abandoned or removed," applies only to railroads so sold. P. 88.

283 Fed. 584, affirmed.

APPEALS from two decrees of the District Court, the first awarding a permanent injunction in the Railroad Company's suit, brought in that court, to restrain the Railroad Commission of Texas, and others, from interfering with its right to abandon operation and dismantle and salvage its property; the second, dismissing a bill to restrain such abandonment, etc., brought by the State in a court of the State and removed to the District Court. See also 258 U. S. 204, where the same cases were passed upon by this Court in another aspect.

Mr. W. A. Keeling, Attorney General of the State of Texas, with whom *Mr. Walace Hawkins* and *Mr. Frank*

Kemp, Assistant Attorneys General, were on the brief, for appellants.

The Eastern Texas Railroad Company is under contract to maintain and operate its railroad continuously for the term of its charter. *Dartmouth College* v. *Woodward,* 4 Wheat. 518; *Northern Securities Co.* v. *United States,* 193 U. S. 347; *Bullock* v. *Railroad Comm.,* 254 U. S. 513; *International, etc. Ry. Co.* v. *Anderson County,* 246 U. S. 424; *Same* v. *Same,* 106 Tex. 60; *Ricaud* v. *American Metal Co.,* 246 U. S. 304; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 313; *Robbins* v. *Shelby Taxing District,* 120 U. S. 489.

The Company is under statutory duty to maintain and operate its railroad during the term of its charter. *State* v. *Enid, etc., Ry. Co.,* 108 Tex. 239; *Enid, etc., Ry. Co.* v. *State,* 181 S. W. 498; *State* v. *Sugarland Ry. Co.,* 163 S. W. 1047.

The St. Louis Southwestern bought the stock of the Eastern Texas, except qualifying shares, and has since operated the road.

Regardless of the specific statute, and even if it be correctly limited to "sold out" railroads, we submit that the manner by which the St. Louis Southwestern came to own the stock of the Eastern Texas makes the statute under such construction applicable. *Chicago, etc., Ry. Co.* v. *Minneapolis Civic Assn.,* 247 U. S. 490.

Because it is technically a separate legal entity, it does not follow that the Eastern Texas is an independent public carrier, free in the conduct of its business from the control of the company which owns its capital stock, furnishing its officers and electing directors. Article 6676, Tex. Rev. Civ. Stats. 1911, requiring operation of trains from day to day, is applicable.

The federal courts usually follow the state courts in arriving at the contract and statutory obligations exist-

ing between a State and its corporations. *Ricaud* v. *American Metal Co.*, 246 U. S. 304; *International, etc., Ry. Co.* v. *Anderson County,* 246 U. S. 431; *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262; *Burgess* v. *Seligman,* 107 U. S. 20; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349.

The constitutionality of the statute is immaterial when the company accepts the charter. *Interstate Consolidated Street Ry. Co.* v. *Massachusetts,* 207 U. S. 79.

The Fourteenth Amendment, preventing an unconstitutional taking of property, is not available to a railroad company seeking to escape a contract and statutory duty to continue operation and maintenance of its lines of railroad even at a loss. *Brooks-Scanlon Co.* v. *Railroad Comm.*, 251 U. S. 396; *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262; *Bullock* v. *Railroad Comm.*, 254 U. S. 519; *International, etc., Ry. Co.* v. *Anderson County,* 246 U. S. 424; *State* v. *Enid, etc., Ry. Co.*, 108 Tex. 239; *Ashley* v. *Ryan,* 153 U. S. 436; *Newburyport Water Co.* v. *Newburyport,* 193 U. S. 561.

Mr. Jno. R. Turney, with whom *Mr. Daniel Upthegrove, Mr. E. B. Perkins, Mr. E. J. Mantooth* and *Mr. W. B. Hamilton* were on the briefs, for appellees.

Mr. Justice Van Devanter delivered the opinion of the Court.

These two suits involve the right of the Eastern Texas Railroad Company, a Texas corporation having a railroad in that State, to dismantle and abandon its road. One was brought by the company to prevent threatened interference by the State's officers; the other by the State to prevent intended dismantling and abandonment by the company. The former was begun in the District Court; the latter was removed into that court from a state court. The company prevailed, 283 Fed. 584, and the State and its officers prosecute these direct appeals.

The road is 30.3 miles long and all in Texas. The company constructed it in 1902, operated it continuously until April 30, 1921, and then discontinued its operation because it had proved a losing venture. The traffic over it during the period of operation was in greater part interstate and foreign commerce and in lesser part intrastate commerce. The withdrawal from interstate and foreign commerce had the sanction of the Interstate Commerce Commission, given under a law of Congress, and was sustained by this Court in *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204. The present controversy relates to the withdrawal from intrastate commerce and the intended dismantling and abandonment of the road.

The road was constructed primarily to carry traffic to and from large lumbering industries in that territory; but in the course of time those industries exhausted the adjacent supply of timber, and in 1917 they were permanently closed and the people who had been employed in them moved away. The traffic over the road then fell off so much that the revenue became pronouncedly less than the cost of operation. But the operation was continued until the company had exhausted its surplus accumulated in prior years, had come to be without cash or credit, and was unable to go on. Its only remaining property consisted of the road and some meager equipment; and these had shrunken in value from $450,000 to $50,000,—the latter being the estimated salvage value less the cost of dismantling. The property was offered for sale at $50,000 to any one who would operate the road, and the offer was widely advertised, but without eliciting any acceptance or bid. Essential repairs would cost $185,000. The operating cost would be as much as $84,000 per year; the possible revenue from all traffic would not exceed $50,000, and that from intrastate traffic would not be more than $20,000. The adjacent country was sparsely populated; the soil had proved to be usually unproductive; there were

no local industries, and the general situation precluded any reasonable expectation that the road would become self-sustaining in the future. In these circumstances the company concluded to cease all operation and to dismantle and abandon the road.

The company was incorporated under a general law of the State in 1900 for a term of 25 years, and when it ceased operating the road four and one-half years of that term remained. It had not received any state land grant or other public aid; nor had it acquired any property through an exercise of the power of eminent domain, although that power was available under the law of the State.

In the District Court, the State and its officers took the position that under the state statutes the company was prohibited from dismantling or abandoning its road and was in duty bound, and could be compelled, to operate the same in intrastate commerce for the remainder of the 25-year term. In this Court they have adhered to that position, with the qualification that, in the circumstances shown, the company may not be compelled to operate the road but may be made to respond in damages to the State for a failure to operate it. The company, on the other hand, has contended throughout that the state statutes neither prohibit the dismantling and abandonment of the road nor lay on the company a duty to operate it when that can be done only at a loss, and that, if the statutes be as insisted on the other side, they deprive the company of property without due process of law and in that respect are in conflict with the Fourteenth Amendment to the Constitution of the United States.

The appellants rely on two statutory provisions, which they insist were in force when the company was incorporated and became a part of the charter contract. Before examining these provisions it is well to advert to principles which would govern in their absence, and also to considerations bearing on their office and effect.

The usual permissive charter of a railroad company does not give rise to any obligation on the part of the company to operate its road at a loss. No contract that it will do so can be elicited from the acceptance of the charter or from putting the road in operation. The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law. The controlling principle is the same that is applied in the many cases in which the constitutionality of a rate is held to depend upon whether it yields a fair return. *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana,* 251 U. S. 396, 399; *Bullock* v. *Railroad Commission of Florida,* 254 U. S. 513, 520; *State ex rel. Cunningham* v. *Jack,* 113 Fed. 823; s. c. 145 Fed. 281; *Iowa* v. *Old Colony Trust Co.,* 215 Fed. 307, 312; *Northern Pacific R. R. Co.* v. *Dustin,* 142 U. S. 492, 499; *Commonwealth* v. *Fitchburg R. R. Co.,* 12 Gray, 180, 190; *State* v. *Dodge City, etc. Ry. Co.,* 53 Kan. 329, 336.

So long as the railroad company "continues to exercise" the privileges conferred by its charter, the State has power to regulate its operations in the interest of the public, and to that end may require it to provide reasonably safe and adequate facilities for serving the public, even though compliance be attended by some pecuniary disadvantage. *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission,* 206 U. S. 1, 26; *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262, 279; *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission,* 242

U. S. 603, 607. But this rule in no wise militates against the principle that the company may withdraw its property from use by the public "when that use can be kept up only at a loss." *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana, supra.*

A State often has many laws relating to railroads on its statute books which do not become a part of the charter contract,—which are of such a nature that it is apparent the State could not have intended to make or exact a continuing and binding stipulation embodying their terms. Among such laws are those containing specific regulations respecting the safety of employees and travellers, liability for injuries, facilities for handling and moving traffic and redress for failure to provide the facilities prescribed. The occasion for keeping such matters where the legislature may deal with them as changing conditions may require forbids that they be regarded as part of the charter contract unless a purpose to make them such be plainly disclosed. In short, the fact that a particular provision is found in the statutes of the State relating to railroads, or even in a special act incorporating a railroad company, does not in itself suffice to show that the provision is a part of the charter contract. *Texas & New Orleans R. R. Co.* v. *Miller,* 221 U. S. 408, 415; *Chicago, Burlington & Quincy R. R. Co.* v. *Railroad Commission of Wisconsin,* 237 U. S. 220, 234. And see *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 387.

Where it becomes necessary to consider whether a State is depriving, or attempting to deprive, a litigant of property without due process of law in violation of the Fourteenth Amendment, and the question turns on the existence and terms of an asserted contract, this Court determines for itself whether there is a contract and what are its terms. *Louisville & Nashville R. R. Co.* v. *Palmes,* 109 U. S. 244, 255; *Stearns* v. *Minnesota,* 179 U. S. 223, 232. "The principle is general and necessary. *Ward* v.

Love County, 253 U. S. 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds." *Davis, Director General of Railroads,* v. *Wechsler,* 263 U. S. 22, 24.

By way of distinguishing the cases in hand from some which are cited by the appellants it is enough to observe that here the company has ceased to exercise the privilege conferred by its charter, of maintaining and operating the road as a common carrier,—and this because the available traffic has diminished to a point where further operation is economically impossible.

One of the statutory provisions relied on is found in Article 6676 of the Revised Civil Statutes of 1911, and requires that on all railroads "carrying passengers for hire" there shall be at least one passenger train a day, Sundays excepted; that these trains shall stop at stations a sufficient time to discharge and receive passengers, and that, "if so many are run", four of these trains going each way shall stop daily, Sundays excepted, at county seats. This is nothing more than a regulation of passenger service on roads which are in operation and engaged in that service. It does not purport to impose an unconditional duty to operate, or to carry passengers, but requires that where and while a passenger service is maintained it shall conform to the standards stated. Such a provision falls far short of subjecting a railroad company, through charter contract or otherwise, to an absolute duty to operate its road for the full charter period, even after it becomes reasonably certain that the operation will be at a pronounced loss.

The other provision on which the appellants rely was enacted as part of an Act of March 29, 1889, c. 24, and was reënacted as Article 4550 of the Revised Civil

Statutes of 1895, and as Article 6625 of the like statutes of 1911. The original enactment is described in its caption as relating " to rights of purchasers of roadbeds, etc., sold for debt," and in the captions of both reënactments as relating to " new corporations in case of sale." It provides that the purchasers of any railroad sold under judicial decree, etc., and their associates shall be entitled to form a corporation to take over, maintain and operate the road with power to " construct and extend." This is followed by provisos of a restrictive nature, the last of which reads: " Provided, that by such purchase and organization no rights shall be acquired under any former charter or law in conflict with the provisions of the present constitution in any respect, nor shall the main track of any railroad once constructed and operated be abandoned or removed." A second section provides that any corporation so formed which shall " claim to be under the jurisdiction of the federal courts " shall thereby forfeit its reorganization, etc., and a third section declares the existence of an emergency requiring that the act take effect immediately on its passage, because of the absence of any sufficient law providing for the formation of a corporation " for the purpose of acquiring, owning, and extending such sold out property." A reading of the enactment, including its caption and emergency section, shows that every part of it relates to the organization, rights and duties of corporations formed to take over, maintain and operate railroads sold under judicial decree, etc., unless the concluding part of the proviso just quoted is to be taken as having a broader scope. The appellants contend that it should be so taken. Read by itself it gives strong support to the contention. But can it be rightly separated from the context and read alone? Does it when so read reflect the legislative intent? In our opinion the answers must be in the negative. The provision evidently is intended to have the

same scope as the other parts of the act, and to be limited to the same railroads that they are. The captions used to describe the subject of the enactment give some support for this view, and the terms of the emergency section give it further support, for they make it fairly certain that only railroads sold for debt were in mind. The fact that the provision is included in a proviso strongly suggests that it is intended to qualify or restrict what precedes it rather than to reach into a larger field, and the suggestion is emphasized by the first part of the proviso, "that by such purchase and organization no rights shall be," etc. A single word, supplied by fair implication, will bring the provision into full accord with all that is in the proviso, and with all other parts of the act. With that word included, the provision will read "nor shall the main track of any [such] railroad once constructed and operated be abandoned or removed." To us it appears very plain that this is what is intended.

There was no decision on the question in the courts of the State when the company was incorporated or when it made its investment in the road. Two decisions made several years later have a bearing but seem to leave the matter more or less open even in those tribunals. One by the Supreme Court, given in 1917, treats the provision as applicable to all railroads. But the question was not discussed, possibly because the road there involved had been sold under a judicial decree. *State* v. *Enid, Ochiltree & Western Ry. Co.,* 108 Texas, 239. The other by the Court of Civil Appeals at Galveston, given in 1922, appears to treat the provision as applicable only to railroads sold for debt. *Wexler* v. *State,* 241 S. W. 231.

As already indicated, we are of opinion that the provision, like other portions of the enactment of which it is a part, applies only to railroads sold under judicial decree, etc. This road never was so sold. The company did not acquire it through such a sale, but constructed it as an original undertaking.

Our conclusion is that the appellants' reliance on the two statutes is not well grounded. They are all that are claimed to make the company's charter other than one of the usual permissive type. It follows that the District Court rightly held the company was entitled to withdraw the road from intrastate commerce and to dismantle and abandon it.

Decrees affirmed.

THE "GUL DJEMAL."[1]

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

No. 83. Argued January 4, 1924.—Decided February 18, 1924.

The objection that a vessel, owned, possessed, manned, and operated by a foreign State, but engaged in ordinary commerce under charter to a private trader, is immune to libel in the District Court for services and supplies, can not be raised by her master, who, although a naval officer, is not functioning as such, and is not shown to have authority to represent his sovereign in making the objection. P. 94.

296 Fed. 567, affirmed.

APPEAL from a decree of the District Court sustaining a libel against a ship, for services and supplies.

Mr. William A. Purrington and *Mr. John M. Woolsey,* with whom *Mr. Frank J. McConnell* was on the brief, for appellant.

Mr. Oscar R. Houston, with whom *Mr. Ezra G. Benedict Fox* was on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Seeking to recover for supplies and services furnished at New York during November, 1920, in order to fit her

[1] The docket title of this case is: *Steamship "Gul Djemal," her engines, etc.; Hussein Lutfi Bey, Master,* v. *Campbell & Stuart, Inc.*

for an intended voyage across the Atlantic, appellee libeled the steamship *Gul Djemal* and caused her arrest under the ordinary admiralty practice. Her master, appearing for the sole purpose of objecting to the court's jurisdiction, claimed immunity for the vessel because owned and possessed by the Turkish Government, and asked that she be released. No one except the master has advanced this claim.

The parties stipulated:[1] The Turkish Government and the United States are at peace with each other, but diplomatic relations have been severed. The *Gul Djemal* is the absolute property of the Turkish Government and under the administration of the Transport Section of the Ministry of Marine. That government employed and

[1] "First: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was owned by the Turkish or Ottoman Government, that it flies the Turkish flag; that Turkey has but one flag, for both national and commercial uses; that it is registered in the name of Seire-Seffain Administration; that the *Gul Djemal* is the absolute property of the Ottoman Seire-Seffain Administration, the third division of the Ministry of Marine of the Turkish Government, which is attached to the Ministry of War; that the maritime title has been given to the Administration Seire-Seffain by the Ministry of War. Said Seire-Seffain Administration, at the times above mentioned, was (and is) the Transport Section of the Ministry of Marine, and was (and is) charged with the control of transport vessels of the Turkish Government, and said vessels, (of which the *Gul Djemal* was one) which are capable of commercial uses, are, when not used as transports, used in commerce; whether such vessels are used as transports or in commerce is subject to the direction of the Ministry of Marine, which, through departments other than the Seire-Seffain, has charge of battleships, artillery, torpedoes, wireless, and engineering work pertaining to all the vessels of the Turkish Navy; that the *Gul Djemal* was transferred for operation to the Administration Seire-Seffain from the Ministry of War in 1914 and has since been under the control of Administration of Seire-Seffain.

"Said Seire-Seffain Administration, at the times above mentioned, had (and has), as its head, a military officer of the Turkish Govern-

paid the master, officers and crew—the master being a reserve naval officer—and was in possession of the ship when arrested. She "was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return."

The court below denied the alleged immunity and passed a decree for the libellant. Upon this direct appeal only the question of jurisdiction is presented. The relevant certificate follows:

"The sole question raised by the answer of the claimant herein, and the sole issue before this court, was the juris-

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ment, in the active or reserve service of the Turkish Government, and said head must be, at all times, a military officer in the employ of the Turkish Government, the Seire-Seffain Administration being charged with the transport of troops, and at all the times above mentioned, said head of the Seire-Seffain Administration was a Colonel; although said head of the Seire-Seffain Administration, at the times above mentioned, was, in respect of the *Gul Djemal*, not functioning in a military or naval capacity.

"Second: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was in the possession of the Turkish Government, being manned by a master, officers and crew employed by or under the direction of said Seire-Seffain Administration, and paid by the Treasury Department of the Turkish Government through the Administration Seire-Seffain; said master, at the times above mentioned, was (and is) a reserve officer in the Turkish Navy employed by the branch of the Ministry of Marine known as the Administration Seire-Seffain, and the navigating officer was a Lieutenant in the active service of the Turkish Navy, both detailed by the said Ministry of Marine to serve on the *Gul Djemal* during the times above mentioned, but in such service they were not performing any naval or military functions, although they were subject to any orders from the department of the Turkish Government charged with naval or military affairs; the other officers

diction of the court over the steamship *Gul Djemal*, a vessel owned, manned, operated by and in the possession of the sovereign government of Turkey, at peace with the Government of the United States of America. The allegations of the libellant that it had furnished supplies to the vessel, were admitted by the claimant, whose answer set up that the vessel was immune, as a sovereign owned vessel, from the process of this court, and that the vessel was not within the admiralty and maritime jurisdiction of this court. I have granted a decree for the amount prayed for by the libellant, and have denied immunity to the vessel because at the time the cause of action and

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and entire crew of the *Gul Djemal*, during the times above mentioned, were civilians, paid by the Turkish Government.

"Third: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return.

"Fourth: That the Turkish Government, prior to the time mentioned in the libel herein, had severed diplomatic relations with the United States of America, advising its peoples by proclamation, however, that American institutions should not be molested but should be treated as heretofore; that said diplomatic relations have not been resumed; although the United States of America maintains unofficial relations with the Turkish Government by American Consular representatives, and through the medium of a High Commissioner; that during said period of the severed relations, the Spanish Ambassador to the United States has represented, and still represents, Turkish interests in the United States, and has been recognized as such representative by the Department of State of the United States of America.

"Fifth: That the Turkish or Ottoman Government, and the Government of the United States of America, are sovereign governments, and were at all the times mentioned herein, at peace with each other, although the Turkish or Ottoman Government was and is an ally of the enemy of the United States in the World War."

liability on which the libel is founded were created, and at the time the vessel was seized under process of this court, she was, although owned, manned by and in the possession of the sovereign government of Turkey, engaged in commercial trade, under charter for hire to a private trader; and furthermore, because diplomatic relations between the United States and Turkey were then severed and no appropriate suggestion was filed from the State Department of the United States."

Appellee maintains that whatever may be the proper rule in our courts concerning the ultimate immunity of vessels owned by foreign governments and employed in ordinary trade and commerce, such immunity will not be granted upon the mere claim of the master, especially when the United States has no diplomatic relations with the sovereign owner. Such claim can be made only by one duly authorized to vindicate the owner's sovereignty. *Ex parte Muir,* 254 U. S. 522, 532, 533, is relied upon to support this view. It is there said—

"As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question. . . . Or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. . . . And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction."

Treating *Ex parte Muir* as relevant, appellant insists that within the meaning of the declaration there made the master of the *Gul Djemal,* a duly commissioned officer of

the Turkish Navy, was the accredited and recognized representative of that government, possessed of adequate authority to protest against the seizure and object to the court's jurisdiction.

We agree with the view advanced by the appellee. *The Anne,* 3 Wheat. 435, reaffirmed by *The Sao Vicente,* 260 U. S. 151, is enough to show that the immunity could not have been successfully set up by a duly recognized consul, representative of his sovereign in commercial matters, in the ordinary course of his official duties, and there seems no adequate reason to presume that the master of the *Gul Djemal* had any greater authority in respect thereto. Although an officer of the Turkish Navy, he was performing no naval or military duty, and was serving upon a vessel not functioning in naval or military capacity but engaged in commerce under charter to a private individual who undertook to carry passengers and goods for hire. He was not shown to have any authority to represent his sovereign other than can be inferred from his position as master and the circumstances specified in the stipulation of facts.

Affirmed.

MR. JUSTICE HOLMES concurs in the result.

MYERS ET AL. *v.* UNITED STATES.

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

No. 158. Submitted January 11, 1924.—Decided February 18, 1924.

1. The power to punish contempt to enforce obedience inheres in all courts, as essential to the performance of their functions. P. 103.
2. Contempt proceedings are *sui generis,*—neither civil actions nor criminal prosecutions, as ordinarily understood, nor criminal prosecutions within the Sixth Amendment. *Id.*
3. The contempts defined by § 21 of the Clayton Act (October 15, 1914, c. 323, 38 Stat. 730,)—disobedience of a lawful writ, etc., by

an act such as to constitute also a criminal offense,—are not, by the Act, declared criminal. P. 104.

4. Proceedings to punish such a contempt, committed by disobedience of an injunction, are within the jurisdiction of the District Court in the division where the main cause is pending, although the contempt was committed in another division of the district. Jud. Code, §§ 51, 52 and 53, do not control the venue. *Id.*

Affirmed.

ERROR to an order of the District Court sentencing the plaintiffs in error to fine and imprisonment for contumacious disobedience of an injunction.

Mr. Allyn Smith for plaintiffs in error.

The injunction was granted under the Clayton Act. The prosecution was under the same act, and is purely a statutory contempt, in no manner governed by the practice of the High Court of Chancery of England.

There is a vast difference between this statutory contempt and contempts under the "inherent power" doctrine. Under the English practice courts of law punished contempts committed *facie curiæ* at once; and, in the chancery court, contempts *facie curiæ* and those consisting of failures to obey mandatory orders were punished without the intervention of a jury. All other contempts were usually punished by indictment, and the right of trial by jury was allowed. *Gompers* v. *United States,* 233 U. S. 604.

The privilege of a trial by jury is a matter of election on the part of the defendant, under the Clayton Act. The venue is controlled by Jud. Code, §§ 51, 52, 53.

A prosecution for contempt for violation of an injunction is a criminal offense. *Gompers* v. *United States, supra.*

Section 22 of the act providing: "If . . . in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court," does not give the judge the

power to direct the trial to be held at any place within the district. *Binkley* v. *United States,* 282 Fed. 244, distinguished.

The Sixth Amendment guarantees in all criminal prosecutions a speedy trial by an impartial jury of the State and district where the crime shall have been committed. The Judicial Code enforces this.

Mr. Solicitor General Beck and *Mr. George Ross Hull,* Special Assistant to the Attorney General, for the United States.

I. This proceeding to punish for contempt, though it follow the procedure prescribed by the Clayton Act, is none the less an exercise of the inherent power of the court to enforce its decrees. *United States* v. *Hudson,* 7 Cr. 32; *Anderson* v. *Dunn,* 6 Wheat. 204; *Kilbourn* v. *Johnson,* 103 U. S. 168; *Ex parte Robinson,* 19 Wall. 505; *In re Debs,* 158 U. S. 564; *Watson* v. *Williams,* 36 Miss. 331; *Cartwright's Case,* 114 Mass. 230; *Thomas* v. *Cincinnati, etc., Ry. Co.,* 62 Fed. 803; *Little* v. *State,* 90 Ind. 338.

It is urged, however, that when Congress laid its hand upon this inherent power and legislated upon the subject of contempt, restricting somewhat the scope of the power, defining more clearly its character, prescribing the procedure to be followed or limiting the punishment to be inflicted, it destroyed the unique character of a contempt and transformed it into a "statutory offense" comparable in all respects with other crimes; and, in the instant case, subject to the same provisions as to venue. We find, however, that legislation upon the subject of contempt has not, heretofore, been so construed. Judiciary Act, 1789, 1 Stat. 73, 83; Act March 2, 1831, 4 Stat. 487, 510; Rev. Stats., § 725; Jud. Code, § 268; *Ex parte Robinson,* 19 Wall. 505; *In re Chiles,* 22 Wall. 157; *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402; *Middlebrook* v. *State,* 43 Conn. 257.

From 1831 until the passage of the Clayton Act in 1914 no right of trial by jury in cases of contempt was recognized. *Eilenbecker* v. *Plymouth County,* 134 U. S. 31; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447; *In re Debs,* 158 U. S. 564. Nor is it recognized today, excepting in the narrow field of cases in which the Clayton Act specifically provides for it. *Canoe Creek Coal Co.* v. *Christinson,* 281 Fed. 559. We have found no indication in any of the opinions of this Court that it considered the Acts of 1789 and 1831 as having any other effect than that of defining and limiting an inherent and existing power of the courts. Nor do we find anything in the purpose or language of the Clayton Act which warrants the conclusion that it created a "statutory" contempt.

It made no change in the substantive law; but merely prescribed a special procedure in the particular class of cases indicated. The act is in derogation of the inherent powers of the court, and cannot be extended by construction. *Duplex Co.* v. *Deering,* 254 U. S. 443.

II. Section 53 of the Judicial Code, which fixes the venue of prosecutions for crimes and offenses, does not apply to prosecutions for contempt.

Contempt is analogous to crime. *Ex parte Kearney,* 7 Wheat. 38; *Hayes* v. *Fischer,* 102 U. S. 121; *Gompers* v. *United States,* 233 U. S. 604.

But it differs from crime in numerous and important particulars.

Contempts are generally classified as civil and criminal. *Bessett* v. *Conkey Co.,* 194 U. S. 324; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *In re Nevitt,* 117 Fed. 448. But even those which are clearly criminal in character, differ from ordinary crimes.

1. Criminal contempts are tried summarily. *Merchants Stock Co.* v. *Chicago Board of Trade,* 201 Fed. 20.

2. There is no right of trial by jury, save as specifically provided by statute. Contempts are not "crimes"

within Art. 3, § 2, cl. 3 of the Constitution, which provides that: "The trial of all crimes, except in cases of impeachment, shall be by jury . . ." *Eilenbecker* v. *Plymouth County,* 134 U. S. 31; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447; *In re Debs,* 158 U. S. 564; *McCourtney* v. *United States,* 291 Fed. 497. Nor are they "criminal prosecutions" within the meaning of the Sixth Amendment. *United States* v. *Zucker,* 161 U. S. 475.

3. Courts having no criminal jurisdiction may nevertheless punish for criminal contempt. *In re Debs,* 158 U. S. 564; *Middlebrook* v. *State,* 43 Conn. 257; *Cartwright's Case,* 114 Mass. 230; Rapalje, Contempt, 1884, § 3.

4. The defendant may, without a waiver or consent, be sentenced in his absence. *Ex parte Terry,* 128 U. S. 289; *Middlebrook* v. *State,* 43 Conn. 257.

5. An act which is a contempt of court and also a crime may be punished summarily and by indictment; and conviction or acquittal in one will not bar the other. *Chicago Directory Co.* v. *United States Directory Co.,* 123 Fed. 194; *Merchants Stock Co.* v. *Chicago Board of Trade,* 201 Fed. 20; *O'Neil* v. *People,* 113 Ill. App. 195. See also § 25 of the Clayton Act.

6. A defendant is not entitled to be confronted with the witnesses against him in open court. *Merchants Stock Co.* v. *Chicago Board of Trade,* 201 Fed. 20.

7. It is doubtful whether the immunity from self-incrimination afforded by the Fifth Amendment to defendants in "any criminal case" will relieve a defendant in contempt from examination as a witness, so long as he is not required to incriminate himself in any matter other than the contempt inquired into. *Id.*

8. Finally, what is of particular importance in the case at bar—the court against which a contempt is committed has exclusive jurisdiction to punish it, and no change of venue can be allowed. *In re Debs,* 158 U. S. 564; *Ex*

parte Bradley, 7 Wall. 364; *Binkley* v. *United States,* 282 Fed. 244; *McGibbony* v. *Lancaster,* 286 Fed. 129; *Dunham* v. *United States,* 289 Fed. 376; *Commonwealth* v. *Shecter,* 250 Pa. St. 282; *Penn* v. *Messinger,* 1 Yeates, 2; *Passmore Williamson's Case,* 26 Pa. St. 9; *People* v. *County Judge,* 27 Cal. 151; *Phillips* v. *Welch,* 12 Nev. 158; Rapalje, Contempt, 1884, § 13; *New Orleans* v. *Steamship Co.,* 20 Wall. 387.

Because of these points of difference this Court, while recognizing their criminal aspects, has held that contempt proceedings are neither civil nor criminal, but are *sui generis. O'Neal* v. *United States,* 190 U. S. 36; *Bessette* v. *Conkey Co.,* 194 U. S. 324.

To construe the statutes which fix the venue of criminal offenses so as to embrace contempts would seriously curtail the power of the courts to enforce their orders.

The question here raised has been recently considered and decided in favor of the contention now made by the Government. *Binkley* v. *United States,* 282 Fed. 244; *McGibbony* v. *Lancaster,* 286 Fed. 129; *McCourtney* v. *United States,* 291 Fed. 497; *Dunham* v. *United States,* 289 Fed. 376.

Mr. Justice McReynolds delivered the opinion of the Court.

Plaintiffs in error challenged the jurisdiction of the court below—United States District Court, Western Division of the Western District of Missouri—to try and punish them for disobeying its order, upon the ground that the contumacious acts occurred in another division of the district. Only the question of jurisdiction is here.

An information charged that plaintiffs in error wilfully disobeyed the injunction lawfully issued in equity cause, *St. Louis, San Francisco Railway Company, Complainant,* v. *International Association of Machinists, et al., Defendants,* pending in the Western Division of the Western Dis-

trict of Missouri, by attempting, within the Southwestern Division of the same district, to prevent certain railroad employees from continuing at work. The order ran against men on strike, and the cause is treated as one within the purview of the Clayton Act (October 15, 1914, c. 323; 38 Stat. 730). Sections 21, 22, 24 and 25 of that act are set out below.[1]

Counsel for plaintiffs in error maintain that ordinary contempts punishable by courts of equity without trial by jury differ radically from the "statutory contempt" here disclosed, which, under the Clayton Act, must be dealt with as a criminal offense. And they insist that §§ 51, 52

[1] Sec. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

Sec. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,* That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable

and 53, Judicial Code, control the venue when such "statutory contempt" is alleged.

Section 51 provides that, with certain exceptions, "no person shall be arrested in one district for trial in another, in any civil action before a district court." . . . Section 52. "When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides." . . . Section 53. "When a district

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bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided*, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show

contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. . . . All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district."

None of the cited Code sections makes specific reference to contempt proceedings. These are *sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions. *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 326.

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cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

Sec. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

Sec. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

To disobey a judicial order is not declared criminal by the Clayton Act. It recognizes that such disobedience may be contempt and, having prescribed limitations, leaves the court to deal with the offender. While it gives the right to trial by jury and restricts the punishment, it also clearly recognizes the distinction between "proceeding for contempt" and "criminal prosecution." "No proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts." § 25.

The Clayton Act says nothing about venue in contempt proceedings; leaves it as theretofore. The power of the court below to issue the enjoining order is not questioned. By disobeying the order, plaintiffs in error defied an authority which that tribunal was required to vindicate. It followed established practice, as modified by the statute; and we think the objections to its jurisdiction are unsubstantial.

The following cases are in point: *Eilenbecker* v. *District Court of Plymouth County,* 134 U. S. 31, 35, *et seq.; Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 489; *In re Debs,* 158 U. S. 564, 594, 596, 599; *Bessette* v. *W. B. Conkey Co., supra,* pp. 326, 327; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441, 450; *Binkley* v. *United States,* 282 Fed. 244; *McGibbony* v. *Lancaster,* 286 Fed. 129; *Dunham* v. *United States,* 289 Fed. 376; *McCourtney* v. *United States* 291 Fed. 497.

Gompers v. *United States,* 233 U. S. 604, does not support the claim that the challenged contempt proceedings amounted to prosecution for a criminal offense within the intendment of § 53, Judicial Code. While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been

regarded as *sui generis* and not "criminal prosecutions" within the Sixth Amendment or common understanding.

The judgment below must be affirmed.

EX PARTE: IN THE MATTER OF TRANSPORTES MARITIMOS DO ESTADO, ETC., PETITIONER.

PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS.

No. 26, Original. Argued January 7, 8, 1924.—Decided February 18, 1924.

1. Upon the libel of a ship, for services and supplies, the District Court acquires jurisdiction of the *res*, with power to pass upon the form and substance of a claim of immunity presented by a foreign minister alleging that the ship is owned and operated by a department of his government. P. 108.
2. The overruling of such a claim, by the District Court and Circuit Court of Appeals, is not reviewable here by prohibition and mandamus, where there was full opportunity to review in the customary way. *Id.*

Rule discharged and petition dismissed.

PETITIONS for prohibition and mandamus, presented to this Court by the Minister of the Republic of Portugal.

Mr. F. Dudley Kohler for petitioner.

The power to issue writs of prohibition is given to this Court, and this remedy is assured to the petitioner by Jud. Code, § 234. It is well settled that this remedy is not in the nature of an appeal or to take the place of an appeal. Its purpose as issuing to a District Court, sitting as a court of admiralty, as in this case, is to prevent an unlawful assumption or exercise of jurisdiction and lies when the court is acting in excess of its jurisdiction or is taking cognizance of matters not arising within its jurisdiction. Its office is to prevent an unlawful assumption of jurisdiction; *Ex parte Phenix Ins. Co.*, 118 U. S. 610;

Ex parte Indiana Transp. Co., 244 U. S. 456; and not to correct errors or irregularities. *Ex parte Gordon,* 104 U. S. 515; *Ex parte Ferry Co.,* 104 U. S. 519; *Curtis* v. *Cornish,* 109 Me. 384; *In re Baiz,* 135 U. S. 403.

It is not necessary where the District Court has no jurisdiction of the parties or of the subject matter to carry the case to, and exhaust the remedies by, appeal. The proper remedy is by petitioning for a writ of prohibition which should issue in such a case. *In re Fassett,* 142 U. S. 479; *The Western Maid,* 257 U. S. 419; *Ex parte State of New York,* 256 U. S. 490; *Ex parte State of New York,* 256 U. S. 503; *State* v. *Colbert,* 129 La. 326; *Ex parte Indiana Transp. Co.,* 244 U. S. 456.

The rule here is that where the lack of jurisdiction in the lower court is clear it is not necessary to show that there was no remedy by appeal.

The exception to this rule of not requiring that there be no remedy by appeal is in cases where the District Court may have had in the first instance some jurisdiction or reasonable grounds for believing that it had jurisdiction, that is where the question of jurisdiction might be doubtful or in cases which are of such a character as those of which the Court might ordinarily have jurisdiction.

The petitioner is entitled to a writ of prohibition as a matter of right. *Iberia, etc., R. R. Co.* v. *Morgan's S. S. Co.,* 129 La. 492; *In re Fassett,* 142 U. S. 479; *Smith* v. *Whitney,* 116 U. S. 167; *Ex parte Chicago, etc., Ry. Co.,* 255 U. S. 273; *Ex parte Phenix Ins. Co.,* 118 U. S. 610; *Ex parte Indiana Transp. Co.,* 244 U. S. 456; *In re Rice,* 155 U. S. 396; *In re Cooper,* 143 U. S. 472.

The lack of jurisdiction of the District Court is unquestionably clear. That this is a suit against a sovereign government at peace with the United States is evident. *Ex parte State of New York,* 256 U. S. 490.

Mr. E. Curtis Rouse for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By this original petition the duly accredited Minister of the Republic of Portugal asks for the writ of prohibition or *mandamus* to prevent further action in the proceeding instituted by Stephen Ransom Dry Dock & Repair Corporation in the District Court at New York, April 14, 1921, to enforce payment for services and materials furnished the *Sao Vicente*. Recognizing the high consideration always due diplomatic representatives of friendly nations, we entertained the petition and directed a rule to show cause why relief should not be granted. The return is here and, after hearing oral argument, we think the court below acted within its jurisdiction and with due regard to the rights of all concerned.

The original libel *in rem*, filed April 14, 1921, claimed for supplies and labor furnished the *Sao Vicente* and prayed for condemnation and sale of the vessel. April 15th Transportes Maritimos do Estado intervened as the true owner having possession when process issued; the customary stipulation for value, bond and release of the ship followed.

Answering by proctor, May 31, 1921, the vessel denied liability and objected to the jurisdiction because it was "owned and operated by Transportes Maritimos do Estado, a department of the sovereign foreign government of Portugal as aforesaid, and that it cannot be sued in any of the courts of the United States without its consent and that this action is in substance and effect an action against the government of Portugal and as such is not maintainable against this respondent." An interlocutory decree of June 9, 1923, directed the master to ascertain the amount due.

July 5, 1923, the present petitioner filed a formal suggestion. He stated that the general appearance by

counsel retained by the Vice Consul General of the Republic of Portugal was unauthorized by his government and that the vessel was owned and operated by Transportes Maritimos do Estado, a department of the sovereign government of Portugal. He protested against exercise of jurisdiction by the court and asked that the proceedings be dismissed. The Secretary of State gave no sanction or approval to this course, but certified the diplomatic position of the Minister. Upon motion the suggestion was stricken from the files. Final judgment for the libellant followed and, upon appeal, the Circuit Court of Appeals affirmed this with interest and damages, October 1, 1923. No proper steps were taken to secure an orderly review by this court.

Plainly the trial court obtained jurisdiction over the *res* and, in the absence of any claim of immunity, it would have been required to render judgment. It had power to consider and pass upon both form and substance of any objection to its jurisdiction because of ownership and to decide whether it should proceed under the circumstances. There was a plain way to seek review here if the defeated party had so desired.

We find no adequate ground for granting the extraordinary relief now asked. There has been ample time and opportunity for advancing the claim of immunity in the customary manner. *Ex parte Muir,* 254 U. S. 522; *The Pesaro,* 255 U. S. 216, 218, 219; *Ex parte Hussein Lutfi Bey,* 256 U. S. 616, 619.

Rule discharged and petition dismissed.

RED CROSS LINE *v.* ATLANTIC FRUIT COMPANY.

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

No. 112. Argued November 14, 15, 1923.—Decided February 18, 1924.

1. A decision of the highest court of a State excluding maritime contracts from the operation of a state statute, not as a matter of statutory construction but due to its opinion that the Federal Constitution so requires, presents a constitutional question reviewable here. P. 120.
2. Under the provision of the Judicial Code (§ 24, par. 3) vesting the District Courts with exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction but saving to suitors the right of a common law remedy, a State may confer upon its courts jurisdiction to specifically perform an agreement for arbitration valid by the general maritime law and by the law of the State, which is contained in a charter-party made in the State and which, by its terms, is to be performed there. P. 122.

233 N. Y. 373, reversed.

CERTIORARI to a judgment of the Supreme Court of New York entered on a judgment of the New York Court of Appeals reversing a judgment of the Appellate Division of the Supreme Court, which had affirmed an order of the Supreme Court, in New York County, by which the present respondent was directed to proceed to arbitration under its contract contained in a charter-party, executed in New York, whereby a vessel was chartered to the petitioner by the respondent.

Mr. Homer L. Loomis, with whom *Mr. Reginald B. Williams* was on the briefs, for petitioner.

The agreement to arbitrate alone is the subject of the statute, which prescribes the procedure, *Berkovitz* v. *Arbib & Houlberg, Inc.,* 230 N. Y. 261, and is intended to compel specific performance of such agreements. *Matter of Division 132,* 196 App. Div. 206.

The courts have never denied that an agreement to arbitrate creates a right, though public policy was thought to forbid specific performance. *Hamilton* v. *Home Ins. Co.,* 137 U. S. 370.

The application of the statutory remedy to the independent contract to arbitrate incorporated in a charter-party does not infringe the jurisdiction of the admiralty court; at least not unless this independent contract is maritime and subject to the admiralty jurisdiction.

The agreement to arbitrate is not a maritime agreement and is not within the jurisdiction of the admiralty court. The essential requisite of a contract to bring it within the admiralty jurisdiction and the true criterion for its determination is an undertaking for the performance of maritime services. *North Pacific S. S. Co.* v. *Hall Bros. Co.,* 249 U. S. 119; *People's Ferry Co.* v. *Beers,* 20 How. 393; *New Jersey Nav. Co.* v. *Merchants Bank,* 6 How. 344; *The Perseverance,* Blatchf. & H. 385; *Pacific Surety Co.* v. *Leatham Co.,* 151 Fed. 440; 1 Am. & Eng. Encyc. Law, 660.

The fact that the arbitration agreement is included in a charter-party does not alter the nature of the act or acts agreed to be done. A charter-party, while it is characterized generally as a maritime contract, is to speak more accurately a series of agreements, some of which very often have no relation to a maritime service and are unenforceable in an admiralty court. The agreement to arbitrate is obviously entirely independent of and unrelated to the other covenants in the charter-party. *Brown* v. *West Hartlepool Nav. Co.,* 112 Fed. 1018; *Richard* v. *Holman,* 123 Fed. 734; *Richard* v. *Hogarth,* 94 Fed. 684; *Taylor* v. *Weir,* 110 Fed. 1005; *The Thames,* 10 Fed. 848; *Plummer* v. *Webb,* 4 Mason, 380; *Grant* v. *Poillon,* 20 How. 162; *The Ada,* 250 Fed. 194; *Pacific Surety Co.* v. *Leatham Co.,* 151 Fed. 440.

On any hypothesis, no reason exists for holding an agreement to arbitrate to be maritime. Its enforcement

no more calls for the application of any maritime principle than would a controversy as to fraud or mistake in its inception, where only the common law courts (as distinguished from the admiralty courts) could assume jurisdiction of the controversy or grant any relief in reference thereto.

If the subject matter of the agreement to arbitrate is the subject matter of the various and varying controversies that may thereafter arise by reason of the asserted breach of other covenants of the principal contract, the measure of damages for the breach of the arbitration agreement in an action at law would not be the loss resulting from the breach of that agreement, but rather the loss suffered by reason of the alleged breach of the other covenants of the contract; an obvious absurdity. *Munson* v. *Straits of Dover S. S. Co.,* 99 Fed. 787, distinguished.

But even if the agreement to arbitrate should be considered maritime, the equity court has jurisdiction to compel its specific performance. *The Eclipse,* 135 U. S. 599; *Andrews* v. *Essex Ins. Co.,* 3 Mason, 6; *Meyer* v. *Pacific Mail S. S. Co.,* 58 Fed. 923; *Dean* v. *Bates,* 2 Woodb. & M. 87; *Kynock* v. *Ives,* Newb. 205; *Steamboat Co.* v. *Chase,* 16 Wall. 522.

Settlement of maritime controversies by arbitration is not inhibited by the provision conferring jurisdiction of maritime causes on admiralty courts. Congress in its exception did not save to suitors a remedy in the common law courts but a common law remedy. *Berry* v. *Donovan & Sons,* 120 Me. 457. Arbitration, while not an action, was nevertheless a well known remedy at common law for the settlement of controversies. Admiralty courts, like the common law courts, have always considered as valid, and upheld, the awards made in such controversies. *Toledo S. S. Co.* v. *Zenith Transp. Co.,* 184 Fed. 391.

Whether a court intervenes to decree the specific performance of the agreement or it is carried out without its intervention, the jurisdiction of the arbitrators, that is the power to hear and determine, results from the agreement of the parties, not from the mandate of the court, and hence it would seem that their jurisdiction is as valid in the one case as in the other.

The state court in enforcing an agreement does not deny to the admiralty court its exclusive jurisdiction merely because by reason of such enforcement a forum other than the admiralty may determine the event and measure of damages for the breach of a maritime contract. *Pacific Surety Co.* v. *Leatham Co.,* 151 Fed. 440.

That a party by contract may waive not only his rights under the maritime law, but also the right to resort to the admiralty court for the adjustment of his disputes, seems to be the effect of *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469. It is not the policy of the law to compel parties to litigate disputes, maritime or otherwise. *West* v. *Kozer,* 104 Ore. 94

The so-called public policy rule against specific performance of such contracts should not be extended. The supposed policy itself is one of the common law; not of the admiralty. It has been followed in the admiralty, as in the state courts, in deference to early precedent, although with frequent protest. *United States Asphalt Co.* v. *Trinidad Lake Co.,* 222 Fed. 1006; *Atlantic Fruit Co.* v. *Red Cross Line,* 276 Fed. 319; *Berkovitz* v. *Arbib & Houlberg, Inc.,* 230 N. Y. 276. It has now been repudiated and abandoned by the courts of England in which it originated. *Atlantic Shipping Co.* v. *Dreyfus & Co.,* 10 Lloyd's List Law Rep. 707; *Aktieselskabet, Korn-Og, etc.* v. *Rederiaktiebolaget Atlanten,* 250 Fed. 935.

Even if the ultimate controversies between the parties are the subject of the state remedy, the state remedy is the

equivalent of a common law remedy and is one that is saved to suitors. The clause saving a common law remedy has always been held to confer concurrent jurisdiction on the state courts to furnish a common law remedy in civil cases of maritime origin even if the jurisdiction had not existed before. *New Jersey Nav. Co.* v. *Merchants Bank,* 6 How. 344; *Propeller Genesee Chief,* 12 How. 443; *The Belfast,* 7 Wall. 624; *Leon* v. *Galceran,* 11 Wall. 185; *Schoonmaker* v. *Gilmore,* 102 U. S. 118; *Insurance Co.* v. *Dunham,* 11 Wall. 1; *Manchester* v. *Massachusetts,* 139 U. S. 262.

[Counsel reviewed the following cases interpreting the saving clause. *The Moses Taylor,* 4 Wall. 411; *The Hine* v. *Trevor,* 4 Wall. 555; *The Belfast,* 7 Wall. 624; *The Lottawanna,* 21 Wall. 558; *The J. E. Rumbell,* 148 U. S. 1; *The Glide,* 167 U. S. 606; *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638; *Leon* v. *Galceran,* 11 Wall. 185; *Rounds* v. *Cloverport Foundry Co.,* 237 U. S. 303; *Johnson* v. *Westerfield,* 143 Ky. 10; *Chase* v. *Steamboat Co.,* 9 R. I. 419; affd. 16 Wall. 522; *The Kalfarli,* 277 Fed. 391. Distinguishing: *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Union Fish Co.* v. *Erickson,* 248 U. S. 308; *Watts* v. *Camors,* 115 U. S. 353. See *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469.]

The uniformity rule is directed toward statutes changing rights and liabilities definitely fixed by maritime rules. *Jensen and Stewart Cases, supra; Industrial Commission* v. *Nordenholt Corporation,* 259 U. S. 263; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372.

The arbitration statute neither changes nor impairs the rights and obligations fixed by maritime rules.

Remedies are regulated by the *lex fori. Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372.

Mr. John W. Crandall, with whom *Edna Rapallo* was on the brief, for respondent.

The dispute between the parties herein arose out of a maritime contract and hence is within the exclusive jurisdiction of the admiralty courts, except as a common law remedy may have been saved to the petitioner. The New York Arbitration Law has provided a new remedy, unknown to the common law, for the adjustment of controversies.

A charter-party is a maritime contract, and accordingly within the exclusive admiralty and maritime jurisdiction of the federal courts, except for the saving clause of the Judicial Code. *Morewood* v. *Enequist,* 23 How. 491; *Metropolitan S. S. Co.* v. *Pacific Alaska Nav. Co.,* 260 Fed. 973; *Dunbar* v. *Weston,* 93 Fed. 472.

The saving clause refers on its face to remedies, and this has been construed to mean common law remedies and not remedies in common law courts. *The Moses Taylor,* 4 Wall. 411; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372. This Court has held that the New York Workmen's Compensation Act provided a remedy and was unconstitutional in so far as such remedy was designed to cover matters of a maritime nature. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149. In the present case, petitioner relies upon the new remedy given by the Arbitration Law. *Berkovitz* v. *Arbib & Houlberg, Inc.,* 230 N. Y. 261; *Red Cross Line* v. *Atlantic Fruit Co.,* 233 N. Y. 373.

It is highly questionable whether there is anything for this Court to review, inasmuch as the Court of Appeals, by holding that the Arbitration Law was not intended to apply to maritime controversies, has left nothing of a federal nature for this Court to consider. The Court of Appeals has not passed upon the constitutionality of the law. If it erred in deciding that the dispute is maritime, the petitioner has in no way been deprived of any right under the Federal Constitution and laws.

The agreement to arbitrate is part of a maritime contract, and is void in the federal forum. To sustain and enforce it, the state courts would deny to the federal court the exclusive jurisdiction with which Congress has clothed it, and likewise destroy a rule of uniformity.

The admiralty and maritime jurisdiction covers not merely the cognizance of the case, but the jurisdiction and principles by which it is to be administered. A State has no right to step in and fill up by its own legislation what is not actually occupied by that of Congress. *The Chusan,* 5 Fed. Cas. No. 2717. It could not have been the intention of Congress, by the exception, to give the suitor all such remedies as might afterwards be enacted by state statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases. *The Hine* v. *Trevor,* 4 Wall. 555; *Brookman* v. *Hamill,* 43 N. Y. 554; *The Lottawanna,* 21 Wall. 558; *The J. E. Rumbell,* 148 U. S. 1.

Not only have the States no power to enact laws giving to suitors an admiralty remedy such as a suit *in rem,* but they have no authority to pass any law regulating or affecting maritime matters which may tend to impair that uniformity which is so essential to the application of the maritime law through all of the States. *Union Fish Co.* v. *Erickson,* 248 U. S. 308; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Watts* v. *Camors,* 115 U. S. 353; *Workman* v. *New York City,* 179 U. S. 552; *The Thielbek,* 241 Fed. 209; *Rodgers & Hagerty, Inc.* v. *New York City,* 285 Fed. 362; *Atlantic Fruit Co.* v. *Red Cross Line,* 276 Fed. 319.

When a party to an arbitration agreement initiates proceedings in the New York Supreme Court under the Arbitration Law to compel the other party to arbitrate, he starts something which does not end until the issue has been finally and completely settled. And the matter can

be disposed of without the necessity of recourse to any other court.

What would finally become of the admiralty law of the United States if the act under consideration were held to be a proper subject of state legislation as regards maritime controversies? In the present case we should have such questions as to whether or not the master prosecuted the voyage with the utmost despatch, whether the vessel was off hire under the "break-down" clause in the charter, whether she encountered a peril of the sea, or whether or not the deviation to the Azores was justified, submitted to the decision of arbitrators who probably would not be versed in the maritime law. Certainly they would not be bound to follow any precedents, and in most cases would probably not be lawyers, and their award could only be set aside upon proof of fraud or of some other irregularity.

The petitioner argues that the Arbitration Law has not created a new remedy, but simply made available the old common law remedy of specific performance. An arbitration agreement such as the present one was never an enforceable agreement. *United States Asphalt Co.* v. *Trinidad Lake Co.,* 222 Fed. 1006; *Insurance Co.* v. *Morse,* 20 Wall. 45; *Doyle* v. *Insurance Co.,* 94 U. S. 535; *Atlantic Fruit Co.* v. *Red Cross Line,* 276 Fed. 319. The only recourse which a suitor would have had previous to the enactment of the Arbitration Law was a suit for damages for breach of contract. Any argument as to whether the statute created or made available a remedy is foreclosed by the decision of the Court of Appeals in this case.

The petitioner says the dispute is over arbitration, and not over its right to the repayment of certain moneys. The real object, however, was to have the right to reimbursement decided by arbitrators under the sanction of the court. An arbitration clause in a charter-party is a

subject of admiralty jurisdiction. *Munson* v. *Straits of Dover S. S. Co.,* 99 Fed. 787.

In determining whether or not a contract is maritime, we must look to its subject matter. This one was made on land and would be performed on land, but nevertheless refers to maritime disputes. *North Pacific S. S. Co.* v. *Hall Bros. Co.,* 249 U. S. 119; *Baltimore Co.* v. *Paterson,* 106 Fed. 736; *Graham* v. *Oregon Co.,* 135 Fed. 608.

Furthermore, when petitioner demanded arbitration and filed its petition, the matters in dispute were obviously maritime and such as the admiralty courts are considering daily. It follows that the agreement is maritime and hence within the admiralty jurisdiction, except where a common law remedy is saved. *The Ada,* 250 Fed. 194, and *Pacific Surety Co.* v. *Leatham Co.,* 151 Fed. 440, distinguished. Cf. *Haller* v. *Fox,* 51 Fed. 289.

It is of course conceded that actions solely for the breach of non-maritime covenants could not be maintained in an admiralty court simply because they were contained in a contract otherwise maritime. *Richard* v. *Holman,* 123 Fed. 734. This doctrine, however, is limited to such covenants as are distinct and separate in themselves, and unrelated to the maritime provisions of the agreement.

The cases of *Western Fuel Co.* v. *Garcia,* 257 U. S. 233; *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469; and *Industrial Commission* v. *Nordenholt Corporation,* 259 U. S. 263; in no way change or modify the rule laid down in the authorities previously cited.

Not only cannot a State enact a law providing a remedy of a peculiarly admiralty nature against a ship *in rem,* but it cannot pass any law affecting matters of a maritime nature which impairs or tends to impair the essential uniformity of the maritime law in the United States.

The rule applied in *Steamboat Co.* v. *Chase, supra,* where there was no remedy in the admiralty courts at

that time for the injury involved, cannot be applied in the case of a claim connected with a charter-party, because the admiralty courts have always taken jurisdiction of suits involving such agreements.

The argument that only a common law remedy is sought flies directly in the face of the decision by the court below that the law gives a statutory legal remedy of a character unknown to the common law.

Mr. Justice Brandeis delivered the opinion of the Court.

The Arbitration Law of New York, enacted April 19, 1920, c. 275, and amended March 1, 1921, c. 14, declares that a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties "shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." It authorizes the Supreme Court, or a judge thereof, to direct, upon the application of a party to such an agreement, that the arbitration proceed in the manner so provided; to appoint an arbitrator for the other party, in case he fails to avail himself of the method prescribed by the contract; and to stay trial of the action, if suit has been begun. The law applies to contracts made before its enactment, if the controversy arose thereafter. *Matter of Berkovitz* v. *Arbib & Houlberg,* 230 N. Y. 261, 270, 271. Prior to this statute an agreement to arbitrate was legal in New York and damages were recoverable for a breach thereof. *Haggart* v. *Morgan,* 5 N. Y. 422, 427. But specific performance of the promise would not be enforced; the promise could not be pleaded in bar of an action; and it would not support a motion to stay. *Finucane Co.* v. *Board of Education,* 190 N. Y. 76, 83. These limitations upon the enforcement of a promise to arbitrate had been held to be part of the law of remedies. *Meacham* v. *James-*

town, etc. R. R. Co., 211 N. Y. 346, 352. The purpose of the statute was to make specific performance compellable. 230 N. Y. 261, 269. Whether agreements for arbitration of disputes arising under maritime contracts are within the scope of the statute, and whether, if so construed and applied, the state law conflicts with the Federal Constitution, are the questions for decision.

Proceeding under the Arbitration Law, the Red Cross Line applied to the Supreme Court of the State, on April 12, 1921, for an order directing the Atlantic Fruit Company to join with it in the arbitration of a dispute arising out of the charter of the steamship Runa. The substantive claim was that the master had not prosecuted the voyage with the utmost dispatch and, hence, that certain amounts paid by the charterer should be returned. The charter party, which had been executed in New York on November 28, 1919, contained the following provision:

"That should any dispute arise between Owners and Charterers, the matters in dispute shall be referred to three persons in New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of Court. . . ."

Before instituting this proceeding the Red Cross Line had duly appointed its arbitrator; but the Atlantic Fruit Company had refused to appoint the one to be named by it. The court ordered the latter company to proceed to arbitration as provided in the contract, and to appoint its arbitrator by a day fixed. This order was affirmed by the Appellate Division without opinion. Its judgment was reversed by the Court of Appeals, which stated that the controversy between the parties is one of admiralty; that under Article III, § 2, of the Federal Constitution, and § 256, Clause Third, of the Judicial Code,

such controversies are within the exclusive jurisdiction of the admiralty courts; and that the State had no power to compel the charter owner to proceed to arbitration. *Matter of Red Cross Line* v. *Atlantic Fruit Co.,* 233 N. Y. 373. The case is here on writ of certiorari under § 237 of the Judicial Code, as amended. 260 U. S. 716.

Respondent contends that the petition should be dismissed for lack of a federal question. The argument is that the Court of Appeals held, as a matter of statutory construction, that the Arbitration Law does not extend to controversies which are within the admiralty jurisdiction; and that the substantive claim sought to be enforced is so cognizable. The claim to recover an amount paid under a charter party as charter hire is within the admiralty jurisdiction. *Morewood* v. *Enequist,* 23 How. 491. If that court had construed the Arbitration Law as excluding from its scope controversies which are within the admiralty jurisdiction, the construction given to the state statute would bind us; and there would be no occasion to consider the constitutional question presented. *Quong Ham Wah Co.* v. *Industrial Accident Commission,* 255 U. S. 445; *Ward & Gow* v. *Krinsky,* 259 U. S. 503, 510. An expression used by the Court of Appeals lends some color to respondent's contention, 233 N. Y. 373, 381. But a reading of the whole opinion shows that the state court excluded maritime contracts from the operation of the law, not as a matter of statutory construction, but because it thought the Federal Constitution required such action. Compare *State Industrial Commission* v. *Nordenholt Corporation,* 259 U. S. 263. We proceed, therefore, to the consideration of the constitutional question.

The federal courts—like those of the States and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to en-

force executory agreements to arbitrate disputes. They have declined to compel specific performance, *Tobey* v. *County of Bristol*, 3 Story, 800, 819–826;[1] or to stay proceedings on the original cause of action. Story, Equity Jurisprudence, § 670. They have not given effect to the executory agreement as a plea in bar; except in those cases where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable or to furnishing essential evidence of specific facts, and makes it a condition precedent to the cause of action. *Hamilton* v. *Liverpool, London & Globe Insurance Co.*, 136 U. S. 242, 255; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549. But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. *Hamilton* v. *Home Insurance Co.*, 137 U. S. 370, 385–386. If executed,—that is, if the award has been made,—effect will be given to the award in any appropriate proceeding at law, or in equity. *Karthaus* v. *Ferrer*, 1 Pet. 222; *Burchell* v. *Marsh*, 17 How. 344; *Bayne* v. *Morris*, 1 Wall. 97. And, although there is no federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be

[1] Mr. Justice Story said (p. 821): "Courts of Equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration, because they wish to discourage arbitrations, as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question. But when they are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common Courts of justice, provided by the Government to protect rights and to redress wrongs."

enforced in courts of the United States by any appropriate process. *Heckers* v. *Fowler,* 2 Wall. 123.[2]

In admiralty, also, agreements to submit controversies to arbitration are valid. Reference of maritime controversies to arbitration has long been common practice.[3] *Houseman* v. *Schooner North Carolina,* 15 Pet. 40, 45. The insertion in a charter party of a provision for such settlement of disputes arising thereunder was practiced, at least, as early as the eighteenth century. *Thompson* v. *Charnock,* 8 Durnford & East, 139. For breach of an executory agreement a libel for damages will lie.[4] An executory agreement may be made a rule of court. *United States* v. *Farragut,* 22 Wall. 406, 419; *Kleine* v. *Catara,* 2 Gall. 61.

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[2] See, also, *Thornton* v. *Carson,* 7 Cranch, 596; *Carnochan* v. *Christie,* 11 Wheat. 446; *Lutz* v. *Linthicum,* 8 Pet. 165; *Alexandria Canal Co.* v. *Swann,* 5 How. 83; *York & Cumberland R. R. Co.* v. *Myers,* 18 How. 246; *Newcomb* v. *Wood,* 97 U. S. 581, 583. The practice of making the agreement for arbitration a rule of court was introduced by Stat. 9 & 10, William III, c. 15. See Russell on Arbitrators, 5th ed., 52.

[3] In England maritime controversies were settled by arbitration as early as 1320. Selden Society, Select Pleas in the Court of Admiralty, Vol. 1, pp. xxii, xxiii. After the establishment of that court (about 1340, *ibid* xiv) arbitration became a common mode of settling disputes in shipping cases. "The parties appear to have usually executed a bond or entered into recognizance in the Admiralty Court to execute the award; there are several suits to enforce such a bond or to compel performance of the award." *Ibid.* lxix; lxi; [1539], p. 90; [1540], p. 101; Vol. II; [1548], p. 18; [1571], p. lxx; [1573], p. lxxi; [1575], p. 39; [1589], p. 44.

The phraseology of the arbitration clause here in question is identical with that contained in the common form of the time charter party long in use. Scrutton, Charter Parties and Bills of Lading (1886), pp. 268, 270. The form appears as clause 15 of the charter party executed in New York in 1885 which was involved in *Compania Bilbaina* v. *Spanish-American Light & Power Co.,* 146 U. S. 483.

[4] See *Ross* v. *Compagnie Commerciale, etc.,* 45 Fed. 207, 208; *Munson* v. *Straits of Dover S. S. Co.,* 99 Fed. 787; 102 Fed. 926; *Aktieselskabet, Korn-Og, etc.* v. *Rederiaktiebolaget Atlanten,* 250 Fed. 935, 937.

attempted changes by the States in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies *in pais,* as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638, 644, *et seq.; Rounds* v. *Cloverport Foundry & Machine Co.,* 237 U. S. 303. A State may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction. *The Hine* v. *Trevor,* 4 Wall. 555; *The Glide,* 167 U. S. 606. But otherwise, the State, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit. New York, therefore, had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, as well as by the law of the State, which is contained in a contract made in New York and which, by its terms, is to be performed there.

This state statute is wholly unlike those which have recently been held invalid by this Court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty. The Workmen's Compensation Laws involved in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Clyde S. S. Co.* v. *Walker,* 244 U. S. 255; *Peters* v. *Veasey,* 251 U. S. 121; and *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, were declared invalid, because their provisions were held to modify or displace essential features of the substantive maritime law. In *Union Fish Co.* v. *Erickson,* 248 U. S. 308, the state statute did not deal with the substantive maritime law. It was held invalid, because, as construed

and applied, it attempted to modify the remedial law of the admiralty courts. The state statutes involved in all the other cases were declared valid. Those giving the substantive right to recover for negligence resulting in death were upheld, because they merely supplemented the substantive maritime law and did not conflict with any essential feature of it. *Western Fuel Co.* v. *Garcia,* 257 U. S. 233; *Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U. S. 479. See also *Steamboat Co.* v. *Chase,* 16 Wall. 522; *Sherlock* v. *Alling,* 93 U. S. 99, 104; *The Hamilton* 207 U. S. 398; *La Bourgogne,* 210 U. S. 95, 138. The Workmen's Compensation Laws involved in other cases were upheld, because their provisions, as applied, were found not to be in conflict with any essential feature of the general maritime law. *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469; *Industrial Commission* v. *Nordenholt Co.,* 259 U. S. 263. No state statute was involved in *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372. The Court held there that under the general maritime law the seaman had no substantive right to recover; that this rule of substantive maritime law applied whether he sued in the state courts or in the court of admiralty; and that the Seaman's Act of 1915 did not change this rule of substantive law. In no case has this Court held void a state statute which neither modified the substantive maritime law, nor dealt with the remedies enforceable in admiralty.

As the constitutionality of the remedy provided by New York for use in its own courts is not dependent upon the practice or procedure which may prevail in admiralty, we have no occasion to consider whether the unwillingness of the federal courts to give full effect to executory agreements for arbitration can be justified.[8]

Reversed.

[8] See *The Atlanten,* 252 U. S. 313, 315; *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.,* 222 Fed. 1006; *Aktieselskabet, Korn-Og, etc.* v. *Rederiaktiebolaget Atlanten,* 250 Fed. 935; *Atlantic Fruit Co.* v. *Red Cross Line,* 276 Fed. 319.

An award will be given full effect.[5] The agreement whether executory or executed, can not be enforced in admiralty by specific performance; merely because that court lacks the power to grant equitable relief. *The Eclipse,* 135 U. S. 599, 608.[6] The executory agreement (perhaps in deference to the rule prevailing at law and in equity) will not be given effect as a bar to a libel on the original cause of action. The reluctance of the admiralty court to lend full aid goes, however, merely to the remedy. The substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation.[7]

By reason of the saving clause, state courts have jurisdiction *in personam,* concurrent with the admiralty courts, of all causes of action maritime in their nature arising under charter parties. Judiciary Act of September 24, 1789, c. 20, § 9, 1 Stat. 73, 77; Judicial Code, § 24, par. 3; *Leon* v. *Galceran,* 11 Wall. 185; *Schoonmaker* v. *Gilmore,* 102 U. S. 118; *Chappell* v. *Bradshaw,* 128 U. S. 132; *De Lovio* v. *Boit,* 2 Gall. 398, 475. The "right of a common law remedy", so saved to suitors, does not, as has been held in cases which presently will be mentioned, include

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[5] See *McConnochie* v. *Kerr,* 9 Fed. 50, 57, 58; *Toledo S. S. Co.* v. *Zenith Transp. Co.,* 184 Fed. 391, 401; *Hannevig* v. *Sutherland & Co.,* 256 Fed. 445.

[6] Admiralty is likewise unable to afford relief by way of reformation of a marine contract, *Andrews* v. *Essex Fire & Marine Ins. Co.,* 3 Mason, 6, 16; or to set it aside for fraud, *Dean* v. *Bates,* 2 Woodb. & M. 87, 90; or to establish an equitable title in a ship; or to take an account among part owners, *Kellum* v. *Emerson,* 2 Curt. 79, 82; or to put an equitable owner of a ship into possession, *Kynoch* v. *The Propeller S. C. Ives,* Newb. Ad. 205, 211. In all such cases, as in the case of specific performance, the relief must be sought in a court of equity.

[7] See *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.,* 222 Fed. 1006; *Aktieselskabet, Korn-Og, etc.* v. *Rederiaktiebolaget Atlanten,* 232 Fed. 403, 405; *The Eros,* 241 Fed. 186, 191.

The separate opinion of Mr. Justice McReynolds.

This controversy arose out of a charter-party dated November 28, 1919, a maritime contract, which contains a clause providing for the settlement of disputes by arbitration. 233 N. Y. 373.

Parties to such agreements contract with reference to the maritime law; consequent rights and liabilities depend upon its rules and are the same in all courts, admiralty or state. This general doctrine, definitely stated in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, has been reaffirmed and applied again and again. *Clyde S. S. Co.* v. *Walker,* 244 U. S. 255; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Union Fish Co.* v. *Erickson,* 248 U. S. 308; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233; *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469; *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255; *Industrial Commission* v. *Nordenholt Co.,* 259 U. S. 263; *Osaka Shosen Kaisha* v. *Pacific Lumber Co.,* 260 U. S. 490; *Great Lakes Co.* v. *Kierejewski,* 261 U. S. 479.

No admiralty court would enforce the arbitration clause of the charter-party before us—their accepted policy forbids. Accordingly, it was not obligatory upon the parties. The law of the sea became part of their agreement.

But it is said, under the local law a state court may enforce arbitration and thus effectuate the provision, although unenforceable in admiralty, since the statute relates to the remedy and not to substantive rights. In *Union Fish Co.* v. *Erickson,* an admiralty cause, we refused to give effect to the state statute of frauds, holding that the parties had contracted with reference to maritime law, not the local enactment. Here, also, the effort is to modify an agreement made with reference to the general rules of maritime law by applying the local law. Certainly this could not be done in an admiralty court;

no more should it be possible under state practice. If *Union Fish Co.* and *Erickson* had been before a state tribunal the applicable rule would have been the same and would have required enforcement of the contract notwithstanding the local statute. Obligations under maritime contracts do not vary with the tribunal.

Fifty years ago this Court pointed out the essential relationship between rights and remedies. *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 552. "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.'"

Under the guise of providing remedies no state statute may add to or take from the obligations imposed by the contract within the admiralty jurisdiction. The doctrine concerning the general maritime law announced here over and over again forbids. If state courts can enforce provisions for compulsory arbitration contrary to the policy of the admiralty courts, what will become of the uniformity of maritime rules which the Constitution undertook to establish?

The Judicial Code, § 256, endows the District Court with exclusive jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The remedy saved must relate to some right or liability given or imposed by maritime law—certainly not one which that law does

not recognize. Furthermore, common-law remedy is the thing excepted from the exclusive jurisdiction, not a remedy wholly unknown to that law. *The Moses Taylor,* 4 Wall. 411, 430, 431, distinctly announced this construction—

"The cognizance of civil causes of admiralty and maritime jurisdiction vested in the District Courts by the ninth section of the Judiciary Act, may be supported upon like considerations. It has been made exclusive by Congress, and that is sufficient, even if we should admit that in the absence of its legislation the State courts might have taken cognizance of these causes. But there are many weighty reasons why it was so declared. 'The admiralty jurisdiction,' says Mr. Justice Story, 'naturally connects itself, on the one hand, with our diplomatic relations and the duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which cannot be yielded, except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home.'

"The case before us is not within the saving clause of the ninth section. That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem,* as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute."

The same view is approved by *The Hine* v. *Trevor,* 4 Wall. 555, 571; *The Glide,* 167 U. S. 606, 616, 617; and *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638, 644, 648.

The latter cause "was clearly one *in personam* to enforce a common-law remedy." The opinion carefully points out that the state court enforced such a remedy and, further, (p. 640) that not until 1866, *The Moses Taylor,* was the exclusive character of admiralty jurisdiction brought to this Court's attention. Earlier opinions must be read accordingly, with *Southern Pacific Co.* v. *Jensen* and the uniformity of maritime rules in mind. *Rounds* v. *Cloverport Foundry,* 237 U. S. 303, 308, follows *Knapp, Stout & Co.* v. *McCaffrey.*

Even where permitted by local law state courts cannot entertain proceedings *in rem* for the reason stated by *The Moses Taylor.* "A proceeding *in rem,* as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute." The same reason inhibits state courts from enforcing any remedy not recognized at common law when the controversy is within the admiralty cognizance. Common-law remedies are within the saving clause, and no others. It is not enough that one has been provided by statute.

The Hine v. *Trevor* (p. 571) declares—"But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated." This negatives the suggestion that the remedy of the saving clause includes any means other than proceedings *in rem* which may be provided for the enforcement of rights or to redress injuries.

Knapp, Stout & Co. v. *McCaffrey* (p. 648) clearly affirms that the thing saved to suitors is the right of a common-law remedy. "The true distinction between

such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, *and* the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, *or* if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (sec. 563) of a common-law remedy. The suit in this case being one in equity to enforce a common-law remedy, the state courts were correct in assuming jurisdiction."

I can find no authority for the broad claim that the "right of a common-law remedy" extends to any and all means other than proceedings *in rem* which may be employed to enforce rights or redress injuries, including remedies *in pais* as well as proceedings in court, those conferred by statute as well as those existing at common law. Neither *Knapp, Stout & Co.* v. *McCaffrey* nor *Rounds* v. *Cloverport Foundry* supports it. It conflicts with *The Hine* v. *Trevor,* and is clearly opposed by the reason advanced in *The Moses Taylor* for excluding proceedings *in rem* from state courts.

The court below has held [1] that the New York arbitration law, c. 275, Laws N. Y. 1920,[2] provides "a statutory

[1] *Matter of Berkovitz* v. *Arbib & Houlberg,* 230 N. Y. 261, 269.

[2] "Sec. 2. A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

legal remedy of a character unknown to the common law . . . declares a new public policy, and abrogates an ancient rule." This statutory remedy is not of the common law nor were the proceedings under review instituted to enforce such a remedy, as was *Knapp, Stout & Co.* v. *McCaffrey.* See *Southern Pacific Co.* v. *Jensen.*

If petitioner is right, why may not a State require the parties to any maritime contract to submit their controversies to varying methods of arbitration and thus introduce the very discord which framers of the Constitution intended to prevent by adopting general maritime rules as laws of the United States? Also why may it not apply other than common-law remedies to controversies within admiralty jurisdiction contrary to plain congressional enactment and repeated decisions of this Court?

To announce principles is not enough; they should be followed. I think opinions of this Court led the conclusion of the court below and require affirmation of its judgment.

UNITED STATES EX REL. TISI, ALIAS CORTINA, *v.* TOD, COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK.

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

No. 132. Argued January 3, 1924.—Decided February 18, 1924.

1. In a proceeding to deport an alien for having in possession, for distribution, printed matter advocating the overthrow of the Government by force, knowledge on his part of the seditious character of the printed matter, though essential to the authority to deport, is not a jurisdictional fact. P. 133.

2. Mere error of the Secretary of Labor in finding a fact essential to deportation from evidence legally, but not manifestly, inadequate is not a denial of due process of law. P. 133.

Affirmed.

APPEAL from an order of the District Court dismissing a writ of *habeas corpus*.

Mr. Walter Nelles, with whom *Mr. Isaac Shorr* was on the briefs, for appellant.

Mr. Solicitor General Beck and *Mr. George Ross Hull,* Special Assistant to the Attorney General, appeared for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Tisi, an alien, was arrested in deportation proceedings as being within the United States in violation of law. The ground specified was knowingly having in his possession for the purpose of distribution printed matter which advocated the overthrow of the Government of the United States by force. Act of October 16, 1918, c. 186, §§ 1 and 2, 40 Stat. 1012, as amended June 5, 1920, c. 251, 41 Stat. 1008. The warrant of deportation issued after a hearing. Then this petition for a writ of *habeas corpus* was brought in the federal court, and heard upon the return and a traverse thereto. The order entered, without opinion, dismissed the writ, remanded the relator to the custody of the Commissioner of Immigration at the Port of New York, and granted a stay, pending the appeal to this Court. The case is here under § 238 of the Judicial Code, the claim being that Tisi was denied rights guaranteed by the Federal Constitution.

Tisi's claim to be discharged on *habeas corpus* rests wholly upon the contention that he has been denied due process of law. There was confessedly due notice of the charge and ample opportunity to be heard. What Tisi

urges is that there was no evidence to sustain the finding that he knew the seditious character of the printed matter. Such knowledge is not, like alienage, a jurisdictional fact. *Ng Fung Ho* v. *White,* 259 U. S. 276, 284; *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149. But it is an essential of the authority to deport. There is no suggestion that the Secretary of Labor failed to recognize this requirement. The contention is that he erred in deciding that there was substantial evidence of such knowledge and in allowing the supposed evidence to convince him of the fact. The printed matter found consisted of leaflets in the English language. Tisi testified that he cannot read English; that he did not know the character of the leaflets; and that his presence in the company of other Italians who were seen folding the leaflets was accidental. The Secretary of Labor was not obliged to believe this testimony. The Government did not introduce any direct evidence to the contrary. But there was much evidence of other facts from which Tisi's knowledge of the character of the leaflets might reasonably have been inferred. We do not discuss the evidence; because the correctness of the judgment of the lower court is not to be determined by enquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found.

The denial of a fair hearing is not established by proving merely that the decision was wrong. *Chin Yow* v. *United States,* 208 U. S. 8, 13. This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact or in drawing a wrong inference from the evidence. The error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one. Compare *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149; *Kwock Jan Fat* v. *White,* 253 U. S. 454; *Zakonaite*

v. *Wolf*, 226 U. S. 272; *Tang Tun* v. *Edsell*, 223 U. S. 673. But here no hasty, arbitrary or unfair action on the part of any official, or any abuse of discretion is shown. There is no claim that the lack of legal evidence of knowledge was manifest; or that the finding was made in wilful disregard of the evidence to the contrary; or that settled rules of evidence were ignored. The procedure prescribed by the rules of the Department appears to have been followed in every respect; and the legality of that prescribed is not questioned. There is no suggestion that Tisi was not allowed to prepare for the hearing, by prior examination of the written evidence on which the warrant of arrest issued; or that he was otherwise restricted in his preparation of the defense. The hearing was conducted orally. Tisi was present and was represented by counsel. He testified fully; and the many witnesses produced by the Government were cross-examined by his counsel. He was given ample time in which to present the evidence, the argument, and a brief. Under these circumstances mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law.

Affirmed.

UNITED STATES EX REL. MENSEVICH *v.* TOD, COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK.

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

No. 148. Argued January 2, 1924.—Decided February 18, 1924.

1. An appeal brought here properly upon a constitutional proposition which is subsequently denied in another case, will not be dismissed for that reason, but other questions raised will be considered. P. 135.
2. In the provision of the Immigration Act, § 20, for the deportation of aliens to the country whence they came, "country" means the

State which, at the time of deportation, includes the place from which an alien came. P. 136.

3. The validity of a detention questioned by a petition for *habeas corpus* is to be determined by the condition existing at the time of the final decision thereon. *Id.*

Affirmed.

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

Mr. Walter Nelles, with whom *Mr. Isaac Shorr* was on the briefs, for appellant.

Mr. Solicitor General Beck and *Mr. George Ross Hull*, Special Assistant to the Attorney General, appeared for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In 1911 Mensevich emigrated from Russia to the United States. In 1921 he was arrested in deportation proceedings, as an alien in this country in violation of law. Act of October 16, 1918, c. 186, §§ 1 and 2, 40 Stat. 1012, as amended June 5, 1920, c. 251, 41 Stat. 1008. After a hearing, the warrant for deportation issued. Then this petition for a writ of *habeas corpus* was brought in the federal court. It was dismissed without opinion; the relator was remanded to the custody of the Commissioner of Immigration for the Port of New York; and a stay was granted, pending this appeal. The case is here under § 238 of the Judicial Code, the claim being that Mensevich was denied rights guaranteed by the Federal Constitution.

The Government moved under Rule 6 of this Court to dismiss, insisting that the appeal does not present a substantial question. Consideration of the motion was postponed until the hearing on the merits. The grounds on which the detention was challenged in the petition are the same as those which were held to be unsound in

United States ex rel. Bilokumsky v. *Tod,* 263 U. S. 149. That decision was not rendered until after this appeal was taken. The motion to dismiss is, therefore, denied. *Sugarman* v. *United States,* 249 U. S. 182, 183. In the traverse to the return the legality of the detention is challenged on a further ground. That ground would not have entitled the relator to bring the case here by appeal. For the only substantial question thus presented is one of the construction of a statute. But since the case is properly here this objection must be considered. Compare *Zucht* v. *King,* 260 U. S. 174, 176, 177.

The Immigration Act, February 5, 1917, c. 29, § 20, 39 Stat. 874, 890, provides that the deportation of aliens "shall, at the option of the Secretary of Labor, be to the country whence they came or to the foreign port at which such aliens embarked for the United States." Mensevich was ordered deported "to Poland, the country whence he came." He insists that the warrant for deportation is illegal, because prior to his emigration to the United States he had been a resident of Tychny, in the Province of Grodno, then a part of Russia; that, at the time the warrant for deportation issued, Grodno had not been recognized by the United States as a part of Poland; and hence, that it should have been treated by the Secretary of Labor as being still a part of Russia. The facts are that, when the warrant for deportation issued and when the judgment below was entered, Grodno was occupied and administered by Poland; that there was then a dispute between Poland and the Soviet Republic concerning the boundary line between them; and that the United States, while officially recognizing Poland, had not recognized Grodno as being either within or without its boundaries.

The term country is used in § 20 to designate, in general terms, the state which, at the time of deportation, includes the place from which the alien came. Whether

territory occupied and administered by a country, but not officially recognized as being a part of it, is to be deemed a part for the purposes of this section, we have no occasion to consider. For, since the entry of the judgment below, the Treaty of Riga has so defined the eastern boundary of Poland as to include Grodno; and the United States has officially recognized this boundary line. Grodno is now confessedly a part of Poland. The validity of a detention questioned by a petition for *habeas corpus* is to be determined by the condition existing at the time of the final decision thereon. *Stallings* v. *Splain,* 253 U. S. 339, 343. Deportation to Poland is now legal.

Affirmed.

PIERCE OIL CORPORATION *v.* HOPKINS, COUNTY CLERK OF SEBASTIAN COUNTY, ARKANSAS, ET AL.

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

No. 151. Argued January 11, 1924.—Decided February 18, 1924.

A state law requiring retailers of gasoline to collect from purchasers a tax of 1¢ per gallon upon such gasoline sold by them as they have reason to believe the purchasers will use in motors on the highways of the State, and requiring the retailers to register, and to report and pay over each month the taxes accruing on sales made, under penalty of a fine, *held,* not violative of the retailers' rights under the due process clause of the Fourteenth Amendment. P. 139.

282 Fed. 253, affirmed.

APPEAL from a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court dismissing the bill in a suit to enjoin enforcement of an Arkansas law taxing gasoline.

Mr. Sam T. Poe, with whom *Mr. Tom Poe* and *Mr. Louis Tarlowski* were on the brief, for appellant.

Mr. William T. Hammock, Assistant Attorney General, with whom *Mr. J. S. Utley,* Attorney General, *Mr. John L. Carter, Miss Darden Moose* and *Mr. J. S. Abercrombie,* Assistant Attorneys General, of the State of Arkansas, were on the brief, for appellees.

Mr. Justice Brandeis delivered the opinion of the Court.

A statute of Arkansas provides that one who sells gasoline to be used by the purchaser in motor vehicles on highways of the State " shall collect from such purchaser, in addition to the usual charge therefor, the sum of one cent (1¢) per gallon for each gallon so sold;" that the dealer shall register with the county clerk in every county in which he does business; shall file each month a report of the sales made within the county during the preceding month; shall personally pay over each month the amount of the taxes accrued thereon; and that failure to file the report or to pay such amount is a misdemeanor which subjects the dealer to a fine. Act No. 606, March 29, 1921, Acts of Arkansas, 1921, p. 685. To enjoin the enforcement of the law the Pierce Oil Corporation brought, in the federal court for Western Arkansas, this suit against taxing officials. The trial court dismissed the bill, without opinion. Its decree was affirmed by the Circuit Court of Appeals. 282 Fed 253. The case is here under § 241 of the Judicial Code. Whether the statute is valid is the sole question for decision. The claims are that the statute violates the due process clause of the Federal Constitution; and that it is void for uncertainty.[1]

[1] In the District Court the plaintiff challenged the validity of the law also under the state constitution. But after the appeal was taken, the statute was upheld by the highest court of the State in *Standard Oil* v. *Brodie,* 153 Ark. 114. So that question is not before us. In this Court, it was argued that the statute violates the equal protection clause. As the contention was not made below, it is not considered. That the remedy at law was not adequate is conceded.

The claim that the act violates the due process clause rests upon the argument that the tax levied is a privilege tax for the use of the highways by the purchasers; that the seller is required to pay the tax laid on the purchasers; that, unlike those cases where a bank is required to pay taxes assessed against stockholders or depositors, *Citizens National Bank* v. *Kentucky,* 217 U. S. 443; *Clement National Bank* v. *Vermont,* 231 U. S. 120, the seller is not afforded the means of reimbursing himself; and that, moreover, the mere process of collecting the tax from the purchaser, and making monthly reports and payments, subjects the seller to an appreciable expense. A short answer to this argument is that the seller is directed to collect the tax from the purchaser when he makes the sale; and that a State which has, under its constitution, power to regulate the business of selling gasoline (and doubtless, also, the power to tax the privilege of carrying on that business) is not prevented by the due process clause from imposing the incidental burden.

The claim that the law is void for uncertainty is not urged as a violation of the due process clause. Compare *International Harvester Co.* v. *Kentucky,* 234 U. S. 216; *Fox* v. *Washington,* 236 U. S. 273. The argument, that there inheres in the statute such uncertainty as to render it a nullity, is answered by the fact that, since the judgment was entered in the trial court, all uncertainty has been removed by the decision of the highest court of the State in *Standard Oil Co.* v. *Brodie,* 153 Ark. 114. There the act was construed as requiring sellers to collect and pay the tax only on such gasoline as they have reason to believe purchasers from them will use in motors on the highways.

Affirmed.

PACKARD *v.* BANTON, AS DISTRICT ATTORNEY IN AND FOR THE COUNTY OF NEW YORK, ET AL.

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

No. 126. Argued January 2, 1924.—Decided February 18, 1924.

1. The amount in controversy in a suit to enjoin enforcement of a statute alleged to be unconstitutional in relation to the plaintiff's business, is the value of his right to carry on the business free from the restraint of the statute. P. 142.
2. When prevention of criminal prosecutions under an unconstitutional statute is essential to protect property rights, equitable jurisdiction exists to restrain them. P. 143.
3. A New York statute requires persons engaged in the business of carrying passengers for hire in motor vehicles, upon public streets, to file security or insurance for payment of judgments for death, or injury to person or property, caused in the operation or by defective construction of such motor vehicles. *Held:*

(*a*) Not in violation of equal protection of the laws, either because it applies only in cities of the first class, or because it does not apply to persons operating motor vehicles for their own private ends, or because it does not apply to street cars and omnibuses, which are regulated under another law. P. 143.

(*b*) Not so burdensome in this case as to amount to confiscation, in violation of due process of law,—in view of the opportunity allowed to file a corporate or personal bond, if the cost of insurance be excessive compared with the returns from plaintiff's business. P. 145.

(*c*) Inability of a party to comply with the statute without assuming an excessive burden does not render the requirement unconstitutional if due to his peculiar circumstances. *Id.*

4. The regulatory power over an activity carried on by government sufferance or permission is greater than over one engaged in by private right. *Id.*

Affirmed.

APPEAL from a decree of the District Court, which dismissed a bill to enjoin enforcement of a New York statute regulating carriers of passengers for hire by motor vehicle.

Mr. Avel B. Silverman, with whom *Mr. Louis J. Vorhaus, Mr. Elijah N. Zoline* and *Mr. Frederick Hemley* were on the briefs, for appellant.

Mr. Carl Sherman, Attorney General of the State of New York, with whom *Mr. Edward G. Griffin* and *Mr. Claude T. Dawes,* Deputy Attorneys General, were on the brief, for the Attorney General of New York, appellee.

Mr. Felix C. Benvenga, with whom *Mr. John Caldwell Myers* was on the brief, for Banton, District Attorney, appellee.

Mr. Louis Tyroler, by leave of Court, filed a brief on behalf of the Allied Taxi Owners Association, as *amicus curiae.*

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit to enjoin the enforcement of a statute of New York (Laws, 1922, c. 612, p. 1566) alleged to be in contravention of the equal protection of the laws and due process clauses of the Fourteenth Amendment. The statute requires every person, etc., engaged in the business of carrying passengers for hire in any motor vehicle, except street cars and motor vehicles subject to the Public Service Commission law, upon any public street in a city of the first class, to file with the State Tax Commission, either a personal bond with sureties, a corporate surety bond or a policy of insurance in a solvent and responsible company, in the sum of $2,500, conditioned for the payment of any judgment recovered against such person, etc., for death or injury caused in the operation or [by] the defective construction of such motor vehicle. The bill alleges that the rate of premium for the required policy is fixed by the insurance companies at $960; that the net income from the operation of a motor vehicle is

about $35 a week, which would be reduced by the operation of the law to $16.50 per week, resulting in confiscation of the earnings of appellant for the benefit of the insurance companies. The statute makes it a misdemeanor to operate such motor vehicle without having furnished the required bond or policy; and appellant avers that appellees, as prosecuting officers of the State, have threatened, and, if not enjoined, will proceed to prosecute him, unless he complies with the law. The court below was constituted of three judges, under § 266 of the Judicial Code. Upon the return of the order to show cause a hearing was had, and the court denied a motion for an injunction *pendente lite,* and dismissed the bill for want of equity, without handing down an opinion.

1. Appellees insist that the District Court was without jurisdiction because the matter in controversy does not exceed the value of $3,000. Judicial Code, § 24, subd. 1. The bill discloses that the enforcement of the statute sought to be enjoined will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced, if the law be enforced, to the extent of $18.50 each per week; and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. *Mississippi & Missouri R. R. Co.* v. *Ward,* 2 Black, 485; *Texas & Pacific Ry. Co.* v. *Kuteman,* 54 Fed. 547, 552; *Nashville, C. & St. L. Ry. Co.* v. *McConnell,* 82 Fed. 65, 73; *Scott* v. *Donald,* 165 U. S. 107, 114; *City of Hutchinson* v. *Beckham,* 118 Fed. 399, 402; *Evenson* v. *Spaulding,* 150 Fed. 517, 520; *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322, 336.

Counter affidavits were filed, tending to show that the expenses incident to compliance with the statute would be less than alleged; but it sufficiently appears that the value of the right of appellant to carry on his business, freed from the restraint of the statute, exceeds the jurisdictional amount.

2. Another preliminary contention is that the bill cannot be sustained because there is a plain, adequate and complete remedy at law; that is, that the question may be tried and determined as fully in a criminal prosecution under the statute as in a suit in equity. The general rule undoubtedly is that a court of equity is without jurisdiction to restrain criminal proceedings unless they are instituted by a party to a suit already pending before it to try the same right that is in issue there. *In re Sawyer,* 124 U. S. 200, 209–211; *Davis & Farnum Manufacturing Co.* v. *Los Angeles,* 189 U. S. 207, 217.

But it is settled that "a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property." *Truax* v. *Raich,* 239 U. S. 33, 37–38. The question has so recently been considered that we need do no more than cite *Terrace* v. *Thompson,* 263 U. S. 197, where the cases are collected; and state our conclusion that the present suit falls within the exception and not the general rule. *Huston* v. *Des Moines,* 176 Ia. 455, 464; *Dobbins* v. *Los Angeles,* 195 U. S. 223.

3. We come, then, to the question whether the statute assailed contravenes the provisions of the Fourteenth Amendment. That the selection of cities of the first class for the application of the regulations and the exclusion of all others, is not an unreasonable and arbitrary classification does not admit of controversy. *Hayes* v. *Missouri,* 120 U. S. 68. We cannot say that there are not reasons applicable to the streets of large cities—such as

their use by a great number of persons or the density and continuity of traffic—justifying measures to safeguard the public from dangers incident to the operation of motor vehicles which do not obtain in the case of the smaller communities.

The contention most pressed is that the act unreasonably and arbitrarily discriminates against those engaged in operating motor vehicles for hire in favor of persons operating such vehicles for their private ends, and in favor of street cars and motor omnibuses. If the State determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper. Neither is there substance in the complaint that street cars and omnibuses are not included in the requirements of the statute. The reason, appearing in the statute itself, for excluding them is that they are regulated by the Public Service Commission laws, and this circumstance, if there were nothing more, would preclude us from saying that their non-inclusion renders the classification so arbitrary as to cause it to be obnoxious to the equal protection clause. Decisions sustaining the validity of legislation like that here involved are numerous and substantially uniform. Among them, we cite the following: *Nolen* v. *Riechman,* 225 Fed. 812, 818; *Schoenfeld* v. *Seattle,* 265 Fed. 726, 730; *Lane* v. *Whitaker,* 275 Fed. 476, 480; *Huston* v. *Des Moines,* 176 Ia. 455, 468; *Memphis* v. *State,* 133 Tenn. 83, 89; *Ex parte Dickey,* 76 W. Va. 576, 578; *Melconian* v. *Grand Rapids,* 218 Mich. 397, 403; *State* v. *Seattle Taxicab & Transfer Co.,* 90 Wash. 416, 423; *Donella* v. *Enright,*

195 N. Y. S. 217; *People* v. *Martin,* 203 App. Div. 423, where the statute now under review was sustained against the attacks here made as to its constitutionality. And see *Fifth Avenue Coach Co.* v. *New York City,* 221 U. S. 467; *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, 353.

It is asserted that the requirements of the statute are so burdensome as to amount to confiscation and, therefore, to result in depriving appellant of his property without due process of law. The allegation is that the rate of premium fixed by insurance companies operating in New York amounts to about $18.50 per week for each taxicab while the net income from each is about $35 per week. The operator, under the statute, however, is not confined to this method of security, but instead may file either a personal bond with two approved sureties or a corporate surety bond. Appellant says that he cannot procure a personal bond, but it does not appear that he might not procure the corporate surety bond at a less cost. Affidavits filed below on behalf of appellees tend to show that insurance policies in mutual casualty companies may be secured for $540 a year; and that operators of upwards of a thousand cars have furnished personal bonds. The fact that, because of circumstances peculiar to him, appellant may be unable to comply with the requirement as to security without assuming a burden greater than that generally borne, or excessive in itself, does not militate against the constitutionality of the statute. Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former. See *Davis* v. *Massachusetts,* 167 U. S. 43.

Affirmed.

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SANGUINETTI *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 130. Argued January 3, 1924.—Decided February 18, 1924.

A canal, constructed by the Government to improve navigation, overflowed intermittently, flooding the claimant's land but not ousting him from his customary user, except for brief periods, or inflicting permanent injury; and it did not appear either that the flooding was intended or anticipated by the Government or its officers, or that it was attributable directly, in whole or in part, to the improvement, rather than to natural conditions. *Held*, that no taking could be implied, and the United States was not liable *ex contractu*. P. 148.

55 Ct. Clms. 107, affirmed.

APPEAL from a judgment of the Court of Claims dismissing a petition.

Mr. Benjamin Carter, with whom *Mr. F. Carter Pope* was on the brief, for appellant.

Mr. Solicitor General Beck appeared for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The main portion of the City of Stockton, California, and the adjacent territory lie between the Calaveras river and the Mormon slough, both flowing in a general southwesterly direction. The streams are several miles apart and the intervening area, including appellant's land, has always been subject to inundation by overflow therefrom, as well as by reason of periodic heavy rainfall. During periods of high water sediment was deposited in large quantities in the navigable channel, interfering with navigation and entailing annual expenditures for dredging.

In view of this condition, Congress, in 1902, authorized the construction above the city of a connecting canal, by means of which the waters of Mormon slough were diverted into the Calaveras river. Act of June 13, 1902, c. 1079, 32 Stat. 368. The canal was constructed in accordance with plans prepared by government engineers, after investigation, upon a right of way procured by the State of California and conveyed to the United States. A diversion dam was placed in the slough, immediately below the intake of the canal. The excavated material was put on the lower side of the canal, making a levee, of which the dam was practically a continuation; but that this was not done with a view of casting flood waters upon the upper lands is apparent, since the engineers believed the capacity of the canal would prove sufficient under all circumstances. It was evidently the most convenient method of disposing of the material and also it may have contributed to strengthen the lower bank against erosion. The canal was completed in 1910. In January, 1911, there was a flood of unprecedented severity, and there were recurrent floods of less magnitude in subsequent years, except in 1912 and 1913. The capacity of the canal proved insufficient to carry away the flood waters, which overflowed the lands of appellant, lying above the canal, damaging and destroying crops and trees and injuring to some extent the land itself. Appellant brought suit against the Government to recover damages upon the alleged theory of a taking of the property thus overflowed. The land would have been flooded if the canal had not been constructed but to what extent does not appear. None of the land of appellant was permanently flooded, nor was it overflowed for such a length of time in any year as to prevent its use for agricultural purposes. It was not shown, either directly or inferentially, that the Government or any of its officers, in the preparation of the plans or in the construction of the canal, had any intention to thereby flood any of the

land here involved or had any reason to expect that such result would follow. That the carrying capacity of the canal was insufficient during periods of very heavy rains and extremely high water was due to lack of accurate information in respect of the conditions to be met at such times. The engineers who made the examination and recommended the plans, determined, upon the information which they had, that the canal would have a capacity considerably in excess of the requirements in this respect.

The Court of Claims concluded that none of the land here involved had been taken, within the meaning of the Fifth Amendment to the Constitution, and that, therefore, no recovery could be had upon the theory of an implied contract; but that the liability sought to be enforced was one sounding in tort, of which the court had no jurisdiction. Accordingly, the petition was dismissed.

Beginning with *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166, this Court has had frequent occasion to consider the question now presented. In that case, by authority of the State of Wisconsin, a dam was constructed across the Fox river, which had the effect of raising the ordinary water level and overflowing plaintiff's land continuously from the time of the completion of the dam in 1861 to the beginning of the action in 1867, resulting in an almost complete destruction of the value of the property. It was held that this constituted a taking in the constitutional sense, and the rule was laid down (p. 181) " that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking."

In *United States* v. *Lynah,* 188 U. S. 445, a dam had been constructed by the United States in such manner as to hinder the natural flow of a stream and, as a necessary result, to raise the level of its waters and overflow the land of plaintiff to such an extent as to cause a total

destruction of its value. It was impossible to remove this overflow of water and the property, in consequence, had become an irreclaimable bog, unfit for any agricultural use. It was held that the property had been taken and that the Government was liable for just compensation, upon payment of which the title and right of possession would pass.

In *United States* v. *Cress*, 243 U. S. 316, the Government by means of a lock and dam, had raised the water of the Cumberland river above its natural level, so that lands not normally invaded were subjected permanently to frequent overflows, impairing them to the extent of one-half their value. A like improvement had raised the waters of the Kentucky river in the same manner so as to end the usefulness of a mill by destroying the head of water necessary to run it. The findings made it plain that it was not a case of temporary overflow or of consequential injury but a condition of "permanent liability to intermittent but inevitably recurring overflows" and it was held that such overflowing was a direct invasion, amounting to a taking.

Under these decisions and those hereafter cited, in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property. These conditions are not met in the present case. Prior to the construction of the canal the land had been subject to the same periodical overflow. If the amount or severity thereof was increased by reason of the canal, the extent of the increase is purely conjectural. Appellant was not ousted nor was his customary use of the land prevented, unless for short periods of time. If there was any permanent impairment of value, the extent of it does not appear. It was not shown that the overflow was the

direct or necessary result of the structure; nor that it was within the contemplation of or reasonably to be anticipated by the Government. If the case were one against a private individual, his liability, if any, would be in tort. There is no remedy in such case against the United States. *Keokuk Bridge Co.* v. *United States,* 260 U. S. 125.

The most that can be said is that there was probably some increased flooding due to the canal and that a greater injury may have resulted than otherwise would have been the case. But this and all other matters aside, the injury was in its nature indirect and consequential, for which no implied obligation on the part of the Government can arise. See *Gibson* v. *United States,* 166 U. S. 269; *Bedford* v. *United States,* 192 U. S. 217; *Transportation Co.* v. *Chicago,* 99 U. S. 635; *Jackson* v. *United States,* 230 U. S. 1; *Horstmann Co.* v. *United States,* 257 U. S. 138; *Coleman* v. *United States,* 181 Fed. 599.

The judgment of the Court of Claims is

Affirmed.

TEXAS TRANSPORT & TERMINAL COMPANY, INCORPORATED, *v.* CITY OF NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 141. Argued January 4, 7, 1924.—Decided February 18, 1924.

A state license tax cannot be laid upon the business of a corporation employed as agent by owners of vessels engaged exclusively in interstate and foreign commerce, where its business is confined to, and is a necessary adjunct of, their commerce, consisting in the soliciting and engaging of cargo, nominating vessels to carry it, arranging for delivery on wharf and for stevedores, issuing bills of lading, collecting freight charges, paying ships' disbursements, and other incidental matters. *McCall* v. *California,* 136 U. S. 104, followed. *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1, distinguished.

152 La. 497, reversed.

ERROR to a judgment of the Supreme Court of Louisiana, which affirmed a judgment for the City of New Orleans in an action for a license tax.

Mr. George H. Terriberry, with whom *Mr. W. W. Young* and *Mr. Joseph M. Rault* were on the briefs, for plaintiff in error.

Mr. W. Catesby Jones, with whom *Mr. Ivy G. Kittredge* was on the brief, for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The City of New Orleans brought this action in a Louisiana state court to recover from defendant (plaintiff in error here) a license tax of $400, imposed, for the year 1922, upon its business of steamship agent. The demand was resisted on the ground that the tax was in contravention of the Commerce Clause of the Constitution of the United States in that it was an interference with and tax upon interstate and foreign commerce. Defendant was regularly employed as agent for four steamship lines, under a contract fixing its compensation on the basis of commissions, calculated upon the gross amount of freight charges collected by it for each company. In addition, defendant occasionally represented other ship owners. All were exclusively engaged in interstate or foreign commerce, and defendant's business was confined solely to representing principals so engaged in such commerce. The service rendered consisted of soliciting and engaging cargo, nominating ships for carrying it, arranging for its delivery on the wharf, issuing bills of lading under the name of ship owner or charterer, arranging for stevedores for loading and discharging cargo, collecting freight charges, paying ships' disbursements, attending to immigration service and assisting generally in matters of local customs and regulations.

Freight moneys collected, after deducting commissions, were remitted to the owners or charterers. As such agent, defendant was authorized to solicit cargo and quote freight rates and to issue receipts in the name of its principal for cargo delivered on the wharf.

Upon these facts the trial court held that defendant's business was local in character and subject to the tax. Upon appeal, this judgment was affirmed by the State Supreme Court. 152 La. 497.

The State Supreme Court thus stated the necessity and character of the agent's duties:

"The business of steamship agents is an extensive business in New Orleans, as it is in every large seaport. As a separate or an independent business, it is a result of the development of the country's commerce with foreign nations and among the several states. In the early days, when time was not so much the object or subject of economy as it is today, every ship's captain, for his own ship, discharged the duties and rendered the services for which local steamship agents are employed nowadays. But it would be impracticable now for a ship's captain to remain with his ship in port long enough to attend to the many matters which the local steamship agents can and do attend to for a ship at sea or in a foreign port. The business of steamship agents is therefore a necessary adjunct to commerce on the high seas."

This Court has had frequent occasion to consider and determine the effect of taxes of the same general character as that here involved, and, for present purposes, we find it unnecessary to do more than refer to the general and well established rule, which is that a State or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a nonresident within the State prior to their introduction therein, *Stockard* v. *Morgan,* 185 U. S. 27; or to impose a tax upon persons for securing or seeking to secure the trans-

portation of freight or passengers in interstate or foreign commerce. *McCall* v. *California,* 136 U. S. 104. The latter decision controls the present case. There the agent of a railroad company was engaged in San Francisco in the business of soliciting and inducing persons to travel from the State of California into and through other States to New York City, over the line of railroad which he represented. It was held that the business of the agent constituted a method of securing passenger traffic for the company, and therefore (p. 109) the tax was one "upon a means or an occupation of carrying on interstate commerce, pure and simple." The only difference between that case and this is that there the agent was engaged in seeking interstate passenger business, while here the agent was engaged in seeking interstate and foreign freight business. Plainly, as pointed out in the *McCall Case* (p. 109), the principle is the same.

Ficklen v. *Shelby County Taxing District,* 145 U. S. 1, is relied upon to justify the tax, but quite clearly it does not do so. The facts of that case differ materially from those of the *McCall Case* and those with which we are here dealing. In the *Ficklen Case* complainants were general merchandise brokers. They paid the initial tax imposed by the Tennessee law for the year 1887 and received and held throughout the year a general and unrestricted license to do business as such. They thereby became liable, under the statute, to pay an additional privilege tax in part graduated according to the amount of commissions received. It happened that, during 1887, the principals of one complainant were wholly nonresident and those of the other, largely so. The opinion pointed out that the fact might have been otherwise then and afterward, since their business was not confined to transactions for nonresidents. At the expiration of the year complainants applied for a renewal of their licenses, which was refused because they had made no return of their commis-

sions and no payment of the tax, as required. In deciding the case, stress was laid upon the fact that they had taken out a license under the law to do a general commission business, had given bond to report their commissions during the year and to pay the required percentage thereon; and, agreeing with the state court, it was said that resort to a judicial remedy could not be had because the authorities had refused to issue a license for the ensuing year without payment of the stipulated tax. Concluding the opinion, it was said: "What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record." The decision rests largely upon the elements above stated, as was pointed out by Mr. Justice Brewer in *Brennan* v. *Titusville,* 153 U. S. 289, 307:

"It was held that the tax was an entirety, and was not affected by the variable and adventitious results of business from year to year. . . . In other words, the tax imposed was for the privilege of doing a general commission business within the State, and whatever were the results pecuniarily to the licensees, or the manner in which they carried on business, the fact remained unchanged that the State had, for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligations of their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the State therefor."

The case is near the border line and has been deemed exceptional. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 296; *Stockard* v. *Morgan, supra,* pp. 34–37.

The present case is sufficiently differentiated by the fact that the agent here neither did nor held itself out as ready to do a general business, partly local and partly interstate and foreign, but confined itself exclusively to the latter.

Reversed.

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE HOLMES concurs.

From the multitude of cases, this general rule may be educed.[1] The validity of a state tax under the commerce clause does not depend upon its character or classification. It is not void merely because it affects or burdens interstate commerce. The tax is void only if it directly burdens such commerce, or (where the burden is indirect) if the tax discriminates against or obstructs interstate commerce. In this case there is no claim that interstate commerce is discriminated against or obstructed. The contention is that the tax imposes a direct burden. Whether the burden should be deemed direct depends upon the character of plaintiff's occupation and its relation to interstate transactions.

The occupation tax laid by New Orleans is fixed in amount;—businesses being classified into several grades according to the amount of business done. The Texas Transport & Terminal Company falls within the highest grade—those whose receipts exceed $100,000 a year—and, thus, it is taxed $400 a year. The business is what is called a steamship agency. The main office is in New York City. It has branches in New Orleans and in five other ports of the United States. It is a wholly independent concern. No ship owner has an interest in it; and it has no interest in any ship which it serves. Some

[1] Compare Thomas Reed Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 Harv. Law Rev. 321, 572, 721, 932; 32 Harv. Law Rev. 234, 374, 634, 902.

of these are regular ocean liners; others are casual tramp ships. The services rendered include, among other things, arranging with independent stevedore concerns for discharging and loading cargoes; arranging with independent dealers for bunkering, that is, buying fuel and oil; making provision for fitting ships for any special or peculiar cargo; making provision for compliance with the immigration and customs laws; and paying the ship's disbursements. For these, and the other services of soliciting cargoes, arranging for their delivery, and collecting payment for freight, the company is compensated. Usually the compensation is measured by a percentage on the gross freight charges collected. Sometimes it is a lump sum for each ship served. These comprehensive services require, for their efficient performance, the employment of a steamship agency, or its equivalent, whatever the home port of the ship or the principal place of its owner's business.

It is settled law that interstate commerce is not directly burdened by a tax imposed upon property used exclusively in interstate commerce, *Transportation Co.* v. *Wheeling,* 99 U. S. 273, 284; *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299, 306; or by a tax upon net income derived exclusively from interstate commerce, *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Shaffer* v. *Carter,* 252 U. S. 37, 57; compare *Peck & Co.* v. *Lowe,* 247 U. S. 165; or by an occupation tax, fixed in amount, although the business consists exclusively of selling goods brought from another State. *Wagner* v. *City of Covington,* 251 U. S. 95. On the other hand, the burden is deemed direct, where the tax is upon property moving in interstate commerce, *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366; or where it lays, like a gross-receipts tax, a burden upon every transaction in such commerce " by withholding, for the use of the State, a part of every dollar received in such transactions,"

Crew Levick Co. v. *Pennsylvania,* 245 U. S. 292, 297; or where an occupation tax is laid upon one who, like a drummer or delivery agent, is engaged exclusively in inaugurating or completing his own or his employer's transaction in interstate commerce. *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489; *Davis* v. *Virginia,* 236 U. S. 697.

The New Orleans tax is obviously not laid upon property moving in interstate commerce. Nor does it, like a gross-receipts tax, lay a burden upon every transaction. It is simply a tax upon one of the instrumentalities of interstate commerce. It is no more a direct burden, than is the tax on the other indispensable instrumentalities; upon the ship; upon the pilot boat, which she must employ; upon the wharf at which she must load and unload; upon the office which the owner would have to hire for his employees, if, instead of engaging the services of an independent contractor, he had preferred to perform those duties himself. The fact that, in this case, the services are performed by an independent contractor having his own established business, and the fact that the services rendered are not limited to soliciting, differentiate this case from *McCall* v. *California,* 136 U. S. 104. If these differences are deemed insufficient to distinguish that case from the one at bar, it should be frankly overruled as inconsistent with the general trend of later decisions.

J. E. RALEY & BROTHERS, ET AL. *v.* RICHARDSON, TAX COLLECTOR OF FULTON COUNTY, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 152. Submitted January 11, 1924.—Decided February 18, 1924.

1. The validity of a flat tax imposed by a state law upon brokers or commission merchants who solicit orders for goods in intrastate

commerce, is not affected by the fact that the persons taxed are engaged also, and to a greater extent, in soliciting orders in interstate commerce. P. 159.

2. Because a state tax on merchants engaged in domestic business is not and cannot be imposed on others engaged in interstate business, is manifestly no reason for thinking it repugnant to the Equal Protection Clause. P. 160.

154 Ga. 140, affirmed.

ERROR to a judgment of the Supreme Court of Georgia affirming a judgment dismissing a bill to enjoin collection of a tax.

Mr. E. B. Weatherly and *Mr. John P. Ross* for plaintiffs in error.

Mr. Geo. M. Napier, Attorney General, *Mr. T. R. Gress,* Assistant Attorney General, of the State of Georgia, and *Mr. Frank Carter* for defendants in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

A statute of Georgia (Acts 1921, p. 46, par. 30) imposes a flat tax of $100 upon any broker or commission merchant buying or selling merchandise on commission for another, or engaged in the business of receiving or distributing articles of merchandise shipped to such broker or merchant for distribution on account of the shipper. The bill filed below sought to enjoin the collection of the tax on the ground that the statute violates the Commerce Clause of the Federal Constitution and also, contingently, upon the further ground that the statute is void under the equal protection clause of the Fourteenth Amendment.

The complainants were divided into two classes, A and B. The business of those in Class B was to solicit orders for goods from dealers in Georgia, which orders were sent to be filled, sometimes to non-resident and sometimes to resident principals, the greater part of the business being with non-resident principals. The business of those in

Class A was wholly confined to representation of non-resident principals. Upon acceptance of an order the goods are shipped by the principal to the purchaser, but remain the property of the former until the time of sale.

The trial court sustained the tax as to Class B and enjoined its collection as to Class A, and its judgment was affirmed by the Supreme Court. 154 Ga. 140. We are concerned here with the judgment only in so far as it affects Class B.

The contention is that the tax is laid, expressly, upon all brokers and commission merchants in the State and upon the business done by them, whether interstate or intrastate, without separating one from the other. The state courts, by whose construction we are bound, held that the statute did not apply to interstate business; and we consider it as though it so provided in terms. It was held, however, that inasmuch as Class B complainants were engaged in intrastate business they were subject to the tax, and none the less because they were also engaged in interstate business. With this conclusion we fully agree.

The complainants were definitely engaged in the domestic business described in the statute and were liable to the tax, irrespective of the extent of it and whether they engaged in interstate business in addition or not. That the former was small in comparison with the latter makes no difference; nor does the fact that both were carried on at the same time and in the same establishment. If the two were not distinct, but the former a mere incident of the latter, the burden was upon complainants to furnish the proof; in which case a different question would arise. *Kehrer* v. *Stewart,* 197 U. S. 60, 69. Certainly, one cannot avoid a tax upon a taxable business by also engaging in a non-taxable business.

There is nothing in the contention that, because, under the construction placed upon the statute by the state

courts, the tax falls upon those engaged in domestic business and does not fall upon those engaged in interstate business, it is void for inequality. It would be a strange application of the equality provision of the Fourteenth Amendment to say that because a State is forbidden by paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the State observe the rule of equality among the persons subject to its taxing power.

Affirmed.

FEDERAL RESERVE BANK OF RICHMOND *v.* MALLOY ET AL., TRADING AS MALLOY BROTHERS.

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

No. 553. Argued January 9, 1924.—Decided February 18, 1924.

1. Generally, as held in *Exchange Natl. Bank* v. *Third Natl. Bank*, 112 U. S. 276, where a check, deposited by the owner in a bank, is forwarded by it in due course to another bank for collection, the second bank does not become responsible, as an agent, to the owner. P. 164.
2. But it is otherwise where, by a state statute with reference to which the first bank and the check-owner presumably contract, the forwarding of such instruments for collection, in the regular course of banking, is to be deemed due diligence acquitting the forwarding bank of liability until it has received actual payment, for, in such case, the initial bank has implied authority to employ another bank as subagent, and this in turn another, and the risk of their default or neglect is with the depositor of the instrument. *Id.*
3. If a bank, responsible to the payee for the collection of a check, surrender the check to the drawee bank and accept in payment an exchange draft of that bank which proves worthless, the collecting bank is liable to the payee of the check for the resulting loss. P. 165.

4. A regulation of the Federal Reserve Board providing for authority to Federal Reserve Banks "to send checks for collection" to banks on which they were drawn, cannot be enlarged by implication to include authority to accept a draft of the drawee of a check in payment. P. 166.
5. A practice of banks to send checks for collection to the banks on which they are drawn, with the expectation that they will be cancelled and charged to the makers and remittance returned either in currency or by the drawees' exchange drafts, lacks the certainty and uniformity essential to make it a custom binding the owner of a check who did not know of it. P. 169.
6. Assuming that the legal principles forbidding that a check be entrusted for collection to the bank on which it is drawn, and requiring payment in money, can be supplanted by custom, the custom must be as definite and specific as the principles themselves. P. 171.

291 Fed. 763, affirmed.

ERROR to a judgment of the Circuit Court of Appeals, which affirmed a recovery in the District Court of the amount of a check.

Mr. M. G. Wallace for plaintiff in error.

Mr. Robert H. Dye for defendants in error

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Malloy Brothers brought this action against the Federal Reserve Bank of Richmond in a state court, to recover $9,000, alleged to be the amount of a check drawn to their order upon the Bank of Lumber Bridge, North Carolina. The case was removed to the Federal District Court for the Eastern District of North Carolina, where it was tried without a jury and judgment rendered for plaintiffs, 281 Fed. 997, which was affirmed by the Court of Appeals. 291 Fed. 763.

The check was drawn on November 30, 1920, delivered to and received by plaintiffs and the amount credited

to the drawer. It was properly indorsed and deposited with the Perry Banking Company of Perry, Florida, for collection and credit, on December 1. A credit card was delivered to plaintiffs upon which was printed: "Checks, drafts, etc., received for collection or deposit, are taken at the risk of the endorser until actual payment is received."

A statute of Florida, then and ever since in force (Laws of Florida, 1909, c. 5951, p. 146) provides as follows:

"That when a check, draft, note or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered due diligence on the part of the bank in the collection of any check, draft, note or other negotiable instrument so deposited, to forward *en route* the same without delay in the usual commercial way in use according to the regular course of business of banks, and that the maker, endorser, guarantor or surety of any check, draft, note or other negotiable instrument, so deposited, shall be liable to the bank until actual final payment is received, and that when a bank receives for collection any check, draft, note or other negotiable instrument and forwards the same for collection, as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part, as aforesaid."

The Perry Banking Company indorsed and transmitted the check to a bank at Jacksonville, Florida, which, in turn, indorsed and transmitted it, on account of the Atlanta Federal Reserve Bank, to a bank at Atlanta, Georgia; and by the latter bank it was transmitted for collection to the Richmond bank, defendant herein.

On December 10, 1920, the Richmond bank transmitted the check, together with several other small checks, to the Lumber Bridge bank for collection and return. The letter containing these checks, by regular course of mail, should have been received, and, so far as appears, was received, by the Lumber Bridge bank on

Saturday, December 11th. On Tuesday, December 14th, the check in question was stamped "Paid" and charged to the account of the drawer, and on the same day the Lumber Bridge bank transmitted to the Richmond bank its draft on the Atlantic Banking & Trust Company, of Greensboro, North Carolina, for the aggregate amount of the checks, including the one here in question. The draft was received by the Richmond bank on December 15th, and immediately forwarded to the bank at Greensboro for payment. On December 17th the Greensboro bank notified the Richmond bank by wire that the Lumber Bridge bank did not have sufficient funds to its credit to pay the draft. Thereupon the Richmond bank wired the Lumber Bridge bank that its draft had been dishonored and called upon it to make it good. The Lumber Bridge bank answered, promising to do so. It failed, however, and the Richmond bank thereupon sent a representative to Lumber Bridge, who reached there on the morning of December 20th, and demanded payment of the draft from the cashier of the Lumber Bridge bank. The cashier of that bank, after stating that it did not have sufficient funds to pay the dishonored draft promised that steps would be taken to meet it.

On December 21st the representative of the Richmond bank was informed that the dishonored draft could not be paid and on the same day the Richmond bank notified the Atlanta bank of the situation and this notice was promptly transmitted to the plaintiffs. The amount of the check was thereupon charged by the Richmond bank to the Atlanta bank, which, in turn, charged the amount to its immediate correspondent and so on until it was finally charged back to the plaintiffs.

In view of the conclusion which we have reached, we find it necessary to consider but two questions:

1. Can the present action be maintained by plaintiffs, Malloy Brothers, against the Richmond bank? and

2. If so, did the failure of the Richmond bank to require payment of the Malloy check in money, and its acceptance of what turned out to be a worthless draft in lieu thereof, create a liability against it and in favor of Malloy Brothers for the amount of the loss?

First. The state decisions in respect of the liability of a correspondent bank to the owner of a check forwarded for collection by the initial bank of deposit are in conflict beyond the possibility of reconciliation. A number of States, following the "New York rule," so-called, have held that there is no such direct liability, but that the initial bank alone is responsible to the owner. On the other hand, an equal, if not a greater, number of States following the "Massachusetts rule," have held exactly the contrary, viz: that the initial bank by the mere fact of deposit for collection, is authorized to employ subagents, who thereupon become the agents of the owner and directly responsible to him for their defaults. This Court, in *Exchange National Bank* v. *Third National Bank,* 112 U. S. 276, after reviewing the two lines of decisions, approved the "New York rule." But the rule may, of course, be varied by contract, express or implied. *Id.* 289. Here the relations of the drawee to the initial bank of deposit are controlled by the Florida statute with respect to which it must be presumed they dealt with each other. This statute had the effect of importing the "Massachusetts rule" into the contract, with the result that the initial bank had implied authority to intrust the collection of the check to a subagent and that subagent, in turn, to another; and the risk of any default or neglect on their part, rested upon the owners. 112 U. S. 281. It follows that the action was properly brought against the Richmond bank.

Second. For the purposes of the case, we assume the correctness of the decision below, holding that the Richmond bank was not negligent in sending the check di-

rectly to the bank on which it was drawn, and consider only whether the acceptance of an exchange draft, found to be worthless, instead of money, creates an enforceable liability.

It is settled law that a collecting agent is without authority to accept for the debt of his principal anything but "that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par." *Ward* v. *Smith,* 7 Wall. 447, 452. The rule applies to a bank receiving commercial paper for collection, and if such bank accepts the check of the party bound to make payment and surrenders the paper, it is responsible to the owner for any resulting loss. *Fifth National Bank* v. *Ashworth,* 123 Pa. St. 212, 218; *Hazlett* v. *Commercial National Bank,* 132 Pa. St. 118, 125; *Bank* v. *Bank,* 151 Mo. 320, 329; *Essex County National Bank* v. *Bank of Montreal,* 7 Biss. 193, 8 Fed. Cas. No. 4532; *Noble* v. *Doughten,* 72 Kans. 336, 351–353; *Anderson* v. *Gill,* 79 Md. 312, 317; *Bank of Antigo* v. *Union Trust Co.,* 149 Ill. 343, 351. It is unnecessary to cite other decisions since they are all practically uniform. *Anderson* v. *Gill, supra,* presented a situation practically the same as that we are here dealing with, and the Supreme Court of Maryland, in disposing of it, said:

"Now, a check on a bank or banker is payable in money, and in nothing else. Morse Banks & Banking (2d edition), p. 268. The drawer having funds to his credit with the drawee has a right to assume that the payee will, upon presentation, exact in payment precisely what the check was given for, and that he will not accept, in lieu thereof, something for which it had not been drawn. It is certainly not within his contemplation that the payee should upon presentation, instead of requiring the cash to be paid, accept at the drawer's risk a check of the drawee upon some other bank or

banker. The holder had a right to make immediate demand for payment upon receipt of Anderson's check, though she was not bound to do so. When her agent, the Old Town Bank—the collecting bank being the agent of the holder—(*Dodge* v. *Freedman's Sav. & Tru. Co.*, 93 U. S. 379) did make demand it was only authorized to receive *money* (*Ward* v. *Smith*, 7 Wall. 451); and the acceptance by the collecting agent of anything else rendered it as liable to the holder as though it had collected the cash."

Acceptance of the draft by the Richmond bank as payment of the Malloy check had the effect of releasing the drawer and therefore materially altering the relations of the parties. Technically, there resulted a transfer of the drawer's funds and his right of action against the drawee bank; and previous rights and obligations between the owners of the check and drawer were superseded. It follows,—this result having been brought about by the unauthorized act of the Richmond bank, standing in that transaction in the relation of agent to the owners of the check,—that such owners are entitled to recover from the Richmond bank for the loss which they sustained, unless the case falls within some exception to the general rule.

And as to this, the Richmond bank says: (1) That its immediate correspondent, from whom it received the check, was bound by a regulation of the Federal Reserve Board, which authorized the method of collection pursued, and that, since that correspondent was the agent of the owners of the check in the transaction, they are likewise bound; (2) that the method was justified by a custom, binding upon Malloy Brothers. We consider these contentions in their order.

1. The regulation relied on, so far as pertinent, is to the effect that a Federal Reserve bank will act as agent only in handling items for member and non-member banks, who are required to authorize " its Federal Reserve bank

to send checks for collection to banks on which checks were drawn, and, except for negligence, such Federal Reserve banks will assume no liability." Regulation J (8) of 1920. This regulation, while it contemplates the sending of checks for collection to the drawee banks, does not expressly permit the acceptance of payment other than in money. It is insisted, however, that the authority to send checks to the drawee bank carries with it, by necessary implication, authority to accept a draft in payment from the drawee. We assume, for the purposes of the argument, that the obligation which the law imposes to collect only in money may be varied by a regulation, clearly and positively so providing, although, in terms, it relates only to the banks *inter se,* upon the ground that the owner of the check is bound by the knowledge and consent of his subagent. But to justify an extension by implication of the terms of the regulation, it must be made to appear, at least, that the addition sought to be annexed is a necessary means to carry into effect the authority expressly given by the regulation. See *First National Bank* v. *Missouri,* 263 U. S. 640. It follows from this limitation upon the extent and purpose of implied powers, that a distinct and independent power cannot be brought into existence by implication from the grant of another distinct power. In other words, authority to do a specific thing carries with it by implication the power to do whatever is necessary to effectuate the thing authorized—not to do another and separate thing, since that would be, not to carry the authority granted into effect, but to add an authority beyond the terms of the grant. The authority expressed by the regulation is " to send checks for collection to banks on which checks were drawn;" the authority now sought to be annexed by implication is " to accept exchange drafts in payment," instead of money, as required by law. That neither is a necessary means of carrying the other into effect, is clear. Nor are

they necessary to each other in the sense that they are corollary or dependent. Certainly a check may be sent for collection to the drawee bank without entailing the necessity of remitting the amount in the form of exchange. Currency itself may be sent; and, as will appear presently, frequently is sent. The first form of remittance, to be sure, is more convenient; but it is not of such necessity as to exclude the second on the score of impracticability. There is nothing to prevent the sending bank from requiring the drawee to remit currency as a condition upon which the check may be satisfied and charged to the account of the drawer. We must not lose sight of the fact that we are here dealing with two distinct rules of law, both of which are sought to be avoided: (a) that which forbids a bank having paper for collection to use the drawee bank as a collecting agent; and (b) that which forbids a collecting agent accepting anything but money in payment. The first rule is probably based upon the theory that the drawee is not a suitable agent for the enforcement of his own obligation, and that commercial paper calling upon him to pay should not be surrendered to and satisfied by him, with the consequent release of the drawer, except upon previous or contemporaneous payment. The second rule proceeds upon the fact that the obligation of the drawee is to pay in money and nothing else. Plainly, the two rules are of such nature that one may be abrogated without the other; and it is obvious, since the law imposes upon a collecting agent the duty to collect in money, that none of the various subagents, receiving the paper to be collected upon the basis of that duty, can waive the requirement of the law in favor of the agent to whom it is transmitted. Indeed, in transmitting the check here in question to the Richmond bank the intermediate banks, in effect, served only as instruments for effectuating the transmission. In essence and in substance the check was delivered by its owners to the

Richmond bank; it is to that bank, as we have said, they must look for redress; and the responsibility of that bank is the same as though the check had been delivered directly to it for collection by the owners.

In this connection, certain state statutes are also referred to, but, if applicable, we find nothing in them that justifies a different conclusion from that reached in respect of the regulation just considered. Their provisions are in substance the same.

2. Finally, it is urged that the acceptance of the drawee's own draft, instead of money, was justified by custom. The testimony relied upon to establish the custom follows:

"The business of check collecting is handled by the Federal Reserve Bank in a way very similar to that in which it is handled by collecting banks throughout the country. When one bank receives checks on another in a distant city, it usually sends them to the bank upon which they are drawn or to some other bank in that city, and receives settlement by means of an exchange draft drawn by the bank to which the checks are sent upon some one of its correspondents. *When checks are sent with the expectation that the bank receiving them will remit at once, we call it sending for collection and return. When this is done, the bank upon which the checks are drawn is expected to cancel the checks and charge them to the accounts of the drawers and to remit by means of its exchange draft or by a shipment of currency.* An exchange draft is used more frequently than a shipment of currency."

It thus appears that the custom, if otherwise established, does not fix a definite and uniform method of remittance. When checks are sent for collection and return, the bank is expected to cancel the checks and charge them to the account of the drawers and remit "by means of its exchange draft *or by a shipment of currency*," the

former being used more frequently than the latter. Whether the choice of methods is at the election of the drawee bank or the collecting bank does not appear. If it be the latter, it would seem to result that the election to have remittance by draft instead of currency, being wholly a matter of its discretion or even of its caprice, as to which the owners are not consulted, would be at its peril rather than at the risk of the owners of the check.

But the proof shows that the alleged custom was not known to plaintiffs; and they could not be held to it without such knowledge, because, all other reasons aside, by its uncertainty and lack of uniformity, it furnishes no definite standard by which the terms of the implied consent sought to be established thereby, can be determined. It furnishes no rule by which it can be ascertained when an exchange draft shall be remitted and when currency shall be required, or who is to exercise the right of election. "A custom to pay two pence in lieu of tithes is good; but to pay sometimes two pence, and sometimes three pence, as the occupier of the land pleases, is bad for uncertainty." 1 Bl. Comm. 78. An alleged custom to remit either in exchange or in currency at somebody's option, means nothing more than a practice sometimes to remit by exchange and sometimes not, and therefore lacks the essential qualities of certainty and uniformity to make it a custom of accepting payment by exchange draft binding upon the owners of the check. *Oelricks* v. *Ford*, 23 How. 49, 62; *Kalamazoo Corset Co.* v. *Simon,* 129 Fed. 144, 146; *Chicago, M. & St. P. Ry. Co.* v. *Lindeman,* 143 Fed. 946, 949; *Foley* v. *Mason & Son,* 6 Md. 37, 50; *Wilson* v. *Willes,* 7 East, 121, 127. A custom to do a thing in either one or the other of two modes, as the person relying upon it may choose, can furnish no basis for an implication that the person sought to be bound by it had in mind one mode rather than the other.

It is said, however, that there is a custom among banks to settle among themselves by means of drafts so well

established and notorious, that judicial notice of it may be taken. But the usage here invoked is not that, but is one of special application to a case where the collection of a check is intrusted to the very bank upon which the check is drawn and where payment is accepted in a medium which the contract, read in the light of the law, forbids. The special situation with which we are dealing is controlled by a definite rule of law which it is sought to upset by a custom to the contrary effect. It is not now necessary to consider the effect of a custom which contravenes a settled rule of law or the limits within which such a custom can be upheld. See *Barnard* v. *Kellogg,* 10 Wall. 383, 390–394. Decisions upon that question are in great confusion. But whatever may be the doctrine in other respects, certainly a custom relied upon to take the place of a settled principle of law, and therefore to have the force of law, ought to be as definite and specific in negativing the principle as the law which it assumes to supplant is in affirming it.

Judgment affirmed.

JONES *v.* UNION GUANO COMPANY, INCORPORATED.

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

No. 73. Argued October 15, 1923.—Decided February 18, 1924.

1. In exercising its right to impose reasonable conditions upon the bringing of suits, a State properly may treat as a separate class actions to recover damages resulting to crops from harmful or deficient fertilizers, and require a chemical analysis as a condition precedent, without excluding other evidence. P. 181.
2. A statute of North Carolina (Laws 1917, c. 143,) regulating the sale of fertilizers to prevent deception and fraud, and granting the purchaser new rights and remedies for departures from the standards fixed without depriving him of any right or cause of action

or of liberty to contract with the manufacturer on other terms, provides that no suit for damages from results of the use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the State Department of Agriculture that during the season the manufacturer has, in other fertilizer offered, employed ingredients outlawed by the act, or offered any kind of dishonest or fraudulent goods. The act provides opportunity for official chemical analysis, limiting, however, the time and manner in which samples for analysis may be taken, and declares that a certificate of the state chemist of an analysis made by him of any sample drawn under these provisions shall be *prima facie* proof that the fertilizer was of the value and constituency shown by such analysis;

In an action to recover damages to a crop alleged to have resulted from fertilizer of inferior quality and containing deleterious ingredients, in which the plaintiff was nonsuited for not having procured a chemical analysis as required by the act, *held*, that the requirement was not arbitrary, but reasonable, and consistent with the due process and equal protection clauses of the Fourteenth Amendment. P. 180.

183 N. C. 338, affirmed.

ERROR to a judgment of the Supreme Court of North Carolina, affirming a judgment of nonsuit in an action to recover damages to a tobacco crop alleged to have resulted from the use of fertilizer, bought from the defendant and alleged to have been inferior in quality and to have contained harmful ingredients.

Mr. Edward C. Jerome, with whom *Mr. J. M. Sharp* and *Mr. B. L. Fentress* were on the brief, for plaintiff in error.

The complaint may be treated as alleging two causes of action: first, because defendant wrongfully inserted into the fertilizer a substance harmful to tobacco; second, for failure to put into the fertilizer the ingredients that it was represented to contain, one cause of action being for destruction, the other for failure to help as represented.

The statute, in the absence of the required certificate, abolishes all remedy for damage caused by the insertion of a harmful substance in fertilizer, unless it was done dishonestly or fraudulently, or accompanied by a similar injury to another person.

A "chemical analysis showing a deficiency of ingredients," made a prerequisite to the bringing of this action, has nothing to do with the additional presence of some harmful substance. This wrong was something that the legislature very evidently did not have in mind in passing the statute, but the Supreme Court of the State has construed the statute as applying to that cause of action. The only alternatives given to one who has had his crop ruined are absurd. We must make it "appear" to the Department of Agriculture that the manufacturer in other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article; or he must make it "appear to the Department of Agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods." In other words, the one injured, as this plaintiff has been, must find some other person who has a like cause of action against the same defendant, and make that appear to the Department, although by what means the statute does not say. The Department may ignore the most convincing evidence, and simply announce that it does not appear. No process is provided for the plaintiff to secure witnesses before the Department, and the Department is not compelled to have a hearing. As much may be said for the other alternative, requiring it to appear that the fertilizer was "dishonest or fraudulent goods." This leaves out entirely a cause of action based upon the negligent insertion of a harmful substance in fertilizer, because in such case there might be no deficiency of ingredients, no "other goods offered in this State during such season" by the same

manufacturer, or none that contained outlawed substances, and no dishonesty or fraud. Thus the plaintiff is left entirely without remedy for the damage caused him by the defendant's placing in his fertilizer some substance that practically ruined his tobacco crop.

A State cannot abolish all remedy for an admitted tort. *Truax* v. *Corrigan,* 257 U. S. 312.

There is a denial of equal protection of the law by a statute which denies to one class of persons the right to recover damages from another class for a particular injury, leaving actions identical in principle for the benefit of all other classes. *Atchison, etc. Ry. Co.* v. *Vosburg,* 238 U. S. 56; *Park* v. *Detroit Free Press Co.,* 72 Mich. 560.

The classification, with reference to a tort, of farmers on one side and fertilizer manufacturers on the other, cannot be sustained. *Truax* v. *Corrigan, supra; Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540. The statute requires the farmer to refuse to take the fertilizer manufacturer's word that his fertilizer contains the ingredients in the proper proportion to help the growth of his crops, and to have it analyzed before using it. A person who is compelled to anticipate the commission of a tort upon him, and to comply with conditions precedent to the bringing of an action for a possible wrong before it is consummated, cannot be said to have the equal protection of the law.

The statute deprives plaintiff in error of a property right without due process of law. No statute can make any evidence conclusive. *United States* v. *Klein,* 13 Wall. 128; *Chicago, etc. Ry. Co.* v. *Minnesota,* 134 U. S. 418; *Missouri, etc. Ry. Co.* v. *Simonson,* 64 Kans. 802.

The statute makes the absence of the particular kinds of evidence that it specifies conclusive of the rights of the plaintiff. It prescribes the kind of evidence that may be introduced, without even a pretense of being general. First, a certificate of chemical analysis showing a de-

ficiency of ingredients; but there may be no deficiency of ingredients and at the same time a harmful substance present. Next, that plaintiff has made it appear to the Department that the same defendant has similarly injured some other farmer in the State during the same season; or that the defendant has been dishonest or fraudulent. These three kinds of evidence have nothing to do with the cause of action of the plaintiff. He does not have to prove that the defendant dishonestly or fraudulently put a harmful substance into his fertilizer, but simply that it was there. *Chicago, etc. Ry. Co.* v. *Minnesota,* 134 U. S. 418; *McFarland* v. *American Sugar Refg. Co.,* 241 U. S. 79; *Bailey* v. *Alabama,* 219 U. S. 219; *Reitler* v. *Harris,* 223 U. S. 437; *Mobile, etc. R. R. Co.* v. *Turnipseed,* 219 U. S. 35. The effect is to deprive a party of the right to try his action on the real facts.

The certificate of chemical analysis of this fertilizer, made by the chemist of the State Department of Agriculture, shows that there was a deficiency of the ingredients that the fertilizer was represented to contain. The plaintiff was denied the right to use this certificate as evidence because the sample used for analysis was not drawn from ten bags of the fertilizer; and, because the plaintiff had used the fertilizer for the purpose for which defendant represented it to be good, he was denied the privilege of introducing evidence of any analysis of it. The court below made much of the fact that this plaintiff bought fifty-one bags of the fertilizer and therefore said that he could not question the validity of the provision requiring samples to be drawn from at least ten bags, but that does not answer the contention that it is not due process of law to require the plaintiff, in advance of any injury to him, to provide himself with the "same kind of instruments used by the inspectors of the Department in taking samples," and to draw the samples within thirty days after delivery to him. The statute deprives the

plaintiff of the privilege of making any contract for the purchase of fertilizer that will obviate the necessity of this expense and trouble.

The statute is void because it substitutes the arbitrary discretion of an executive department for the judicial inquiry of the courts. In cases where there is no certificate of chemical analysis showing a deficiency of ingredients, it leaves it absolutely to the Department, in its ungoverned discretion, to say whether there is a cause of action. It thus assigns a judicial function to an executive department without provisions for a hearing or for procuring witnesses. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *State* v. *Tenant,* 110 N. C. 609; *Chicago, etc. Ry. Co.* v. *Minnesota,* 134 U. S. 456.

Mr. Louis M. Swink and *Mr. W. M. Hendren,* with whom *Mr. Oscar O. Efird* was on the brief, for defendant in error.

Mr. Justice Butler delivered the opinion of the Court.

Plaintiff in error brought this action in the Superior Court of Rockingham County to recover damages alleged to have resulted to his tobacco crop from the use of fertilizer manufactured and sold by defendant in error. A state law (§ 7, c. 143, Laws of 1917) provides that no such action shall be brought until after chemical analysis showing the ingredients of the fertilizer. The plaintiff in error failed to meet this requirement, and, notwithstanding evidence tending to show inferior quality of and deleterious ingredients in the fertilizer and injury to the crop resulting from its use, the court dismissed the case and entered judgment of nonsuit. The Supreme Court of the State affirmed the judgment. 183 N. C. 338. The question here is whether the state law so applied is repugnant to the due process clause or equal protection clause of the Fourteenth Amendment.

The facts alleged and on which plaintiff in error seeks to recover are these. In the spring of 1919, he purchased 51 bags of fertilizer upon the representation and warranty of defendant in error that it was good for and conducive to the growth of tobacco. The weather was propitious, the plants were good and properly set out, and the land was properly tilled. The fertilizer contained deleterious ingredients not available as food for plants, and killed or prevented the growth of tobacco. There was produced 4469 pounds of tobacco on which, by reason of inferior quality, there was a loss of thirty cents a pound, $1,340.70; and in addition to the actual yield there should have been produced 5281 pounds of the value of seventy cents per pound, $3,696.70, making total damages alleged $5,037.40.

In North Carolina commercial fertilizer is generally used for the production of crops. Prior to the passage of the act, litigation between the users and sellers of fertilizers involving demands for damages for injuries to crops alleged to have resulted from the use thereof, became a matter of public concern affecting, or liable to affect, the general welfare.[1] In earlier cases, the Supreme Court of the State held the measure of damages to be the difference between the actual value and the purchase price of fertilizer, and denied recovery for diminution of crops on the ground that such a claim necessarily must be speculative. *Fertilizer Works* v. *McLawhorn,* (1912) 158 N. C. 274. Later, recovery for diminution of crops was permitted. *Tomlinson & Co.* v. *Morgan,* (1914) 166 N. C. 557; *Carter* v. *McGill,* (1915) 168 N. C. 507, Rehearing, (1916) 171

[1] See *Carson* v. *Bunting,* (1911) 154 N. C. 530; *Fertilizer Works* v. *McLawhorn,* (1912) 158 N. C. 274; *Ober & Sons Co.* v. *Katzenstein,* (1912) 160 N. C. 439; *Tomlinson & Co.* v. *Morgan,* (1914) 166 N. C. 557; *Guano Co.* v. *Live-Stock Co.,* (1915) 168 N. C. 442; *Carter* v. *McGill,* (1915) *id.* 507, Rehearing, (1916) 171 N. C. 775. See also decisions subsequent to its passage: *Fertilizer Works* v. *Aiken,* (1918) 175 N. C. 398; *Fertilizing Co.* v. *Thomas,* (1921) 181 N. C. 274.

N. C. 775. In *Guano Co.* v. *Live-Stock Co.*, (1915) 168 N. C. 442, where the contract of sale of fertilizer contained a warranty that the seller should not be held responsible for results in actual use, the court said (p. 448): "The warranty was drawn for the very purpose of preventing the recovery of such damages as are, in their nature, very speculative, if not imaginary, and out of all proportion to the amount of money or price received by the seller for the fertilizer. If fertilizer companies can be mulcted in damages for the failure of the crop of every farmer who may buy from them, they would very soon be driven into insolvency or be compelled to withdraw from the State, as the aggregate damages, if the supposed doctrine be carried to its logical conclusion, would be ruinous, and the farmers in the end would suffer incalculable harm."

In 1917 the state legislature dealt with the situation and passed the act above referred to, comprehensively regulating fertilizers. Among other provisions to prevent deception and fraud, it requires that before sale there shall be attached to each package a brand name, which is required to be registered with the state department of agriculture, the weight, the name and address of the manufacturer and the guaranteed analysis, giving the percentage of valuable constituents,—phosphoric acid, nitrogen (or equivalent in ammonia) and potash. Change of a registered brand to a lower grade is forbidden. The use of the terms "high grade" and "standard" is regulated, and minimum percentages of valuable constituents are prescribed for each grade. Deleterious substances are prohibited. Fertilizers offered for sale or sold contrary to the provisions of the act are liable to be seized and condemned. Penalties are prescribed for violations of the act or of the rules and regulations of the department made to carry it into effect. Whenever the commissioner of agriculture shall be satisfied that any fertilizer is five per cent. below the guaranteed value in plant food, it is his

duty to require that twice the value of the deficiency shall be made good by the manufacturer to one who has purchased such fertilizer for his own use. If ten per cent. below, it is the duty of the commissioner to require three times the value of such deficiency to be paid to the consumer. If the deficiency is due to intention of the manufacturer to defraud, then there shall be collected from him double the amounts above stated. If the manufacturer resists payment, the commissioner is required to publish the analysis in an official bulletin and also in one or more newspapers. The department is required to have sufficient chemists and assistants and the necessary equipment to enable it promptly to make a report of the chemical analyses of all samples sent by purchasers or consumers. It is authorized to collect and analyze fertilizer offered for sale in the State. Samples for analysis are required to be taken from at least ten per cent. of the lot, but from not less than ten bags of any lot or brand. The drawing of samples is safeguarded by the act, and the department is authorized to make additional rules and regulations for taking and forwarding them to the department. No sample shall be taken after thirty days from the actual delivery to the consumer, except by the state inspector. It provides (§ 7) that in the trial of any case where the value or composition of any fertilizer is called in question, a certificate of the state chemist, setting forth the analysis made by him "of any sample of said fertilizer drawn under the provisions of this chapter . . . shall be *prima facie* proof that the fertilizer was of the value and constituency shown by said analysis. . . . *Provided further,* that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the Department of Agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients

as are outlawed by the provisions of this act, or unless it shall appear to the Department of Agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods. That nothing in this act shall impair the right of contract."

It is not contended that the provision making the certificate of the state chemist *prima facie* evidence is invalid.[2] The contention is that the act arbitrarily substitutes the determination of an executive department for a judicial inquiry, and has the effect of abolishing all remedies against manufacturers of fertilizer for damages caused by the use of inferior or deleterious fertilizer, and is therefore repugnant to the Fourteenth Amendment.

The act does not deprive purchasers of any right or cause of action. On the contrary, it gives additional rights and remedies to one who purchases for his own use fertilizer below the guaranteed value in plant food. The terms of the statute are not made exclusive. Under the act the parties were free to deal on other terms. *Fertilizer Works* v. *Aiken,* (1918) 175 N. C. 398, 402; *Fertilizing Co.* v. *Thomas,* (1921) 181 N. C. 274, 283. The ingredients of fertilizers can be ascertained definitely by chemical analysis. The department is required to provide chemists and equipment and to make and report analyses of all fertilizers sent in by purchasers or consumers. The requirement imposed is reasonable and seems well calculated to safeguard against uncertainty, conjecture and mistake. The analysis is not made conclusive. Other

[2] See *Pillow* v. *Roberts,* 13 How. 472, 476; *Marx* v. *Hanthorn,* 148 U. S. 172, 182; *Turpin* v. *Lemon,* 187 U. S. 51, 59; *Adams* v. *New York,* 192 U. S. 585, 599; *Minneapolis & St. Louis R. R. Co.* v. *Minnesota,* 193 U. S. 53, 63; *Mobile, J. & K. C. R. R. Co.* v. *Turnipseed,* 219 U. S. 35, 42; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81; *Reitler* v. *Harris,* 223 U. S. 437, 441; *Luria* v. *United States,* 231 U. S. 9, 25; *Easterling Lumber Co.* v. *Pierce,* 235 U. S. 380; *Meeker & Co.* v. *Lehigh Valley R. R. Co.,* 236 U. S. 412, 430; *Hawkins* v. *Bleakly,* 243 U. S. 210, 213; *Hawes* v. *Georgia,* 258 U. S. 1, 4.

evidence may be introduced by either party. The determination of the department is not substituted for a trial in court.

The Fourteenth Amendment does not prevent a State from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object. See *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, 155; *Truax* v. *Corrigan,* 257 U. S. 312, 337. We think it plain that actions to recover damages to crops resulting from the use of fertilizers may reasonably be distinguished from other damage suits. Crops depend on the kind and condition of the soil, the vitality of seeds sown or plants set out, the cultivation and care given, the weather and many other things, as well as the kind and amount of the fertilizer applied. The amount or quality of the yield cannot be known in advance. When good results are not obtained, it is impossible to discover the causes and determine how much of the shortage, whether of quantity or kind, properly may be attributed to any particular thing. In such actions, peculiar difficulties attend the ascertainment of the constituent elements of the fertilizer used, and the determination whether it is inferior in quality or contains ingredients that are deleterious or harmful to plant growth. To attempt to establish the kind or quality of fertilizer applied to the land by an inspection of the crop growing thereon, or by the result of the season's planting and effort, is to indulge in speculation and conjecture. A State has power to provide for and require a more definite method of ascertaining the essential facts and a better basis upon which judicial determinations may be made.

The provision of the state law here under attack is not repugnant to the Fourteenth Amendment.

Judgment affirmed.

SALEM TRUST COMPANY *v.* MANUFACTURERS' FINANCE COMPANY ET AL.

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

No. 74. Argued October 15, 1923.—Decided February 18, 1924.

1. In a suit between citizens of different States to determine which of them is entitled to a fund which by their agreement has been collected by one and deposited to his special account, as trustee, to be paid to himself or the other as the issue between them shall be determined, the depositary is not a necessary party, and its joinder as defendant in the state court will not prevent removal to the federal court. P. 189.
2. In the absence of any local statute or usage, the question whether prior notice to the debtor of the later of two assignments of an account receivable subordinates the rights of the earlier to those of the later assignee, is a question of general law in deciding which the federal court is not bound by the decisions of the highest court of the State. P. 191.
3. While there are contingencies which entitle the second of two successive assignees of the same chose in action to prevail over the first, mere priority of notice to the debtor by a second assignee who lent money to the assignor in consideration of his assignment, without making any inquiry of the debtor, is not sufficient to subordinate the first assignment to the second. Pp. 194, 197.

280 Fed. 803, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed a suit brought by the above named petitioner against the above named respondent, and its corespondent, International Trust Company, to determine the rights of the first two, as assignees, to a fund deposited with the third.

Mr. Alexander Whiteside, with whom *Mr. Arthur Drinkwater* and *Mr. Raymond P. Baldwin* were on the brief, for petitioner.

The proceeding was erroneously removed.

The trust *res* is the debt the Trust Company owes the Finance Company as trustee under the agreement between petitioner and respondent. This suit was brought by petitioner not only to determine its rights, but to collect the debt. The Trust Company was made a party for the purpose of collection, and for that purpose must be an indispensable party.

The agreement also provided that the question of the ownership of the proceeds of the assigned accounts, if the two parties should be unable to agree on the same, should be determined by a proper proceeding, brought by either party, in a court of competent jurisdiction. This amounts to an agreement on the part of the Finance Company that petitioner might bring a proceeding in *any* court of competent jurisdiction. While an agreement not to remove a case to a federal court is void, it does not follow that an agreement that a party may prosecute an action in a state court is not valid and enforceable where based on adequate consideration.

By the great weight of authority an assignee of a chose in action has priority without notice over attaching or other creditors of the assignor. 5 Corpus Juris, 971–973.

The first assignee should have priority unless for some reason it is estopped. The assignment of a chose in action is valid and complete, and title to it passes, before any notice is given to the obligor. *Greey* v. *Dockendorff,* 231 U. S. 513; *Putnam* v. *Story,* 132 Mass. 205; *Thayer* v. *Daniels,* 113 Mass. 129; *Fortunato* v. *Patten,* 147 N. Y. 277; *In re Hawley Furnace Co.,* 238 Fed. 122; *Petition of National Discount Co.,* 272 Fed. 570. Whether legal or equitable, some title passes,—all that the assignor has power to give.

In Massachusetts, in the absence of estoppel, the claim of the first assignee will prevail against that of a subsequent assignee regardless of notice to the obligor. *Thayer* v. *Daniels,* 113 Mass. 129; *Putnam* v. *Story,* 132 Mass.

205; *Herman* v. *Mutual Life Ins. Co.,* 218 Mass. 181; *Rabinowitz* v. *People's Natl. Bank,* 235 Mass. 102.

Since the contracts of assignment were made and to be performed in Massachusetts, and since all parties, except the Finance Company, were Massachusetts corporations, and since the forum was a Massachusetts forum, the law of Massachusetts must govern all the questions involved. The fact that the Finance Company was a Delaware corporation does not give it the right to demand the application of the law of some other geographical unit. *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305; *Shaffer* v. *Carter,* 252 U. S. 37.

The court below erroneously held that the relative merits of the equities of successive assignees of the same chose in action was a question of general jurisprudence and that, consequently, the federal courts were not bound by decisions of the state court in determining the territorial law of Massachusetts.

The federal decisions relied on by the majority of the court below and by the Finance Company do not justify this Court in approving the naked rule of mere priority of notice. *Methven* v. *Staten Island Light Co.,* 66 Fed. 113; *In re Leterman, Becher & Co.,* 260 Fed. 543; *Judson* v. *Corcoran,* 17 How. 612; *Spain* v. *Hamilton's Admr.,* 1 Wall. 604; *Laclede Bank* v. *Schuler,* 120 U. S. 511; *Dearle* v. *Hall,* 3 Russ. 1; *Farmers' & Merchants' Bank* v. *Farwell,* 58 Fed. 633; *The Elmbank,* 72 Fed. 610; *Third National Bank* v. *Atlantic City,* 126 Fed. 413; and *In re Hawley Furnace Co.,* 233 Fed. 451, distinguished. See *Foster* v. *Cockerell,* 3 Cl. & F. 456; *Ward* v. *Duncombe,* [1893] A. C. 369. The weight of authority in the various state courts, and also the weight of federal decisions, are against this rule. *Greey* v. *Dockendorff,* 231 U. S. 513; *Petition of National Discount Co.,* 272 Fed. 570.

State court decisions control federal courts as to assignments and pledges or choses in action and as to chattel

mortgages, conditional sales and liens; as to real estate, wills, descent and distribution; as to construction of state constitutions and statutes; as to liability for personal injury; and as to miscellaneous contracts. [Citing many decisions of this and of lower federal courts.]

The denial of certiorari in *In re Leterman, Becher & Co.,* 260 Fed. 543, adds nothing to the authority of that case. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U. S. 251. See *Coleman & Co.* v. *Tawas Co.,* 250 U. S. 668; and *Benedict* v. *Ratner,* 259 U. S. 579.

Mr. Robert G. Dodge, with whom *Mr. Laurence Curtis 2d* was on the brief, for respondents.

The fact that the International Trust Company, which, like the plaintiff, is a Massachusetts corporation, was made a party defendant, did not prevent the removal of the case. It was in no sense a necessary party, as it had no concern whatever with the outcome of the controversy between the plaintiff and the Finance Company. A final decree in favor of plaintiff would naturally run against the Finance Company only, requiring that company to draw a check on the account in favor of the plaintiff. The Trust Company is a mere debtor of the Finance Company, and the fact that the deposit stands in the name of the latter as trustee does not change the relation. *In re Nichols,* 166 Fed. 603; *Minard* v. *Watts,* 186 Fed. 245; *Fletcher* v. *Sharp,* 108 Ind. 276; *Paul* v. *Draper,* 158 Mo. 197; Perry, Trusts, 6th ed., § 122.

It is settled that the citizenship of a merely nominal party is immaterial upon the question of removability on the ground of diverse citizenship. *Walden* v. *Skinner,* 101 U. S. 577; *Barney* v. *Latham,* 103 U. S. 205; *Bacon* v. *Rives,* 106 U. S. 99; *Ex parte Nebraska,* 209 U. S. 436; *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U. S. 77; *New York Construction Co.* v. *Simon,* 53 Fed. 1; *Shattuck* v. *North British Ins. Co.,* 58

Fed. 609; *American National Bank* v. *National Benefit & Casualty Co.,* 70 Fed. 420; *First National Bank* v. *Bridgeport Trust Co.,* 117 Fed. 969; *Harvey* v. *Harvey,* 290 Fed. 653.

On the question of priority as between the assignees, the English rule, that the party who first gives notice is entitled to priority, is the established rule in the federal courts. *Judson* v. *Corcoran,* 17 How. 612; *Spain* v. *Hamilton's Admr.,* 1 Wall. 604; *Laclede Bank* v. *Schuler,* 120 U. S. 511; *Farmers' & Merchants' Bank* v. *Farwell,* 58 Fed. 633; *Methven* v. *Staten Island Light Co.,* 66 Fed. 113; *The Elmbank,* 72 Fed. 610; *Third National Bank* v. *Atlantic City,* 126 Fed. 413; *In re Hawley Furnace Co.,* 233 Fed. 451; *In re Leterman, Becher & Co.,* 260 Fed. 543. Distinguishing, *Petition of the National Discount Co.,* 272 Fed. 570; *Greey* v. *Dockendorff,* 231 U. S. 513. See further: *Fortunato* v. *Patten,* 147 N. Y. 277; *Graham Paper Co.* v. *Pembroke,* 124 Cal. 117; *Lambert* v. *Morgan,* 110 Md. 1; *Lumber Co.* v. *Newcomb,* 79 Miss. 462; *Jenkinson* v. *New York Finance Co.,* 79 N. J. Eq. 247; *Jack* v. *National Bank,* 17 Okla. 430; *Phillips's Estate,* 205 Pa. St. 515; *Coffman* v. *Liggett,* 107 Va. 418; Pomeroy, Eq. Juris., 4th ed., § 695, note J; 66 L. R. A. 761; 5 Corp. Jur. 953; 19 Yale Law Jour. 258, 263; 60 Univ. of Penna. Law Rev. 668, 669.

Dearle v. *Hall,* 3 Russ. 1; *Foster* v. *Cockerell,* 3 Cl. & F. 456; *Meux* v. *Bell,* 1 Hare, 73; Story, Eq. Juris., § 1384. In the federal courts, and in the state courts which follow *Dearle* v. *Hall, supra,* the rule is stated and applied without being limited to cases where the second assignee made inquiry or was in fact misled. See the cases and text writers above cited, and also *Lambert* v. *Morgan,* 110 Md. 1; Scott's Cases on Trusts, p. 623.

The question is one of general jurisprudence on which the federal court is not controlled by decisions of the state court. *Methven* v. *Staten Island Light Co.,* 66 Fed.

.113; *In re Leterman, Becher & Co.,* 260 Fed. 543; *Swift* v. *Tyson,* 16 Pet. 1.

The rights of owners of choses in action have been constantly dealt with by the federal courts as matters of "general jurisprudence." The question whether a transferee of a negotiable instrument is entitled to rank as a holder for value is such a question. *Swift* v. *Tyson, supra; Oates* v. *National Bank,* 100 U. S. 239; *Railroad Co.* v. *National Bank,* 102 U. S. 14.

So of the right of a purchaser of municipal bonds to rely upon recitals therein, *Presidio County* v. *Noel-Young Bond Co.,* 212 U. S. 58; of the validity of the assignment of an insurance policy, *Russell* v. *Grigsby,* 168 Fed. 577; *New York Life Ins. Co.* v. *Dunlevy,* 214 Fed. 1; of whether the title to checks deposited in a bank passes to the bank in the absence of agreement, *In re Jarmulowsky,* 249 Fed. 319; *In re Grocers Baking Co.,* 266 Fed. 900; of whether an instrument purporting to effect an absolute transfer of title may be shown to have been intended as security only, *Russell* v. *Southard,* 12 How. 139; of the rights of a holder of an insurance policy issued before the payment of the first premium, *MacKelvie* v. *Mutual Benefit Life Ins. Co.,* 287 Fed. 660. See *Aetna Life Ins. Co.* v. *Moore,* 231 U. S. 543; *Myrick* v. *Michigan Central R. R. Co.,* 107 U. S. 102; *Harper* v. *Hochstim,* 278 Fed. 102; *Johnson* v. *Norton Co.,* 159 Fed. 361.

Mr. Justice Butler delivered the opinion of the Court.

On May 16, 1919, the Nelson Blower & Furnace Company, a Massachusetts corporation, assigned to the petitioner for a valuable consideration indebtedness to the amount of $45,000 due or to become due to the Nelson Company from the Murray & Tregurtha Corporation, under a contract whereby the Nelson Company was to construct certain engines for the latter. July 15, 1919,

the Nelson Company for a valid consideration assigned to the respondent, Manufacturers' Finance Company, the same indebtedness to the amount of $40,000, and on September 20 made another assignment to the Finance Company of the same indebtedness to the amount of $10,000. Later, about the last mentioned date, the Finance Company notified the debtor of its assignment. Up to that time it had made no inquiry of the debtor as to its indebtedness to the Nelson Company, and neither it nor the debtor had any knowledge of the prior assignment to the petitioner. September 26, 1919, the United States District Court in a suit in equity appointed a receiver of the Nelson Company. About that time each assignee learned of the assignment to the other. October 6, 1919, petitioner and respondent Finance Company agreed that the Nelson Company, acting by its receiver, should finish the work being done for the debtor, and that the net proceeds, which amounted to $7,963.36, a sum less than the amount of the claim of either assignee, should be deposited with the respondent International Trust Company, a Massachusetts corporation, in a special account in the name of the Finance Company as trustee for the one or the other of such assignees thereafter to be agreed by them, or found by some court of competent jurisdiction, to be entitled thereto. They failed to agree, and petitioner brought a bill in equity in the state court against the respondents to establish its right to the amount so on deposit, and to have the same paid to it. For the removal of the suit to the District Court of the United States, the Finance Company filed its petition stating that the International Trust Company is not a necessary party to the suit but is a mere nominal party, being only a stakeholder and without any interest whatever in the result, and that the controversy in the suit is entirely between citizens of different States, Salem Trust Company, a Massachusetts corporation, and the Manufacturers' Finance

Company, a Delaware corporation. Other proper steps were taken, and the case was removed from the state to the federal court. Petitioner moved to remand, asserting that the International Trust Company is a necessary party to the suit, and that the case was improperly removed, because the plaintiff and one of the defendants are citizens of the same State. The motion was denied. The case was tried in the District Court and dismissed on final decree which was affirmed by the Circuit Court of Appeals.

There are two questions for decision: Did the District Court have jurisdiction? Which of the parties is entitled to the fund?

The District Courts have original jurisdiction of controversies between citizens of different States (Constitution, Art. III, § 2; Judicial Code, § 24); and when in any suit brought in a state court, there is a controversy, which is wholly between citizens of different States, and which can be fully determined as between them, a defendant interested in such controversy may remove the suit to the proper District Court of the United States. Judicial Code, § 28. District Courts have jurisdiction if all the parties on the one side are of citizenship diverse to those on the other side.[1] Jurisdiction cannot be defeated by joining formal or unnecessary parties.[2] The right of removal depends upon the case disclosed by the pleadings when the petition therefor is filed, (*Barney* v. *Latham*,

[1] *Raphael* v. *Trask*, 194 U. S. 272, 277; *Gage* v. *Carraher*, 154 U. S. 656; *Ayres* v. *Wiswall*, 112 U. S. 187, 192; *Removal Cases*, 100 U. S. 457, 468–469; *Strawbridge* v. *Curtiss*, 3 Cranch, 267; *Chipman* v. *West United Verde Copper Co.*, 271 Fed. 91; *Danks* v. *Gordon*, 272 Fed. 821, 824.

[2] *Wormley* v. *Wormley*, 8 Wheat. 421, 451; *Wood* v. *Davis*, 18 How. 467, 469; *Walden* v. *Skinner*, 101 U. S. 577, 589; *Wilson* v. *Oswego Township*, 151 U. S. 56, 64; *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428, 435; *Wallin* v. *Reagan*, 171 Fed. 758, 763; *Jackson* v. *Jackson*, 175 Fed. 710, 716; *Atchison, T. & S. F. Ry. Co.* v. *Phillips*, 176 Fed. 663, 666.

103 U. S. 205, 215; *Ex parte Nebraska,* 209 U. S. 436, 444) and is not affected by the fact that one of the defendants is a citizen of the same State as the plaintiff, if that defendant is not an indispensable party to the controversy between plaintiff and defendant who are citizens of different States. *Barney* v. *Latham, supra,* 213. The facts set forth in the present bill are substantially those already stated. This suit involves a controversy between the petitioner, a citizen of Massachusetts, and the respondent, the Finance Company, a citizen of Delaware, which can be determined without affecting any interest of the other respondent, the International Trust Company, a citizen of Massachusetts. The latter is not an indispensable party. See *Niles-Bement Co.* v. *Iron Moulders Union,* 254 U. S. 77, 80. It has no interest in the controversy between the petitioner and the other respondent. Its only obligation is to pay over the amount deposited with it when it is ascertained which of the other parties is entitled to it. On the question of jurisdiction, an unnecessary and dispensable party, will not be considered. *Walden* v. *Skinner,* 101 U. S. 577, 589; *Bacon* v. *Rives,* 106 U. S. 99, 104; *Ex parte Nebraska, supra.* The cases of *Wilson* v. *Oswego Township,* 151 U. S. 56, and *Construction Co.* v. *Cane Creek,* 155 U. S. 283, do not support the contention that this case was not properly removed to the federal court. These cases hold that where the object of the suit is to recover possession of personal property the one in possession is a necessary and indispensable, and not a formal, party. Here, no cause of action exists against the International Trust Company, because it has not been determined which of the other parties is entitled to payment. The District Court had jurisdiction. The motion to remand was rightly denied.

As between successive assignees of the same account receivable, does prior notice to the debtor of the later assignment without more subordinate the rights of the earlier to those of the later assignee?

There is a conflict of authority on the question. Under decisions of the Supreme Judicial Court of Massachusetts, which are in harmony with the decisions of the highest courts in a number of the States,[3] the earlier assignee would prevail. The courts below held the question to be one of general jurisprudence, declined to be bound by the Massachusetts decisions, and followed what they understood the rule to be, as applied by this and other federal courts,[4] and in a number of the States,[5] and decided that the later assignee, the first to give notice to the debtor, is entitled to the money.

The question is one of general law, not based on any legislation of the State or local law or usage, and the

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[3] *Putnam* v. *Story,* 132 Mass. 205, 211; *Tingle* v. *Fisher,* 20 W. Va. 497, 506, 510; *Meier* v. *Hess,* 23 Ore. 599, 603; *Columbia Finance & Trust Co.* v. *First National Bank,* 116 Ky. 364, 375; *Fortunato* v. *Patten,* 147 N. Y. 277, 283; *Hawk* v. *Ament,* 28 Ill. App. 390, 394; *Harris County* v. *Campbell,* 68 Tex. 22, 29; *White* v. *Wiley,* 14 Ind. 496; *Maybin* v. *Kirby,* 4 Richardson (S. C.) 105, 114. See also *Thayer* v. *Daniels,* 113 Mass. 129, 131; *Herman* v. *Mutual Life Ins. Co.,* 218 Mass. 181, 186. *Rabinowitz* v. *People's National Bank,* 235 Mass. 102; *MacDonald* v. *Kneeland,* 5 Minn. 352, 361, 365; *Bellingham Bay Boom Co.* v. *Brisbois,* 14 Wash. 173, 176; *Trust Co.* v. *Krause,* 22 Ohio C. C. (N. S.) 216; *Houser* v. *Richardson,* 90 Mo. App. 134, 139.

[4] *Judson* v. *Corcoran,* 17 How. 612; *Spain* v. *Hamilton's Administrator,* 1 Wall. 604; *Laclede Bank* v. *Schuler,* 120 U. S. 511; *Farmers' & Merchants' Bank* v. *Farwell,* 58 Fed. 633; *Methven* v. *Staten Island Light, Heat & Power Co.,* 66 Fed. 113; *In re Leterman, Becher & Co.,* 260 Fed. 543.

[5] *Graham Paper Co.* v. *Pembroke,* 124 Cal. 117, 120; *Lambert* v. *Morgan,* 110 Md. 1, 26; *Jenkinson* v. *New York Finance Co.,* 79 N. J. Eq. 247, 257; *Jack* v. *National Bank,* 17 Okla. 430, 435; *Phillips's Estate,* 205 Pa. St. 515, 521; *Vanbuskirk* v. *Hartford Fire Insurance Co.,* 14 Conn. 141, 144; *Dillingham* v. *Insurance Co.,* 120 Tenn. 302, 309; *Bank* v. *Insurance & Trust Co.,* 17 App. D. C. 112, 124; *Ward & Co.* v. *Morrison,* 25 Vt. 593, 599. See also *Merchants & Mechanics Bank* v. *Hewitt,* 3 Iowa, 93, 102; *Lumber Co.* v. *Newcomb,* 79 Miss. 462, 466; *Perkins* v. *Butler County,* 44 Nebr. 110, 116.

lower court rightly decided that it was not bound by the rule applied in the decisions of the highest court of Massachusetts. *Swift* v. *Tyson,* 16 Pet. 1, 18; *Boyce* v. *Tabb,* 18 Wall. 546; *Railroad Company* v. *National Bank,* 102 U. S. 14, 28; *Presidio County* v. *Noel-Young Bond Co.,* 212 U. S. 58, 73; *Methven* v. *Staten Island Light, Heat & Power Co.,* 66 Fed. 113; *In re Leterman, Becher & Co.,* 260 Fed. 543, 547.

The precise question now before us was not involved, and therefore was not decided, in any of the decisions of this Court cited by the Circuit Court of Appeals.

In *Judson* v. *Corcoran,* 17 How. 612, one Williams had a claim against Mexico for the illegal confiscation of a cargo. Under a treaty with Mexico (9 Stat. 922) such claims were to be adjusted by the United States upon allowance by a board of commissioners created by an act of Congress. 9 Stat. 393. Judson obtained from Williams an assignment of an interest in the claim. Later Corcoran obtained assignments covering the whole claim. The board found that Corcoran owned the whole claim and made an award in his favor. Judson set up no pretensions to the claim until after the award, some six years from the time he obtained the assignment. This Court (p. 614) pointed out that the assignor, having parted with his interest by the first assignment, the second assignee could take nothing by the later assignment; that the purchaser is entitled only to the remedies of the seller, and hence has arisen the maxim that "he who is first in time is best in right." The second assignee had drawn to his equity a legal title to the fund (the award of the board of commissioners); and it was said that,—assuming that no negligence could be imputed to the earlier assignee and that the case was one where an equity in the same chose in action was successively assigned to two innocent persons whose equities are equal,—there must be applied the rule that "the equities being equal, the law must prevail."

The court said (p. 615): "There may be cases in which a purchaser, by sustaining the character of a bona fide assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund, (as in this instance,) would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy."

Judson took his assignment in 1845 and first produced it in 1851. In the meantime, Corcoran got his assignment, gave notice, and prosecuted it to final award. It was held that he was entitled to the fund. Clearly that case does not hold that mere priority of notice by a later assignee will subordinate the rights of the first purchaser.

In *Spain* v. *Hamilton's Administrator,* 1 Wall. 604, the fund was one-tenth of the amount to be received from the United States on account of bonds of the Republic of Texas, after payment of a debt owed by a bank to one Wetmore, which the bonds were pledged to secure. Wetmore was trustee to make collection. The bank gave Hamilton an order on him for the fund. Hamilton made the following assignments: February 12, 1850, to Spain in general terms, without limit as to amount and not identifying the fund. August 30, 1850, to Wetmore for $2,500. September 21, 1850, to Corcoran & Riggs for $30,000, which was presented to and accepted by Wetmore. April 30, 1851, to Robb, the whole fund, subject to Wetmore's claim and that of Corcoran & Riggs. Robb gave notice immediately and later obtained judgment and made seizure of the residuary fund. Hill succeeded to the rights of Robb. The one-tenth covered by the order of the bank in favor of Hamilton was left in the Treasury, subject to the assignments. May 10, 1856, Spain brought suit, claiming the fund under the document of February 12, 1850. Up to this time, neither Wetmore nor any of

the other assignees had heard of Spain's claim against the fund.

In its decision, this Court referred to Spain's negligence and delay. It adverted to the rule that the assignee is entitled to the remedies of the assignor and is subject to all the equities between him and his debtor, and said: (p. 624) "But in order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee [assignor] before such notice."

If a debtor pays, or becomes bound to pay, a later assignee, he is not liable to an earlier assignee who failed to give him notice of his assignment. And if, without notice of any assignment, he pays the assignor he cannot be held by the assignee. To safeguard against such things, it is necessary for an assignee to give the debtor notice of his assignment. But it does not follow that mere priority of notice of the later assignee, who took nothing by his assignment, will subordinate the rights of an earlier assignee. That case does not establish or apply the rule contended for by respondent.

In *Laclede Bank* v. *Schuler,* 120 U. S. 511, it was held that a bank is not liable to a holder of a check which was not presented for payment until after the drawer had made a general assignment for the benefit of creditors, and directed the bank to hold the fund subject to the order of the assignee. This case does not support the rule applied by the Circuit Court of Appeals. A check in usual form does not constitute an assignment. It is an order which may be countermanded at any time before it is cashed. *Fourth Street Bank* v. *Yardley,* 165 U. S. 634, 643; *Florence Mining Co.* v. *Brown,* 124 U. S. 385, 391.

The doctrine that mere priority of notice to trustee or debtor gives priority of right to a later assignee over an

earlier assignee of a chose in action is generally referred to *Dearle* v. *Hall* and *Loveridge* v. *Cooper*, 3 Russell, 1, decided at the same time and upon the same principle. The leading case is *Dearle* v. *Hall*. In that case, there was much more in favor of the second assignee than mere priority of notice. Brown, *cestui que trust* under his father's will, made three assignments of income payable to him during his life by the executors. The two earlier assignments were made to Dearle and Sherring, respectively. Each was for a part of the annual income. By the terms of the assignments the assignor was permitted to continue to collect, and for years he did collect, the income assigned. No notice of the earlier assignments was given to the executors. Before he purchased, Hall, the latest assignee, diligently inquired of the trustees as to Brown's title and the amount of income paid him. The trustees knew of no assignments, and without any suspicion of prior incumbrance, Hall in good faith purchased the entire claim. He gave immediate notice of his assignment to the trustees and received assurance that the income would be paid to him. When it became due, an installment was paid to him. Thereafter, the earlier assignees gave notice and demanded payment under their respective assignments. The trustees withheld all payments. Suit was brought by Dearle and Sherring against Hall to establish priority of their assignments over his. In the lower court, Sir Thomas Plumer, M. R., gave judgment in favor of Hall, and it was affirmed by Lord Lyndhurst, L. C. Two grounds of the decision may be gathered from the opinions: (1) That the negligence of the prior assignees in failing to give notice to the trustees resulted in Hall being induced to purchase without knowledge of the prior assignments. (2) That notice to the trustees was necessary to perfect title,—as, "the act of giving the trustee notice is in a certain degree taking possession of the fund." (See *Ward* v. *Duncombe*, L. R. A. C. [1893] 369, 387.) These cases

did not decide that notice by a subsequent assignee after his purchase, without any inquiry in advance of his purchase, will subordinate the title of the prior assignor to that of the later. No such questions were involved. But later, in the case of *Foster* v. *Cockerell,* in the House of Lords, 3 Cl. & F. 456, that question was decided in favor of the subsequent assignee, and it appears to have become the settled rule in England. However, it has been the subject of much discussion and explanation by the English courts. See *Wilmot* v. *Pike,* 5 Hare, 14; *Ward* v. *Duncombe, supra.* It appears that in 1814 in *Cooper* v. *Fynmore,* 3 Russell, 60, Sir Thomas Plumer, V. C., himself decided that mere neglect of notice was not sufficient to postpone the first assignee, and held (p. 64): "In order to deprive him of his priority, it was necessary that there should be such laches as, in a court of equity, amounted to fraud." In 1827, *Dearle* v. *Hall* and *Loveridge* v. *Cooper* were decided. In 1833, Lord Lyndhurst, then Chief Baron, in *Smith* v. *Smith,* 2 Cr. & M. 231, in the Court of Exchequer, held that the second assignee in order to obtain priority must show that he exercised proper caution in taking the assignment, and that he had applied to the trustees to know if any previous assignment had been made, and that, unless he so applied to each of the trustees, he would not have exercised due caution or done all that he ought to have done. Lord Herschell, in *Ward* v. *Duncombe, supra,* said (p. 380): "The language thus used by the Chief Baron is somewhat remarkable. It would seem, if correctly reported, to indicate the view that a second incumbrancer would only obtain priority over an earlier one if he had used due caution, and had, in fact, made such inquiry as a prudent man would of each of the trustees. This view is in direct conflict with the decision of this House two years later in *Foster* v. *Cockerell* in which Lord Lyndhurst himself delivered the leading opinion." Undoubtedly the first application of

the rule that mere priority of notice gives priority of right was in *Foster* v. *Cockerell*, but it is always referred to *Dearle* v. *Hall* and *Loveridge* v. *Cooper*. In *Ward* .v *Duncombe*, the earlier decisions by which the rule was established were discussed by Lord Herschell and Lord Macnaghten. The opinions leave the impression that the rule itself was not deemed to be wholly satisfactory, and that it is not very clear upon what principle it rests. *Ward* v. *Duncombe, supra,* 391.

There is no decision of this Court which sustains the contention that, as between successive assignees of the same chose in action, mere priority of notice gives priority of right. It seems to us that the better reasons are against such a rule. By the first assignment, the rights of the assignor pass to the assignee. The creditor has a right to dispose of his own property as he chooses and to require the debt to be paid as he directs, without the assent of the debtor. See Story, Equity Jurisprudence, 11th ed., § 1057. Notice of the assignment to the debtor adds nothing to the right or title transferred. A subsequent assignee takes nothing by his assignment, because the assignor has nothing to give. See *Judson* v. *Corcoran, supra,* 614. If, after assignment, the assignor receives payment from the debtor, he is liable to the assignee. Failure of the first assignee to give notice does not divest him of any title or right or vest any claim in a subsequent purchaser. It cannot injuriously affect an intending purchaser who makes no inquiry of the debtor concerning the assignor's title. The debtor is not bound to answer inquiries concerning the assignor's title, and there can be no assurance that an intending purchaser can ascertain the incumbrance by inquiry of the debtor having notice of the earlier assignment. *Low* v. *Bouverie,* (1891) L. R. 3 Ch. 82, 99. Compare *Ward* v. *Duncombe, supra,* 393. It is impossible to eliminate all risk from such a transaction. If the second assignee elects to rely on the

representations of the vendor as to his title, and is deceived, he cannot shift his loss to the first assignee, unless some act or omission of the latter was proximate to the deception.

Facts and circumstances may create an equitable estoppel against the first assignee. *Herman* v. *Mutual Life Insurance Co.,* 218 Mass. 181; *Rabinowitz* v. *People's National Bank,* 235 Mass. 102.[6] It would be unconscionable to permit him to prevail over a later assignee whom he had misled or deceived in respect of the assignor's title at the time of purchase by the latter. But, assuming a duty on the first purchaser to protect a subsequent assignee against deception and fraud by the assignor, there is no ground for subordinating his claim, unless his failure was an element in or contributed to the deception. In the absence of inquiry by the subsequent purchaser, the failure of the first to give notice is immaterial.

In a case where, as here, the later assignee has made no inquiry of the debtor in advance of taking his assignment, there is no analogy between the giving of notice by the

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[6] In *Ward* v. *Duncombe,* Lord Macnaghten said (p. 391):

"The general principle applicable to all equitable titles is, I think, well expressed by Lord Cairns in *Shropshire Union Railways and Canal Company* v. *The Queen* (L. R. 7 E. & I. at p. 506): 'A pre-existing equitable title,' said Lord Cairns, 'may be defeated by a supervening legal title obtained by transfer'—he was there speaking of an equitable title to shares. Then he goes on: 'And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.'"

first assignee to the debtor and the taking of possession of tangible personal property by a purchaser. It is impossible in any real sense to transfer possession of accounts receivable or the like, and, as to them, an assignee does not become clothed with the *indicia* of ownership as does one taking possession of tangible things. It is not accurate to say that notice is necessary to perfect title in the assignee of a chose in action. While failure to give notice may become an important element in a situation from which equitable estoppel may arise against the first assignee, it cannot be said to be necessary to or an element in acquisition of title.

The result will be the same if it be assumed that each *bona fide* purchaser takes merely an equity in the chose in action assigned. If equities are equal, the first in time is best in right. Otherwise the stronger equity will prevail. While there are contingencies which entitle the second to prevail over the first assignee,[7] we hold that mere priority of notice to the debtor by a second assignee, who lent his money to the assignor without making any inquiry of the

[7] In Professor James Barr Ames' Cases on Trusts, 2nd ed., in a note on *Dearle* v. *Hall*, it is said (p. 328): "Whatever view may be entertained as to the English doctrine which prefers the assignee who first gives notice, the second assignee is in several contingencies clearly entitled to supplant the first assignee. E. g. (1) If, acting in good faith, he obtains payment of the claim assigned; *Judson* v. *Corcoran*, 17 How. 612; *Bridge* v. *Conn. Company*, 152 Mass. 343; *Bentley* v. *Root*, 5 Paige 632, 640; or (2) if he reduces his claim to a judgment in his own name; *Judson* v. *Corcoran*, 17 How. 612; *Mercantile Company* v. *Corcoran*, 1 Gray 75; or (3) if he effects a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to himself, *N. Y. Company* v. *Schuyler*, 34 N. Y. 30, 80; *Strange* v. *Houston Company*, 53 Tex. 162; or (4) if he obtains the document, containing the obligation, when the latter is in the form of a specialty. *Re Gillespie*, 15 Fed. 734; *Bridge* v. *Conn. Company*, 152 Mass. 343; *Fisher* v. *Knox*, 13 Pa. 622. In all these cases, having obtained a legal right in good faith and for value, the prior assignee cannot properly deprive him of this legal right."

debtor, is not sufficient to subordinate the first assignment to the second. The petitioner is entitled to the fund.

Decree reversed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur on the ground that the rights of the parties are governed by the law of Massachusetts.

GUARANTY TITLE & TRUST CORPORATION, RECEIVER OF VUE DE L'EAU COMPANY, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 109. Argued November 14, 1923.—Decided February 18, 1924.

1. Under the Virginia Code, 1919, § 5805, providing that no person shall make an entry on, or bring action to recover, any land lying east of the Alleghany Mountains, but within 15 years next after the time when the right to do so first accrued to himself or to some person through whom he claims, adverse possession for the required period not only bars the owner's right of entry or action but vests title in the disseisor. P. 204.
2. The disseisor need not have a deed or writing giving color of title or furnishing foundation for belief or claim of ownership or legal right to enter and take possession; his intention to appropriate and use the land as his own to the exclusion of all others suffices. *Id.*
3. Acts sufficient to apprise everyone of exclusive occupation and use, with unequivocal, emphatic and public assertion of ownership, *held* to have met the requirements of the Virginia law governing title by adverse possession. P. 205.
4. Where one of two rival claimants in the Court of Claims was rightly awarded the judgment, but payment of the money subsequently appropriated by Congress was withheld because of an appeal taken by the other in which the former intervened as appellee, this Court, in affirming the judgment, required the appellant to pay the successful claimant costs and interest on the judgment from the date of the appropriation until funds should be

available for payment of the judgment by the United States. P. 206.

57 Ct. Clms. 620, affirmed.

APPEAL from a judgment of the Court of Claims awarding recovery, for land taken by the United States, to one of two rival claimants of the title. The defeated claimant, Guaranty Title & Trust Corporation, as receiver, which had intervened in the Court of Claims, took the appeal. The other claimant, Norfolk-Hampton Roads Company, original plaintiff, was permitted to intervene here as an appellee.

Mr. E. R. F. Wells for appellant.

Mr. H. H. Rumble for Norfolk-Hampton Roads Company, appellee.

Mr. Solicitor General Beck and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, filed a brief on behalf of the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In 1873, the Vue de L'Eau Company, a Virginia corporation, owned a tract of about 294 acres at Hampton Roads, Virginia. It platted the "Prize Lot Reserve" (hereinafter called the "Reserve"), containing 4.55 acres, into lots and streets. In January, 1874, after having sold seven of these lots, it made an assignment for the benefit of its creditors and conveyed to trustees all of its land except the Reserve. Then the company became dormant. No organization was kept up. It had no directors or officers. But there was no formal dissolution or surrender of the charter. Thereafter, no action was taken by or in behalf of the company in reference to this land. It was allowed to remain in its former condition and to develop forest growth.

The Court of Claims found that in 1899 the Norfolk-Hampton Roads Company purchased a large acreage of land, including that immediately surrounding the Reserve, and, in the language of the findings of fact, ". . . upon purchasing said lands the plaintiff company, [Norfolk-Hampton Roads Company] without any right, title or interest, or claim of right, title or interest, in or to the lots or land of said Prize Lot Reserve, and with full knowledge of the fact that it had no claim of right, title or interest in or to any part of said lots or land, deliberately set about trying to acquire title to said lots and land by adverse possession; and in the course of its efforts to so acquire title thereto, the following action was taken: The plaintiff company . . . took possession of said holdings and from thenceforward to the time of its taking by the Government in June, 1917, treated the land of said Reserve as though it belonged to the plaintiff company. It recorded plats of its said property in which the land of said Reserve was included and indicated as a part of the company's holdings. The company's advertising matter issued in 1899 indicated as belonging to the company lands which included the lands of said Reserve, and said land was included in the company's subdivision known as 'Subdivision No. 1, Norfolk on the Roads,' a plat of which, stating said subdivision to be the 'Property of Norfolk-Hampton Roads Company,' was recorded in the County Clerk's office on June 14, 1901. In the development of its said property, streets were opened and graded through the land of said Reserve; timber was cut therefrom and used or marketed by the company; and bulkheads were built by the company in front of the property to protect it from erosion by the waves and tides. Said company also leased an area of its lands to the Jamestown Exposition Company, in 1907, including therewith said Prize Lot Reserve land as belonging to plaintiff company, and thereafter, upon the termination of the Exposition Company's lease,

said lands were leased by plaintiff company to another tenant, by whom they were occupied for some time. And in general, the land of said Reserve was held out and treated by plaintiff company as being the property of said company. It does not satisfactorily appear who, if anyone, paid the taxes on said land between the years 1874 and 1917."

June 28, 1917, the United States, pursuant to an Act of Congress of June 15, 1917, 40 Stat. 207, took 9.22 acres of land fronting on Hampton Roads for a naval base, made up of the Reserve and 4.67 acres immediately surrounding it. At that time the Norfolk-Hampton Roads Company was in possession of the tract taken. The compensation fixed by the President, $37,000, was not satisfactory. Payment of 75 per cent., as provided by the act, was not made because there was a question as to the title to the Reserve. The company sued the United States in the Court of Claims. 40 Stat. 207, 208; Judicial Code, § 145. Thereafter, in a suit brought in the Circuit Court of the City of Norfolk, Virginia, against the Vue de L'Eau Company by one of its stockholders, the Guaranty Title & Trust Corporation was appointed receiver of the company to take charge of its property and to prosecute claims and suits for the protection of its rights and interests. The receiver intervened in this case in the Court of Claims, alleging that the Vue de L'Eau Company was the owner of the Reserve at the time of the taking, and that it is entitled to compensation therefor. The Court of Claims found that, at the time of the taking, that part of the tract, title to which is not in controversy, was worth $35,500, and that the Reserve, claimed by both parties, was worth $33,000, and gave judgment in favor of the Norfolk-Hampton Roads Company for the whole $68,500. The receiver appealed. September 22, 1922, Congress made appropriation for the payment of this judg-

ment. 42 Stat. 1052. The amount fixed as compensation for the land not claimed by appellant was paid. Because of the claim of appellant, the United States withholds payment of the balance until the determination of this appeal. June 4, 1923, this Court granted leave to the Norfolk-Hampton Roads Company to intervene as party appellee, and required appellant to give bond " . . . to secure the payment of costs of the appeal as well as interest on $33,000 . . ." [262 U. S. 733.]

The owner at the time of the taking is entitled to the balance remaining unpaid. The question for decision is whether the Vue de L'Eau Company or the Norfolk-Hampton Roads Company was then the owner of the Reserve.

A Virginia statute provides that, " No person shall make an entry on, or bring an action to recover, any land lying east of the Alleghany mountains, but within fifteen years . . . next after the time at which the right to make such entry or bring such action shall have first accrued to himself or to some person through whom he claims. . . ." Code of 1919, §5805. By adverse possession and lapse of time the owner's right of entry or action is barred, and title is acquired by the occupant. *Cochran* v. *Hiden,* 130 Va. 123, 142; *Virginia Midland R. R. Co.* v. *Barbour,* 97 Va. 118, 123; *Creekmur* v. *Creekmur,* 75 Va. 430, 435, 439; *Thomas* v. *Jones,* 28 Gratt. 383, 387; *Middleton* v. *Johns,* 4 Gratt. 129.

The disseisor need not have a deed or other writing giving color of title or furnishing foundation for belief or claim of ownership or legal right to enter or take possession of land. Sometimes misapprehension arises from the somewhat misleading, if not inaccurate terms frequently used, such as " claim of right," " claim of title," and " claim of ownership." " These terms, when used in this connection, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the

exclusion of all others." *Carpenter* v. *Coles,* 75 Minn. 9, 11. On the facts found, it is clear that the necessary adverse intent of the Norfolk-Hampton Roads Company existed from 1899 to the time of the taking. *Cochran* v. *Hiden, supra; Brock* v. *Bear,* 100 Va. 562, 565; *Haney* v. *Breeden, id.* 781, 784; *Virginia Midland R. R. Co.* v. *Barbour, supra,* 122; *Kincheloe* v. *Tracewells,* 11 Gratt. 587, 605. See also *Chicago & Northwestern Ry. Co.* v. *Groh,* 85 Wis. 641, 645; *Rennert* v. *Shirk,* 163 Ind. 542, 545, 546.

The Reserve was inclosed on all its sides, excepting the waterfront, by land acquired by the Norfolk-Hampton Roads Company in 1899. In that year, it issued advertising matter indicating the land as belonging to it. It included the Reserve and asserted ownership of it in a plat filed in 1901. It did not leave the land in a state of nature, but changed and improved it. It opened and graded streets, cut and removed timber for its own use and for sale, protected the waterfront by construction of bulkheads, and leased it to others. It platted, occupied and treated the Reserve just as it did surrounding land which it purchased. Its acts were sufficient to apprise everyone of its exclusive occupation and use. Its assertion of ownership was unequivocal, emphatic and public. The findings show that the possession met all the requirements of law under the decisions of the Supreme Court of Appeals of Virginia. *Kincheloe* v. *Tracewells, supra,* 602; *Creekmur* v. *Creekmur, supra,* 434; *Virginia Midland R. R. Co.* v. *Barbour, supra.* See also *Taylor* v. *Burnsides,* 1 Gratt. 165, 192, 198, 201; *Harman* v. *Ratliff,* 93 Va. 249, 253; *Whealton* v. *Doughty,* 112 Va. 649, 656; *Craig-Giles Iron Co.* v. *Wickline,* 126 Va. 223, 232. And the facts make out adverse possession under the rule generally applied.[1]

[1] *Alice State Bank* v. *Houston Pasture Co.,* 247 U. S. 240; *Ellicott* v. *Pearl,* 10 Pet. 412, 442; *Ewing* v. *Burnet,* 11 Pet. 41, 52; *Zeilin* v. *Rogers,* 21 Fed. 103, 108; *Plume* v. *Seward,* 4 Cal. 94; *Costello* v. *Edson,* 44 Minn. 135, 138; *Lyons* v. *Fairmont Co.,* 71 W. Va. 754, 768;

The judgment is affirmed. In addition to costs of this appeal, the Norfolk-Hampton Roads Company is entitled to interest to be paid by appellant on $33,000 since September 22, 1922, until funds are available for payment by the United States of the balance of the judgment.

Judgment affirmed.

UNITED STATES *v.* STATE INVESTMENT COMPANY ET AL.

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

No. 195. Argued January 25, 1924.—Decided February 18, 1924.

1. The questions where the line run by a survey lies upon the ground, and whether a particular tract lies on one side of it or the other, are questions of fact, upon which this Court will accept the concurrent findings of the District Court and Circuit Court of Appeals, unless clear error is shown. P. 211.
2. The general rule is that, in matters of boundary, calls for natural objects and fixed monuments control those for distances; and calls for courses prevail over those for distances. *Id.*
3. After a tract of land has been surveyed and patented by the United States, its boundary cannot be affected, to the prejudice of the owner, by surveys and rulings of the Land Department. P. 212.

285 Fed. 128, affirmed.

Johns v. *McKibben,* 156 Ill. 71, 73; *Worthley* v. *Burbanks,* 146 Ind. 534, 539; *Merritt* v. *Westerman,* 165 Mich. 535; *Porter* v. *McGinnis,* 1 Pa. St. 413, 416; *Dice* v. *Brown,* 98 Ia. 297, 302; *Wallace* v. *Maxwell,* 32 N. C. 110, 113; *Twohig* v. *Leamer,* 48 Nebr. 247, 253; *Chicot Lumber Co.* v. *Dardell,* 84 Ark. 140, 143; *Davies* v. *Wickstrom,* 56 Wash. 154, 161; *Ford* v. *Wilson,* 35 Miss. 490, 504; *Mississippi County* v. *Vowels,* 101 Mo. 225, 228; *Toltec Ranch Co.* v. *Babcock,* 24 Utah, 183, 191; *Stevens* v. *Pedregon* (Tex. Civ. App.) 140 S. W. 236, 239; *Richbourg* v. *Rose,* 53 Fla. 173, 193; *Finlay* v. *Cook,* 54 Barb. (N. Y.) 9, 22; *King* v. *See,* 27 Ky. L. Rep. 1011; *Foulke* v. *Bond,* 41 N. J. L. 527, 550.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court for the defendants in a suit by the United States to quiet title to land.

Mr. S. W. Williams, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

The court erred in refusing to admit in evidence the plats and field notes showing the closing of the public land surveys on the west boundary of the grant and also in refusing to admit the decisions of the Land Department, holding that the west boundary of the grant was along the line run by surveyor Compton.

The power to make and correct surveys of public lands belongs to the political department of the Government and not to the judicial. *Cragin* v. *Powell,* 128 U. S. 691; *Kirwan* v. *Murphy,* 189 U. S. 35. Therefore, the survey of 1882 was admissible on the trial of this cause in 1918 as an archive of the General Land Office, if upon no other ground. *Ayers* v. *Watson,* 137 U. S. 584.

It is stipulated that the Walker survey was not approved by the Interior Department. His location of the Means line was never adopted by the Department, but the latter accepted the Compton survey as the west boundary of the grant. The plaintiff was clearly entitled to show what the Secretary of the Interior had decided on this question.

The Walker line must be rejected because it was not accepted or approved by the Land Department and because the stones found by Walker do not answer either the calls of the patent or the calls of the grant.

Means' survey was so erroneous as to be fraudulent; indeed, it was no survey at all and is not binding upon the Government. It follows therefore, that if the court is not satisfied with the Compton survey it should order a new survey by the Land Department.

The line run by the deputy surveyors in 1882 has been regarded as the west boundary of the grant from the time it was run until the question was agitated by the grant claimants about the year 1907, a period of some 25 years. During all that time the land here involved was regarded as public land of the United States and administered accordingly. When the question was raised by the grant claimants, the Interior Department adhered to this line and refused to change it.

It was held in *Iowa* v. *Carr*, 191 Fed. 257, that possession was *prima facie* evidence of title to real estate. Where the lands of respective owners adjoin, and for many years one, with the silent acquiescence of the other, has had possession and occupation to a certain line between them claiming title, these facts constitute strong evidence of the correctness of the line, and that line should be taken as the correct line in the absence of persuasive countervailing evidence. See also *United States* v. *Stone*, 2 Wall. 525, 537; *Virginia* v. *Tennessee*, 148 U. S. 503.

The grant claimants have no equities to be considered. They have never been in possession of the land in controversy; and for 25 years after the public land surveys were closed upon the west boundary in 1882 they set up no claim to it. They have received an area enormously larger than that granted by the Mexican authorities, and have no cause to complain. The boundary was fixed by the public land survey of 1882 and should not be disturbed.

Mr. A. T. Rogers, Jr., with whom *Mr. Herbert W. Clark* and *Mr. Chas. W. G. Ward* were on the brief, for appellees.

Mr. Justice Sanford delivered the opinion of the Court.

This is a suit in equity brought by the United States in the Federal District Court for New Mexico to quiet title

to a large strip of land claimed as part of the public lands. The defendants claim title under the "Mora Grant", which was segregated from the public domain by a patent issued in 1876. The United States does not challenge the validity of the grant, and admits that the west boundary of the grant is the east line of the public lands. The sole question is whether the strip of land in dispute lies within the limits of the grant.[1] This depends entirely upon the location of the west boundary of the grant.

The Mora Grant was originally a community grant made by the Republic of Mexico in 1835. The west boundary was described as "the Estillero." After the cession to the United States by the treaty of Guadalupe Hidalgo, the claim under this grant was confirmed by Congress by the Act of June 21, 1860, c. 167, 12 Stat. 71. The grant was surveyed, in 1861, by Thomas Means, a Deputy United States Surveyor, under instructions of the United States Surveyor General for New Mexico. The patent, after setting forth the descriptive notes of Means' survey, authenticated by the Surveyor General, granted to the patentees "the tract of land embraced and described in the foregoing survey," covering an area of more than 800,000 acres.[2]

The survey describes the west boundary as a line more than thirty-three miles long, running south from the northwest corner, a point "inaccessible in the mountain and not set": passing successively, at given distances, a large stone marked W.B.M.G. and EO., with given bearings to aspen and pine trees marked W.B.M.G., and Estillero and a stone marked W.B.M.G.; a trail to Picuris; the Pueblo river; and a large stone at the foot of a high mountain, marked W.B.M.G.; and ending at a large stone on the bank of the Sapello river, marked S.W.C.M.G.

[1] The parties stipulated at the hearing that title to the land in dispute is either in the United States or in the defendants.

[2] With certain exceptions and reservations which are not here material.

The defendants contend that the west boundary as surveyed by Means is a north and south line passing through "the Estillero", and now established by stones marked by Means and by the natural objects called for in the survey. The Government contends that it is located more than three miles farther east, as established by a survey made for the Government by one Compton in 1909.

The District Judge, in an opinion reviewing the evidence, found that "the Estillero," at which Means was instructed to establish the west boundary of the grant, is a place in the valley of the Pueblo river; that no monuments were found on or near the so-called Compton line; and that the west boundary "being established from the evidence on the ground, that is, natural objects—the Estillero, the trail to Picuris, and Pueblo River, and the permanent monuments, stone marked EO on one side and W.B.M.G. on the other, stone marked W.B.M.G. and stone south of the Pueblo River marked W.B.M.G., all now being located in the relative positions called for in the patent, these calls for natural objects and permanent monuments on the ground definitely located" must control. He therefore concluded that the west boundary of the grant is a north and south line drawn through the monuments set by Means in 1861 at the Estillero on the Pueblo river and now in place on the ground; and that the United States by the patent had conveyed the land lying east of this line and has no title thereto. A decree was accordingly entered in favor of the defendants; quieting their title to the land in dispute against any adverse claim of the United States.[3]

On an appeal taken by the United States, the Circuit Court of Appeals, again reviewing the evidence, concurred in the finding of the District Court as to the location of the Estillero; found that the so-called Compton line ran about three miles east of the monuments at the

[3] This relief was prayed in the defendants' answer.

Estillero, did not cross the Pueblo river, and was "without support;" and held that the west boundary of the grant is "the north and south line through Means' monuments at the Estillero," as had been found by the District Court. The decree of that court was accordingly affirmed. 285 Fed. 128.

1. The questions where the line run by a survey lies on the ground, and whether any particular tract is on one side or the other of that line, are questions of fact. *Russell* v. *Land Grant Co.*, 158 U. S. 253, 259. In the present case both the District Court and the Circuit Court of Appeals have found, from the evidence, that the west line of Means' survey lies upon the ground in the location claimed by the defendants, and that the land in dispute is east of that line and within the boundary of the grant. Under the well settled rule these concurrent findings on questions of fact will be accepted by this Court unless clear error is shown. *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 402; *Bodkin* v. *Edwards*, 255 U. S. 221, 223; *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 86. An examination of the evidence—which need not be recited here—discloses no such error; and, on the contrary, leads us to the conclusion that the findings of the lower courts are in accordance with the greater weight of the testimony.

2. These findings, although extending the lines of the grant farther west and south than the distances called for in the survey, do not involve any erroneous application of the law. The west line of the grant was correctly located by reference to the Estillero, the marked stones and the natural objects called for. The general rule is that in matters of boundaries calls for natural objects and fixed monuments control those for distances. *Newsom* v. *Pryor*, 7 Wheat. 7, 9; *Higueras* v. *United States*, 5 Wall. 827, 835; *Security Land Co.* v. *Burns*, 193 U. S. 167, 179; *Silver King Co.* v. *Conkling Co.*, 255 U. S. 151, 161; *Wat-*

kins v. *King* (C. C. A.) 118 Fed. 524, 536; *United States* v. *Development Co.* (C. C. A.) 254 Fed. 656, 658. And calls for courses likewise prevail over those for distances. *Ewart* v. *Squire* (C. C. A.) 239 Fed. 34, 36. No ground appears here for any exception to these rules.

3. The District Court did not err in refusing to admit public land surveys made in 1882 as evidence showing the closing of such surveys on the west boundary of the grant, and decisions of the Land Department holding that its west boundary was along the line run by Compton. Although the power to correct surveys of the public land belongs to the political department of the Government and the Land Department has jurisdiction to decide as to such matters while the land is subject to its supervision and before it takes final action, *Cragin* v. *Powell,* 128 U. S. 691, 698; *Knight* v. *Land Association,* 142 U. S. 161, 177; *Kirwan* v. *Murphy,* 189 U. S. 35, 54, this power of supervision and correction by the Department is " subject to the necessary and decided limitation " that when it has once made and approved a governmental survey of public lands, and has disposed of them, the courts may protect the private rights acquired against interference by corrective surveys subsequently made by the Department. *Cragin* v. *Powell, supra,* p. 699. A resurvey by the United States after the issuance of a patent does not affect the rights of the patentee; the Government, after conveyance of the lands, having " no jurisdiction to intermeddle with them in the form of a second survey." *Kean* v. *Canal Co.,* 190 U. S. 452, 461. And although the United States, so long as it has not conveyed its land, may survey and resurvey what it owns, and establish and reëstablish boundaries, what it thus does is " for its own information " and " cannot affect the rights of owners on the other side of the line already existing." *Lane* v. *Darlington,* 249 U. S. 331, 333.

The decree of the Circuit Court of Appeals is

Affirmed.

THE PERKINS-CAMPBELL COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 183. Argued January 21, 1924.—Decided February 18, 1924.

1. Where an award, made under the Dent Act for expenses incurred under a war contract, was accepted, with payment, by the claimant, in full discharge of the obligations of the United States under the contract, reformation of the award is a prerequisite to recovery of additional compensation in the Court of Claims. P. 218.
2. It is not a ground for reforming such an award that the claimant, before accepting it, was advised by army officers believed to be acting under directions of the board that examined the case, that acceptance would not waive further claim under the contract. *Id.*
3. Allegations of a petition *held* insufficient as a basis for reforming an award on the ground of mutual mistake by the claimant and the United States. *Id.*

57 Ct. Clms. 623, affirmed.

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

Mr. Henry T. Hunt and *Mr. Arlen G. Swiger,* for appellant, submitted.

Mr. Geo. Ross Hull, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Perkins-Campbell Co. filed its petition asking the reformation of an award made it under the provisions of the Dent Act of compensation for expenses incurred in the partial performance of a war contract for the manufacture of ambulance harness; and the allowance of addi-

tional compensation. This petition was dismissed on demurrer, without an opinion. 57 Ct. Clms. 623.

The material facts set forth in the petition and appearing from the exhibits are: On August 10, 1917, the Company entered into a contract with the War Department, designated as No. 2788, for the manufacture of 35,000 sets of ambulance harness. This contract was not executed in the manner prescribed by law. After the Company had delivered 3,000 sets of harness and incurred expenses for the manufacture of the full number, negotiations were had for a reduction of the contract to 20,000 sets. This resulted in a written offer by the Company to "allow 15,000 sets of this harness without expense to the Government with the understanding that we are to be allotted 10,000 dump cart harness", at a specified higher price. On October 22, 1918, the Quartermaster General's Office wrote the Company that 15,000 sets of ambulance harness had been cancelled from its contract, and that in lieu of this cancellation an award had been made it for 10,000 sets of cart harness at the higher price, "on contract L-357-J," which was being prepared and would shortly be forwarded for signature. The next day the Quartermaster General's Office telegraphed: "Telegram referring to 10,000 dump cart harness received. Cancellation and award of 10,000 sets approved. Contract now before Review Board but has not been approved by them. Use your own judgment in cutting harness. Will notify you when contract is approved." The Company, expecting that the duly executed contract would follow shortly, but without intending, the petition avers, to surrender otherwise its right to deliver the 35,000 sets of ambulance harness, suspended the production of more than 20,000 sets of ambulance harness and proceeded to prepare for the manufacture of the cart harness "in so far as it might do so without risk of serious loss if the contract were not executed." In so doing it incurred expenses of more than

$70,000. Shortly after the Armistice, and before the new contract had been executed, the Company, at the request of the Quartermaster General's Office, suspended the further manufacture of both the ambulance and the cart harness.

After the passage of the Dent Act, 40 Stat. 1272, c. 94,—which authorized the Secretary of War to adjust claims for expenses incurred in connection with the prosecution of the war under "an agreement, express or implied", entered into in good faith but not executed as prescribed by law—the Company presented to the War Department Claims Board, the designated agent of the Secretary, two claims for compensation: one for all expenses incurred in the performance of contract 2788 for 35,000 sets of ambulance harness; and the other for expenses incurred under the "proposed contract L-357-J" for cart harness. Each was in the form prescribed for claims based on "agreements" reduced to contract form or otherwise established by written evidence.[1]

The Claims Board, in accordance with its rules of procedure,[2] made a certificate setting forth that an agreement had been entered into as shown by contract 2788, and, after this had been approved by the Company, forwarded the claim under this contract to a Zone Board for detailed examination. A certificate as to the agreement entered into under "Contract L-357-J", was made a week later.[3]

The Zone Board, deciding that the Company had surrendered its right to deliver 15,000 sets of the ambulance

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[1] The petition does not set forth either of these claims, or show the steps taken in the prosecution of the claim as to the cart harness prior to the final award.

[2] Supply Circular No. 17, 1 Dec. War Dept., Bd. of Cont. Adjust., xlviii.

[3] This appears from the recitals in the final awards made under the two claims.

harness, rejected the claim on the basis of 35,000 sets, and "instructed" the Company to submit it on the basis of 20,000 sets only. The Company, in obedience to these "instructions", revised its claim so as to exclude all expenses incurred as to more than 20,000 sets. And, the petition avers, a captain and a lieutenant attached to the Zone Board, "believed" by the Company to be acting under its direction, "instructed" the Company that it might accept an award based on its expenses for 20,000 sets without waiving its claim for those incurred for the additional 15,000 sets. The Zone Board, upon proof submitted as to 20,000 sets only, found the amount of compensation to which the Company was entitled and recommended payment. Pursuant to such recommendation, the Claims Board, in December, 1919, made an award to the Company under "Contract 2788." This award, after reciting that an agreement had been entered into on August 10, 1917, as set out in the certificate of the Board, awarded the Company, in addition to the payments for the ambulance harness that had been delivered,[4] and as remuneration for the expenses incurred in preparing to perform said agreement, the further sum of $80,385.15 "in full adjustment, payment, and discharge of said agreement." This award was accepted by the Company by written endorsement; and was duly paid. The petition avers, however, that although this award purported to be a settlement of all obligations of the Government under contract 2788, it "was not the intention of the claimant nor of the officers with whom the settlement covered by the award was negotiated to settle thereunder any claim of the claimant beyond 20,000 sets."

On the same day the Claims Board made the Company an award under "Contract L-357-J." This award after reciting that an agreement had been entered into on or

[4] $416,781.18, the value of 14,142 sets that had been delivered.

about October 22, 1918, the terms of which had been set out in a certificate of the Board, awarded the Company as remuneration for the expenses incurred in preparing to perform "said agreement," the sum of $71,705.76, in full adjustment and discharge of "said agreement." This award was also accepted by the Company by written endorsement; and was duly paid.

Meanwhile the Company had filed, in June, 1919, pursuant, as the petition avers, to "instructions" of the Zone Board, a claim with the Board of Contract Adjustment for the expenses incurred in the performance of the ambulance harness contract not included in the 20,000 sets. In March, 1920, the Board of Contract Adjustment decided that the United States, having paid the awards as to 20,000 sets of ambulance harness and the 10,000 sets of cart harness, was under no obligation to reimburse the Company for expenses as to the 15,000 sets of ambulance harness "which were eliminated" from the original contract. 4 Dec. War Dept., Bd. Cont. Adjust. 529, 531. This decision was affirmed by the Secretary of War, who found that the original order for 15,000 sets of ambulance harness "was cancelled with the consent of claimant without cost to the Government."

The petition prays that the court adjudge that the award made and accepted under contract 2788 did not express the intention of the parties and reform it so as to express their intention that it should constitute a settlement of that part only of the contract covering 20,000 sets of ambulance harness; and that the Company be awarded the further sum of $21,868.89 for expenses incurred in preparing to manufacture the 15,000 additional sets covered by the contract.

The demurrer to the petition is based upon the ground, among others, that it does not state facts sufficient to constitute a cause of action against the United States or entitle the Company to the relief prayed for.

Aside from any other question, it is clear that, under the averments of the petition, the Company is not entitled to the reformation of the award accepted by it in full discharge of the obligations of the United States under the original contract for the ambulance harness. The reformation of this award is clearly a prerequisite to any recovery for expenses incurred in reference to the 15,000 sets. The petition, however, shows no facts sufficient to require such a reformation.

The fact that the Company had been advised by a captain and a lieutenant "believed" to be acting under the directions of the Zone Board, that it might accept an award on the basis of 20,000 sets without waiving its claim as to the 15,000 additional sets, is, obviously, not a sufficient ground for reformation of the award which it subsequently accepted, deliberately, in "full discharge" of the contract. And the general allegation that neither the Company nor the officers with whom the settlement was negotiated intended to settle under the award any claim beyond 20,000 sets, is a mere conclusion of the pleader, at least in so far as the intention of the Government is concerned. The petition does not designate the officers referred to or show their authority to bind the United States in any respect whatever. And it does not aver that the award was in fact the result of any negotiation for settlement. On the contrary the award appears to have been an adjudication made by the Claims Board upon the facts, when it had before it the claim under the agreement as to the cart harness as well as that under the original contract for the ambulance harness. There is no averment that the Claims Board in making the award intended it as only a partial settlement of the claims under the contract for the ambulance harness, or that it was paid by the authorized agents of the United States with any such understanding.

Manifestly the averments of fact contained in the petition show no "mutual mistake of the parties which upon

well-established principles of equity jurisprudence requires the reformation of the contract, and certainly no such special circumstances . . . of fraud, duress, or oppression, as would necessarily require relief against a mistake of law." *Cramp* v. *United States*, 239 U. S. 221, 233.

The judgment of the Court of Claims is accordingly

Affirmed.

STATE OF WASHINGTON *v.* W. C. DAWSON & COMPANY.

ERROR TO SUPREME COURT OF THE STATE OF WASHINGTON.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL. *v.* JAMES ROLPH COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Nos. 366 and 684. Argued January 8, 9, 1924.—Decided February 25, 1924.

1. The Act of Congress of June 10, 1922, c. 216, 42 Stat. 634, which, by amendment of Judicial Code, §§ 24, 256, undertakes to permit application of the workmen's compensation laws of the several States to injuries within the admiralty and maritime jurisdiction, excepting the masters and crews of vessels, is unconstitutional, for the reasons explained in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, and other cases reviewed. P. 222.
2. So *held*, (a) in a case in which it was sought to compel an employer of stevedores to contribute to an accident fund, as provided by the Workmen's Compensation Act of Washington; (b) in a case involving the power of a commission of California to award compensation for the death of a workman killed while engaged at maritime work, under maritime contract, upon a vessel moored at dock and discharging her cargo. *Id.*
3. The proviso in the above act of Congress "that the jurisdiction of the district courts shall not extend to causes arising out of injuries

to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any State", etc., was intended to supplement the provision allowing rights and remedies under state compensation laws; and, that being ineffectual, the proviso is also. P. 223.

122 Wash. 572, and 220 Pac. 669, affirmed.

ERROR to a judgment of the Supreme Court of Washington, affirming a judgment of a Superior Court of the State which dismissed, on demurrer, a complaint brought by the State to recover the sum of $211.45, from W. C. Dawson & Company, as a contribution to the accident fund created by Laws of Washington, 1911, c. 74, the amount claimed being computed on the wages paid by defendant to stevedores working on board ship.

Error, also, to a judgment of the Supreme Court of California, rendered on review of an award made by the Industrial Accident Commission of the State to the dependents of an employee of the James Rolph Company who died as a result of injuries sustained while working as a stevedore upon a vessel afloat on the navigable waters of San Francisco Bay. The judgment annulled the award as in excess of the Commission's jurisdiction.

Mr. John H. Dunbar, Attorney General of the State of Washington, with whom *Mr. Raymond W. Clifford,* Assistant Attorney General, was on the brief, for plaintiff in error in No. 366.

Mr. Warren H. Pillsbury for plaintiffs in error in No. 684.

Mr. Robert S. Terhune and *Mr. Howard G. Cosgrove,* for defendant in error in No. 366, submitted.

Mr. G. Bowdoin Craighill, Mr. L. A. Redman and *Mr. Chas. B. Tebbs,* for defendants in error in No. 684, submitted. *Mr. Jewel Alexander* and *Mr. W. C. Bacon* were also on the brief.

Mr. Alfred J. Schweppe, by leave of Court, filed a brief as *amicus curiae.*

Mr. Henry C. Hunter and *Mr. Joseph P. Chamberlain,* by leave of Court, filed a brief as *amici curiae.*

Mr. Justice McReynolds delivered the opinion of the Court.

These causes turn upon the same point, were heard together and it will be convenient to decide them by one opinion.

The immediate question presented by number three hundred sixty-six is whether one engaged in the business of stevedoring, whose employees work only on board ships in the navigable waters of Puget Sound, can be compelled to contribute to the accident fund provided for by the Workmen's Compensation Act of Washington. The State maintains that the objections to such requirement pointed out in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, were removed by the Act of June 10, 1922, c. 216, 42 Stat. 634.[1] Its Supreme Court ruled otherwise. 122 Wash. 572, 582.

[1] That clause 3 of section 24 of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize: *Provided,* That the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for

In number six hundred eighty-four the Supreme Court of California approved the conclusion of the Supreme Court of Washington and declared the Act of June 10, 1922, went beyond the power of Congress. It accordingly held the Industrial Accident Commission had no jurisdiction to award compensation for the death of a workman killed while actually engaged at maritime work, under maritime contract, upon a vessel moored at her dock in San Francisco Bay and discharging her cargo. 220 Pac. 669.

The judgments below must be affirmed; the doctrine of *Knickerbocker Ice Co.* v. *Stewart,* to which we adhere, permits no other conclusion. There we construed the Act of October 6, 1917, c. 97, 40 Stat. 395,[2] which undertook

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which compensation is provided by the workmen's compensation law of any State, District, Territory, or possession of the United States."

Sec. 2. That clause 3 of section 256 of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States."

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

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."

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

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

to amend the provision of §§ 24 and 256, Judicial Code, which saves to suitors in all civil causes of admiralty and maritime jurisdiction "the right of a common-law remedy where the common law is competent to give it," by adding the words "*and to claimants the rights and remedies under the workmen's compensation law of any State.*" After declaring the true meaning and purpose of the act, we held it beyond the power of Congress.

Except as to the master and members of the crew, the Act of 1922 must be read as undertaking to permit application of the workmen's compensation laws of the several States to injuries within the admiralty and maritime jurisdiction substantially as provided by the Act of 1917. The exception of master and crew is wholly insufficient to meet the objections to such enactments heretofore often pointed out. Manifestly, the proviso which denies jurisdiction to district courts of the United States over causes arising out of the injuries specified was intended to supplement the provision covering rights and remedies under state compensation laws. As that provision is ineffective, so is the proviso. To hold otherwise would bring about an unfortunate condition wholly outside the legislative intent.

Counsel insist that later conclusions of this Court have modified the doctrine of *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and *Knickerbocker Ice Co.* v. *Stewart.* They rely especially upon *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, and *Industrial Commission* v. *Nordenholt Co.,* 259 U. S. 263.

Southern Pacific v. Jensen involved a claim under the New York Compensation Act for death resulting from injuries sustained while the deceased was on board and engaged in unloading the vessel. We held (pp. 216, 217)— "It would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That

this may be done to some extent cannot be denied. . . . Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. . . . And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. . . . The work of a stevedore in which the deceased was engaging is maritime in nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 59, 60. If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien condemned in *The Roanoke.* [189 U. S. 185.] The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed."

In *Knickerbocker Ice Co.* v. *Stewart* (pp. 163, 164, 166), where claim was made under the New York Act on account of the death of a bargeman who fell into the Hudson River and drowned, this was said—

"We conclude that [by the Act of October 6, 1917] Congress undertook to permit application of Workmen's Compensation Laws of the several States to injuries within the admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out by *Southern Pacific Co.* v. *Jensen*. It sought to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

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

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

"Congress cannot transfer its legislative power to the States—by nature this is non-delegable. . . .

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

In *Western Fuel Co.* v. *Garcia,* a proceeding begun in admiralty to recover damages for death of a stevedore fatally injured while working in the hold of a vessel then anchored and discharging her cargo, we held (p. 242)—"As the logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given. The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

Grant Smith-Porter Ship Co. v. *Rohde* was a proceeding in admiralty to recover damages from the ship-builder for injuries which the carpenter received while working on an unfinished vessel moored in the Willamette River at Portland, Oregon. "The contract for constructing 'The Ahala' was nonmaritime, and although the incompleted structure upon which the accident occurred was lying in

navigable waters, neither Rohde's general employment, nor his activities at the time had any direct relation to navigation or commerce." We held the matter was only of local concern and that to permit the rights and liabilities of the parties to be determined by the local law would not interfere with characteristic features of the general maritime rules. We also pointed out the conclusion was in entire accord with prior cases.

Industrial Commission v. *Nordenholt Co.* related to a claim based upon death which resulted from injuries received by the longshoreman while on the dock—a matter never within the admiralty jurisdiction. "Insana was injured upon the dock, an extension of the land, *Cleveland Terminal & Valley R. R. Co.* v. *Cleveland S. S. Co.*, 208 U. S. 316, and certainly prior to the Workmen's Compensation Act the employer's liability for damages would have depended upon the common law and the state statutes. Consequently, when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law. And this is true whether awards under the act are made as upon implied agreements or otherwise. The stevedore's contract of employment did not contemplate any dominant federal rule concerning the master's liability for personal injuries received on land."

None of the later causes departs from the doctrine of *Southern Pacific Co.* v. *Jensen* and *Knickerbocker Ice Co.* v. *Stewart*, and, we think, the provisions of the Act of 1922 cannot be reconciled therewith.

Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States. The grant of admiralty and maritime jurisdiction looks to

uniformity; otherwise wide discretion is left to Congress. *Knickerbocker Ice Co.* v. *Stewart.* Exercising another power—to regulate commerce—Congress has prescribed the liability of interstate carriers by railroad for damages to employees (Act April 22, 1908, c. 149, 35 Stat. 65) and thereby abrogated conflicting local rules. *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147.

This cause presents a situation where there was no attempt to prescribe general rules. On the contrary, the manifest purpose was to permit any State to alter the maritime law and thereby introduce conflicting requirements. To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme.

Affirmed.

MR. JUSTICE HOLMES.

The reasoning of *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and cases following it never has satisfied me and therefore I should have been glad to see a limit set to the principle. But I must leave it to those who think the principle right to say how far it extends.

MR. JUSTICE BRANDEIS, dissenting.

A concern, doing a general upholstering business in New York, directs one of its regular employees, resident there, to make repairs on a vessel lying alongside a New York dock. The ship, then temporarily out of commission, is owned and enrolled in New York, and when used is em-

ployed only within the State. While on the vessel engaged in making the repairs, the employee is injured without the fault of anyone and is disabled for life. A statute of New York provides that, in such a case, he and his dependents shall receive compensation out of funds which employers are obliged to provide. To such state legislation Congress has, in express terms, given its sanction. Under the rule announced by the Court, the Federal Constitution prohibits recovery.[1] If, perchance, the accident had occurred while the employee so engaged was on the dock, the Constitution would permit recovery.[2] Or, if happily he had been killed and the accident had been due to the employer's negligence, recovery (which is provided for by another state statute) would likewise be permitted under the Constitution, even though the accident had occurred on board the vessel.[3]

The Constitution contains, of course, no provision which, in terms, deals, in any way, with the subject of workmen's compensation. The prohibition found by the Court rests solely upon a clause in § 2 of Article III:

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[1] Compare *Peters* v. *Veasey*, 251 U. S. 121, a stevedore; also, *Morse Dry Dock & Repair Co.* v. *Danielsen*, 235 N. Y. 439; certiorari denied, 262 U. S. 756; *Morse Dry Dock & Repair Co.* v. *Warren*, 235 N. Y. 445; certiorari denied, 262 U. S. 756; *Morse Dry Dock & Repair Co.* v. *Connelly*, 235 N. Y. 602; certiorari denied, 262 U. S. 756, all drydock employees. In *Industrial Accident Comm.* v. *Zurich General Accident, etc., Co.*, 218 Pac. 563; certiorari denied, 263 U. S. 722, the injury occurred in connection with the operations of a harbor dredger, not engaged in commerce or navigation. In *Industrial Accident Comm.* v. *Alaska Packers Association*, 218 Pac. 561; certiorari denied, 263 U. S. 722; the accident occurred on an Alaska fishing vessel while laid up for the winter at San Francisco, alongside the dock.

[2] *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263, a stevedore.

[3] *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479, a member of the crew; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, a stevedore. See also *Steamboat Co.* v. *Chase*, 16 Wall. 522; *Sherlock* v. *Alling*, 93 U. S. 99; *The Hamilton*, 207 U. S. 398.

"The judicial power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction."[4] The conclusion that the state law violates the Constitution and that the consent of Congress cannot save it, is reached solely by a process of deduction. The chain of reasoning involved is a long one. The argument is that the grant of judicial power to the United States confers upon Congress, by implication, legislative power over the substantive maritime law; that this legislative power in Congress (while not necessarily exclusive) precludes state legislation which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international or interstate relations;" that there is a rule of the general maritime law by which an employer is not liable, except in case of negligence, for an occupational injury occurring on board a vessel; that the rule applies whenever the vessel on which the injury occurs is afloat on navigable water, even if the vessel, made fast to a dock, is out of commission; that the rule applies to occupations which, like upholstering, are not in their nature inherently maritime; that the rule governs the relations not only of the ship and its owners to their employees, but also the relations of independent contractors to their employees who customarily work on land; that this rule is a characteristic feature of the general maritime law; that for a State to change the rule, even as applied to independent contractors doing work on craft moored to a dock, temporarily disabled, and normally employed wholly within the State, interferes with the

[4] Article I, § 8, confers upon Congress power "To make all laws which shall 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." The conclusion reached by the Court emphasises not the breadth of the congressional power, but the limitations upon it.

proper harmony and uniformity of the general maritime law in its international and interstate relations; and that, hence, a statute of a State which provides that employers within it shall be liable to employees within it for occupational accidents occurring within it violates the Federal Constitution, notwithstanding the state statute is expressly sanctioned by Congress.

Such is the chain of reasoning. Every link of the chain is essential to the conclusion stated. If any link fails, the argument falls. Several of the links are, in my opinion, unfounded assumption which crumbles at the touch of reason. How can a law of New York, making a New York employer liable to a New York employee for every occupational injury occurring within the State, mar the proper harmony and uniformity of the assumed general maritime law in its interstate and international relations, when neither a ship, nor a ship owner, is the employer affected, even though the accident occurs on board a vessel on navigable waters? The relation of the independent contractor to his employee is a matter wholly of state concern. The employer's obligation to pay and the employee's right to receive compensation are not dependent upon any act or omission of the ship or of its owners. To impose upon such employer the obligation to make compensation in case of an occupational injury in no way affects the operation of the ship. Nor can it affect the ship owners in any respect, except as every other tax, direct or indirect, laid by a State or municipality may affect, by increasing the cost of living and of doing business, every one who has occasion to enter it and many who have not.[5] This is true of the application of the workmen's compensation law, whether the service rendered by the independent contractor is in its nature non-

[5] That the obligation to contribute to the compensation fund may be deemed a tax, see *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237.

maritime, like upholstering, or is inherently maritime, like stevedoring. The requirement by the State is a regulation of the business of upholstering or stevedoring. It is not a regulation of shipping. It in no respect attempts to modify, or deal with, admiralty jurisdiction or procedure, or the substantive maritime law. It is but an exercise of the local police power.[6] To impose upon the independent employer the obligation to provide compensation for accidents occurring on a vessel in port, while the vessel is made fast to the dock, in fact, cannot conceivably interfere with the proper harmony and uniformity of the general maritime law in its international or interstate relations.

Moreover, it is not a characteristic feature of the general maritime law that the employer, in case of accident, is liable to an employee only for negligence. The characteristic feature is the very contrary. To one of the crew, the vessel and her owners are liable, even in the absence of negligence, for maintenance, care and wages, at least so long as the voyage is continued. To him, they are liable, also, even in the absence of negligence, for indemnity or damages, if the injury results from unseaworthiness of the ship, or from failure to supply and keep in order the proper appliances.[7] The legal rights, in case of accident to persons other than members of the crew, were not determined by the maritime law until recently. The admiralty court, instead of extending to these persons this characteristic feature, borrowed the rule of negligence from the common law courts, making modifications conformable to its views of justice.[8]

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[6] Compare *New York* v. *Miln*, 11 Pet. 102; *Hooper* v. *California*, 155 U. S. 648.

[7] *The Osceola*, 189 U. S. 158; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255.

[8] See *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 221–2.

The mere fact that the accident is an incident of a maritime contract, and the service performed thereunder is inherently maritime, does not preclude the application of the workmen's compensation law. The stevedore can recover under the workmen's compensation law, if the injury happens to occur on land, although the contract of the stevedoring concern is confessedly a maritime one; and the stevedore is employed in a maritime service quite as much while he is on the dock as after he crosses the gangplank and enters the ship.[9] Underlying the whole chain of reasoning, by which the conclusion is reached that the state and federal statutes are unconstitutional, will be found the legally indefensible assumption that the liability under the workmen's compensation law is governed by the law of the locality in which the accident happened; that is, by the rule that in tort the test of admiralty jurisdiction is presence on navigable waters. There is no more reason why the mere fact that the injury occurs on navigable waters should make applicable the maritime law to liabilities arising under the workmen's compensation law, than that it should make the maritime law applicable, in such cases, to the liability under a general accident insurance policy. Tort is, in fact, not an element in the liability created by the workmen's compensation law.[10] On the contrary, the basis of this legislation is liability without fault. Nor does the workmen's compensation law create a status between employer and employee. It provides an incident to the employment which is often

[9] In my opinion, the state law, being sanctioned by Congress, is valid, also, as applied to accidents suffered in port by persons, other than the master or member of the crew, even if the persons injured are employees of the vessel or of the owners, and notwithstanding their occupations are inherently maritime, like stevedoring.

[10] See Ernest Angell, "Recovery Under Workmen's Compensation Acts for Injury Abroad," 31 Harv. L. Rev. 619, 620. See, also, 37 Harv. L. Rev. 375. Compare Pound, Spirit of the Common Law (1921), 30.

likened to a contractual obligation, even where the workmen's compensation law is not of the class called optional. It will hardly be contended that an act occurring beyond the geographical limits of a State cannot be made the basis for the creation of rights to be enjoyed or enforced within it. Workmen's compensation laws which provide for compensation for injuries occurring in States other than that of the residence of the employer and the employee are held constitutional.[11] Why should they not be deemed valid where they provide for accidents occurring within the State but upon navigable waters?

A further assumption is that Congress, which has power to make and to unmake the general maritime law, can have no voice in determining which of its provisions require adaptation to peculiar local needs and as to which absolute uniformity is an essential of the proper harmony of international and interstate maritime relations. This assumption has no support in reason; and it is inconsistent (at least in principle) with the powers conferred upon Congress in other connections. The grant "of the . . . judicial power . . . to all cases of admiralty and maritime jurisdiction" is, surely, no broader in terms than the grant of power "to regulate commerce with foreign nations and among the several States." Yet as to commerce, Congress may, at least in large measure, determine whether uniformity of regulation is required or diversity is permissible.[12] Likewise, Congress is given exclusive power of legislation over its forts, arsenals, dockyards, and other needful places and buildings. But it may permit the

[11] *Quong Ham Wah Co.* v. *Industrial Accident Commission*, 184 Cal. 26, 35–37, 39, 44, 45; 255 U. S. 445. Compare *Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544; *Anderson* v. *Miller Scrap Iron Co.*, 169 Wis. 106. See Ernest Angell, *supra*, 31 Harv. L. Rev. 619, 628, 636.

[12] See *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 244–251; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *In re Rahrer*, 140 U. S. 545, 564.

diverse laws of the several States to govern the relations of men within them.[13] Congress has exclusive power to legislate concerning the Army and Navy of the United States, to declare war, to determine to what extent citizens shall aid in its prosecution, and how effective aid can best be secured. But state legislation directly affecting these subjects has been sustained.[14] In respect to bankruptcy, duties, imposts, excises and naturalization the Constitution prescribes uniformity. Still, the provision in the bankruptcy law giving effect to the divergent exemption laws of the several States was held valid.[15] Absolute uniformity in things maritime is confessedly not essential to the proper harmony of the maritime law in its interstate and international relations. This is illustrated both by the cases which hold constitutional state regulation of pilotage and liens created by state laws in aid of maritime contracts, and by those which hold that there are broad fields of maritime activity to which admiralty jurisdiction does not extend. A notable instance of the latter is the liability in tort for injuries inflicted by a ship to a dock, or to maritime workers on the dock engaged in the inherently maritime operation of stevedoring.[16]

The recent legislation of Congress seeks, in a statesmanlike manner, to limit the practical scope and effect of our decisions in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, and later cases, by making them hereafter applicable only to the

[13] Compare *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525; *Chicago & Pacific Ry. Co.* v. *McGlinn,* 114 U. S. 542; *Western Union Tel. Co.* v. *Chiles,* 214 U. S. 274; *Omaechevarria* v. *Idaho,* 246 U. S. 343.

[14] *Gilbert* v. *Minnesota,* 254 U. S. 325. Compare *Moore* v. *Illinois,* 14 How. 13; *Halter* v. *Nebraska,* 205 U. S. 34.

[15] *Hanover National Bank* v. *Moyses,* 186 U. S. 181. See *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 168.

[16] See *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 219–220.

relations of the ship to her master and crew. To hold that Congress can effect this result by sanctioning the application of state workmen's compensation laws to accidents to any other class of employees occurring on the navigable waters of the State would not, in my judgment, require us to overrule any of these cases. It would require merely that we should limit the application of the rule therein announced, and that we should declare our disapproval of certain expressions used in the opinions. Such limitation of principles previously announced, and such express disapproval of *dicta*, are often necessary. It is an unavoidable incident of the search by courts of last resort for the true rule.[17] The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law.

If the Court is of opinion that this act of Congress is in necessary conflict with its recent decisions, those cases should be frankly overruled. The reasons for doing so are persuasive. Our experience in attempting to apply the rule, and helpful discussions by friends of the Court, have made it clear that the rule declared is legally unsound;[18] that it disturbs legal prin-

[17] Compare, *e. g.*, *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, qualifying *Texas Co.* v. *Brown*, 258 U. S. 466; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642; *Askren* v. *Continental Oil Co.*, 252 U. S. 444; *Standard Oil Co.* v. *Graves*, 249 U. S. 389, and *Baltimore & Ohio S. W. R. R. Co.* v. *Settle*, 260 U. S. 166, 173, overruling *dicta* in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 204 U. S. 403.

[18] See Edgar Tremlett Fell, Recent Problems in Admiralty Jurisdiction (1922), 1–53; John Gorham Palfrey, "The Common Law Courts and the Law of the Sea," 36 Harv. L. Rev. 777; also, Vol. 31, p. 488; Vol. 34, p. 82; Vol. 35, p. 743; Vol. 37, p. 478; E. Merrick Dodd, Jr., "The New Doctrine of the Supremacy of Admiralty over the Common Law," 21 Col. L. Rev. 647; also, Vol. 17, p. 703; Vol. 20, p. 685; Frederic Cunningham, "Is Every County Court in the United States

ciples long established; and that if adhered to, it will make a serious addition to the classes of cases which this Court is required to review.[19] Experience and discussion have also made apparent how unfortunate are the results, economically and socially. It has, in part, frustrated a promising attempt to alleviate some of the misery, and remove some of the injustice, incident to the conduct of industry and commerce. These far-reaching and unfortunate results of the rule declared in *Southern Pacific Co.* v. *Jensen* cannot have been foreseen when the decision was rendered. If it is adhered to, appropriate legislative provision, urgently needed, cannot be made until another amendment of the Constitution shall have been adopted. For no federal workmen's compensation law could satisfy the varying and peculiar economic and social needs incident to the diversity of conditions in the several States.[20]

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a Court of Admiralty?" 53 Amer. L. Rev. 749; "The Tables Turned—Lord Coke Demolished," 55 Amer. L. Rev. 685; J. Whitla Stinson, "Admiralty and Maritime Jurisdiction," 54 Amer. L. Rev. 908; Yale L. Journal, Vol. 27, pp. 255, 924; Vol. 28, pp. 281, 835; Vol. 29, p. 925; Mich. L. Rev., Vol. 15, p. 657; Vol. 16, p. 562; Vol. 18, p. 793; Calif. L. Rev., Vol. 6, p. 69; Vol. 8, p. 338; Vol. 10, p. 234; Minn. L. Rev., Vol. 2, p. 145; Vol. 4, p. 444; Vol. 6, p. 230; Southern L. Q., Vol. 2, p. 304; Vol. 3, p. 76; Francis J. MacIntyre, "Admiralty and the Workmen's Compensation Law," 5 Cornell L. Q. 275; 91 Central L. J. 43; 6 Ill. L. Q. 157; 3 Va. L. Reg. (n. s.) 290–296; 61 Amer. L. Reg. (n. s.) 42–45.

[19] By making the substantive maritime law the rule of decision in the common law courts exercising concurrent jurisdiction, the rule of *Southern Pacific Co.* v. *Jensen* introduces into every case in a state court involving maritime law, even if it is not affected by any state statute, a federal question which may be brought to this Court for review either by writ of error or by petition for a writ of certiorari. Compare *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 293–303; *Great Northern Ry. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285, 290.

[20] Compare *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147, 169. See Andrew Furuseth, "Harbor Workers Are Not Seamen: An Essential Distinction in Compensation Legislation," 11 Am. Labor

The doctrine of *stare decisis* should not deter us from overruling that case and those which follow it. The decisions are recent ones. They have not been acquiesced in. They have not created a rule of property around which vested interests have clustered. They affect solely matters of a transitory nature. On the other hand, they affect seriously the lives of men, women and children, and the general welfare. *Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the Court has disregarded its admonition are many.[21] The existing admiralty jurisdiction rests, in large part, upon like action of the Court in *The Genesee Chief,* 12 How. 443, 456. In that case the Court overruled *The Thomas Jefferson,* 10 Wheat. 428, and

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Leg. Rev. 139; T. V. O'Connor, "The Plight of the Longshoremen," *ibid,* p. 144; J. P. Coughlin, "Accident Protection for Ship Repairmen," *ibid,* p. 146; J. P. Chamberlain, "The Conflict of Jurisdiction in Compensation for Maritime Workers," *ibid,* p. 133; L. W. Hatch, "The 'Maritime' Twilight Zone from the Standpoint of Compensation Administration," *ibid,* 148; J. B. Andrews, "Legislative Program of Accident Compensation for 'Maritime' Workers," *ibid,* p. 152. See also, *ibid,* Vol. 10, pp. 117, 241; Vol. 12, pp. 53, 69, 103, 104.

[21] See *Lee* v. *Chesapeake & Ohio Ry. Co.,* 260 U. S. 653, 659, overruling *Ex parte Wisner,* 203 U. S. 449; *Terral* v. *Burke Construction Co.,* 257 U. S. 529, 533, overruling *Doyle* v. *Continental Insurance Co.,* 94 U. S. 535, and *Security Mutual Life Insurance Co.* v. *Prewitt,* 202 U. S. 246; *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8, 25, and *Motion Picture Co.* v. *Universal Film Co.,* 243 U. S. 502, 518, overruling *Henry* v. *Dick Co.,* 224 U. S. 1; *United States* v. *Nice,* 241 U. S. 591, 601, overruling *Matter of Heff,* 197 U. S. 488; *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U. S. 601, overruling *Hylton* v. *United States,* 3 Dall. 171; *Roberts* v. *Lewis,* 153 U. S. 367, 379, overruling *Giles* v. *Little,* 104 U. S. 291; *Brenham* v. *German American Bank,* 144 U. S. 173, 187, overruling *Rogers* v. *Burlington,* 3 Wall. 654, and *Mitchell* v. *Burlington,* 4 Wall. 270; *Leisy* v. *Hardin,* 135 U. S. 100, 118, overruling *Pierce* v. *New Hampshire,* 5 How. 504; *Morgan* v. *United States,* 113 U. S. 476, 496, overruling *Texas* v. *White,* 7 Wall. 700; *Legal Tender Cases,* 12 Wall. 457, 553, overruling *Hepburn* v. *Griswold,* 8 Wall. 603.

The Steamboat Orleans v. *Phoebus,* 11 Pet. 175; and a doctrine declared by Mr. Justice Story with the concurrence of Chief Justice Marshall, and approved by Chancellor Kent, was abandoned when found to be erroneous, although it had been acted on for twenty-six years.

MATTHEW ADDY COMPANY *v.* UNITED STATES.

FORD *v.* UNITED STATES.

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

Nos. 84 and 85. Argued October 17, 18, 1923.—Decided February 25, 1924.

1. In a prosecution for violation of an order of the President fixing prices of coal, under the Lever Act (August 10, 1917, c. 53, § 25, 40 Stat. 276), the order must be construed, as criminal statutes are, strictly, and without retroactive effect unless clearly indicated. P. 244.
2. A construction which raises a grave constitutional question should be avoided. P. 245.
3. *Quaere:* Whether Congress, when enacting the Lever Act, could constitutionally have fixed prices at which persons then owning coal might sell it, without providing compensation for losses? *Id.*
4. The President's Order of August 23, 1917, limiting jobbers to a gross margin of 15¢ per ton in reselling bituminous coal, did not apply to sales f. o. b. the mines, contracted and made by jobbers after the date of the order, of coal purchased by them f. o. b. the mines before the dates of the order and the Lever Act. P. 245.

281 Fed. 298, reversed.

CERTIORARI to judgments of the Circuit Court of Appeals affirming fines imposed on the petitioners, in criminal prosecutions based on the Lever Act.

Mr. Julius R. Samuels, with whom *Mr. Nelson B. Cramer* was on the briefs, for petitioners.

Mr. Geo. Ross Hull, Special Assistant to the Attorney General, for the United States.

The Executive Order of August 23, 1917, applied to sales for which the defendants were indicted.

Evidence offered to prove that the gross margin fixed by the Executive Order would not allow the defendants any profit was properly excluded.

The indictments were sufficient. The President had power to fix prices without the aid or coöperation of the Federal Trade Commission. The allegations of the indictments are definite and certain.

The Executive Order was not a taking of property without due process of law in violation of the Fifth Amendment. It was valid, regardless of whether the defendants could conduct their business profitably thereunder. Congress, in the exercise of the war power, may control and regulate or may prohibit and destroy the business of trading in coal.

If it be necessary that the jobber's margin be a profitable one, nevertheless the ascertainment of that fact by judicial process is not essential to due process of law.

The Lever Act and the Executive Order did not take the defendants' property.

The Lever Act did not delegate legislative or judicial power in violation of the Constitution.

The Lever Act was not an abuse of the congressional power to provide for the national security and defense, nor was it an invasion of the reserved powers of the State.

Mr. Justice McReynolds delivered the opinion of the Court.

The petitioners were found guilty of violating the President's order of August 23, 1917, by receiving margins above those prescribed for coal jobbers. Both causes present the same fundamental questions and one opinion will suffice.

The Lever Act, "An Act To provide further for the national security and defense by encouraging the production,

conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, c. 53, 40 Stat. 276, 284, 286, provides—

"Sec. 25. That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary. . . .

"Whoever shall, with knowledge that the prices of any such commodity have been fixed as herein provided, ask, demand, or receive a higher price, or whoever shall, with knowledge that the regulations have been prescribed as herein provided, violate or refuse to conform to any of the same, shall, upon conviction, be punished by fine of not more than $5,000, or by imprisonment for not more than two years, or both. Each independent transaction shall constitute a separate offense."

"Sec. 26. That any person carrying on or employed in commerce among the several States, or with foreign nations, or with or in the Territories or other possessions of the United States in any article suitable for human food, fuel, or other necessaries of life, who, either in his individual capacity or as an officer, agent, or employee of a corporation or member of a partnership carrying on or employed in such trade, shall store, acquire, or hold, or who shall destroy or make away with any such article for the purpose of limiting the supply thereof to the public or affecting the market price thereof in such commerce, whether

temporarily or otherwise, shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both." . . .

On August 21, 1917, after prescribing a schedule of prices for bituminous coal at the mine, the President said: "It is provisional only. It is subject to reconsideration when the whole method of administering the fuel supplies of the country shall have been satisfactorily organized and put into operation. Subsequent measures will have as their object a fair and equitable control of the distribution of the supply and of the prices not only at the mines but also in the hands of the middlemen and the retailers."

August 23, 1917, pending further investigation and determination, it was ordered by the President—"a coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle, or yard. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2000 pounds, nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2000 pounds."

September 6, 1917, the Fuel Administrator directed, that "contracts relating to bituminous coal made before the proclamation of the President on August 21, and contracts relating to anthracite coal made before the President's proclamation of August 23, are not affected by these proclamations, provided the contracts are *bona fide* in character and are enforcible at law." [On August 23 the President issued an order fixing prices for anthracite coal at the mines, effective September 1st.]

A statement and order by the Fuel Administrator, dated September 7, 1917, contained the following paragraphs.

"A very large proportion of the coal supply available for the coming winter is under contract. These contracts, which are allowed to stand for the present, were made prior to the President's proclamation and very largely limit the amount which may be placed on sale at retail prices based on the President's order.

"It is absolutely essential, however, that a sufficient amount of coal be put on the market at once at these prices to meet the needs of domestic consumers. The Fuel Administration believes that this supply of coal can be made available and will be made available by voluntary arrangement between the operators and those with whom they have contracts, and thus make it unnecessary for the Fuel Administration to exercise or recommend the exercise of the powers provided in the Lever Act."

On October 6, 1917, the Fuel Administrator further directed—

"Coal may be bought and sold at prices lower than those prescribed by the orders of the President.

"The effect of the President's orders on coal rolling when the order affecting such coal was issued is to be decided by first ascertaining whether or not the title had passed from the operator to the consignee at the time the President's order became effective. If the title had passed to the consignee, the price fixed by the President does not apply. . . .

"A jobber who had already contracted to buy coal at the time of the President's order fixing the price of such coal, and who was at that time already under contract to sell the same, may fill his contracts to sell at the price named therein.

"A jobber who, at the time of the President's order fixing the price of the coal in question at the mine, had contracted to buy coal at or below the President's price, and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus

the proper jobber's commission as determined by the President's regulation of August 23, 1917.

"A jobber who, at the time of the President's order fixing the price of the coal in question, was under contract to deliver such coal at a price higher than a price represented by the price fixed by the President or the Fuel Administrator for such coal plus a proper jobber's commission as determined by the President's regulation of August 23, 1917, shall not fill such contract at a price in excess of the President's price plus the proper jobber's commission, with coal purchased after the President's order became effective and not contracted for prior thereto.

"A jobber who, at the date of the President's order fixing the price of the coal in question, held a contract for the purchase of coal without having already sold such coal, shall not sell such coal at more than the price fixed by the President or the Fuel Administrator for the sale of such coal after the date of such order, plus the jobber's commission as fixed by the President's regulation of August 23, 1917."

The Fuel Administrator issued many other orders, not presently important.

The petitioning corporation, Matthew Addy Company, acting by petitioner Ford, the Vice President, did business as coal jobber at Cincinnati, Ohio. By contract dated July 31, 1917, it purchased many carloads of coal from Bluefield Coal and Coke Company, at $3.25 per ton f. o. b. the mines in West Virginia. With knowledge of jobbers' margins fixed by the President's order of August 23, 1917, it sold sundry lots of this coal during August and September, 1917, at $3.50 per ton f. o. b. the mines, without having contracted so to do before that order issued. Do these circumstances suffice to establish the offense charged? We think not; and, accordingly, the judgments below must be reversed.

The order must be construed as criminal statutes are—strictly and without retroactive effect unless clearly indi-

cated. *Chew Heong* v. *United States,* 112 U. S. 536, 559; *Shwab* v. *Doyle,* 258 U. S. 529, 534. If it be construed as applying to the sales of coal purchased by petitioners prior to August 23rd, we must decide a grave constitutional question, not necessary to consider if another view be accepted. Under the existing circumstances, did Congress have power to fix prices at which persons then owning coal must sell thereafter, if they sold at all, without providing compensation for losses? If this difficulty can be eliminated by some reasonable construction of the order, it should be accepted. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 407, 408.

The above quoted statements and orders show plainly enough that in August, 1917, a very large part of the available coal supply was under contract. This greatly limited the amount which "may be placed on sale at retail prices based on the President's order," as pointed out on September 7th. Nevertheless, the contracts were "allowed to stand for the present." Evidently the purpose was to begin the administration of the fuel supplies by regulating subsequent transactions without striking down all existing *bona fide* contracts which might affect such supplies. If, prior to August 23rd, petitioners had agreed to sell coal purchased in July, such contracts would not have been within the order. October 6th more sweeping rules were promulgated; one of them has direct relation to circumstances like those here presented.

The order treated buying and selling as integral parts of the regulated transaction and made no reference to expenses incident thereto. If it applied only to transactions thereafter begun, all had opportunity to govern themselves accordingly; but, if given retroactive effect, jobbers who had negotiated purchases at costs exceeding fifteen cents per ton would necessarily lose if they sold, although they had acted in entire good faith. Certainly, there was no purpose to encourage hoarding, contrary to

the Lever Act, § 26, or to retard movement of fuel to the ultimate consumers by making sales unprofitable. No imperative reason appears for treating jobbers who had bought but had not contracted to sell with less consideration than was accorded those with agreements for sales, irrespective of the stipulated price.

Considering the ordinary rules of interpretation and the circumstances disclosed, we conclude that the order of August 23rd did not apply to the sales in question. It was not retroactive, and the sales were but part of a transaction begun before its date. We are not unmindful of the forceful argument to the contrary; and we consciously refrain from indicating any opinion respecting the validity of the order as interpreted.

The judgments of the court below are reversed and the causes will be remanded to the District Court for further proceedings in harmony with this opinion.

Reversed.

ERICKSON ET AL. *v.* UNITED STATES AND UNITED STATES SPRUCE PRODUCTION CORPORATION.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 125. Argued February 20, 1924.—Decided March 3, 1924.

1. A suit brought by the United States in the assertion of a substantial claim is within the jurisdiction of the District Court under § 24 of the Judicial Code, whatever the decision on the merits. P. 249.
2. Where the United States joined with the United States Spruce Production Corporation (a federal war instrumentality, cf. *Clallam County* v. *United States*, 263 U. S. 341,) in an action on contracts made by the latter with the defendants, *held* that the case had the jurisdictional status of an action by the United States, irrespective of the merits of its claim, and that objection to the jurisdiction on the ground that the Corporation and one of

the defendants were citizens of the same State and the United States not a necessary or proper party, was rightly overruled. *Id.* Affirmed.

ERROR to a judgment of the District Court, to review only the question of jurisdiction, in an action on contracts.

Mr. Corwin S. Shank, with whom *Mr. Henry F. McClure* was on the brief, for plaintiffs in error.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck, Mr. W. Marvin Smith, Mr. Charles H. Carey* and *Mr. James B. Kerr* were on the brief, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Action by the United States and United States Spruce Production Corporation, praying judgment against C. J. Erickson in the sum of $56,679.35, and against the United States Fidelity and Guaranty Company in the sum of $56,679.35, the ground of recovery being alleged breaches of certain contracts entered into between the Spruce Corporation and Erickson for the sale of certain logs belonging to the Spruce Corporation.

There was a motion to strike out certain allegations of the complaint, and being overruled, the complaint was demurred to. The demurrer and the motion to strike out were upon the ground that it appeared upon the face of the complaint that the court had no jurisdiction of the subject matter of the action. The demurrer was overruled. An answer was then filed, and a reply thereto. In the answer there was also a denial of jurisdiction.

Upon the issues thus made a jury was impaneled to try, which rendered a verdict, fixing the recovery against Erickson at $45,710.70, and against the Fidelity and Guaranty Company in the sum of $20,000. For these sums judgment was entered.

Accompanying the writ of error is the certificate of the district judge that a question of jurisdiction arose in the case. The certificate recited that on the motion to strike out and upon the demurrer the defendants raised the question of the jurisdiction of the court as a federal court to hear and determine the cause "and asserted that the United States of America was neither a necessary nor proper party to the said action," it being one "founded on contract between a corporation organized under the laws of the State of Washington on the one part and a citizen and resident of the State of Washington on the other part, the said court was without jurisdiction to hear and determine the same, but this court in consideration of the allegations and facts" of the complaint "was of the opinion that it had jurisdiction to hear and determine the case."

Even a summary of the facts of the certificate would be somewhat long. Fortunately, we may dispense with it as the elemental facts are sufficiently set forth in *Clallam County* v. *United States,* 263 U. S. 341.

Reference to that case is satisfactory to plaintiffs in error, they conceding that the connection of the United States with the litigation can be completely and accurately stated in the language of the *Clallam Case* by adding the following quotation from the case: "In short the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war, all its property was conveyed to it by or bought with money coming from the United States and was used by it solely as means to that end, and when the war was over it stopped its work except so far as it found it necessary to go on in order to wind up its affairs. When the winding up is accomplished there will be a loss, but whatever assets may be realized will go to the United States."

In addition, it is only necessary to say that the Spruce Production Corporation is a corporation of the State of Washington. Erickson is a citizen of the State of Wash-

ington, and a resident of the Western District of the State, Northern Division. The Fidelity and Guaranty Company is a corporation of the State of Maryland.

The matter in dispute exceeds $3,000, exclusive of interest and costs. The United States joined as plaintiff to protect its asserted interests.

In connection with the petition for a writ of error, the errors assigned are based on the action of the District Court and noted in its certificate, and that the "court was without any jurisdiction whatsoever to enter any such judgment."

There is no question of the merits of the case or of the judgment. In other words, the question of jurisdiction is alone before us for decision and, the letter of the complaint being regarded, there is no doubt of the jurisdiction of the Court, for the first subdivision of § 24 of the Judicial Code expressly gives the District Court jurisdiction of suits brought by the United States. This is such a suit. The United States is one of the plaintiffs and joined in the suit by way of asserting and seeking to enforce a right in which it claims to have a direct and legal interest. Judged by the complaint, the claim made by the United States is not frivolous or wholly without support but is real and substantial. In other words, it calls for consideration and determination. This involves an exercise of jurisdiction, whether the ultimate decision sustains or rejects the claim. Jurisdiction is power to decide the case either way, as the merits may require. *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25; *Geneva Furniture Co.* v. *Karpen & Bros.*, 238 U. S. 254, 258; *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201, 203; *Hart* v. *Keith Exchange*, 262 U. S. 271, 273.

That another party joins in the suit does not take from it its status as a suit brought by the United States.

It follows that the ruling of the District Court sustaining the jurisdiction must be, and it is

Affirmed.

MANUFACTURERS' LAND & IMPROVEMENT COMPANY *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION AND PUBLIC SERVICE RAILWAY COMPANY.

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

No. 181. Argued January 21, 1924.—Decided March 3, 1924.

The Act of March 1, 1918, c. 19, 40 Stat. 438, empowering the United States Shipping Board Emergency Fleet Corporation to requisition land for the construction thereon of houses for employees, and the families of employees, of shipyards in which ships were being constructed for the United States, and to construct on such land for their use houses "and all other necessary or convenient facilities", etc., authorized the taking of land for an electric railway terminal, for the purpose of providing convenient transportation for employees of a nearby shipyard, and their families, for whom housing was being provided under the act on other land in close proximity. P. 253.

284 Fed. 231, affirmed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court for the defendants in error in an action in ejectment brought against them by the plaintiff in error.

Mr. Francis D. Weaver, with whom *Mr. John W. Wescott* and *Mr. Samuel B. Scott* were on the brief, for plaintiff in error.

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

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

This was an action in ejectment by the land company against the fleet corporation and the public service com-

pany for a small tract of land in Camden, New Jersey. The action was begun in a state court and removed to the District Court of the United States, where, after trial, judgment was given for the defendants. The judgment was affirmed by the Circuit Court of Appeals. 284 Fed. 231.

The facts out of which the case arose are easily stated.

On and prior to May 28, 1918, the land in question was owned and possessed by the land company, and was without buildings or other improvements. It was in close proximity to shipyards where ships were being constructed for the United States for service in the World War, and was also in close proximity to other lands in which the fleet corporation had acquired an interest and on which it had caused, or was causing, many houses to be constructed for the use of the shipyard employees and their families. On that day the fleet corporation, acting under the Act of March 1, 1918, c. 19, 40 Stat. 438, requisitioned the fee simple title of the land and took possession. Afterwards, in conformity to the act, the fleet corporation determined the compensation to be made for the land, the amount being $19,743.20. The land company did not accept that sum or any part of it, but questioned the authority of the fleet corporation to make the requisition and take possession.

After the land was requisitioned, the fleet corporation constructed thereon a loop of electric railway tracks with platforms and sheds, connected the same with an adjacent electric railway line operated by the public service company, and contracted with that company to run its cars over the newly made loop to and from the platforms and sheds so constructed, all for the purpose of providing necessary and convenient transportation facilities for the employees of the shipyards and their families. The land was suitable for that purpose and, when the improvements were completed, was used therefor under the con-

tract between the fleet corporation and the public service company. No houses were constructed on the land by the fleet corporation; nor was it used otherwise than in providing the transportation facilities just described.

The action in ejectment was brought on the assumption that the land was unlawfully taken by the fleet corporation in that the declared purpose of the taking was to use the land in housing the employees and their families, when in truth the purpose was to use it for an electric railway terminal, or to enable the public service company so to use it, and that the fleet corporation was without authority to take it for such terminal use. Whether that assumption was well or ill grounded is the question presented on this writ of error.

The material part of the Act of March 1, 1918, under which the fleet corporation acted, reads as follows:

"That the United States Shipping Board Emergency Fleet Corporation is hereby authorized and empowered within the limits of the amounts herein authorized—

"(a) To purchase, lease, requisition, including the requisition of the temporary use of, or acquire by condemnation or otherwise any improved or unimproved land or any interest therein suitable for the construction thereon of houses for the use of employees and the families of employees of shipyards in which ships are being constructed for the United States.

"(b) To construct on such land for the use of such employees and their families houses and all other necessary or convenient facilities, upon such conditions and at such price as may be determined by it, and to sell, lease, or exchange such houses, land, and facilities upon such terms and conditions as it may determine.

"(c) To purchase, lease, requisition, including the requisition of the temporary use of, or acquire by condemnation or otherwise any houses or other buildings for the use of such employees and their families, together with the land

on which the same are erected, or any interest therein, all necessary and proper fixtures and furnishings therefor, and all necessary and convenient facilities incidental thereto; to manage, repair, sell, lease, or exchange such lands, houses, buildings, fixtures, furnishings and facilities upon such terms and conditions as it may determine to carry out the purposes of this Act.

"(d) To make loans to persons, firms, or corporations in such manner upon such terms and security, and for such time not exceeding ten years, as it may determine to provide houses and facilities for the employees and the families of employees of such shipyards.

"Whenever said United States Shipping Board Emergency Fleet Corporation shall acquire by requisition or condemnation such property or any interest therein, it shall determine and make just compensation therefor, and if the amount thereof so determined is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as added to such seventy-five per centum will make such an amount as will be just compensation for the property or interest therein so taken."

The requisition, as set forth in the record, shows that the land was desired and was taken "for the uses and purposes" expressed in the act, and not, as asserted by the land company, for the sole and declared purpose of using it for housing the employees and their families. So, if the act authorized a taking to provide necessary or convenient facilities whereby these people readily could reach and use local car lines, that purpose was comprehended in the terms of the requisition.

The land company apparently takes the position that subdivision (a) of the act is alone to be considered. If this position were right, there would be good ground for

thinking that the only purpose for which a taking was authorized was to provide housing facilities. But subdivision (b) must also be considered. It and subdivision (a) are so plainly interrelated that they must be read together. When this is done, it is obvious that the purposes for which a taking was authorized were not confined to providing housing facilities but extended to providing "all other necessary or convenient facilities" for the use of the employees and their families. Other parts of the act, notably subdivisions (c) and (d), strengthen this conclusion. Of course the act must be examined as a whole, and not as if each part were an independent enactment. Its purpose was to facilitate the accomplishment of large undertakings wherein it was necessary to employ artisans and laborers in unusually large numbers, and to utilize their services in the best possible way. It recognized not only that they and their families should be housed, but that many other necessary or convenient facilities should be provided for their use; and to these ends it authorized an expenditure of fifty million dollars.

Whether artisans or laborers could be obtained and retained in requisite numbers would measurably be affected by the conditions surrounding them in the employment, such as the facilities for going from their places of living to their places of work, and the converse, and the facilities for reaching markets, schools and churches from their places of living.

Here what was done was to provide facilities whereby an extensive electric railway service in the city of Camden was brought, with a suitable terminal, into close proximity to the shipyards and to the lands where houses were provided for the use of the employees and their families. In our opinion these transportation facilities were of a class which the fleet corporation was authorized to provide and for which it was empowered to requisition or take needed land. They were a legitimate complement

to the housing facilities provided by the corporation in that vicinity,—at great cost according to the record. It was not essential under the act that the other facilities be on the same tract with the houses any more than that all the houses be on a single tract. The act was intended to be susceptible of practical application in varying situations.

We conclude that the action of ejectment was brought on a mistaken assumption and was rightly determined against the land company by the courts below. Questions which would arise if the assumption or any material part of it were well grounded need not be considered.

Judgment affirmed.

MR. JUSTICE MCKENNA, dissenting.

I concur in the judgment of the Court. I dissent from the grounds upon which the Court bases it. It is my opinion that the record establishes that the requisition of the land was made under the first paragraph (a) of the Housing Act of March 1, 1918, the fee simple in the land acquired and, necessarily, it became subject to all of the uses accessorial to the fee, every use whatever; for the use of trolley tracks to connect with a street railway as in this case, or for the erection of a church for the spiritual guidance of employees and their families, or for a dance hall and an accompanying refectory for the amusement of their leisure. Indeed, for any use under the sun.

Twenty days after the requisition, the President seeing the situation and that the land was so subject, availed of it—availed of the power given him under the Act of April 22, 1918, c. 62, 40 Stat. 535, to take over transportation systems for the transportation of shipyard and plant employees, issuing his executive order of June 18, 1918, by which he directed that the Fleet Corporation should "have and exercise all power and authority vested" in him by

the act. By this direction and delegation, the Fleet Corporation proceeded to construct the trolley tracks with the assistance of the Public Service Railway Company, a defendant in the case. The land became a terminal for the latter Company.

The act of the President was in the public service, but it was not an act of requisition of the land, it was after the requisition of the land,—not its requisition. If this were not so there is color for the accusation of the Land & Improvement Company that the Housing Act was used as a pretense—used under the pretense of acquiring land for the building of houses when the purpose was, in effect, a different one.

During the taking of the testimony, counsel for the Fleet Corporation several times declared that the requisition was under the Housing Act and that whatever use the land was subsequently put to was immaterial.

I quote from the record as follows:

"Now then, the power under which we took this land was a power delegated under 40 Statutes 438, directly delegated to the Fleet Corporation so that we could not in this requisition say that the Fleet Corporation took this land by virtue of the Act of March 1, 1918, and by virtue of the Act of April 22, 1918, because the power was not given to us under both of those Acts, it was only [given] under one of them.

"The Court: You claim you were the deputy of the President?

"Mr. Pearse: Later.

"Mr. Jacobsen: After the taking of the land we claim we were. At the time we took the land we had the right to take it by virtue of statute, and after *we had it we used it by virtue of power delegated to us by the President.* [Italics mine.] Those are the actual facts; in other words, we took this land under a direct power delegated to us."

It will be observed that Mr. Pearse, of counsel for the Fleet Corporation, in response to the Court's inquiry as to when the Fleet Corporation became the deputy of the President, answered, "Later." It will also be observed that Mr. Jacobsen, of counsel for the Fleet Corporation, continuing his comment said that, "after the taking of the land we [the Fleet Corporation] claim we were." "Later", and "after the taking of the land", meaning after the executive order. Until it there is nothing in the record to show that there was prophecy or thought of trolley tracks or transportation systems.

The opinion of the Court now delivered is, in my view, in opposition to this. There is an attempt at consistency with it by the declaration that the requisition was under the act and for the uses and purposes expressed in the act and that the uses and purposes were facilities for neighboring shipyards. In determining the correctness of this conclusion all paragraphs of the act must, of course, be considered, but not one of them has provision for any housing of employees except what houses may be erected on the land and for the employees who should occupy them.

As I have said, the President's order was moved by consideration of the public service. The difference between the Court and me is how the service was accomplished—was it by requisition of the land or the use of the land after requisition?

I think the latter—the Court declares the former. In other words, it was a part of the requisition. Of course, the occupation of the land after the construction of the trolley tracks was as useful, whether the right was acquired and exercised one way as the other—the trolley would be a facility as much in one case as in the other; and to ascribe it to one and not to the other is to give that one a gloss and show that it is denied to the other—a fictitious importance.

I repeat, the difference between the Court and me is one of means—not of effect, and my view is that of the Circuit

Court of Appeals; it is that of the Land & Improvement Company; it is, in essential foundation, that of the Government. These circumstances cannot, of course, obstruct the declaration of superior authority, as this Court is, although the grounds of the exertion of the authority may surprise.

THE CHICAGO JUNCTION CASE.[1]

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

No. 489. Argued January 24, 1924.—Decided March 3, 1924.

1. An order of the Interstate Commerce Commission permitting one carrier to acquire control of another, made under par. 2 of § 5 of the amended Act to Regulate Commerce, which allows this whenever the Commission is of opinion, after hearing, that the acquisition will be in the public interest, is subject to judicial review. P. 263.
2. Such an order is void if the finding that the acquisition will be in the public interest is made without supporting evidence. P. 265.
3. Facts conceivably known to the Commission but not put in evidence will not support an order. P. 263.
4. In a bill to set aside such an order, an allegation that such finding was wholly unsupported by evidence charges a fact which must be taken as admitted on appeal from a decree dismissing the bill on motion equivalent to a demurrer. P. 262.
5. Carriers which suffer serious disadvantage, prejudice and loss of traffic from the transfer of neutral terminal railroads to the control of a competitor, and which intervened unsuccessfully before the Commission in opposition to such transfer, have a standing to attack the order permitting it, upon the ground that there was no evidence to support the finding of public interest on which the order was based. P. 266.
6. Section 212, Jud. Code, which declares that any party to a proceeding before the Interstate Commerce Commission may, as of

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[1] The docket title of this case is: *Baltimore & Ohio Railroad Company et al.* v. *United States, Interstate Commerce Commission, New York Central Railroad Company, et al.*

right, become a party to any suit wherein is involved the validity of its order, impliedly authorizes one who was permitted to oppose an order before the Commission by intervention, to institute a suit to challenge it. P. 267.

7. Under the Act of October 22, 1913, a suit may be brought to set aside an order of the Commission and also to restore the *status quo ante*, by joining with the United States private parties who appeared before the Commission and have acquired rights under the order. P. 269.

Reversed.

APPEAL from a decree of the District Court denying an interlocutory injunction and dismissing the bill, on motion, in a suit to set aside an order of the Interstate Commerce Commission.

Mr. Luther M. Walter, with whom *Mr. John S. Burchmore* was on the brief, for appellants.

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

Mr. Ralph M. Shaw, with whom *Mr. Silas H. Strawn, Mr. Guy Currier* and *Mr. Frederick C. Hack* were on the brief, for Chicago Junction Railway Company et al., appellees.

Mr. Robert J. Cary filed a brief on behalf of New York Central Railroad Company and Chicago River & Indiana Railroad Company, appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Chicago Junction Railway and the Chicago River and Indiana Railroad are terminal railroads located

within the Chicago switching district. Prior to May 16, 1922, they were operated as independent belt-lines, uncontrolled by any trunk line carrier; and they were used by the twenty-three railroads entering Chicago, impartially and without discrimination. Among these were the New York Central Lines and their chief competitors, the six carriers who are plaintiffs in this suit.[1] The New York Central sought to obtain control of these terminal railroads. To this end, it made an application to the Interstate Commerce Commission, on December 28, 1920, under paragraph 18 of § 1 and paragraph 2 of § 5 of the Act to Regulate Commerce as amended by Transportation Act, 1920, c. 91, 41 Stat. 456, 477, 481.[2] The authorization requested was to make an agreement with stockholders then owning these properties by which, among other things, the New York Central would purchase all the capital stock of the Chicago River and Indiana Railroad for $750,000; and the latter company would lease for 99 years (and thereafter) the Chicago Junction Railway at an annual rental of $2,000,000. Upon this application hearings were had. The Baltimore and Ohio Railroad, and its co-plaintiffs herein, intervened, and opposed granting the application. On May 16, 1922, an order was entered which authorized the New York Central to acquire the Chicago River and Indiana Railroad stock;

[1] The Baltimore & Ohio, the Pennsylvania, the Chicago & Erie, the Grand Trunk Western, the Chicago, Indianapolis & Louisville, and the Pittsburg, Cincinnati, Chicago & St. Louis. The Wabash, originally joined as plaintiff, was dismissed on its own motion.

[2] Neither of the operating companies affected joined in the application of the New York Central; and no separate application to the Commission was filed by either of them. But they were represented before the Commission; and the petition of the New York Central prayed that the several corporations involved be authorized to sell and to buy such stock, and to execute such lease; and that the Commission "issue in respect thereof its certificate of public convenience and necessity."

and authorized the latter company to lease the Chicago Junction Railway.[3] *Chicago Junction Case,* 71 I. C. C. 631. The order did not fix the date when it should become effective.[4] Immediately after its entry, the purchase of the stock was completed and the lease was executed.

On April 10, 1923, this suit was brought in the federal court for the Northern District of Illinois against the United States, the Commission, the New York Central, the terminal railroads and the stockholders thereof.[5] The relief sought is to have the order declared void; to have

[3] The report entitled "By the Commission," states that the authority is granted subject only to the observance of seventeen conditions which it enumerates. Applications under paragraph 18 of § 1 and paragraph 2 of § 5 are customarily heard by Division 4 consisting of four commissioners. See Interstate Commerce Act, § 17; Annual Report of the Commission for 1920, pp. 3–6. But this case was heard by the full Commission. The Commission consists of eleven members. Only four concurred entirely in what is called the Report of the Commission. Four others dissented wholly. One "concurred in part" declaring that the "facts warrant grant of authority without elaboration of conditions" which (with two exceptions) seemed to him "vain, perhaps harmful." The two other members concurred "in the result reached in the report," but declared that the opinion "should recognize explicitly that the application should have been entertained under section 1, paragraph 18, of the act; and that in accordance therewith a certificate of public convenience and necessity should be incorporated in the order entered."

[4] On May 29, 1922, the intervening carriers filed a petition praying that the order be set aside or modified. The petition was denied June 12, 1922.

[5] The agreement of the New York Central was with the Chicago Junction Railways and Union Stock Yards Company, a holding company, which owned all the stock in the Chicago River and Indiana Railroad and half of the stock in the Chicago Junction Railway; the other half being owned by Richard Fitzgerald, who wished to join in making the sale transferring control. The property to be leased included the railroad of the Union Stock Yards and Transit Company of Chicago, which had theretofore been leased to the Chicago Junction Railway.

set aside the sale of the stock and the lease; to restore the *status quo ante* the order; and for an injunction. The case was heard before three judges on plaintiffs' motion for an interlocutory injunction and on defendants' motions to dismiss the bill.[6] The District Court, without opinion, denied the injunction and dismissed the bill. The case is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

The order did not provide for the issue of a certificate of public convenience and necessity. It did not disclose whether it was issued under paragraph 18 of § 1 or under paragraph 2 of § 5. An application, by the carriers who are plaintiffs herein, that this be specified was denied by the Commission without opinion. In this Court counsel for all the defendants stated that the order was entered solely under paragraph 2 of § 5. We have, therefore, no occasion to consider the incidents of applications under paragraph 18 of § 1, or rights thereunder. Several reasons are urged why the order should be held void. The defendants, besides asserting its validity, insist that the plaintiffs have no interest which entitles them to assail the order; and that there are, also, other obstacles to the maintenance of this suit.

First. Plaintiffs contend that the order is void because there was no evidence to support the finding that the acquisition of control of the terminal railroads by the New York Central "will be in the public interest." The bill charges, in clear and definite terms, that this finding was wholly unsupported by evidence. We must take that fact as admitted for the purposes of this appeal. The allega-

[6] When the cause was heard on the original bill the hearing was upon motions to dismiss filed by the United States, the New York Central, the Chicago River and Indiana Railroad, the Chicago Junction Railways and Union Stock Yards Company, the Chicago Junction Railway and Richard Fitzgerald; and upon the answer of the Interstate Commerce Commission. The bill was then amended. Thereupon, the case was heard solely on the motions to dismiss.

tion is made as one of fact. There is no suggestion in the motions to dismiss (which are both general and special) that this fact is not well pleaded; or that a copy of the evidence introduced at the hearing should have been annexed to the bill. Compare *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U. S. 114. Facts conceivably known to the Commission but not put in evidence will not support an order. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 93. The defendants concede that the New York Central could not legally acquire control of these terminal railroads unless authorized so to do by the Commission pursuant to paragraph 2 of § 5; and that the Commission cannot legally grant such authority unless it finds, after hearing, that the acquisition " will be in the public interest." They contend that this order is not one of those subject to judicial review; and that, if subject to review, it cannot be held void merely because unsupported by evidence. These objections are based on the nature of the order, not on the class of persons by whom the judicial review is invoked.

Whether this order can be described properly as legislative, may be doubted. It is clear that legislative character alone would not preclude judicial review. Rate orders are clearly legislative. *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 226. Nor would the further fact that the order is permissive preclude review, if by that term is meant an order which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited. Orders entered under the Act of June 18, 1910, c. 309, 36 Stat. 539, 547, amending § 4 of the Interstate Commerce Act, are of this character. That section prohibits carriers from charging more " for a shorter than for a longer distance over the same line or route in the same direction " without obtaining authority from the Commission. A suit will lie to set aside an order granting such authority, and to enjoin action by the carrier there-

under. *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, 562. Compare *United States* v. *Merchants & Manufacturers Traffic Association,* 242 U. S. 178. The order here challenged is wholly unlike those which have been held not subject to judicial review. In *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82, 89, the action of the Commission, with which the Court refused to interfere, was the assignment of a complaint for hearing. As this Court said: "The notice . . . had no characteristic of an order, affirmative or negative." In *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; and *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412, judicial review was refused, not because the order was permissive, or because it was negative in character, but because it was a denial of the affirmative relief sought.[7] This Court declined to interfere, because to do so would have involved exercise by it of the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied. Here the order complained of is an affirmative one. That is, it grants the relief sought. Compare *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 483.

It is further contended that paragraph 2 of § 5 confers a power purely discretionary, and that, for this reason, the order entered cannot be set aside by a court merely on the ground that the action taken was based on facts erroneously assumed, or of which there was no evidence.[8] The power here challenged is not of that character. Con-

[7] Compare *Interstate Commerce Commission* v. *Waste Merchants Assn.,* 260 U. S. 32. The mandamus was granted in *Interstate Commerce Commission* v. *Humboldt S. S. Co.,* 224 U. S. 474, and *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, because the Commission erroneously refused to assume jurisdiction. See also *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission,* 252 U. S. 178.

[8] Compare *Martin* v. *Mott,* 12 Wheat. 19, 29–33; *Philadelphia & Trenton R. R. Co.* v. *Stimpson,* 14 Pet. 448, 458.

gress by using the phrase "whenever the Commission is of opinion, after hearing," prescribed quasi-judicial action.[9] Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing.[10] The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion

[9] The same phrase is used in the Interstate Commerce Act in respect to many other classes of orders. These orders, so far as considered by this Court, have uniformly been held to be subject to judicial review; and where an essential finding was unsupported by evidence, the order was declared to be void. (1) Unreasonable rates, § 15, par. 1; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91; *Florida East Coast Ry. Co.* v. *United States*, 234 U. S. 167, 185. (2) Discriminatory rates, § 15, par. 1; compare *New York* v. *United States*, 257 U. S. 591, 600. (3) Switching connections, § 1, par. 9; *United States* v. *Baltimore & Ohio Southwestern R. R. Co.*, 226 U. S. 14. (4) Division of joint rates, § 15, par. 6; compare *New England Divisions Case*, 261 U. S. 184, 203. (5) Pooling, § 5, par. 1. (6) Railroad control of water carriers, § 5, par. 10. (7) Valuation, § 19*a*, par. Fifth *i*.

[10] Transportation Act, 1920, like the original Act to Regulate Commerce and earlier amendments, distinguished, by the language used and, also, in other respects, between those orders which can be made only after hearing and those as to which no hearing is required. Thus, orders on applications for extension of line, for new construction, or for abandonment under § 1, pars. 18–20, can be made only after hearing. But in the case of applications concerning the issue of securities under § 20a, par. 6, the Commission may hold hearings "if it sees fit." See *Miller* v. *United States*, 277 Fed. 95. And under the emergency provisions, § 1, pars. 15 and 16, and § 15, par. 4, the order may be issued without a hearing, but "terms" are fixed after "subsequent hearings." *Peoria & Pekin Union Ry. Co.* v. *United States*, 263 U. S. 528.

to consider the other grounds of invalidity asserted by plaintiffs.

Second. The defendants contend that the plaintiffs have not the legal interest necessary to entitle them to challenge the order. That they have in fact a vital interest is admitted. They are the competitors of the New York Central. Practically all the tonnage originated at or destined to points on these terminal railroads is competitive, in that the same can be hauled either over the lines of the New York Central or over those of the plaintiffs. Prior to the date of the order, and while the terminal railroads were uncontrolled by any trunk line carrier, they were all served impartially and without discrimination; and they competed for the traffic on equal terms. The order substitutes for neutral control of the terminal railroads, monopoly of control in the New York Central; and, in so doing, necessarily gives to it substantial advantage over all its competitors and subjects the latter to serious disadvantage and prejudice. The main purpose of the acquisition by the New York Central was to secure a larger share of the Chicago business. By means of the preferential position incident to the control of these terminal railroads, it planned to obtain traffic theretofore enjoyed by its competitors. Because such was the purpose of the New York Central control, and would necessarily be its effect, these plaintiffs intervened before the Commission. That their apprehensions were well founded is shown by the results. The plaintiffs are no longer permitted to compete with the New York Central on equal terms. A large volume of traffic has been diverted from their lines to those of the New York Central. The diversion of traffic has already subjected the plaintiffs to irreparable injury. The loss sustained exceeds $10,000,000. Continued control by the New York Central will subject them to an annual loss in net earnings of approximately that amount. If, as suggested in *Interstate Commerce Commission* v.

Chicago, Rock Island & Pacific Ry. Co., 218 U. S. 88, 109, a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here.

This loss is not the incident of more effective competition. Compare *Edward Hines Trustees* v. *United States,* 263 U. S. 143, 148. It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. *Pennsylvania Co.* v. *United States,* 236 U. S. 351. It is true that, before Transportation Act, 1920, the Interstate Commerce Act would not have prohibited the owners of the terminal railroads from selling them to the New York Central. Nor would it have prohibited the latter company from making the purchase. And, by reason of a provision then contained in § 3 of the Interstate Commerce Act, the purchase might have enabled the New York Central to exclude all other carriers from use of the terminals. Compare *Louisville & Nashville R. R. Co.* v. *United States,* 242 U. S. 60; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482. But Transportation Act, 1920 repealed that provision in § 3; it made provision for securing joint use of terminals; and it prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company.

The plaintiffs may challenge the order because they are parties to it. The Judicial Code, § 212 (originally the Commerce Court Act, June 18, 1910, c. 309, 36 Stat. 542,) declares that any party to a proceeding before the Commission may, as of right, become a party to "any suit wherein is involved the validity of such order." The section does not in terms provide that such party may insti-

tute a suit to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. In the proceeding before the Commission, they opposed by evidence and argument the granting of the application. This they did as of right. For under the rules of practice, adopted by the Commission pursuant to paragraph 1 of § 17 of the Interstate Commerce Act, the intervener becomes a party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel.[11] The intervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest. No case has been found in which either this Court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the Commission but did not do so, have been allowed to maintain such suits where the requisite interest was shown. *Interstate Commerce Com-*

[11] Rules of Practice (1923) pp. 2, 27, 28. The Commission, like courts, distinguishes between those who are permitted to intervene, and thus become parties, and persons who are merely permitted to be heard. See *Hurlburt* v. *Lake Shore & Michigan Southern Ry. Co.*, 2 I. C. C. 122, 125. Compare *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578.

Leave to intervene can be granted only to one entitled under the act to complain to the Commission. The right to complain was broadly bestowed by Congress. Act of February 4, 1887, c. 104, § 13, 24 Stat. 379, 383, as amended June 18, 1910, c. 309, § 11, 36 Stat. 539, 550, 557. From its inception, the Commission has construed liberally this right to complain. See *Boston & Albany R. R. Co.* v. *Boston & Lowell R. R. Co.*, 1 I. C. C. 158, 173, 174; *In re Chicago, St. Paul & Kansas City Ry. Co.*, 2 I. C. C. 231, 235.

mission v. *Diffenbaugh,* 222 U. S. 42, 49; *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, 562.[12]

Third. It is contended that this bill was properly dismissed for want of jurisdiction, at least as to the terminal companies and their stockholders other than the New York Central, because the plaintiffs have joined with the suit to set aside the order, a suit to restore the *status quo.* The objection is not that the bill is multifarious, or that it is otherwise in conflict with established equity practice. The argument is that the United States is a necessary party; that, against it, suit can be brought only when Congress gives consent; that the suit was brought necessarily and solely under the Act of October 22, 1913, c. 32, 38 Stat. 219, 220; and that the consent so given does not extend to a suit in which it is sought to set aside both the order and rights acquired by private persons thereunder. There is nothing in the legislation to indicate that Congress intended such a limitation of the scope of the relief

[12] The order involved in the latter case—relief from the operation of the Fourth Section—resembles in character that here in question. See also *Nashville Grain Exchange* v. *United States,* 191 Fed. 37; *Atlantic Coast Line R. Co.* v. *Interstate Commerce Commission,* 194 Fed. 449; *Merchants' & Manufacturers' Traffic Association* v. *United States,* 231 Fed. 292; *McLean Lumber Co.* v. *United States,* 237 Fed. 460; *City of New York* v. *United States,* 272 Fed. 768, 769; *Village of Hubbard* v. *United States,* 278 Fed. 754, 759; *Tennessee* v. *United States,* 284 Fed. 371, s. c., *Nashville, etc. Ry.* v. *Tennessee,* 262 U. S. 318; *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.,* 286 Fed. 540, 548.

In *Edward Hines Trustees* v. *United States,* 263 U. S. 143, 147, 148, the bill was dismissed because it failed to disclose any interest in the plaintiff. Cases like *Railroad Co.* v. *Ellerman,* 105 U. S. 166, which are not brought under the Interstate Commerce Act, have no bearing on the question here presented. The contention that under the principle applied in *Muskrat* v. *United States,* 219 U. S. 346, Congress was without power to confer upon persons situated like the plaintiffs the right to challenge in the courts the validity of the order is unsound.

to be afforded. The sale of the stock and the lease, which it is sought to set aside, were made immediately after entry of the order; that is, before expiration of the thirty days provided by paragraph 2 of § 15; and before the plaintiffs' petition to set aside or modify the order had been disposed of. To permit the joinder objected to could not prejudice the United States. To prohibit the joinder would, in large measure, defeat the very purpose of the bill and would clearly prevent that expedition in affording relief which it was the purpose of Congress to ensure. Act of February 11, 1903, c. 544, 32 Stat. 823. Moreover, the terminal companies, and the stockholders affected, were entitled to intervene as parties in the proceedings before the Commission; and they appeared by counsel. If they became parties to the proceeding before the Commission, they were entitled, under § 212 of the Judicial Code, to become parties, also, to any suit brought to set aside the order. It was the policy of Congress to allow persons so situated to be joined in suits to enforce provisions of the Interstate Commerce Act. See Act of February 19, 1903, c. 708, § 2, 32 Stat. 847, 848. If this suit had been brought by the United States, the court could have given the complete relief prayed for. *United States* v. *Union Pacific Ry. Co.,* 160 U. S. 1, 50; *United States* v. *Union Pacific R. R. Co.,* 226 U. S. 61, 96. The same rule should apply where the suit to set aside the order is brought by a private party.[13]

The contention that the suit is barred by laches is clearly unfounded. The situation of none of the defendants appears to have been affected by the brief lapse of time. Compare *United States* v. *Southern Pacific Co.,* 259 U. S. 214, 240; *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 488.

Reversed.

[13] There is nothing to the contrary in *Illinois Central R. R. Co.* v. *State Public Utilities Commission,* 245 U. S. 493; *Oregon* v. *Hitchcock,* 202 U. S. 60; or *Minnesota* v. *Hitchcock,* 185 U. S. 373.

258 SUTHERLAND, MCREYNOLDS and SANFORD, JJ., dissenting.

MR. JUSTICE SUTHERLAND, dissenting.

I think the injuries alleged to have been sustained by complainants are not such as to afford the basis for a legal remedy. Complainants are interested only in the sense that the acquisition of the rights here in question by their competitor will enable the latter to absorb a larger share of the business. That is not enough to constitute a remediable interest.

Before Transportation Act, 1920, the New York Central would have been free to acquire these terminals without the consent of the Commission. If it had done so, its gain of business with the resulting loss to complainants would have been the same; but it would be inadmissible to assert that complainants might have maintained a suit to annul or enjoin the acquisition on the ground of that injury. "The effort of a carrier to obtain more business . . . proceeds from the motive of self-interest which is recognized as legitimate." *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 523. See *Johnson* v. *Hitchcock*, 15 Johns. (N. Y.) 185.

It is claimed, however, that Transportation Act, 1920, so alters the rule as to give a right of action to complainants where none existed before. I am unable to perceive any sound basis for the conclusion. That act, so far as this question is concerned, requires the carrier, as a prerequisite to an acquisition of the character here under consideration, to secure the authorization of the Commission, which that body may grant if "it will be in the public interest." The mere effect of such acquisition upon the business of competing lines is no more to be considered since the Act of 1920 than it was prior to the passage thereof. It is the public, not private, interest which is to be considered.

The complainants have no standing to vindicate the rights of the public, but only to protect and enforce their

own rights. Redress for public grievances must be sought by public agents, not by private intervention. *Home Telephone Co.* v. *Railroad Commission,* 174 Mich. 219. The right of the complainants to sue, therefore, cannot rest upon the alleged violation of a public interest, but must rest upon some distinct grievance of their own. Loss of business, or of opportunities to get business, attributable to the activity or increase of facilities on the part of a competitor is not enough. Transportation Act, 1920, lays down no new or additional rule by which the question, What constitutes a legal or equitable right, interference with which may give rise to an action? may be tested; and the determination of that question must still rest upon general principles of jurisprudence. See *Peavey & Co.* v. *Union Pacific R. Co.,* 176 Fed. 409, 417. In *Railroad Co.* v. *Ellerman,* 105 U. S. 166, 174, this Court held that a private complainant may not be heard by a court except for an "invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed."

If it were conceded that the acquisition of the terminals by the New York Central was in the public interest, I suppose it would not be contended that complainants had any standing to interfere on the ground that their opportunities for obtaining business had been impaired. And, since they are without legal right to intervene to redress a public grievance, the contrary fact that the acquisition will not be in the public interest cannot avail them. Their complaint must stand or fall upon the nature of their own grievance. A private injury for which the law

affords no remedy, cannot be converted into a remediable injury merely because it results from an act of which the public might complain. In other words, the law will afford redress to a litigant only for injuries which invade his own legal rights; and since the injuries here complained of are not of that character and do not result from the violation of any obligation owing to the complainants, it follows that they are without legal standing to sue.

The decision of the Court here proceeds upon the theory that the injury complained of is a denial of equality of treatment in the use of the terminals; but I do not understand this to be the gravamen of the bill. The complaint is of inequality of opportunity to get business—not of opportunity to use the terminals. Complainants' access to the use and enjoyment of the terminal facilities acquired by the New York Central, remains the same in respect of any business they may obtain. Interstate Commerce Act, § 3-(3), (4), as amended by Transportation Act, 1920, c. 91, 41 Stat. 479. The Commission granted the authorization only upon condition that the neutrality of the terminals in their handling of traffic should be preserved.[1] If their use be lessened, therefore, it will not be because access to the terminals has been, or is in danger of being, restricted, but because, with less business, there will be less occasion to use them. An illustration may be helpful: Suppose, instead of these terminal facilities, the acquisition had been of a line of railroad running west from Chicago, which, prior thereto, had been neutral and

[1] Among other conditions is the following:

"2. The present neutrality of handling traffic inbound and outbound by the Junction and River Road organization shall be continued so as to permit equal opportunity for service to and from all trunk lines reaching Junction rails, without discrimination as to routing or movement of traffic which is competitive with the traffic of the Central, and without discrimination against such competitive traffic in the arrangement of schedules,"

whose business had been distributed without favor among the several eastern lines terminating at that city. It is manifest that the effect of such an acquisition would be, as it is here, to enable the New York Central to absorb more of the traffic of the railroad so acquired than theretofore and, consequently, to lessen that received by other parallel lines running east from Chicago. In that situation, could any of such lines maintain a suit to annul the authorization of the Commission? It seems to me not; and I can see no difference in principle between the case supposed and that with which we are dealing.

I am authorized to say that MR. JUSTICE MCREYNOLDS and MR. JUSTICE SANFORD concur in this dissent.

SMITH *v.* APPLE.

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

No. 124. Argued January 2, 1924.—Decided March 3, 1924.

1. Where a District Court dismisses a suit upon the specific ground of want of jurisdiction, this Court, upon a sufficient certificate, acquires jurisdiction of a direct appeal, and whatever the reason assigned by the District Court for the supposed want of jurisdiction, must determine whether that court had and should have exercised the jurisdiction thus denied. P. 277.
2. But where a decree of the District Court does not purport to be based upon a question of its jurisdiction, a subsequent certificate characterizing the ground of decision as one involving a question of jurisdiction, does not authorize this Court to entertain the appeal unless the question certified presents an issue as to "the jurisdiction of the court" within the meaning of Jud. Code, § 238. *Id.*
3. The question whether, in a suit in equity, the plaintiff is prevented by Jud. Code, § 265, from obtaining an injunction staying proceedings in a state court, does not present an issue as to the jurisdiction of the District Court, within the meaning of § 238, but one of the equity or merits of the case. *Id.*

4. Section 265 of the Code is not a jurisdictional statute, but a mere limitation upon the general equity powers of the federal courts, preventing relief by injunction in the cases covered by it. P. 278.
5. An appeal from the District Court, involving only the merits but mistakenly brought here as involving only that court's jurisdiction, will be transferred to the Circuit Court of Appeals, under the Transfer Act of September 14, 1922, Jud. Code, § 238a. P. 280.

Case transferred to Circuit Court of Appeals.

DIRECT appeal from a decree of the District Court dismissing, for want of jurisdiction, a suit to enjoin enforcement of judgments recovered by the defendant in a state court.

Mr. John S. Dean, with whom *Mr. A. Scott Thompson* and *Mr. Harry W. Colmery* were on the brief, for appellant.

Mr. Edward E. Sapp, with whom *Mr. P. P. Campbell* was on the brief, for appellee.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The record presents a preliminary question as to our jurisdiction of this appeal. This we must consider, although not raised by counsel. *Stevirmac Oil Co.* v. *Dittman,* 245 U. S. 210, 214.

This is a suit in equity brought in the District Court by a citizen of Oklahoma against a citizen of Kansas to enjoin the latter from enforcing certain judgments that he had recovered against the plaintiff in a state court—which were alleged to be unconscionable and void—and, incidentally, from further prosecuting a suit in the District Court that had been brought by him against a surety on a supersedeas bond given by the plaintiff in the course of the proceedings in the state court. The amount involved, exclusive of interest and costs, exceeds $3,000.

The defendant moved to dismiss the suit on two grounds: 1st, for want of jurisdiction, because the diver-

sity of citizenship had not existed at the time the judgments were rendered; and, 2nd, for want of "a valid cause of action in equity." The District Judge, on consideration of this motion, handed down a memorandum in which—without passing upon the jurisdictional question raised by the motion—he said: "In examining the matter I am constrained to believe in so far as restraint of further proceedings in the courts of the state are concerned, the injunction prayed for in this suit is within the letter and spirit of the prohibition of Section 265 of the Judicial Code, . . . and that the motion to dismiss interposed in this suit should be sustained." A decree was thereupon entered dismissing the suit, at the costs of the plaintiff, "for the reasons stated" in the memorandum. Thereafter the appeal to this Court was allowed by another District Judge, sitting by assignment; his order allowing the appeal reciting that the decree dismissing the suit "was made upon consideration solely of the question of the court's jurisdiction of the said action under the provisions of Section 265 of the Judicial Code."

Section 238 of the Judicial Code—reënacting a like provision in the Act of March 3, 1891, c. 517, 26 Stat. 826,—provides that appeals and writs of error may be taken from district courts direct to this Court in cases "in which the jurisdiction of the court is in issue", in which case that question alone shall be certified from the court below for decision.[1]

We assume for present purposes that in matter of form the recital in the order allowing the appeal that the suit was dismissed "upon consideration solely of the court's jurisdiction" of the action under § 265 of the Code, is a sufficient certification of a jurisdictional question. See

[1] The Act of 1891 related to direct appeals and writs of error from the then existing circuit courts as well as district courts. Decisions under that act as well as the Code, are cited in this opinion without distinction in this respect.

Excelsior Pipe Co. v. *Bridge Co.,* 185 U. S. 282, 285. Coming, however, to the matter of substance, it is clear that the suit was dismissed solely upon the ground that in the opinion of the District Judge the court was prohibited by § 265 from granting the injunction sought by the bill. True it is that where a district court dismisses a suit upon the specific ground of want of jurisdiction, this Court, upon a sufficient certificate, acquires jurisdiction of a direct appeal, and, whatever the ground assigned by the district court for the supposed want of jurisdiction, must determine whether or not that court had and should have exercised the jurisdiction thus denied. *Excelsior Pipe Co.* v. *Bridge Co., supra,* p. 285; *The Ira M. Hedges,* 218 U. S. 264, 270; *Louisville Railroad* v. *Telegraph Co.,* 234 U. S. 369, 377; *Public Service Co.* v. *Corboy,* 250 U. S. 153, 159. But where, as in the present case, a decree of the district court does not purport to be based upon a question of its jurisdiction, a subsequent certificate characterizing the ground of the decision as one involving its jurisdiction, does not authorize this Court to entertain the appeal unless the question certified presents an issue as to "the jurisdiction of the court" within the meaning of § 238 of the Code. *Smith* v. *McKay,* 161 U. S. 355, 357; *O'Neal* v. *United States,* 190 U. S. 36, 38; *Bien* v. *Robinson,* 208 U. S. 423, 427; *Darnell* v. *Illinois Railroad,* 225 U. S. 243, 245; *Stevirmac Oil Co.* v. *Dittman, supra,* p. 214; *DeRees* v. *Costaguta,* 254 U. S. 166, 172.

Does the dismissal of a suit in equity upon the ground that the court is prohibited by § 265 of the Code from granting the relief sought by the bill, involve an issue as to "the jurisdiction of the court" within the meaning of § 238 of the Code?

Under the latter section, as interpreted by repeated decisions of this Court, the jurisdiction of the district court is in issue only when its power to hear and determine the cause, as defined and limited by the Constitution or

statutes of the United States, is in controversy, *Smith* v. *McKay, supra,* p. 358; *Mexican Railway* v. *Eckman,* 187 U. S. 429, 432; *O'Neal* v. *United States, supra,* p. 37; *United States* v. *Construction Co.,* 222 U. S. 199, 201; *The Pesaro,* 255 U. S. 216, 218; that is, shortly stated, when "its power to entertain the suit under the laws of the United States" is in issue. *Louisville Railroad* v. *Telegraph Co., supra,* p. 371. Where a district court is vested with jurisdiction of a cause—as where diversity of citizenship exists and the matter in controversy is of the requisite value—the question whether as a court of equity it has power to entertain the suit and afford the plaintiff equitable relief, does not present a jurisdictional issue. *Bien* v. *Robinson, supra,* p. 427. Such an issue is not presented by the question whether there is want of equity in the bill, *Smith* v. *McKay, supra,* p. 358; *Building Association* v. *Price,* 169 U. S. 45, 46; *World's Columbian Exposition* v. *United States,* (C. C. A.) 56 Fed. 654, 666; as whether its allegations are sufficient to entitle the plaintiff to the equitable relief sought, *Louisville Railroad* v. *Telegraph Co., supra,* p. 372; *DeRees* v. *Costaguta, supra,* p. 173, or whether it is not cognizable in equity because of a plain, adequate and complete remedy at law, *Smith* v. *McKay, supra,* p. 356; *Shepard* v. *Adams,* 168 U. S. 618, 622; *Illinois Railroad* v. *Adams,* 180 U. S. 28, 34.

So the question whether, in a suit in equity, the plaintiff is prevented by § 265 of the Code from obtaining an injunction staying proceedings in a state court, does not present an issue as to "the jurisdiction" of the district court. This section—reënacting § 720 of the Revised Statutes—provides that, except in bankruptcy cases, the "writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State". It is not a jurisdictional statute. It neither confers jurisdiction upon the district courts nor takes away the jurisdiction otherwise specifically conferred upon them

by the federal statutes.[2] It merely limits their general equity powers in respect to the granting of a particular form of equitable relief; that is, it prevents them from granting relief by way of injunction in the cases included within its inhibitions. In short, it goes merely to the question of equity in the particular bill. See *Simon* v. *Southern Railway,* 236 U. S. 115, 116, 122–124; *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 185; *Public Service Co.* v. *Corboy,*[3] *supra,* p. 160; *National Surety Co.* v. *State Bank,* (C. C. A.) 120 Fed. 593, 604. This section, as settled by repeated decisions of this Court, does not prohibit in all cases injunctions staying proceedings in a state court. Such injunctions may be granted, consistently with its provisions, in several classes of cases. See *Wells Fargo & Co.* v. *Taylor, supra,* at p. 183, in which many decisions on this question are collated and classified. Necessarily, therefore, in a suit in equity of which a district court has jurisdiction under the federal statutes, where the relief sought is an injunction against proceedings in a state court, it is the duty of the court to determine, under the allegations and proof, whether a case is made which entitles the plaintiff to the injunction sought, that is, whether the case presented is one in which such relief is prohibited by the statute or one in which it may

[2] Its language is similar to that in § 267 of the Judicial Code, providing that suits in equity "shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law", which does not go to the jurisdiction of the court; and in marked contrast to the provision in § 24 of the Code that no "district court shall have cognizance of any suit" to recover upon any chose in action in favor of an assignee, unless it might have been prosecuted in such court if no assignment had been made.

[3] In this case, as the decree had dismissed the bill "for want of jurisdiction", this Court was required, under the direct appeal, to determine whether the district court had the jurisdiction which it had denied; and its decree denying jurisdiction was reversed.

nevertheless be granted. *Marshall* v. *Holmes,* 141 U. S. 589, 601. Where the plaintiff has the undoubted right to invoke its federal jurisdiction the court is bound to take the case and proceed to judgment. *Kline* v. *Construction Co.,* 260 U. S. 226, 234. And when the court takes jurisdiction and determines that in the light of § 265 of the Code it is either authorized or prevented from granting the injunction prayed, its decision, whether the relief sought be granted or denied, is plainly not a decision upon a jurisdictional issue but upon the question whether there is or is not equity in the particular bill; that is, a decision going to the merits of the controversy.

In the present case the district court, as shown by the memorandum and decree, did not decline to exercise jurisdiction. On the contrary, it took jurisdiction of the cause, and, determining, upon consideration of the bill, that it was prohibited by § 265 from granting the relief sought, dismissed the bill; thereby, in effect, sustaining the ground of the motion relating to want of equity in the bill. This decision, not being upon a jurisdictional issue, but on the merits, was only reviewable by appeal to the Circuit Court of Appeals. *De Rees* v. *Costaguta, supra,* p. 173. The direct appeal to this Court was therefore improvidently allowed.

Prior to the Act of September 14, 1922, c. 305, 42 Stat. 837, this would have resulted in the dismissal of the appeal for want of jurisdiction here. *Smith* v. *McKay, supra,* p. 359; *O'Neal* v. *United States, supra,* p. 38; *Excelsior Pipe Co.* v. *Bridge Co., supra,* p. 285; *DeRees* v. *Costaguta, supra,* p. 174. That act, however, amends the Judicial Code by adding § 238(a), providing, *inter alia,* that an appeal taken to this Court in a case wherein it should have been taken to a circuit court of appeals, shall not for such reason be dismissed, but shall be transferred to that court for determination as if the appeal had been duly taken to it. As this appeal involves a question upon

the merits of the controversy which should have been taken to the Circuit Court of Appeals for the Eighth Circuit instead of to this Court, it must, pursuant to the statute, be transferred to that court.

It is so ordered.

WESTERN UNION TELEGRAPH COMPANY *v.* CZIZEK.

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

No. 300. Argued February 26, 27, 1924.—Decided March 10, 1924.

1. A contract between a telegraph company and the sender of an unrepeated interstate message, on a form filed with and approved by the Interstate Commerce Commission, valued the message at $50.00 in default of any higher valuation specified by the sender and paid for at a higher rate, and relieved the company of liability beyond that sum for mistakes or delays in the transmission or delivery, or for the non-delivery of the message, caused by the negligence of its servants or otherwise. *Held* valid and applicable although the message was never transmitted, due to the inadvertence of a receiving clerk in filing it in the wrong place, and to subsequent mistaken assurances that it had been sent. P. 284.
2. *Quaere:* Whether this agreed limitation of liability would not have applied even if the failure to transmit had been attributable to gross negligence? P. 285.
3. The reasonableness of such a limitation is determined as of the date of the contract and not by later, prospective rules of the Interstate Commerce Commission. *Id.*
4. *Semble,* that another printed stipulation on the telegram limiting the company's liability for nondelivery, etc., of any unrepeated message to the amount received for sending it, was invalid in this case. *Id.*
5. A stipulation on a telegram exempting the company from liability if claim is not presented in writing within sixty days after filing of the message for transmission, *held* inapplicable where the filing of the message, by the plaintiff's agent, was unknown to the plaintiff during the sixty days, and where the plaintiff thereafter was diligent in presenting his claim. P. 286.

286 Fed. 478, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court for the plaintiff Czizek in an action against the Telegraph Company for damages resulting from the failure to forward and deliver a telegram.

Mr. Francis R. Stark and *Mr. Beverly L. Hodghead,* with whom *Mr. J. H. Richards, Mr. Oliver O. Haga, Mr. Joseph L. Egan* and *Mr. J. Julien Southerland* were on the briefs, for petitioner.

Mr. Richard H. Johnson, with whom *Mr. Carey H. Nixon* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit against the Telegraph Company for failure to forward and deliver to the plaintiff a message from one Jones, found by the Court below to have been acting as agent for the plaintiff in the matter. The District Court found for the defendant, but the judgment was reversed by the Circuit Court of Appeals, 272 Fed. 223, and at a second trial, in deference to the Circuit Court of Appeals, a judgment was entered for the plaintiff, which was affirmed. 286 Fed. 478. Certiorari granted. 262 U. S. 739.

The plaintiff owned fifty shares of stock in the Idaho National Bank at Boise, Idaho. Miller, vice president of the bank, was buying the stock with a view to a merger. He talked with the plaintiff and told him that he would buy his stock and that they would have no difficulty in agreeing on the price. The plaintiff told this to Jones, an attorney at Boise, who owned fifteen shares, asked Jones to act for him, saying that they would sell their stock together, and told Miller that Jones would represent him. Later Miller called on Jones and at Miller's request Jones, on November 30, 1917, wrote on a Western Union form—directing the Company to send, "subject to the terms on

back hereof", the following telegram addressed to the plaintiff at 5767 Shafter Avenue, Oakland, California, where the plaintiff lived: "Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow. Will you take ninety dollars per share for yours. I am inclined to accept offer for mine. Answer." The form had been filed with the Interstate Commerce Commission and the Commission had approved the provisions and rates that it set forth. Among the terms on the back of the form were the following: "To guard against mistakes or delays, the sender . . . should order it REPEATED, that is, telegraphed back to the originating office for comparison," an additional half rate being charged. "Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed . . . 1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any UNREPEATED telegram, beyond the amount received for sending the same . . . 2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof."

This telegram was an unrepeated message of the class known as night letter, and was not specially valued or paid for upon a value in excess of $50. It was the duty of the receiving clerk, Margaret Brown, to indorse her in-

itials, the filing time and the amount of toll received, and to place the message on the sending hook for transmission. By inadvertence, although a competent clerk, she put it in a file of earlier messages instead of upon the hook, and it was not sent. The next day Jones's son inquired at the telegraph office for an answer and being told that there was none, asked if they had sent the telegram and was answered yes. On December 3 he asked again and was told that the plaintiff had received the message. Miller was ready and willing to buy the stock until December 5, 1917, and the plaintiff testified that he would have sold if he had received the telegram. Later the stock became worthless. The District Court found that there was no gross negligence but the Circuit Court of Appeals distinguished between a failure to take the first step toward transmission and some later neglect, held that the failure was not and, as a matter of public policy, could not be within the protection of the terms that we have stated and held the company liable for $4,500 with interest at seven per cent. from June 18, 1918, on which day the plaintiff made a demand.

The plaintiff, the respondent here, does not deny that he is bound by the terms that we have recited. That was assumed below and is established law. *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566. Those terms apply as definitely to a nondelivery in consequence of a neglect or oversight at the first office as at any other. The moment that the message is received the contract attaches along with the responsibility, and the transit begins. We can perceive no legal distinction between that moment and the next when the message is handed to a transmitting clerk, or that on which a copy is given to a boy at the further end. The hand that holds the paper technically is that of the Company, but no more at the beginning than at the end, and as in fact it is that of servants, reasonable self-protection is allowed to the

master against their neglects. One such self-protection sanctioned by the decisions is a valuation of the message, with liberty to the sender to fix a higher value on paying more for it. *Adams Express Co.* v. *Croninger,* 226 U. S. 491. The plaintiff finds no difficulty in valuing the message now. It was at least equally possible to value it when it was sent. See *Western Union Telegraph Co.* v. *Esteve Bros. & Co.,* 256 U. S. 566, 574; *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co.,* 251 U. S. 27.

When the message is valued it may be doubted whether the valuation can be affected by the intensity of the vituperative epithet applied to an admitted fault. *Kirsch* v. *Postal Telegraph Cable Co.,* 100 Kans. 250, 252. At all events something more would have to be shown than is proved here to take the case out of the general rule. The act of the receiving clerk cannot reasonably be supposed to have been more than a momentary inadvertence. It was not a wilful wrong. The answers to the inquiries were probably the natural consequence of the first error, and the second answer probably was too late to have had any effect upon the plaintiff's position. See *Primrose* v. *Western Union Telegraph Co.,* 154 U. S. 1, 15. With regard to the amount of the valuation, if it is too low now, *Unrepeated Message Case,* 61 I. C. C. 541, it was reasonable in 1917. *Primrose* v. *Western Union Telegraph Co.,* 154 U. S. 1, 15. *Unrepeated Message Case,* 44 I. C. C. 670. Whatever effect may be given to the judgment of the Commission in the later case, it was not intended to be retroactive. The rules prescribed by the Commission were to take effect on July 13, 1921.

We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case. *Unrepeated Message Case,* 61 I. C. C. 541.

Another clause not mentioned as yet reads: "The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission." This could not be held to apply literally to a case where through the fault of the Company the plaintiff did not know of the message until the sixty days had passed. It might be held to give the measure of a reasonable time for presenting the claim after the fact was known, in the absence of anything more. But here the plaintiff called on Hackett, the General Manager at Boise, about February 14, 1918, as soon as he knew the facts. Directly after, he received a letter from Hackett regretting the occurrence and enclosing the amount paid by the plaintiff as toll. Three days later the plaintiff returned the check by letter saying "an acceptance of this check on my part might be construed as a settlement of the matter," so that the defendant then had written notice that a claim was made. There was further communication and finally on June 18 the plaintiff made a formal written demand. We should be unwilling to decide that the action was barred by this clause. But we are of opinion that his claim is limited to fifty dollars for the reasons given above.

Judgment reversed.

MR. JUSTICE MCKENNA dissents.

DORCHY *v.* STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 163. Argued January 15, 16, 1924.—Decided March 10, 1924.

1. The system of compulsory arbitration of industrial disputes set up by the Court of Industrial Relations Act of Kansas, and held unconstitutional in *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, as applied to packing plants, is, for the same reasons, invalid as applied to coal mines of that State. P. 289.

2. *Quaere:* Whether as a matter of statutory construction, § 19 of this act, which declares that one who uses his position as an officer of a union, or as an employer, to influence violations of the act or of valid orders of the Court of Industrial Relations shall be deemed guilty of a felony, is separable from the system of compulsory arbitration held invalid? P. 290.
3. A declaration in a statute that it shall be conclusively presumed the legislature would have passed the statute without any part of it found invalid by the courts, provides a rule which may aid in determining the legislative intent, but is not an inexorable command. *Id.*
4. In reviewing a judgment of a state court, this Court may not only correct errors but may make such disposition of the case as justice may require in view of changes in law and fact that have supervened since the judgment was entered. P. 289.
5. Where a conviction under § 19 of the above mentioned statute was affirmed by the Supreme Court of Kansas before this Court had, in another case, declared a closely related part of the same act unconstitutional, *held* that the question whether § 19 is separable should be remitted for primary determination by that court. P. 290.

112 Kans. 235, reversed.

ERROR to a judgment of the Supreme Court of Kansas which affirmed a judgment entered against the plaintiff in error in a criminal prosecution, under § 19 of the Court of Industrial Relations Act of Kansas.

Mr. John F. McCarron and *Mr. Phil H. Callery,* with whom *Mr. Redmond S. Brennan* and *Mr. Frank Bonar Hegarty* were on the brief, for plaintiff in error.

Mr. John G. Egan, Assistant Attorney General of the State of Kansas, and *Mr. Chester I. Long,* with whom *Mr. Charles B. Griffith,* Attorney General, *Mr. Austin M. Cowan* and *Mr. William E. Stanley* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Court of Industrial Relations Act was approved January 23, 1920. Laws of Kansas, 1920, Special Session,

c. 29. The purpose of the statute is to ensure continuity of operation in coal mining and other businesses declared to be affected with a public interest.[1] The means provided for accomplishing this is a system of compulsory arbitration of industrial disputes. The instrument is the so-called industrial court. Upon it is conferred power to investigate all matters involved in such controversies; to make findings thereon; to issue such orders as it may deem needful, fixing the wages to be paid, the hours of work, the rules for work, and the working and living conditions. The provisions in aid of the enforcement of this system are both comprehensive and detailed. The employer is prohibited, among other things, from limiting or ceasing operations with a view to defeating the purpose of the statute. Likewise, every association of persons (*e. g.*, trade unions) is prohibited from acting to that end. In effect, strikes and lockouts, the boycott and picketing, are made unlawful. Any person violating any provision of the statute, or any order of the so-called court, is declared guilty of a misdemeanor. Some of the provisions of the act were considered in *Howat* v. *Kansas,* 258 U. S. 181, and in *Chas. Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522.

Section 19 provides that any officer of a union of workmen engaged in an industry within the provisions of the act, who shall wilfully use the power incident to his official position to influence any other person to violate any provision of the statute or any valid order of the Court of

[1] Section 2 of the statute, as enacted, conferred upon the Court of Industrial Relations the functions theretofore performed by the Public Utilities Commission. These functions were restored to a Public Utilities Commission by c. 260, Laws of 1921. There was conferred upon the Court of Industrial Relations by c. 262 of the Laws of 1921 the functions theretofore performed by the Commissioner of Labor and Industry, and by c. 263 of the Laws of 1921 the functions theretofore performed by the Industrial Welfare Commission. These latter powers were also enlarged.

Industrial Relations, shall be deemed guilty of a felony punishable by a fine not to exceed $5,000, or by imprisonment at hard labor, not to exceed two years, or by both such fine and imprisonment. Under this section an information was filed against Dorchy, a union official, for calling a strike in a coal mine. He was found guilty. The judgment entered was affirmed by the highest court of the State, 112 Kans. 235; and a rehearing was denied. The case is here on writ of error under § 237 of the Judicial Code as amended. It is contended that § 19 is void, because it prohibits strikes; and that to do so is denial of the liberty guaranteed by the Fourteenth Amendment.

After the judgment under review was entered in the Supreme Court of Kansas, this Court declared, in the *Wolff Packing Co. Case, supra,* p. 544, that the system of compulsory arbitration as applied to packing plants, violates the Federal Constitution. For the reasons there set forth, it is unconstitutional, also, as applied to the coal mines of that State. The question suggests itself whether § 19 has not, therefore, necessarily fallen as a part of the system of compulsory arbitration. If so, there is no occasion to consider the specific objection to the provisions of that section. This Court has power not only to correct errors in the judgment entered below, but, in the exercise of its appellate jurisdiction, to make such disposition of the case as justice may now require. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis,* 224 U. S. 503, 506. In determining what justice requires the Court must consider changes in law and in fact which have supervened since the judgment was entered below. *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione,* 248 U. S. 9, 21. If § 19 falls as the result of the decision in the *Wolff Packing Co. Case,* the effect is the same as if the section had been repealed without any reservation.

A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand

if separable from the bad. *Berea College* v. *Kentucky,* 211 U. S. 45, 54–56; *Carey* v. *South Dakota,* 250 U. S. 118, 121. But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall. Section 19 does not, in terms, prohibit the calling of strikes or influencing workingmen to strike. It merely declares that one who uses his official position, or his position as an employer, to "influence, impel, or compel any other person to violate any of the provisions of this act, or any valid order of said Court of Industrial Relations, shall be deemed guilty of a felony." Most of the provisions of the original act are very intimately connected with the system of compulsory arbitration. Whether § 19 is so interwoven with the system held invalid that the section cannot stand alone, is a question of interpretation and of legislative intent. Compare *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126. Section 28 of the act,[2] (which resembles that discussed in *Hill* v. *Wallace,* 259 U. S. 44, 70, 71) provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command.

The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court. *Gatewood* v. *North Carolina,* 203 U. S. 531, 543; *Guinn* v. *United States,* 238 U. S. 347, 366;

[2] Section 28: "If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court."

Schneider Granite Co. v. *Gast Realty Co.*, 245 U. S. 288, 290. In cases coming from the lower federal courts, such questions of severability, if there is no controlling state decision, must be determined by this Court. Compare *Myers* v. *Anderson*, 238 U. S. 368, 381; *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 311. In cases coming from the state courts, this Court, in the absence of a controlling state decision, may, in passing upon the claim under the federal law, decide, also, the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to the state court. We think that course should be followed in this case.

The Supreme Court of Kansas has already dealt, to some extent, with the effect of our decision upon other sections of the act. When a motion was made there in the *Wolff Packing Co. Case* to spread the mandate of this Court upon its record, the state court held that the order of the Court of Industrial Relations under review remains in force in so far as it regulates hours of labor and weekly rest periods. 114 Kans. 304. The judgment then entered was modified November 10, 1923, upon a rehearing.[3] [114 Kans. 487.] The relation of § 19 to the provisions held invalid is a different matter. So far as appears, the state court has not passed upon the question whether § 19, being an intimate part of the system of compulsory arbitration held to be invalid, falls with it. In order that the state court may pass upon this question, its judgment in this case, which was rendered before our decision in the *Wolff Packing Co. Case*, should be vacated. Compare *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis, supra*, p. 509. To this end the judgment is

Reversed.

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[3] The action of the state court has been brought here for review by proceedings entered February 16, 1924, and not yet disposed of.

RADICE *v.* PEOPLE OF THE STATE OF NEW YORK.

ERROR TO THE CITY COURT OF BUFFALO, STATE OF NEW YORK.

No. 176. Argued January 17, 18, 1924.—Decided March 10, 1924.

1. A New York statute prohibiting employment of women in restaurants in large cities (cities of the first and second class) between the hours of 10 p. m. and 6 a. m., *held* not an arbitrary and undue interference with the liberty of contract of the women and their employers, but justifiable as a health measure. P. 294. *Adkins* v. *Children's Hospital,* 261 U. S. 525, distinguished.
2. Whether this kind of work is so substantially and especially detrimental to the health and welfare of women engaging in it as to justify its suppression in their case, is a question of fact as to which the Court is unable to say that the finding of the legislature was clearly unfounded. *Id.*
3. The regulation does not deny the equal protection of the laws either (a) because it applies only to first and second class cities, or (b) because it does not apply to women employed in restaurants as singers and performers, to attendants in ladies' cloak rooms and parlors and those employed in hotel dining rooms and kitchens, or in lunch rooms or restaurants conducted by employers solely for the benefit of their employees. P. 296.
4. To be violative of the Equal Protection Clause, the inequality produced by a statute must be actually and palpably unreasonable and arbitrary. *Id.*

234 N. Y. 518, affirmed.

ERROR to a judgment entered in the City Court of Buffalo upon remittitur from the Court of Appeals affirming a conviction of plaintiff in error for violating a statute forbidding night employment of women.

Mr. Henry W. Hill, with whom *Mr. Dean R. Hill* was on the briefs, for plaintiff in error.

Mr. Walter F. Hofheins and *Mr. Irving I. Goldsmith,* Deputy Attorney General of the State of New York, with

whom *Mr. Carl Sherman,* Attorney General, and *Mr. John A. Van Arsdale* were on the briefs, for defendant in error.

Mr. Justice Sutherland delivered the opinion of the Court.

Plaintiff in error was convicted in the City Court of Buffalo upon the charge of having violated the provisions of a statute of the State of New York, prohibiting the employment of women in restaurants in cities of the first and second class, between the hours of 10 o'clock at night and 6 o'clock in the morning. Laws of New York, 1917, c. 535, p. 1564.[1]

An appeal was prosecuted through intermediate appellate courts to the Court of Appeals, where the judgment was affirmed without an opinion. The record having been remitted to the City Court, the writ of error was allowed to that court. *Aldrich* v. *Ætna Co.,* 8 Wall. 491, 495; *Hodges* v. *Snyder,* 261 U. S. 600, 601.

The validity of the statute is challenged upon the ground that it contravenes the provisions of the Fourteenth Amendment, in that it violates (1) the due process clause, by depriving the employer and employee of their liberty of contract, and (2) the equal protection clause, by an unreasonable and arbitrary classification.

1. The basis of the first contention is that the statute unduly and arbitrarily interferes with the liberty of two

[1] "3. In cities of the first and second class no female over the age of sixteen years shall be employed, permitted or suffered to work in or in connection with any restaurant more than six days or fifty-four hours in any one week, or more than nine hours in any one day, or before six o'clock in the morning or after ten o'clock in the evening of any day. This subdivision shall, however, not apply to females employed in restaurants as singers and performers of any kind, or as attendants in ladies' cloak rooms and parlors, nor shall it apply to females employed in or in connection with the dining rooms and kitchens of hotels, or in or in connection with lunch rooms or restaurants conducted by employers solely for the benefit of their own employees."

adult persons to make a contract of employment for themselves. The answer of the State is that night work of the kind prohibited, so injuriously affects the physical condition of women, and so threatens to impair their peculiar and natural functions, and so exposes them to the dangers and menaces incident to night life in large cities, that a statute prohibiting such work falls within the police power of the State to preserve and promote the public health and welfare.

The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women. We cannot say that the conclusion is without warrant. The loss of restful night's sleep can not be fully made up by sleep in the day time, especially in busy cities, subject to the disturbances incident to modern life. The injurious consequences were thought by the legislature to bear more heavily against women than men, and, considering their more delicate organism, there would seem to be good reason for so thinking. The fact, assuming it to be such, properly may be made the basis of legislation applicable only to women. Testimony was given upon the trial to the effect that the night work in question was not harmful; but we do not find it convincing. Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legisla-

tive determination. *Holden* v. *Hardy,* 169 U. S. 366, 395. The language used by this Court in *Muller* v. *Oregon,* 208 U. S. 412, 422, in respect of the physical limitations of women, is applicable and controlling:

"The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her."

Adkins v. *Children's Hospital,* 261 U. S. 525, is cited and relied upon; but that case presented a question entirely different from that now being considered. The statute in the *Adkins Case* was a wage-fixing law, pure and simple. It had nothing to do with the hours or conditions of labor. We held that it exacted 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" of the employee; but, referring to the *Muller Case,* we said (p. 553) that "the physical differences [between men and women] must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account." See also *Riley* v. *Massachusetts,* 232 U. S. 671; *Miller* v. *Wilson,* 236 U. S. 373; *Bosley* v. *McLaughlin,* 236 U. S. 385; and compare *Truax* v. *Raich,* 239 U. S. 33, 41, and *Coppage* v. *Kansas,* 236 U. S. 1, 18–19.

2. Nor is the statute vulnerable to the objection that it constitutes a denial of the equal protection of the laws. The points urged under this head are (a) that the act discriminates between cities of the first and second class and other cities and communities; and (b) excludes from its operation women employed in restaurants as singers and performers, attendants in ladies' cloak rooms and parlors, as well as those employed in dining rooms and kitchens of hotels and in lunch rooms or restaurants conducted by employers solely for the benefit of their employees.

The limitation of the legislative prohibition to cities of the first and second class does not bring about an unreasonable and arbitrary classification. *Packard* v. *Banton, ante,* 140; *Hayes* v. *Missouri,* 120 U. S. 68. Nor is there substance in the contention that the exclusion of restaurant employees of a special kind, and of hotels and employees' lunch rooms, renders the statute obnoxious to the Constitution. The statute does not present a case where some persons of a class are selected for special restraint from which others of the same class are left free (*Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 564); but a case where all in the same class of work, are included in the restraint. Of course, the mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must not be "purely arbitrary, oppressive or capricious." *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92. But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, in order to encounter the challenge of the Constitution, must be "actually and palpably unreasonable and arbitrary." *Arkansas Natural Gas Co.* v. *Railroad Commission,* 261 U. S. 379, 384, and cases cited. Thus classifications have been sustained which are based upon differences between fire insurance and other kinds of insurance, *Orient Insur-*

ance Co. v. *Daggs,* 172 U. S. 557, 562; between railroads and other corporations, *Tullis* v. *Lake Erie & Western R. R. Co.,* 175 U. S. 348, 351; between barber shop employment and other kinds of labor, *Petit* v. *Minnesota,* 177 U. S. 164, 168; between "immigrant agents" engaged in hiring laborers to be employed beyond the limits of a State and persons engaged in the business of hiring for labor within the State, *Williams* v. *Fears,* 179 U. S. 270, 275; between sugar refiners who produce the sugar and those who purchase it, *American Sugar Refining Co.* v. *Louisiana, supra.* More directly applicable are recent decisions of this Court sustaining hours of labor for women in hotels but omitting women employees of boarding houses, lodging houses, etc., *Miller* v. *Wilson, supra,* at p. 382; and limiting the hours of labor of women pharmacists and student nurses in hospitals but excepting graduate nurses. *Bosley* v. *McLaughlin, supra,* at pp. 394–396. The opinion in the first of these cases was delivered by Mr. Justice Hughes, who, after pointing out that in hotels women employees are for the most part chambermaids and waitresses; that it cannot be said that the conditions of work are the same as those which obtain in the other establishments; and that it is not beyond the power of the legislature to recognize the differences, said (pp. 383–384):

"The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is

specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.' *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227. Upon this principle which has had abundant illustration in the decisions cited below, it cannot be concluded that the failure to extend the act to other and distinct lines of business, having their own circumstances and conditions, or to domestic service, created an arbitrary discrimination as against the proprietors of hotels."

The judgment below is

Affirmed.

FEDERAL TRADE COMMISSION *v.* AMERICAN TOBACCO COMPANY.

FEDERAL TRADE COMMISSION *v.* P. LORILLARD COMPANY, INC.

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

Nos. 206 and 207. Argued March 7, 1924.—Decided March 17, 1924.

1. The clause of the Federal Trade Commission Act, § 6(d), empowering the commission to investigate and report facts as to alleged violation of the Anti-Trust Acts when directed by either house of Congress, will not support its demand for disclosure of the records of a corporation in an investigation directed by the Senate not based on such an alleged violation. P. 305.
2. The mere facts of carrying on commerce not confined within state lines and of being organized as a corporation do not make men's affairs public. *Id.*
3. A governmental fishing expedition into the papers of a private corporation, on the possibility that they may disclose evidence of crime, is so contrary to first principles of justice, if not defiant of

the Fourth Amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in most explicit language. P. 306.

4. The above act, (§ 9), provides that the commission shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any documentary evidence of any corporation being investigated or proceeded against, and that, to enforce compliance, writs of mandamus may issue upon application of the Attorney General. *Held,* that access is confined to such documents as are relevant as evidence to the inquiry or complaint before the commission, and that their disclosure cannot be compelled without some evidence of their relevancy and upon a reasonable demand. *Id.*

283 Fed. 999, affirmed.

ERROR to judgments of the District Court denying petitions for writs of mandamus brought by the Attorney General to compel disclosure of their records, by the defendants, to the Federal Trade Commission.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck, Mr. W. H. Fuller* and *Mr. Adrien F. Busick* were on the brief, for plaintiff in error.

The Federal Trade Commission Act confers authority on the Commission to inspect the documents and correspondence specified in the prayer of the petitions. The access here prayed was in connection with both an "investigation" under § 6(a), and with a "proceeding" under § 5. The documents and correspondence demanded were of a character, and limited to a period, pertinent to the inquiry and the charge of a violation of law. The objection that correspondence connected with intrastate transactions can not be had is not sound. No privilege attaches to correspondence between a corporation engaged in interstate commerce and its customers written in the ordinary course of business. *Interstate Commerce Comm.* v. *Baird,* 194 U. S. 25.

Congress is vested with visitorial power over corporations within the field committed to its jurisdiction and may constitutionally confer authority on executive officers and administrative bodies to exercise such power to enforce laws which they are required to administer. *Hale* v. *Henkel,* 201 U. S. 43; *Guthrie* v. *Harkness,* 199 U. S. 148; *Wilson* v. *United States,* 221 U. S. 361.

Statutes empowering executive officers or administrative bodies to inspect books, documents, and papers of corporations to ascertain whether laws administered by them are being violated are upheld. *United States* v. *Louisville & Nashville R. R. Co.,* 236 U. S. 318; *United States* v. *Union Pacific R. R. Co.,* 98 U. S. 569. Laws empowering state public utility commissions to inspect the books, papers, and documents of corporations subject to their jurisdiction obtain in a number of States. The provisions of these statutes appear to be generally acquiesced in, and have been specifically upheld. *Federal Mining Co.* v. *Public Utilities Comm.,* 26 Idaho, 391; *Federal Trade Comm.* v. *Baltimore Grain Co.,* 284 Fed. 886. *Harriman* v. *Interstate Commerce Comm.,* 211 U. S. 407, distinguished.

Visitorial power applies with equal force to private corporations and corporations in quasi-public business. *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541; *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322; *People* v. *American Ice Co.,* 54 Misc. (N. Y.) 67; *United States* v. *Union Pacific R. R. Co.,* 98 U. S. 569.

Visitorial power of the Government over corporations is not the same as subpoena power or the power to grant a bill of discovery. It comprehends something more than the right to have competent and relevant evidence produced in the trial of a case. *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322; *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541; *Federal Mining Co.* v. *Public Utilities Comm.,* 26 Idaho, 391.

The power committed to the Commission to inspect documents in connection with investigations authorized by § 6 (a) as a basis of reports to Congress, is constitutional. It was recently argued in another case that, as an indispensable incident to its power to legislate, Congress had power to ascertain the facts respecting any subject committed to its legislative jurisdiction. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Legal Tender Cases,* 110 U. S. 421; 12 Wall. 457, 536; *In re Chapman,* 166 U. S. 661; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447, 476; *Smith* v. *Interstate Commerce Comm.,* 245 U. S. 33; *McDonald* v. *Keeler,* 99 N. Y. 463; *People* v. *Sharp,* 107 N. Y. 427; *Bender* v. *Milliken,* 185 N. Y. 35; *Sheppard* v. *Bryant,* 191 Mass. 591; 9 A. L. R. 1341; that Congress could constitutionally authorize an administrative body to compel the production of facts concerning any subject over which Congress had jurisdiction, for the reasons (*a*) that the power to collect information is not legislative power and may be delegated; Watson, Const., p. 114; *Burton* v. *United States,* 202 U. S. 344, 367; *Wayman* v. *Southard,* 10 Wheat. 1, 42, 43; *Interstate Commerce Comm.* v. *Goodrich Transit Co.,* 224 U. S. 194; *Bender* v. *Milliken,* 185 N. Y. 35; (*b*) that the act lays down a sufficiently definite rule for the guidance of the Commission; *Field* v. *Clark,* 143 U. S. 649; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Buttfield* v. *Stranahan,* 192 U. S. 470; *United States* v. *Grimaud,* 220 U. S. 506; (*c*) that it is a proper and constitutional means for carrying into execution the legislative power of Congress; *McCulloch* v. *Maryland,* 4 Wheat. 316, 421; *Legal Tender Cases,* 110 U. S. 421, 440; *United States* v. *Fisher,* 2 Cranch, 358, 396; *First National Bank* v. *Union Trust Co.,* 244 U. S. 416, 424. If natural persons may be summoned to appear and produce documents for inspection of either house of Congress, or of its committees when duly authorized by either house, it would appear compe-

tent for a committee, so authorized, to visit the offices of persons and demand an inspection of relevant books and papers. It would appear that this power may be exercised, at least with respect to corporations, because of the superior power of the State over corporations as distinguished from natural persons. The superiority of this method over that of requiring the production of books and papers at distant points is clear.

To permit the inspection prayed in the Commission's petitions would not violate the Fourth Amendment. Corporations are not entitled to as full a measure of protection under the Fourth Amendment as natural persons. *Essgee Co.* v. *United States,* 262 U. S. 151; *Wilson* v. *United States,* 221 U. S. 361.

Unlike a natural person, a corporation may be compelled to produce its books and papers to convict it of violations of penal statutes or to inflict forfeiture. This Court holds, however, that a corporation is entitled to some protection under this Amendment. It is entitled, presumably, not to have its offices denuded of records to an extent which will render it difficult, if not impossible, to conduct its business. *Hale* v. *Henkel,* 201 U. S. 43, 77. Corporations are also entitled under the Amendment not to have their offices broken open and their papers seized and carried away without warrant of law. *Silverthorne Co.* v. *United States,* 251 U. S. 385.

"Probable cause," "specific charge," or "materiality" need not be proven as a condition precedent to the exercise of the visitorial power. *Hale* v. *Henkel, supra; Wilson* v. *United States, supra.* But if a specific charge must be formulated and probable cause made to appear before an examination can be had under the Federal Trade Commission Act, both conditions have been fully met in the cases at bar. A specific charge of a violation of law was set forth in the notice and demand, and especially in the formal complaint which the Commission filed. Probable

cause to believe that evidence would be found material to this charge was amply shown in the Commission's preliminary report in response to Senate Resolution 129.

The notice and demand was sufficiently specific even under the tests applied to subpœnas duces tecum. *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541.

The companies can not assert any constitutional privilege on behalf of their customers.

Mr. William D. Guthrie, with whom *Mr. William B. Bell, Mr. William R. Perkins* and *Mr. Bernard Hershkopf* were on the brief, for defendant in error in No. 207.

Mr. Junius Parker, with whom *Mr. John Walsh* and *Mr. Jonathan H. Holmes* were on the brief, for defendant in error in No. 206.

Mr. Justice Holmes delivered the opinion of the Court.

These are two petitions for writs of mandamus to the respective corporations respondent, manufacturers and sellers of tobacco, brought by the Federal Trade Commission under the Act of September 26, 1914, c. 311, § 9, 38 Stat. 717, 722, and in alleged pursuance of a resolution of the Senate passed on August 9, 1921. The purpose of the petitions is to require production of records, contracts, memoranda and correspondence for inspection and making copies. They were denied by the District Court. 283 Fed. 999. The resolution directs the Commission to investigate the tobacco situation as to domestic and export trade with particular reference to market price to producers, &c. The act directs the Commission to prevent the use of unfair methods of competition in commerce and provides for a complaint by the Commission, a hearing and a report, with an order to desist if it deems the use of a prohibited method proved. The Commission and the party concerned are both given a resort to the Circuit

Court of Appeals. § 5. By § 6 the Commission shall have power (a) to gather information concerning, and to investigate the business, conduct, practices and management of any corporation engaged in commerce, except banks and common carriers, and its relation to other corporations and individuals; (b) to require reports and answers under oath to specific questions, furnishing the Commission such information as it may require on the above subjects; (d) upon the direction of the President or either House of Congress to investigate and report the facts as to alleged violation of the Anti-trust Acts. By § 9 for the purposes of this act the Commission shall at all reasonable times have access to, for the purposes of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against and shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. In case of disobedience an order may be obtained from a District Court. Upon application of the Attorney General the District Courts are given jurisdiction to issue writs of mandamus to require compliance with the act or any order of the Commission made in pursuance thereof. The petitions are filed under this clause and the question is whether orders of the Commission to allow inspection and copies of the documents and correspondence referred to were authorized by the act.

The petitions allege that complaints have been filed with the Commission charging the respondents severally with unfair competition by regulating the prices at which their commodities should be resold, set forth the Senate resolution, and the resolutions of the Commission to conduct an investigation under the authority of §§ 5 and 6 (a), and in pursuance of the Senate resolution, and for the further purpose of gathering and compiling information concerning the business, conduct and practices, &c., of

each of the respondent companies. There are the necessary formal allegations and a prayer that unless the accounts, books, records, documents, memoranda, contracts, papers and correspondence of the respondents are immediately submitted for inspection and examination and for the purpose of making copies thereof, a mandamus issue requiring, in the case of the American Tobacco Company, the exhibition during business hours when the Commission's agent requests it, of all letters and telegrams received by the Company from, or sent by it to all of its jobber customers, between January 1, 1921, to December 31, 1921, inclusive. In the case of the P. Lorillard Company the same requirement is made and also all letters, telegrams or reports from or to its salesmen, or from or to all tobacco jobbers' or wholesale grocers' associations, all contracts or arrangements with such associations, and correspondence and agreements with a list of corporations named.

The Senate resolution may be laid on one side as it is not based on any alleged violation of the Anti-trust Acts, within the requirement of § 6(d) of the act. *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 329. The complaints, as to which the Commission refused definite information to the respondents, and one at least of which, we understand, has been dismissed, also may be disregarded for the moment, since the Commission claims an unlimited right of access to the respondents' papers with reference to the possible existence of practices in violation of § 5.

The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33, 43. Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize

one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrevelant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, and as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville & Nashville R. R. Co.,* 236 U. S. 318, 335. The question is a different one where the State granting the charter gives its Commission power to inspect.

The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. Wigram, Discovery, 2d ed., § 293. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable. *Essgee Co.* v. *United States,* 262 U. S. 151, 156, 157. A general subpœna in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. *Hale* v. *Henkel,* 201 U. S. 43, 77. In the

state case relied on by the Government, the requirement was only to produce books and papers that were relevant to the inquiry. *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541. The form of the subpœna was not the question in *Wheeler* v. *United States,* 226 U. S. 478, 488.

The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, *Stafford* v. *Wallace,* 258 U. S. 495, 520, 521, but that possibility does not warrant a demand for the whole. For all that appears the corporations would have been willing to produce such papers as they conceived to be relevant to the matter in hand. See *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252, 256. If their judgment upon that matter was not final, at least some evidence must be offered to show that it was wrong. No such evidence is shown.

We have considered this case on the general claim of authority put forward by the Commission. The argument for the Government attaches some force to the investigations and proceedings upon which the Commission had entered. The investigations and complaints seem to have been only on hearsay or suspicion—but, even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 408. *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401.

Judgments affirmed.

FIRST NATIONAL BANK OF COLUMBUS, OHIO, *v.* LOUISIANA HIGHWAY COMMISSION ET AL.

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

No. 509. Motion to affirm submitted November 26, 1923.—Decided March 17, 1924.

An allegation of a bill in the District Court that the amount involved exceeds $3,000.00, exclusive of interest and costs, is not enough to show jurisdiction in that regard, when the other allegations do not tend to support, but contradict, the claim. P. 310.

Affirmed.

On motion to affirm a decree of the District Court, dismissing a bill for want of jurisdiction.

Mr. W. M. Barrow, for appellees, in support of the motion to affirm. *Mr. George Seth Guion,* Assistant Attorney General of the State of Louisiana, was also on the brief.

No brief filed for appellant.

Mr. Justice Butler delivered the opinion of the Court.

Jurisdiction was invoked solely on the ground of diversity of citizenship. The District Court held that the required amount, $3,000, was not involved, and for that reason dismissed the case. Appeal was taken under § 238 of the Judicial Code. The appellees move to affirm under § 5 of Rule 6.

The complaint alleges that the appellant is the holder of real estate and a taxpayer in the Parish of Jefferson, Louisiana; that in 1919 state highway bonds were sold to provide funds for the construction of certain highways, one of which was to extend from Hammond to New Orleans approximately paralleling the Illinois Central Railroad through the Parishes of Tangipahoa, St. John

the Baptist, St. Charles, and Jefferson to the line of Orleans Parish; that, in violation of law, contracts were let for partial construction of a portion of this highway on a route different from that fixed by law, and that some of the proceeds of the bond issue have been set aside for that purpose; that it is the intention of the Highway Commission forever to abandon construction of a part of the prescribed highway, and it is averred that such abandonment and the diversion and exhaustion of the highway fund will cause irreparable injury to the appellant, impair the contractual obligation with the bondholders, violate appellant's rights as a property holder and taxpayer, and that the amount involved exceeds the sum of $3,000, exclusive of interest and costs. The prayer is that appellees be enjoined from paying the contractor and from paying out the money on any contract not let according to law.

Appellant applied for a temporary injunction. In support of its application, it filed an affidavit of its attorney, stating that the location of the Hammond-New Orleans highway according to law would enhance the property of appellant more than $5,000, and that the exhaustion of the fund would damage appellant in a sum exceeding $5,000. It also filed an affidavit of a resident of the Parish of Jefferson, stating that appellant is the owner of 1400 acres of land situated in the Fourth Drainage District of that parish, and that the drainage tax for the district is $3.50 an acre per year in addition to other taxes.

It is not alleged that the appellant or its property has been or will be subjected to any tax to pay the bonds or to pay any part of the cost of the highway, or that it is the holder of any of the bonds, or that the construction of the highway on the route designated in the contracts will damage its property. The attorney's affidavit does not strengthen the naked conclusion alleged in the com-

plaint. The statements in the other affidavit have no relevancy to the question of jurisdiction.

It must appear on the face of the complaint or otherwise from the proofs that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000. *Pinel* v. *Pinel,* 240 U. S. 594, 597. The value of the object to be gained is the test of the amount involved. *Western & Atlantic Railroad* v. *Railroad Commission,* 261 U. S. 264, 267; *Glenwood Light Co.* v. *Mutual Light Co.,* 239 U. S. 121, 125; *Berryman* v. *Whitman College,* 222 U. S. 334, 345; *Bitterman* v. *Louisville & Nashville R. R. Co.,* 207 U. S. 205, 225; *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322, 336. The mere assertion that more than the required amount is involved is not enough where, as in this case, the facts alleged do not even tend to support the claim. There is nothing to indicate that the matter sought to be enjoined would be of any pecuniary detriment to the appellant or would in any way detract from the value of its property. Indeed, it affirmatively appears that the requisite amount or value is not involved. See *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 86. No argument is required to show that the facts set forth in the complaint and affidavits fail to support jurisdiction. Appellees' motion to affirm must be granted.

Judgment affirmed.

CITIZENS SAVINGS BANK & TRUST COMPANY *v.* SEXTON, EXECUTOR OF CHAPMAN, ET AL.

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

No. 261. Argued February 25, 1924.—Decided March 17, 1924.

1. Where the parties to a note and mortgage are citizens of the same State, jurisdiction to collect the note by foreclosure of the mortgage

and deficiency judgment does not exist in the District Court through diversity of citizenship, if one of the defendants is a citizen of that State and the plaintiff, although of another State, acquired the obligations by assignment from the original obligee. Jud. Code, § 24. P. 312.

2. While this restriction does not apply to a plaintiff who, although nominally the assignee, was really the payee, the evidence in the present case fails to sustain the allegation that the payee named in the note acted as the maker's broker in securing the loan from the plaintiff and that the plaintiff was at all times the beneficial owner of the paper. P. 313.
3. The rule that the restriction of Jud. Code, § 24, does not prevent a suit by the assignee on a new and subsequent agreement is inapplicable where the suit is for foreclosure of a mortgage and the relief sought by a deficiency judgment, against a purchaser of the property who assumed its payment, is merely ancillary and incidental to the primary purpose of the bill. *Id.*

Affirmed.

APPEAL from a decree of the District Court dismissing, for want of jurisdiction, a suit on a promissory note and mortgage.

Mr. Lawrence H. Brown, with whom *Mr. Frederick W. Dewart* was on the brief, for appellant.

Mr. James A. Williams, with whom *Mr. Samuel Herrick, Mr. Robert J. Danson* and *Mr. Robert W. Danson* were on the brief, for appellees.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This is an appeal under § 238 of the Judicial Code from a decree dismissing a suit in equity for want of jurisdiction. The question certified for decision arises under the provision in § 24 of the Judicial Code that, "No district court shall have cognizance of any suit . . . to recover upon any promissory note or other chose in action in favor of any assignee . . . unless such suit might

have been prosecuted in such court . . . if no assignment had been made."[1]

The appellant, a citizen of Vermont, brought suit in the Eastern District of Washington, to recover on a promissory note for $5,000 and to foreclose a mortgage on land in the latter State given to secure it. The makers and the payee of the note are citizens of Washington. The note and mortgage were assigned and transferred by the payee to the plaintiff for a valuable consideration. The mortgaged land was thereafter conveyed by the makers of the note to a citizen of Washington, who, it is alleged, in consideration of a subsequent extension of the mortgage by the plaintiff expressly assumed its payment. The purchaser thereafter died. The defendants are the executor of his will, a citizen of Washington, and the devisees, citizens of Michigan and Ohio. A deficiency judgment is prayed against the executor if the proceeds of the foreclosure prove insufficient to pay the debt. Neither the makers nor the payee of the note are sued.

We conclude that the suit was rightly dismissed for want of jurisdiction.

1. Jurisdiction was invoked solely on the ground of diversity of citizenship. However the plaintiff's assignor, the payee of the note, being a citizen of Washington, could not have proceeded in the District Court against another citizen of the same State; and hence, under the restriction in § 24 of the Code, nothing else appearing, the court had no jurisdiction of the suit brought by the plaintiff as assignee. *Gibson* v. *Chew,* 16 Pet. 315, 316; *Kolze* v. *Hoadley,* 200 U. S. 76, 83, and cases cited.

[1] This restriction upon the jurisdiction of the lower federal courts has been in force, with some changes not here material, since the Judiciary Act of 1789. The prior statutes, except § 629 of the Revised Statutes, are set forth in *New Orleans* v. *Quinlan,* 173 U. S. 191, 192. Decisions under them as well as under the Code provision are cited in this opinion without distinction in this respect.

2. If, however, it is shown, upon allegation and proof, that the relation of the parties to a note is otherwise than appears from its terms, and that the plaintiff, although apparently assignee, is in reality the payee, the Code provision does not apply and his right to invoke the jurisdiction of the District Court is not restricted by the fact that the suit could not have been prosecuted by the nominal payee. *Holmes* v. *Goldsmith,* 147 U. S. 150, 159. Such is the case where the nominal payee was merely the agent of the maker for the purpose of negotiating the note and had no beneficial interest therein or right of action thereon. *Blair* v. *Chicago,* 201 U. S. 400, 448; *Kirven* v. *Chemical Co.* (C. C. A.) 145 Fed. 288, 290; *Wachusett Bank* v. *Stove Works* (C. C.) 56 Fed. 321, 323; *Baltimore Trust Co.* v. *Screven County* (D. C.) 238 Fed. 834, 836; *Commercial Trust Co.* v. *Laurens County* (D. C.) 267 Fed. 901, 903.

To bring the suit within this exception the plaintiff alleged that in taking and assigning the note and mortgage, the payee acted as the mere broker and agent of the makers in procuring a loan from the plaintiff and neither became their creditor nor acquired any beneficial interest in the note or mortgage; but that the plaintiff was at all times the beneficial owner. The defendants denied these allegations. These issues of fact were tried by the District Judge, on evidence taken before him, from which he found that the payee, a member of a firm engaged in the mortgage loan business, did not act as agent for the makers, but for his firm, as independent dealers, and acquired the note and mortgage and afterwards sold them to the plaintiff as in "the ordinary case where a person purchases property for resale."

An examination of the evidence discloses no error in this finding; on the contrary it accords with the greater weight of the testimony.

3. It is urged that as the plaintiff seeks a deficiency judgment against the executor on the ground that his

testator expressly assumed payment of the mortgage to the plaintiff, the suit is maintainable in the District Court on this agreement, by reason of diversity of citizenship, without reference to the question whether the payee could have proceeded on the original note. The assignee of a chose in action, although prevented by the Code from maintaining an action thereon in the District Court, may nevertheless, if the requisite diversity of citizenship appears, proceed therein upon a new agreement subsequently made. *American Colortype Co.* v. *Continental Colortype Co.*, 188 U. S. 104, 106; *Kolze* v. *Hoadley, supra*, p. 83. This rule, however, has no application here, since the main object of the suit is the foreclosure of the mortgage, to which the plaintiff must trace title through the assignment, and the relief sought by a deficiency judgment against the executor is merely ancillary and incidental to the primary purpose of the bill. *Blacklock* v. *Small*, 127 U. S. 96, 103; *Kolze* v. *Hoadley, supra*, p. 85.

The decree of the District Court is accordingly

Affirmed.

KELLER ET AL., DOING BUSINESS AS HARTFORD WINDSHIELD COMPANY, *v.* ADAMS-CAMPBELL COMPANY, INC., ET AL.

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

No. 315. Argued February 27, 28, 1924.—Decided April 7, 1924.

1. An ordinary patent case, with the usual issues of invention, breadth of claims and infringement, will not be brought here by certiorari unless it be necessary to reconcile decisions of the circuit courts of appeals on the same patent. P. 319.
2. Certiorari granted under the impression that the case involved an important general question under Rev. Stats., § 4916, as to rights intervening between the issue and reissue of a patent, will be

dismissed when it is found that the case was really disposed of by the lower courts upon the ground of non-infringement. *Id.*
Writ of certiorari to review 287 Fed. 838, dismissed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a decree of the District Court dismissing a bill to enjoin infringement of a patent.

Mr. Wm. A. Loftus, with whom *Mr. Chas. E. Townsend* and *Mr. Jas. E. Kelby* were on the brief, for petitioners.

Mr. Ford W. Harris, for respondents, submitted.

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

This was a suit to enjoin the infringement of a patent for an improvement in auxiliary windshields for automobiles. It was brought on a reissued patent. The reissue was granted on the ground that the original patent was inoperative to protect the real invention due to defective and insufficient and too narrow claims, all of which arose through inadvertence and mistake due to misunderstanding between the inventor and his solicitor. The defect in his claims was alleged to have been called to his attention April 1, 1919, his application for reissue was filed May 22, 1919, six months and ten days after the granting of the original patent, and the patent for reissue was granted July 20, 1920.

A. F. Kipper, who was the active person among the defendants in designing and promoting the manufacture of the windshield charged to be an infringement, was familiar with the device, the specifications and claims of Keller. He conceived of his device in December of 1918, made some models of it in February of 1919, and in association with one Dick Smith, got up some experimental dies and tools for its manufacture and sale in April and May of that year. Kipper was an employee of Adams-

Campbell Company and that firm in August of 1919 made a contract with Kipper to go into the business of making and selling his product.

The suit for infringement was begun July 1, 1921. All the usual defenses were set up, including lack of invention, the invalidity of the reissue and non-infringement. There was only one expert witness produced by the plaintiff as to the originality and utility of the invention and the infringement by the respondent's device. His evidence was presented in an affidavit but he was tendered for cross-examination which the defendants below declined to pursue. No expert evidence was offered by defendants though they introduced a number of patents to show the state of the art.

The patent is for glass wings or auxiliaries secured in an adjustable manner to the main windshield of an automobile. Their principal object is thoroughly to prevent the creation of a draft through the vehicle body, and they are so mounted that they will not obstruct vision and will have a universality of movement on a double hinge such that they can be changed from their normal position of preventing a draft in cold or windy weather to a deflected position permitting varying degrees of draft desirable in hot weather. To avoid the necessity of a frame around the glass, and to hold it safely and firmly and avoid danger to occupants of the car from breakage and flying pieces of glass, a hollow rod extends lengthwise along the shield, and connects with, and spaces apart, clamp brackets along each end of the shield. The rod is attached at its middle to a double hinge joint giving the shield the universal movement already referred to, and having means firmly to lock it in any position. The real difference between the device as shown in the patent and the alleged infringement is in the method by which the glass is clamped. In the patent, the clamps operate on both sides of the ends of the glass, engaging its opposite surfaces. In the de-

fendant's device, these clamps are brought nearer to the center of the shield member because they are held by perforations in the glass and do not need to reach over to the ends.

The District Court dismissed the bill and the Circuit Court of Appeals affirmed this decree. We granted certiorari upon the allegation of the petition, not denied by opposing counsel, that the sole question was whether one who makes and sells articles not covered by the claims of an original patent, but embraced by the enlarged claims of a subsequent valid reissue, applied for within seven months after the original was granted, has intervening rights such that he is not only immune from liability for what he has made and sold, but enjoys an irrevocable and permanent license to continue to make and sell without restriction.

The extent of the operation of the estoppel creating intervening rights in such a case presents a question not free from difficulty. That a reissued patent enlarging claims of the original, although not specifically mentioned in § 4916, Rev. Stats., is authorized by that section, when the failure to claim the larger claims justified by the actual invention was due to inadvertence, accident or mistake, is settled by the decision of this Court in *Topliff* v. *Topliff,* 145 U. S. 156, and other cases. That case also recognizes that one who, pending the application and granting of the reissue, manufactures and sells articles which infringe the reissued patent may be protected on principles of estoppel from the literal application of § 4916, Rev. Stats., which makes the operation of the reissue relate to the date of the original patent. In *Abercrombie & Fitch Co.* v. *Baldwin,* 245 U. S. 198, a change, in the reissue, of the language of an original claim made it cover not only a bent pipe as shown, but a straight pipe as well, where the substance of the invention included both, and it was held that the intervening rights of immunity of the infringer did not ex-

tend beyond the date of the reissue. It is insisted, however, that the *Fitch Case* was not one of an enlarged claim, or at any rate that a reissue was unnecessary because the original claim would have sufficed. The views of the Circuit Courts of Appeals on the general subject of the scope of intervening rights are not entirely easy to reconcile. *Crown Cork & Seal Co.* v. *Aluminum Stopper Co.,* 108 Fed. 845; *General Electric Co.* v. *Richmond Ry. Co.,* 178 Fed. 84; *A. D. Howe Mach. Co.* v. *Coffield Motor Washer Co.,* 197 Fed. 541; *Autopiano Co.* v. *American Player Action Co.,* 222 Fed. 276; *American Automotoneer Co.* v. *Porter,* 232 Fed. 456. The question, if it were really before us, would be one sufficiently important therefore to justify our consideration of it on certiorari.

Both the District Court and the Circuit Court of Appeals in their final disposition of the case gave color of support to the claim of the petitioners that the question of intervening rights was in this case.

The District Judge in dismissing the bill said:

"Without further discussion, I think the defendants occupy the position of one who has intervening rights and under those circumstances I think the plaintiffs are not entitled to a reissue of the patent as against the defendants."

So the Circuit Court of Appeals, after reciting the evidence showing that the defendants had made the shields in question and built the machinery for future manufacture before the patentee applied for reissue and after being advised by counsel that they would not infringe the original patent, said:

"We, therefore, think it clear that the appellees had and have such intervening rights as were properly protected by the court below."

Yet an analysis of the record and the reasons given in the body of the opinions of the two courts leads to a different conclusion. The District Court said of the alleged infringing device:

"The defendants' bracket is an invention. It is a surprise to me that that which the defendants did could be done. The bracket will fit any glass. It is shorter and does not obstruct the view. . . . The defendants' bracket is not an equivalent of the bracket in plaintiffs' original patent, because it does not perform the same functions in the same way, but it performs the function of holding the glass in an entirely different way."

So the Circuit Court of Appeals said:

"That there is nothing of a pioneer nature in Keller's device is abundantly shown by the numerous exhibits appearing in the record of windshields and deflectors, of one kind or another, attached to automobiles long before Keller entered the field. Both his drawings and specifications show that his shield is attached to the machine by brackets that run up and down the glass, holding it at the top and bottom, whereas the appellee's device holds the glass by means of a fixture attached to the face of the glass and which does not extend to either of its ends.

"That for one device to be the equivalent of another it is essential that the former must perform the same function of the latter in substantially the same way is thoroughly settled law."

These passages read in connection with the original and reissued patents and the alleged infringement show that what the courts really held was that the defendants were manufacturing a different invention from that of the plaintiffs, and so could not and did not infringe. Such an ordinary patent case with the usual issues of invention, breadth of claims and non-infringement, this Court will not bring here by certiorari unless it be necessary to reconcile decisions of Circuit Courts of Appeal on the same patent. We therefore find ourselves mistaken in assuming that an important issue of general patent law under § 4916, Rev. Stats., is here involved.

The result is that an order must be entered dismissing the writ of certiorari as improvidently granted at the costs of the petitioner. *Layne & Bowler Corporation* v. *Western Well Works, Inc.*, 261 U. S. 387; *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association*, 242 U. S. 430; *United States* v. *Rimer*, 220 U. S. 547.

Writ dismissed.

JOHN E. THROPP'S SONS COMPANY *v.* SEIBERLING.

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

No. 185. Argued January 21, 22, 1924.—Decided April 7, 1924.

1. Patent No. 941,962, granted to one State, November 30, 1909, claims 4–7, inclusive, 12, 13, and 22–26, inclusive, for the making of the outer shoes or casings of pneumatic automobile tires composed of woven fabric treated with rubber, is void for lack of invention, viewed either as a mechanical or as a method patent. P. 327.
2. The fact that wide and successful use of a device has been made under license from the patentee may be evidence of patentable novelty, but is by no means conclusive and must be weighed in the light of all the circumstances. P. 329.

284 Fed. 746, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals holding the respondent's patent valid and infringed by the petitioner and reversing a decree of the District Court which dismissed the respondent's bill to enjoin infringement.

Mr. Livingston Gifford, with whom *Mr. E. Clarkson Seward* and *Mr. Thomas G. Haight* were on the briefs, for petitioner.

Mr. Melville Church, with whom *Mr. Luther E. Morrison* was on the brief, for respondent.

Mr. Harry Frease, by leave of Court, filed a brief as *amicus curiae.*

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

This is a suit to enjoin the infringement of a patent for the making of the outer shoes or casings of pneumatic automobile tires, composed of woven fabric treated with rubber. We have brought it here because of a conflict of opinion between the Circuit Courts of Appeals of the Sixth and the Third Circuits.

The suit in each Circuit was begun by Frank A. Seiberling, as assignee. That in the Sixth Circuit was filed in 1914 against the Firestone Tire and Rubber Company, and was based on alleged infringement of three claims of a patent to Seiberling and Stevens, No. 762,561, of June 14, 1904, and sixteen claims of a patent to one State, No. 941,962, dated November 30, 1909. The District Judge found both patents valid and infringed, 234 Fed. 370. The Firestone Company appealed and the Circuit Court of Appeals for the Sixth Circuit reversed the District Court, holding that all the claims of the State patent were invalid, and that of the three claims of the Seiberling and Stevens patent, two were invalid and one was not infringed. 257 Fed. 74. The bill in the case before us was brought in 1914 in the District of New Jersey on the same two patents. After the decision in the Sixth Circuit in December, 1918, the plaintiff Seiberling filed in the Patent Office a disclaimer absolute as to eight claims of the State patent and qualified as to the other eleven. No proofs were made in this case to sustain suit upon the Seiberling and Stevens patent, State, the patentee of the other patent, having testified that it had failed. The District Judge dismissed the bill on the ground that the effect of the disclaimers on the State patent was to change it from a machine patent and to make it a method or process

patent, and that the method was old. On appeal to the Circuit Court of Appeals for the Third Circuit, a majority of that court held that the record herein in respect to the State patent was substantially different from that in the Sixth Circuit, and that the State patent as qualified by the disclaimers was valid and infringed. The third Judge dissented on the ground that the disclaimers were of such a character as not to be permitted by the statute.

The making of rubber tires for automobiles began by hand and the proof seems to show that, while power and complicated mechanism have been applied to secure much greater speed in production and possibly greater uniformity in the product, there is even now no successful device for their completely automatic manufacture.

A hand tire was framed on an annular metallic core of the proper size, with spokes and a hub mounted and revolving on a shaft. It was made up of layers of fabric stuck together by a proper adhesive material and formed into a tube with a narrow opening on the inside, called the bead. The ends of the tube were united together to make it circular and endless. The layers were arranged to give a solid rubber tread along the outer periphery to make contact with the road. The workman began by coating the core with a suitable cement, and affixed a strip of the rubber impregnated fabric, stretching it and cutting it so as to cover the circumference of the core. In width it was somewhat less than enough to cover the sides of the core. He then revolved the core slowly, patting and stretching the woven strip on it, pressing and shaping it with his fingers and hand tools so that it adhered smoothly to the core without wrinkles. He followed this with another strip of fabric attaching it to the one before by the rubber cement. This operation he repeated with as many layers as were needed.

The strips of the fabric were cut on the bias, and the warp threads of one strip when set in place were intended

to run from one inner open edge or bead, in a diagonal course, along, across and around the tube to its other open edge or bead. The next strip or layer was reversed so that its warp threads crossed those of the first strip at a selected angle.

There was no difficulty in making the part of the layer on the tread easy and smooth because the curvature there was small, but as the fabric was pressed against the sides and inside of the core, it tended to bagginess and did not lie so smoothly. It would gather and wrinkle. This if carried into the permanent condition of the fabric would greatly weaken the tire. The tendency of woven material, however, is to contract in one direction as it stretches in another. The fabric lengthens circumferentially as it is stretched on the outer periphery. The square meshes thus become diamond shaped along the tread. There is a corresponding longitudinal contraction in the fabric as it is stretched laterally down the sides, so that its shrinking will be greatest as the edges are approached. Thus the wrinkling and bagginess of the fabric may by proper treatment with hand and tool be made to disappear and the strip be shaped smoothly to the sides and beads of the core surface.

At first, the skirts of the fabric were stretched radially along the sides of the core and treated by a saw-tooth tool to avoid wrinkles and then a spinning roll or wheel was spun along the fabric down the core side in a spiral course. There was thus given to the fabric what was called the double stretch and this was supposed to give greater strength and smoothness to the fabric as set upon the core. The workmen, however, found that they could work more rapidly and with less pains if they gave up the saw tooth stretch and depended only on the use of the spinning wheel with which, by increasing the hand speed of the core, they could smooth the fabric against the core without wrinkles. The spinning or stitching of the sides

by the rapid revolution of the core had been previously shown in the kindred art of shaping thin metal sheets over a power driven core. The evidence was that rotation of the core by hand to a speed of fifty or sixty revolutions a minute would give a centrifugal tendency to the skirt of the fabric, keeping it away from the core. By thus doing what the foremen of the shops at first deprecated, the workmen developed a successful improvement in the hand making of tires. The spinning was usually done one side at a time; but powerful workmen were known to work the spinning wheels together on both sides of the core. The spinning of the fabric by rotating the core rapidly was more usual in tires of smaller sizes because the fabric was so stiff that such a method by hand in larger tires was impracticable.

One of the early power machines to make tire casings was patented to Moore in 1894. It disclosed an expansible core upon which an endless rubber fabric was placed and stretched. The core was rotated rapidly by power and the fabric was rolled down by a set of rollers of which one was a spinning roller. This was pivoted to swing radially toward the core but the handle of the spinning wheel was so fixed that it could not travel as far down as the bead.

The Seiberling and Stevens patent of 1904 for making tires sought to do the work of fitting the fabric to the core wholly by machinery, i. e., automatically without the intervention of the hand of the operator. It comprised:

1st. A main power driven shaft to drive the core capable of low or quick revolutions, or entire release,

2nd. A reel carrying the rubber impregnated strip,

3rd. A tension roller retarding the reel and stretching the fabric on the periphery after the free end is attached to the core,

4th. A pressure roller concave in form to match the tread of the strip and press it to the core as it revolves

5th. An arm carrying a laterally spring pressed finger called a jigger finger intended to be reciprocated rapidly, radially of the core, travelling in and out between the tread and in its outer edge, functioning like a human finger in pressing the fabric down against the core and stretching it into shape; and,

6th. A further pressure wheel or spinning roller applied along the edge of the fabric to press it into a crease. The spinning roller was set in a plane at a receding angle to the plane of the core.

The evidence in this record shows that Seiberling and Stevens' device was not successful in its operation and that the automatic operation of the finger was not effective.

The Vincent patent of 1905 had a power driven core, to draw and stretch the fabric with guide rolls through which the fabric was led on its way to the core and which were geared so as to resist the pull of the fabric. As soon as the fabric was spread circumferentially on the core, its skirts or edges were formed down the sides by two sets of spring actuated hammers, arranged progressively in a radial direction so that as the core rotated the fabric was tapped on the sides from their outer portion inwardly toward the bead. This device seems to have had considerable commercial use.

The Mathern Belgian patent of 1906 had a core arranged to be power driven at high and low speeds effected by changing gears, the ratio between the two being 20 to 1. It had a stock roll from which the fabric passed at a tension around guide rolls and between conical gears to secure uniform puckers in the outer edges of the fabric and to hold it out from the core as its middle is delivered circumferentially to become the tread. A screw fed slide was arranged to be moved radially to the core, having suspended on pins a pair of spinning rolls, the handles of which enable the operator to press them laterally against

the skirts of the fabric on the core during their inward radial movement.

The Belgian Mathern patent is attacked as a paper patent because it was allowed to expire through failure to pay the annual Belgian tax. The evidence shows, however, that in 1911 it was offered commercially to the Hood Company which preferred a German patent of the same inventor, and the Belgian machine was actually used for the making of tires which proved to be commercially satisfactory. We do not doubt from the record that it was a practical tire-making machine.

The State patent was applied for March 26, 1909. It was of the same general type as that of Seiberling and Stevens. State's most substantial change was that he discarded the reciprocal, spring-pressed, in and out forming-finger of Seiberling and Stevens and substituted spring-pressed spinning rolls which he supplemented with stitching rolls if needed. He provided, in the same general way as Seiberling and Stevens, a core, a fabric reel, a retarding or tension device, whereby he attached his strip of fabric to the core for the width of the tread portion, leaving the skirts or wings projecting outwardly. Fixed to the base of the frame carrying the core was a standard travelling in a horizontal track with a turret, having four tools mounted at four equidistant points and independent of each other except for their common base. One carried a tread roller, the second the spinning rollers, the third the stitching rolls and the fourth the bead attaching rolls. The operator revolved the turret so as to make the tread roller bear against the tread on the core, then the spinning roll device, then the stitching roll and then the bead forming roll, the latter two of which were not always used. There was no real combination of the operation of the four tools. It was an aggregation not different from a successive use by an operator of hand tools, and so the Circuit Court of Appeals

of the Sixth Circuit held. This was what led to the disclaimer of eight of the claims. It possibly gave the change in the character of the record and proof in this case from that in the Sixth Circuit as remarked upon by the Circuit Court of Appeals of the Third Circuit.

Eleven claims are left. While qualified by disclaimers, consideration of the original claims will serve our purpose. Claims 4, 5, 6 and 7 are for combinations of a sheet fabric supply, a power driven ring core, a radially moving support laterally spring-pressed toward the core, with a spinning roll mounted on the support to shape the sheeted fabric to the core. The variety in the claims is in adding to the spinning roll the element of a receding angle to the plane of the core in the 5th, in giving the spinning roll a round disk shaped edge in the 6th, in giving both the receding angle and the disk shaped edge to the spinning roll in the 7th.

Claims 12 and 13 comprise in their combinations all the above and the slow speed mechanism for actuating the core when the fabric is received from the stock roll, and the high speed mechanism for the spinning rolls to pass over the fabric on the core and shape it.

Claims 22, 23, 24, 25 and 26 cover the same combinations save that they emphasize the feature of the radially moving support of the spinning roll which is power-pressed toward the core.

There was no novelty in the combination of a power-operated core with fabric rolls for delivering the rubber impregnated strips through tension rolls to the core, or in the use of pressure rolls to stretch and press the tread at the slow speed of the core followed by the spinning of the stretching or spinning rolls with high speed down the sides from the outer line of the tread to the bead edge of the fabric, or in the use of the tangential force upon the skirts of the fabric to keep them away from the core. The use of power to revolve the core was seen

in earlier patents in Seiberling and Stevens, in Vincent, and in the Belgian Mathern. The change of speed from slow to rapid revolution by shifting of the gears was shown in the first and third of these. The receding angle of the spinning roller to the plane of the core was not new with State. It was seen in Seiberling and Stevens.

The operation of the spinning wheel in the State patent is said to be automatic. We do not find it to be so. It is partly automatic in that the spinning rolls, when properly placed, are brought closer to the fabric by the springs. The Belgian Mathern device is partly automatic in an analogous way. But when the process of spinning is carried to its completion, the adjustment and pressure of the wheels to the fabric as it approaches the bead edge, need the hand of the operator just as in the hand-making of tires. It is true that the spinning rolls in all these patents are steadied against the fabric in one way or another, as by the power-pressed radially moving support in the State patent; but in the end the hand is needed to complete the spinning process as it nears the bead edge. We do not think that the use of the springs by State in such a combination involves patentable invention when we weigh its inconsiderable importance and note the suggestion of the use of such springs for analogous purposes in Vincent, and in Seiberling and Stevens.

The change from hand to the use of machinery often involves invention. In the making of tires, it has in fact resulted, because of the use of power, in speed of manufacture and possibly in some greater uniformity of the product. But the record does not show that there has been substantial change in the mechanics or method of making. The steps are the same and the succession from one to the other are as in the manual art, and the transfer from hand to power was by the usual appliances and had all been indicated before the State patent.

These conclusions as to the lack of novelty in the elements and combinations of the State patent were reached by the Circuit Court of Appeals for the Sixth Circuit and we agree with them.

The majority opinion of the Third Circuit Court of Appeals in this case attributed much importance and novelty to the effect of the centrifugal force of the revolving core upon the fabric. Its view was that State had discovered that the fabric was thus substantially stretched radially as the spinning wheels hinged against the flowing fabric, and the square meshes on the sides were elongated substantially by the centrifugal force so that at the bead they were lozenge shaped and easily smoothed. We do not find such a new result, or anything different from what was shown in the making of tires by hand. If there were such a newly-developed, substantial addition to the stretching of the material by tangential force, it must have occurred in the Mathern Belgian patent before State. But we find it in neither. The discovery of such a new source of radial stretching power is not testified to by the experts in either hearing.

We are pressed with the argument that many tires, reaching into the millions, have been made under a license granted by Seiberling, and that the success of the device shows the utility and novelty of what he licensed. He gave to his licensees not only the use of the State patent but also that of the Seiberling and Stevens patent. Both patents made large and sweeping claims which were well calculated to induce acquiescence by those without sufficient knowledge of the prior art, or adequate capital to resist. Yet the more comprehensive claims of the State patent have now been disclaimed and the Seiberling and Stevens patent included in his licenses has been abandoned. There has been a complete change about in the Third Circuit law suit. Mr. Seiberling, when these licenses were

granted, was at the head of the great Goodyear Company. He could give great vogue to a device owned and used by him. The license was not a heavy tax, equal to less than one per cent. of the cost of a machine, and purchase of peace was a wise course for the smaller manufacturer. Evidence of this kind is often very persuasive, especially when patentable novelty is in doubt. *Potts* v. *Creager,* 155 U. S. 597, 609; *Magowan* v. *New York Belting Co.,* 141 U. S. 332, 343. But it is by no means conclusive, and must be weighed in the light of all the circumstances, to accord to it its proper significance. *Eibel Process Co.* v. *Minnesota Paper Co.,* 261 U. S. 45, 56; *McClain* v. *Ortmayer,* 141 U. S. 419, 428. In the case before us, we do not think it can overcome the lack of novelty and invention

Seiberling disclaimed combination claims of 4, 5, 6 and 7, except when constructed and coördinated in a certain way. He disclaimed claims 12 and 13 except for the combined operations of a certain kind and unless the recited elements were constructed and coördinated as he described. He disclaimed claims 22, 23, 24, 25 and 26, except when constructed and coördinated for a particular purpose and unless the power drive functioned as he pointed out. As we have found that there is nothing really new in the method or mechanism of State, it will serve no purpose to go through the qualifying disclaimers in detail and consider their effect.

The disclaimers are attacked on the ground that they exceed the legal function of a disclaimer and are an attempt to change a mechanical patent to a process or method patent, something which could only be properly accomplished by a reissue. The Circuit Court of Appeals for the Sixth Circuit examined the possibility of sustaining the alleged invention of State as a process or method patent but concluded that it was fully anticipated by the method of making tires by hand. We do not find it

necessary to pass upon the validity of the method of making disclaimers here pursued, because we agree with the Sixth Circuit Court in failing to find invention in the State device either as a mechanical or as a method patent.

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

Reversed.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA *v.* SOUTHERN PACIFIC COMPANY ET AL.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA *v.* LOS ANGELES & SALT LAKE RAILROAD COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Nos. 283–285. Argued November 22, 1923.—Decided April 7, 1924.

1. In view of the policy and provisions of the Transportation Act, establishment of a new union station for several interstate carriers, involving the abandonment of their separate stations, extensive changes and relocations of their main tracks and very great expense, cannot be brought about by voluntary action of the carriers or order of a state commission in the absence of a certificate of the Interstate Commerce Commission, under pars. 18–21 of § 402 of the act. P. 342.
2. The provisions of the Transportation Act, § 402, pars. 18–21, that no interstate carrier shall extend its line of railroad unless and until the Interstate Commerce Commission shall certify that public convenience requires it, and forbidding the Commission to authorize such extension unless it finds it reasonably required in the interest of public convenience or necessity or that the ex-

pense will not impair the carrier's ability to perform its duty to the public,—*construed*, as not confined to extensions with a purpose to include new territory to be served by a carrier, but as including proposed extensions of main tracks within a city to a proposed new union station, involving changes in the intramural destinations of carriers and in the handling of interstate traffic, and necessitating great expense. P. 344.

190 Cal. 214, affirmed.

CERTIORARI to a judgment of the Supreme Court of California, annulling, upon review, an order of the State Railroad Commission which sought to require the above-named railroads to eliminate certain grade crossings and establish a new union terminal depot, in the City of Los Angeles.

Mr. William W. Clary and *Mr. Hugh Gordon* for petitioner.

The amendments of 1920 to the Commerce Act vest no power in the Interstate Commerce Commission relative to new union passenger depots.

Section 15a is referred to by the court below only as showing generally the greatly enlarged powers of the Commission and its affirmative duty to maintain an adequate railway service for the people of the United States. Section 5, pars. 4 and 5, relate to the general plan for the consolidation of railway properties of the United States into a limited number of systems. They are quoted in the decision as being expressive of the enlarged scope and purposes of the act. Section 1, pars. 3 and 10, are referred to to show the definitions of the terms " railroad " and " car service." None of these sections makes any reference to depots or terminal facilities.

Section 1, par. 1, gives the Commission power, when an emergency exists, (a) to suspend established rules, (b) to make directions relative to car service, (c) to require joint use of terminals, including main line tracks for a reasonable distance outside of such terminals. This

language does not authorize the Commission to require the erection of a new union depot for permanent use, but refers to the joint use during emergencies of existing terminals.

Section 1, par. 18, refers to the construction, extension and abandonment of railroad lines and provides for the issuance of certificates of public convenience and necessity therefor.

The State Commission ordered neither the construction nor the abandonment of a "line of railroad." True, the erection of a new union depot and the elimination of grade crossings will require a rearrangement of traffic. Some new track may have to be laid and some old track abandoned. The amount of new track necessary is very small.

The Interstate Commission has held that such relocations of trackage not affecting the service to the public, do not constitute either the construction or abandonment of "lines of railroad" within par. 18, § 1 of the Commerce Act. *Matter of Philadelphia, Newtown & N. Y. R. R. Co.*, 67 I. C. C. 252; *Matter of Pearl Valley R. R. Co.*, 67 I. C. C. 748. This is borne out by *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204.

Here, the carriers will not abandon or cease operating their roads or any part of them. They will merely shift their lines in such a way as to carry on the same operations they do now, but with more safety and convenience to the public.

Paragraph 21 of § 1 authorizes the Commission to require any carrier to provide adequate facilities for performing "its car service as that term is defined in the Act" and to extend its line or lines. The term "car service" is defined in par. 10 of § 1 and has to do with the supply, distribution and exchange of cars and locomotives. The clause as to extension of lines is similar to that found in par. 18 of § 1, except that par. 18 applies to cases where

permission to extend is sought by the carrier and par. 21 to cases where the carrier is ordered to extend by the Commission upon its own initiative or upon complaint. In neither case is a mere rearrangement of existing trackage an extension of a "line of railroad" within the meaning of these provisions. Paragraph 22 exempts from the authority of the Commission, conferred by pars. 18 to 21, inclusive, all construction or abandonment of spurs, industrial tracks, etc., located wholly within one State.

Paragraph 3 of § 3 refers to the interchange of traffic between different carriers, and has no bearing on the issue before the Court. Paragraph 4 of § 3 refers to existing terminal facilities. It is not inconsistent with § 36 of the California Public Utilities Act. Paragraph 4 refers to a "carrier owning or entitled to the enjoyment of terminal facilities." It provides for the use of the "terminal facilities including main line track for a reasonable distance outside such terminal" of one carrier by another carrier. It provides that "the carrier whose terminal facilities are required to be so used" may recover compensation. These expressions plainly mean existing terminal facilities.

It may be claimed that the order cannot be obeyed without a joint use of certain existing facilities such as main line tracks; and that the order is for that reason repugnant to the provisions of par. 4. The State Commission did not order the railroad companies to carry out any of the proposed plans. It simply ordered them to construct a depot somewhere within a large area according to plans which they themselves were to prepare. To say that no possible plan for a union depot can be devised which does not require a joint use of tracks is merely to speculate in advance of any attempt to prepare final plans.

Paragraph 20 of § 1 prohibits the railroads from making any constructions or abandonments of lines of railroad without the consent of the Interstate Commerce Commis-

sion. The prohibitions of the paragraph refer expressly to pars. 18 and 19 of § 1. They do not refer to existing terminal facilities, which are covered by § 3, par. 4. The state court erroneously construed par. 20 to apply to " the extension of railroad facilities and the abandonment of other railroad facilities, including terminals."

As already shown, the order required no construction or extension of new lines or abandonment of old lines within the meaning of the act as construed by the Interstate Commerce Commission. Nor did it require any joint use of facilities. The prohibitions of § 20 therefore did not terminate the power of the State Commission to make the order.

The fact that many kinds of regulations are specifically provided for in the act, as, for instance, interchange of traffic, switch connections, car service, securities, extensions into new territory, consolidation of lines, etc., while the act is silent as to any regulation concerning new union depots, indicates that the latter are not covered by the act.

If, after plans are prepared for a union depot in compliance with the State Commission's order, it should be deemed advisable to invoke the jurisdiction of the Interstate Commerce Commission in connection with any part of the work, such as a joint use of tracks, or for the issuance of securities, application may be made to the Interstate Commerce Commission at that time. The present validity of the order is not affected by this possibility. Under well settled law, an order of the Railroad Commission is not invalid merely because it cannot be carried out until some other public authority takes additional or concurrent action. *Motor Transit Co.* v. *Railroad Comm.*, 189 Cal. 573; *Oro Elec. Co.* v. *Railroad Comm.*, 169 Cal. 466; *Turner Co.* v. *Chicago, etc., Ry. Co.*, 36 S. Dak. 310.

The legislative history of the act clearly indicates an intention that jurisdiction over union passenger depots

should not be taken away from the States. See Cong. Rec., Nov. 15, 1919, pp. 9067–9071.

If the amendments of 1920 should be construed to cover the subject of union depots, nevertheless the State's power remains unimpaired and the State Commission's order is valid unless the Interstate Commerce Commission makes an inconsistent order.

The proviso of par. 17, § 1, in plain terms preserves the police power of the State to require just and reasonable freight and passenger service for intrastate business. The fact that a carrier may also be engaged largely in interstate business does not deprive the State of this reserved power unless the State makes a requirement that is "inconsistent with any lawful order of the Commission [interstate] made under the provisions of this act."

The proviso in par. 17 is in effect a congressional enactment of the principle announced in *Missouri Pac. Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, viz., that even when Congress has entered a particular field of interstate commerce and has authorized the Interstate Commerce Commission to exercise jurisdiction therein, nevertheless, unless the matter is one to be handled by general rule or regulation, the States may continue to act as to particular situations unless and until the Interstate Commerce Commission takes action as to such particular situations.

The power of Congress to regulate interstate commerce, although supreme and exclusive, remains dormant until actually exercised. The mere enactment of laws by Congress does not arouse this dormant power unless those laws are of such nature as to exclude any action by the States.

New York Central R. R. Co. v. *Public Service Comm.*, 233 N. Y. 113, is not in point, because § 3, par. 3 of the Commerce Act, as amended, specifically provides for the interchange of traffic, and the New York court held that the New York law did not authorize the state commission to make such a requirement.

The State Commission's finding that public convenience and necessity require the operation of a union depot was consistent with, and supported by, the evidence.

The Commission's findings on questions of public convenience and necessity were final and conclusive under the California law.

The Commission under the police power of the State has authority to order the railroads to erect a union depot as an essential measure for the elimination of dangerous grade crossings. *Erie R. R. Co.* v. *Board of Public Utility Commrs.*, 254 U. S. 394.

The order, in requiring the construction and use of the new union depot and the abandonment of the present facilities, does not deprive railroads of property in violation of the guarantees of the Federal Constitution.

The Commission's requirement that the operation of trains on Alameda Street be eliminated after the construction of the union depot does not impair the obligation of a contract contained in a franchise permitting the railroads to operate trains on Alameda Street.

The Commission's order is not invalid because it may require the railroads to expend large sums of money and to exercise power of eminent domain in acquiring the necessary land and constructing a union depot.

Mr. C. W. Durbrow, with whom *Mr. Wm. F. Herrin, Mr. Frank C. Cleary, Mr. J. P. Blair, Mr. F. H. Wood, Mr. Wm. R. Harr, Mr. E. W. Camp, Mr. M. W. Reed, Mr. Gardiner Lathrop, Mr. A. S. Halsted* and *Mr. Fred E. Pettit, Jr.,* were on the briefs, for respondents.

Mr. John E. Benton and *Mr. Paul A. Walker,* by leave of Court, filed a brief as *amici curiae,* on behalf of the National Association of Railway and Utilities Commissioners and of the regulatory commissions of twenty-nine States.

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

The question in this case is whether the State Railroad Commission of California has power to require the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company and the Salt Lake & Los Angeles Railroad Company to build an interstate union depot in the city of Los Angeles.

The proceedings were begun in 1916 before the Railroad Commission by complaints of Civic Associations and others against the Railway Companies. Before the hearing and the decision were had, the Transportation Act of Congress of 1920 was enacted. In December, 1921, after two hearings, an amended order against the Railways was made by which they were required to remove certain grade crossings and to build a union terminal within a certain defined area in the city.

The Railway Companies sought review of this order in the Supreme Court of the State, and their three writs were heard and disposed of as one case. The Supreme Court of the State held that the order was beyond the power of the State Railroad Commission, because the subject matter was committed to the Interstate Commerce Commission by the Transportation Act of 1920. The court further held that if the order had effected the elimination of grade crossings alone, it would have been valid, but that, associated as it was with the establishment of the Union Station, it must be annulled. We have brought the case of the Commission against each of the railways here by certiorari.

Lines of the three railways approach Los Angeles from the north and come together in the city near the North Broadway viaduct as it crosses the Los Angeles River. Thence the Salt Lake and Santa Fe lines follow the bed of the Los Angeles River, one on its east and the other on its west bank. The Salt Lake passenger station is at 1st

Street. Its main line from Pasadena and Glendale comes from the north, but its line from Salt Lake comes in from the south. From north to south in Los Angeles, its line hugs the east bank of the river for three miles. The Santa Fe Station is opposite that of the Salt Lake Railway on the west bank. The Santa Fe hugs the west bank for three miles in the city. One of its lines leaves Los Angeles by the north for Chicago. Another leaves the city by the south through Riverside for Chicago. The Southern Pacific does not follow the river bed after passing under the Broadway viaduct but extends in a southwesterly direction until it reaches the north end of Alameda Street. From that point it runs south through the city at grade on that street. Its station is at 5th Street and lies southwesterly from the Salt Lake and Santa Fe stations and a quarter of a mile distant from them. The eastern main line of the Southern Pacific crosses the river at Alhambra Avenue, joins the San Francisco main line and reaches the station from there by the same tracks on Alameda Street. The Southern Pacific occupies Alameda Street on grade and longitudinally in both directions from its station for three miles. Its lines toward the South go to San Pedro and Santa Anna.

The order of the Railroad Commission requires the abandonment of the passenger stations of the three railways. The Southern Pacific Station is a comparatively modern depot and would be adequate for many years. Those of the other two companies are not adequate, but they have ample ground upon which to construct suitable stations. The order required the removal from Alameda Street of the main line of the Southern Pacific for three miles, permitting the use of its tracks in that street for switching during a few hours at night. The order also required that by viaducts over the river and over the Salt Lake & Santa Fe tracks on the river banks, grade crossings should be eliminated. The order further required

that the three railways should purchase jointly land enough in an area reaching from Alameda Street to the river and from Aliso Street to Alhambra Street to erect a suitable Union Station, to be situated somewhere near a square called the Plaza. The railways are directed to make such additions to, extensions of, improvements and changes in the existing railroad facilities of said companies as may be reasonably necessary and incidental to the use of said Union Passenger Station. This would require the removal of the present station of the Southern Pacific from 5th Street toward the Plaza, at least half a mile, and the stations of the Santa Fe and the Salt Lake from 1st Street on the river to the Plaza more than a quarter of a mile. The changes to be effected under the order will require, in the abandonment of the Southern Pacific main track on Alameda Street for three miles, a joint use by the Southern Pacific of main tracks on the river bank with either the Salt Lake or the Santa Fe, or the construction of its own main tracks on one side or the other along the river bank. The main tracks of the Salt Lake must be extended across the Los Angeles River on a viaduct to the area selected for the Union Station. The main track of the Santa Fe runs along the river side of the selected area but an extension of its main tracks will have to be made to bring it into the new station.

The order requires the joint use of land, tracks and terminal facilities valued at $28,050,691; the abandonment of three existing passenger stations of the railways as such, and the ultimate capital expenditure for all recommendations of from $25,000,000 to $45,000,000.

The Railroad Commission in the Supreme Court of the State pressed the argument that, in view of its finding that the Union Station was an indispensable element in getting rid of the grade crossings, it had the incidental right to order its building. The court rejected the argument. It said:

"That notwithstanding the views expressed by the Railroad Commission in its findings and conclusions in the proceeding herein presented for review, we can perceive no indispensable relation between the elimination of grade crossings and the establishment of union depot facilities, nor can we see an unsurmountable difficulty why jurisdiction over the matter of eliminating grade crossings may not be exercised in a proper case consistently, and it may be concurrently, with the exercise of the authority which is vested by the Act of Congress of 1920 in the Interstate Commerce Commission over the subject of union terminal depot facilities."

The State Supreme Court thus modifies the findings of the Railroad Commission in so far as they sought to tie the validity of its order establishing a union station to its unquestioned police power to regulate grade crossings in the interest of the public safety. We avoid any inquiry how far, if at all, the principle laid down in *Erie R. R.* v. *Board of Public Utility Commrs.*, 254 U. S. 394, is qualified by the provisions of the Transportation Act. Our only question here is whether the power to direct a new union station with its essential incidents is committed exclusively to the Interstate Commerce Commission under the Act of 1920.

In *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478, this Court said of the Transportation Act:

"The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the [Interstate Commerce] Commission, which is to supervise their issue of

securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged." *New England Divisions Case,* 261 U. S. 184; *Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563.

On the one hand, it is urged that, with the purposes thus declared, the act commits to the supervision and control of the Interstate Commerce Commission such an undertaking as is here in question involving a new capital investment of from twenty-five to forty-five millions of dollars in the terminals of three great interstate railway systems in the largest city of our Western Coast. On the other hand, it is earnestly contended that, since no specific provision is made for the supervision of interstate union stations, by the Interstate Commerce Commission, the whole subject remains in the control of the state Railroad Commissions. We must examine the sections of the act in some detail to determine the force of these counter contentions.

The term railroad is defined in the act, par. 3, § 400, to include all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of persons or property, including freight depots, yards and grounds used therein. Section 402, after defining the term "car service" under the act as including use, control, distribution, and exchange of locomotives, cars and other vehicles used in interstate transportation, provides for just regulation of it by the Commission, and gives that body power, in case of shortage of equipment or other emergency, to suspend the regulations, to give just directions, without regard to ownership, to promote the service and to adjust proper compensation

for its use, and "to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals," as in the opinion of the Commission will meet the emergency and the public interest, and upon hearing determine just compensation for use of same. Paragraph 16 authorizes the Commission to provide transportation by other carriers if one carrier is unable to handle its traffic upon terms fixed by the Commission.

By § 405, amended § 3 of the Interstate Commerce Act provides in its third paragraph that all carriers shall afford all reasonable facilities for the interchange of traffic between their respective lines and for forwarding and delivering passengers. Paragraph 4 provides that the Commission may in the public interest and without impairment of a carrier's power to handle its own business with its terminal facilities, require the use of its terminal facilities, including its main-line track or tracks for a reasonable distance outside of its terminal—for another carrier or carriers, upon such terms as may be agreed upon by the parties, fixed by the Commission or determined by suit as in condemnation proceedings.

It is obvious from the foregoing that Congress intended to place under the superintending and fostering direction of the Interstate Commerce Commission all increased facilities in the matter of distribution of cars and equipment and in joint terminals, in the exchange of interstate traffic and passengers between railways so as to make it prompt and continuous. It not only provides for the temporary expropriation of terminals and main track of one railway to the common use of one or more other railways in an emergency, but it also contemplates the compulsory sharing of one company's terminals with one or more companies as a permanent arrangement. This is a drastic limitation of a carrier's control and use of its own property in order to secure convenience and dispatch

for the whole shipping and travelling public in interstate commerce. It gives to the Interstate Commerce Commission the power and duty, where the public interest requires, to make out of what is the passenger and freight station of one interstate carrier, a union station or depot.

But it is insisted that the supervisory power thus conferred does not include the installation of an interstate union station, where its terminals and main tracks are newly built, and the interstate carriers are compelled to expropriate, not the terminal property of another interstate carrier, but property of others than carriers not theretofore used for terminals. This would be giving power to the Interstate Commerce Commission to provide for a small and contracted union station of interstate carriers limited to the terminals of one carrier, and would leave the larger and more important union stations of interstate carriers to the control of state commissions. We think, however, that means of control over installation of such new union stations for interstate carriers is given to the Interstate Commerce Commission in amended paragraphs (18 to 21) of § 402. They provide that no interstate carrier shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation over such additional or extended line of railroad, unless and until the Commission shall certify that public convenience present or future requires it, and that no carrier shall abandon all or any portion of its line or the operation of it without a similar certificate of approval. Such a certificate is, we think, necessary in the construction of a new interstate union station which involves a substantial and expensive extension of the main tracks or lines of interstate carriers who theretofore have maintained separate terminals.

It is argued that paragraphs 18 to 21, of § 402, refer only to extensions of a line of railroad having the

purpose to include new territory to be served by the interstate carrier and do not refer to an extension of new main track for the mere purpose of rearranging terminals within the same city. We do not think the language of paragraphs 18 to 21 can be properly so limited. We are confirmed in this by paragraph number twenty-two which immediately follows:

"The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

This is a palpable distinction between the main tracks of an interstate carrier, and its spur, industrial, switching or side tracks, and shows the legislative intention to retain any substantial change in the main tracks within the control of the Interstate Commerce Commission. It may well be that a mere relocation of a main track of an interstate carrier which does not involve a real addition to, or abandonment of, main tracks and terminals, or a substantial change in destination, does not come within the paragraphs 18 to 21. One might, too, readily conceive of railroad crossings or connections of interstate carriers in which the exercise by a state commission of the power to direct the construction of merely local union stations or terminals without extensions of main tracks and substantial capital outlay should be regarded as an ordinary exercise of the police power of the State for the public convenience and would not trench upon the power and supervision of the Interstate Commerce Commission in securing proper regulation of an interchange of interstate traffic or passengers. Only a lawful order of the Interstate Commerce Commission would raise a question of the power of

a state commission in such cases, as the proviso of paragraph 17, § 402 of the Transportation Act shows:

"That nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act."

But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of § 402 and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission.

The proviso of paragraph 21 of § 402 is significant of the distinction we are pointing out. It forbids the Commission to authorize or order the extension of its lines "unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension . . . that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

The extensions of the lines and main tracks of these railways under the plan which the State Commission has ordered are not great in distance, but they involve a new intramural destination for each railway with important changes in the handling of interstate traffic and passengers. Great expense attends such changes of the main tracks in a crowded city, and they here carry with them as necessarily incident thereto, the abandonment of available sites and of valuable existing passenger and freight stations and the construction of a new union station elsewhere, imposing on the three railways a cost in making

the changes of from twenty-five millions to forty-five millions of dollars. We think it clear that in such an extension of main lines with their terminals the Interstate Commerce Commission is required by the act to make a finding that the expense involved will not impair the ability of the carriers concerned to perform their duty to the public.

The purpose of Congress to prevent interstate carriers from incurring expense which will lessen their ability to perform well their interstate functions is further shown in § 439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of § 20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds or other evidence of indebtedness and forbids approval unless the Commission shall find that their issue is for a lawful purpose, is compatible with the public interest, is appropriate and necessary to the discharge of its public duty as a common carrier and will not impair its ability to perform that service. This is of course *in pari materia* with the restriction of paragraph 21 of § 402 to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties. Such a heavy burden as that involved in this new union station and the main track changes and extensions and other accessories would in all probability require the three railways to issue new capital securities and this could not be done without the approval of the Interstate Commerce Commission. To be sure this provision only becomes operative when securities have to be issued and would not, of itself, prevent action by a state commission until such securities are seen to be necessary; but the provision indicates the general congressional plan.

We were advised by statements at the bar that, after the California Supreme Court handed down its decision in this case, the City of Los Angeles filed a petition with

the Interstate Commerce Commission asking for an order to provide, maintain and use a union station; that a hearing followed and that, pending the decision in this Court, the matter is held under consideration.

For the reasons given, we think the course taken by the City of Los Angeles was the correct one. Until the Interstate Commerce Commission shall have acted under paragraphs 18 to 21 of § 402 of the Transportation Act, the respondent railways can not be required to provide a new interstate union station and to extend their main tracks thereto as ordered by the State Railroad Commission.

The judgment of the Supreme Court of California is

Affirmed.

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

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

No. 268. Argued February 26, 1924.—Decided April 7, 1924.

A statute of New Mexico (Anno. Stats., 1915, § 1820) provides that, whenever any person shall die from an injury occasioned by negligence of the servants, etc. of a railroad company whilst running a train, the company "shall forfeit and pay for every person or passenger so dying" the fixed sum of $5,000.00, to be sued for and recovered by the husband in case of the death of a wife.

(a) *Held,* that the purpose is not to punish an offense against public justice, but to afford redress for a civil injury; and, therefore, enforcement of the right accruing from a death in New Mexico by an action in another State is not objectionable to the principle that one State will not enforce the penal laws of another. P. 350.

(b) The law of California (Code Civ. Proc., § 377) measures the damages for death by wrongful act by the pecuniary loss resulting to the surviving relative, while the above cited act of

New Mexico fixes the amount, in the class of cases covered, at $5,000.00. *Held,* that there is here no such difference of policy as should deny the aid of the state and federal courts in California to the enforcement of a cause of action arising under the New Mexico statute in New Mexico. P. 352.

286 Fed. 1, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing a judgment of the District Court for the Railroad Company, and directing entry of judgment for the plaintiff, Nichols, in his action to recover damages for the death of his wife, alleged to have been caused by the company's negligence. The action came into the District Court by removal from the Superior Court of California.

Mr. Robert Brennan, with whom *Mr. Edgar W. Camp* and *Mr. Gardiner Lathrop* were on the brief, for petitioner.

Mr. Milton K. Young, with whom *Mr. Lyndol L. Young* and *Mr. William K. Young* were on the brief, for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Action for personal injuries received by Nichols' wife while a passenger on a train of petitioner in New Mexico. The injuries resulted in death. The action was brought in one of the Superior Courts of the State of California and removed on petition of petitioner to the United States District Court for the Southern District of California, Southern Division.

The amount sued for was $35,586.42, being composed of the elements of $15,000.00 for the loss of services and advice of the wife, $20,000.00 for the loss of her society, love and affection, and $586.42 for various specified services.

Judgment was rendered for petitioner, with costs. It was reversed by the Circuit Court of Appeals with directions to enter judgment for Nichols in the sum of $5,000.

The question of liability in some court petitioner does not contest. It contests only that the law of New Mexico upon which liability of petitioner was based is in conflict with the policy of the State of California expressed in the laws and decisions of the State. We therefore immediately encounter as an element for consideration the law of New Mexico. It is as follows: "Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe whilst running, conducting or managing any locomotive, car, or train of cars, . . . the corporation . . . in whose employ any such officer, agent, servant, employe, engineer or driver, shall be at the time such injury was committed, . . . shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, which may be sued [for] and recovered; First, by the husband . . ." Anno. Stats. 1915, § 1820.

The Circuit Court of Appeals sustained the law. Judge Ross, addressing himself to the contention that the law could not be enforced or administered in California or in a federal court sitting in California, and considering the ground of the contention to be that the law is penal, said, "But a penal law is one thing, and a statute intended to protect life and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to private action for the pecuniary damages thereby resulting to the family of the deceased, is quite another. The latter is a question of general law." For this were adduced *Huntington* v. *Attrill,* 146 U. S. 657; *Dennick* v. *Railroad Co.,* 103 U. S. 11; *Texas & Pacific Ry. Co.* v. *Cox,* 145 U. S. 593.

The principle announced is contested and the application of the cases adduced to support it. The attack is

naturally directed against *Huntington* v. *Attrill* as it declares itself to be in submission and sequence to the other cases as well as the expression of independent reasoning and conclusion. The question there, as here, was upon the character of a statute having "aspects" of penalty. The statute was, however, excluded from the class of criminal laws which had their venue of commission and trial where committed, for it was decided to be, applying and quoting from *Dennick* v. *Railroad Co., supra,* "though a statutory remedy, a civil action to recover damages for a civil injury." And this because the Court decided that when a statute like the one passed on is involved in consideration, the question whether it is one "which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."

The reasoning of the Court is very complete with the pertinence of cases, and it has the supplement of a number of State rulings which the Circuit Court of Appeals has adduced.

The law of New Mexico is within the principle and description of those rulings, and of *Huntington* v. *Attrill.* It is in reparation of a private injury, not in punishment of "an offence against the public justice of the State." Its reparation is in a fixed amount, it is true, but it is in an amount that has been fixed by a consideration of the determining factors, they necessarily having a certain similarity in all cases. It was the legislative judgment, therefore, that the interests of the State would best be served by an exact definition of the measure of responsibility and relief when the circumstances were such as are represented in the law. It is not less reparative because so defined.

Against this conclusion an argument can be opposed and is opposed,—one not without strength and the support of cases. We are unable to yield to it. We repeat, we think the motive and effect of the law is not punishment in the sense of a penal law, but remuneration—"damages for a civil injury." And a peculiar injury—one resulting from death and its deprivations—deprivations difficult to estimate (and which the common law did not estimate in individual injury and redress), and, therefore, we think properly within the power of the State—its power to make provision for the controversies and rights that may grow out of the relations of its people.

The contention of petitioner is, as we understand it, not that damages in redress of death are opposed to the policy of California, but only when damages are given in a fixed amount as provided by the law of New Mexico, the Code of Civil Procedure of the State giving such damages only "as under all the circumstances of the case may be just," [1] therefore, confining the damages to compensation for pecuniary loss suffered by surviving relatives of the deceased. This may be conceded—there is nothing in the law of New Mexico that transcends the purpose. It does not preclude the recovery of damages—it only defines them, recognizing, as the Supreme Court of California has recognized, the incapability of precise accuracy being attained either by court or jury of the damages that may result from the death of a person to surviving relatives. (*Redfield* v. *Oakland C. S.*

[1] "Sec. 377. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Ry. Co., 110 Cal. 277, 285. See also *Ryan* v. *North Alaska Salmon Co.,* 153 Cal. 438.)

We do not regard, therefore, the code of the State as expressing the policy of the State to be that the aid of its courts and of the federal courts sitting in the State are to be denied the power to enforce the redress given by the law of the State where the injury was inflicted, the law not being penal.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS concurs in the result.

UNITED STATES *v.* GAY.

APPEAL FROM THE COURT OF CLAIMS.

No. 205. Argued March 11, 1924.—Decided April 7, 1924.

Section 3 of the Act of March 2, 1907, 34 Stat. 1228, in providing that when any naturalized citizen shall have resided for two years in the foreign state from which he came it shall be presumed that he has ceased to be an American citizen, does not apply to a retired officer of the Navy who resided abroad with the permission of the Navy Department, reported to it each year as required by the regulations, evidenced his willingness to respond to the call of duty and performed no act inconsistent with his allegiance or his official status. P. 356.

57 Ct. Clms. 424, affirmed.

APPEAL from a judgment of the Court of Claims sustaining the claim of a retired warrant machinist in the Navy for pay unlawfully withheld.

Mr. Assistant Attorney General Lovett, with whom *Mr. Solicitor General Beck* and *Mr. John G. Ewing* were 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.

This appeal is for the review of a judgment of the Court of Claims for the sum of $10,302.52 in favor of the appellee for pay as a machinist on the retired list of the Navy from May 1, 1916, to June 13, 1922, at the rate of $1,687.50 per year.

It is contested by the United States on the ground that Gay had ceased to be an American citizen. For this the Act of March 2, 1907, c. 2534, 34 Stat. 1228, is adduced, and that he, having expatriated himself, abandoned his office as machinist in the Navy, the law and regulations requiring that officers of the Navy must in all cases be American citizens. The further contention is that from the date of abandonment he was not entitled to pay.

The facts are not in dispute. Gay, after serving as an enlisted man in the Navy, was appointed, by warrant of the President, a warrant machinist, the title of which office was changed by subsequent legislation to machinist. He remained on the active list until November 23, 1908, when he was retired from active service on account of deafness.

He was born in Switzerland, May 19, 1856, and was admitted to citizenship August 4, 1897, and has done no act inconsistent with his allegiance nor with his status as an officer of the Navy.

On retirement he was given permission to leave the United States for three successive years, and on August 30, 1912, he was authorized to remain abroad indefinitely. In accordance with the permission, he has been residing in Switzerland, but has kept the Bureau of Navigation informed as to his address as required by the Naval Instructions. He made one or more affidavits of continued American citizenship before the American Consul at Geneva.

He was registered as an American citizen at that consulate and received a registration certificate. On November 25, 1912, he requested a renewal of his certificate but was informed by the Consul that since he had lived over two years in Switzerland, the country of his birth, he would have to sign an affidavit to overcome the presumption of expatriation. He signed such affidavit, and on November 26, 1912, he called at the consulate and asked that the affidavit not be sent to the Department of State.

On January 11, 1916, he was notified by letter from the Navy Department that he had been selected for duty in connection with the Naval Intelligence Office in time of war and requested, in case of return to the United States and to Washington, to call at that office, but "should you remain abroad indefinitely, and opportunity offer, it is requested that you confer with the naval attaché at Paris." The letter was transmitted to him through the naval attaché at Paris with request to acknowledge receipt, which he did on January 28, 1916.

On February 24, 1916, the Chief of the Bureau of Navigation of the Navy Department addressed him a copy of General Instructions issued to naval officers abroad directing them to notify the accredited naval attaché of their presence, address and probable length of stay, etc., or if in countries or colonies to which no naval attaché is accredited, to make similar report to the nearest United States naval attaché practicable.

On March 15, 1916, in accordance with this order, he notified the attaché at Paris, giving particulars in regard to his residence, and expressing himself as ready and willing to leave Switzerland whenever recalled to the United States by the Navy Department.

On March 17, 1916, the receipt of the letter was acknowledged, stating, "2. In case you are in the vicinity of Paris, I would be greatly obliged if you would call at the embassy in order to receive certain confidential informa-

tion which I have been directed by the Navy Department to furnish you. 3. There is no immediate necessity of your coming to Paris at present."

On June 19, 1916, and again on July 25, 1916, he was notified by the pay officer of the New York Navy Yard, who had been carrying his accounts and paying his monthly retired pay, that he, the officer, had been directed by the Navy Department to make no further payments to him, Gay.

On September 1, 1916, he wrote to the Chief of the Bureau of Navigation of the Navy Department, Washington, requesting to be informed of the reason for that action, stating that he was ready to answer at any time for his action. No response seems to have been made to his letter. On November 12, 1917, he informed the Bureau of Navigation that he was able to perform sea or shore duty, but in the following month it was officially stated that there was no duty to which he " might be assigned." His name appeared continuously on the official published annual " Register of the Commissioned and Warrant Officers of the Navy and Marine Corps " down to and including that of January 1, 1917. He is carried on it as a machinist on the retired list of the Navy and, under the column " Present Residence or Duty," he is listed "Abroad." It does not appear by what authority his name was omitted from the register.

The contention of the United States is that Gay having resided for over two years in Switzerland, the place of his birth, the presumption occurred that he had ceased to be an American citizen. And this presumption, it is further contended, was not overcome by " the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe." Section 2 of the Act of March 2, 1907, is cited for the contention. The section provides as follows: " When any naturalized citi-

zen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war."

The contention puts out of view all of the other facts of the case—puts out of view the rights of Gay as an officer of the Navy. To be such officer he had to be a citizen, but, being such officer, he had relations and rights besides those of citizenship. And this was recognized—recognized by him, and recognized by the Navy Department. His going and staying abroad was submitted to the judgment and permission of the Department, first in yearly applications for three successive years and then by permission "to remain abroad indefinitely." He reported to the Bureau of Navigation his address each year as required by its regulations. The Department was, therefore, enabled to and did inform him that he had been selected for duty, and directed him to confer with the naval attaché at Paris, which he did, giving particulars in regard to his residence and willingness to respond to a call to duty. To this the attaché responded as follows: "2. In case you are in the vicinity of Paris, I would be greatly obliged if you would call at the embassy in order to receive certain confidential information which I have been directed by the Navy Department to furnish you. 3. There is no immediate necessity of your coming to Paris at present."

Up to this moment of time, he was an officer in the Navy, one worthy of "confidential information"; and it

is to be remembered that a war was in progress—a war in which at any time this country might become engaged, and subsequently did become engaged. A discontinuance of his pay came soon after; it was as abrupt as it is unexplained, and we are induced to say, inexplicable. Gay, we repeat, was an officer of the Navy, and as such he was subject to duties and as such he was entitled to rights; for neglect or violation of duty he was subject to reprimand and, it might be, punishment, but punishment only after charge and conviction. §§ 1229 and 1624 Rev. Stats.[1] This was his right even if there had been culpability in his actions. There was none. We find no act of dereliction in his retirement nor afterwards. All was done in submission to, and under permission granted by, the Navy Department, in exercise of law. By that law his case must be judged. The Act of March 2, 1907, has other purpose. That act has only to do with the action of a citizen as such, having no other relations. His place of residence was an element in making him a citizen, it might be regarded as an element in continuing him a citizen; and presumptions could be erected upon it and we are prompted to say it is a presumption easy to preclude, and easy to overcome. It is a matter of option and intention.

The relation of an officer of the Navy to his place of residence is entirely different. It is selected in submission to Navy Regulations, subordinate to his duty, subject to change; and, that it may be so, he must keep the Bureau

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[1] Revised Statutes, § 1624, being the Articles for the Government of the Navy, Article 36 of which provides: "No officer shall be dismissed from the naval service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof."

Article 64 of said Articles for the Government of the Navy provides that "officers shall mean commissioned and warrant officers, . . ."

of Navigation informed of it. To these conditions Gay was at all times in conformity.

The finding of the Court of Claims is that: "He has always borne true faith and allegiance to the United States and has done no act inconsistent with his allegiance nor with his status as an officer of the United States Navy."

Judgment affirmed.

PRESTONETTES, INC. *v.* COTY.

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

No. 197. Argued February 18, 19, 1924.—Decided April 7, 1924.

1. The ownership of a registered trade mark consisting of a name designating the owner's goods does not carry with it the right to prohibit a purchaser, who repacks and sells them with or without added ingredients, from using the name on his own labels to show the true relation of the trade-marked product to the article he offers, provided the name be not so printed or otherwise used as to deceive the public. P. 368.
2. In this regard, no new right under the trade mark can be evoked from the fact that the goods are peculiarly liable to be spoilt or adulterated. P. 369.

285 Fed. 501, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals reversing a decree of the District Court in a suit to enjoin alleged unlawful uses of trade marks.

Mr. Charles H. Tuttle and *Mr. Louis Marshall,* with whom *Mr. Isaac Reiss* and *Mr. William J. Hughes* were on the briefs, for petitioner.

The labels ordered by the District Court were modeled upon the wording proposed in *Hennessy* v. *White,* 6 W. W. & A'B. Eq. 216. They stated the true name of the merchandise and of the manufacturer and the true relation of the defendant to the product,

This Court has held in trade mark cases that the essence of the wrong consists in the sale of the goods of one manufacturer for those of another. *Hanover Milling Co.* v. *Metcalf,* 240 U. S. 403; *Elgin National Watch Co.* v. *Illinois Watch Co.,* 179 U. S. 665; *United Drug Co.* v. *Rectanus Co.,* 248 U. S. 90; *Canal Co.* v. *Clark,* 13 Wall. 311.

A trade mark right is not a right in gross or at large, like a statutory copyright or a patent for invention, and its owner may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly. Its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his. *United Drug Co. Case, supra.*

Under the Trade Mark Act, § 16, there is no actionable offense unless one man's trade mark is unlawfully reproduced on the product of another's manufacture; and the common law of trade marks is but a part of the broader law of unfair competition. *Hanover Milling Co.* v. *Metcalf,* 240 U. S. 403; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict,* 198 U. S. 118; *Goodyear Co.* v. *Goodyear Rubber Co.,* 128 U. S. 598; *Laurence Mfg. Co.* v. *Tennessee Mfg. Co.,* 138 U. S. 537; *Davids Co.* v. *Davids,* 233 U. S. 461.

Federal cases directly in point are *Russia Cement Co.* v. *Frauenhar,* 126 Fed. 228; 133 Fed. 518; *Apollinaris Co.* v. *Scherer,* 27 Fed. 18; *Russia Cement Co.* v. *Katzenstein,* 109 Fed. 314; *Coty* v. *Ivory Novelties Trading Co.,* 12 Trade Mark Rep. 284; *Gretsch* v. *Schoening,* 238 Fed. 780; *Vitascope Co.* v. *U. S. Phonograph Co.,* 83 Fed. 30; *Walker* v. *Reid,* Fed. Cas. No. 17,084; *Societe Anonyme* v. *Consolidated Filters Co.,* 248 Fed. 358. See also *Farina* v. *Silverlock,* 6 De G. M. & G. 214; Cox's Manual of Trade Mark Cases, 2d ed., pp. 73, 74; *Condy* v. *Taylor,* 56 Law T. Rep. (N. S.) 891; Nims, Unfair Competition

and Trade Marks, 2d ed., 1917, p. 253; *Sweezy* v. *McBrair,* 89 Hun, 155; *Edison* v. *Mills-Edisonia,* 74 N. J. Eq. 521.

The principle announced below is revolutionary and perverts the settled purposes of the Trade Mark Act. It is of vast commercial importance in its implications; opens a new door to control by a wholesaler of the retail trade; creates for the first time a reserved right of property surviving an absolute and unconditioned sale, and restricting, at the mere caprice of the seller, the new owner's right to use the merchandise for the very purpose for which it was bought, i. e., resale.

The cases cited by the court below fall into one or both of two classes, neither of which bears any analogy to the present case: (1) The ordinary cases of the sale of the goods of one manufacturer as those of another; (2) those cases where a manufacturer of two brands or qualities of the same article has given a separate trade mark or distinctive label to each brand or quality. In such case to buy in bulk the inferior brand and then to sell it under the trade mark or label reserved by the manufacturer for the superior brand, is a palpable misrepresentation and fraud.

The distinction between this latter class of cases and the present case is, perhaps, nowhere better put than in *Hennessy* v. *White,* 6 W. W. & A'B. Eq. 216. The cases of *Coca-Cola Co.* v. *Bennett,* 238 Fed. 513; *Hires* v. *Xeappas,* 180 Fed. 952; and *Ingersoll* v. *Doyle,* 247 Fed. 620, are of the former class; *Coca-Cola Co.* v. *Butler & Sons,* 229 Fed. 224, belongs to both the first and second classes; and *Krauss* v. *Peebles Co.,* 58 Fed. 585, is a case of the second class.

Bourjois & Co. v. *Katzel,* 260 U. S. 689, involved a sale by one vendor of his own goods under a trade mark and labels belonging exclusively to another.

The argument that a careless or unscrupulous person might adulterate or injure the perfume in rebottling or

repacking, and that, therefore, it is improper to affix Coty's assurance of genuineness, is purely hypothetical and irrelevant and misreads the labels ordered by the District Court. Those labels do not give Coty's assurance. See Sebastian, Trade Marks, p. 630.

The fact that a delicate perfume is involved gives the plaintiff no new or special legal right. It is not the delicacy but the genuineness of the article which determines the legal right.

There is no allegation or evidence that the labels ordered by the District Court did not convey to the ordinary observer the precise meaning which they expressed. *Handel Co.* v. *Jefferson Glass Co.,* 265 Fed. 286; *Wrisley* v. *Iowa Soap Co.,* 122 Fed. 796.

The New York statute, cited below, cannot possibly uphold the unlimited injunction granted by the court below; and, in any event, it was misinterpreted and has no application to the labels ordered by the District Court for either the liquid perfume or the compact.

In any event, even if not entitled to use for its compacts the label ordered by the District Court, the petitioner is entitled to use the label ordered by the District Court for the liquid perfume.

Not only is the construction given by the court below to the Trade Mark Act and to the New York statute erroneous, but it would render them unconstitutional as confiscatory of a vested and essential right of property, and as compelling the owner to sell his goods untruthfully or under a false description. *People* v. *Luhrs,* 195 N. Y. 377; *People* v. *Otis,* 90 N. Y. 48; *Ames* v. *Union Pacific R. R. Co.,* 64 Fed. 165; *Southern Ry. Co.* v. *Greene,* 216 U. S. 414; *Carrollton* v. *Bazzette,* 159 Ill. 283; *Moskowitz* v. *Jenkins,* 202 N. Y. 53; *Tyroler* v. *Warden,* 157 N. Y. 116; *Adams* v. *Tanner,* 244 U. S. 590; *Coppage* v. *Kansas,* 236 U. S. 1; *Lawton* v. *Steele,* 152 U. S. 133.

The registered trade mark purporting to cover the name "L'Origan," is void, because it does not comply with one of the jurisdictional requirements of § 2 of the Trade Mark Act of 1905, under which it purports to have been issued.

Mr. Asher Blum and *Mr. Lindley M. Garrison,* with whom *Mr. Hugo Mock* was on the briefs, for respondent.

The general principles of trade-mark law, independent of statute, forbid exposing plaintiff's good-will to the hazards which are inevitably produced by the acts of defendant.

With reference to the compacts, it is well established, and in fact conceded by the defendant, that an unauthorized concern should not be permitted to sell inferior and independently manufactured goods by using the trade marks of a well known manufacturer in any manner whatever. The court below ruled that plaintiff had proved that the manufacturing and packing methods used by defendant had injured the delicate perfume which is the basis of plaintiff's reputation, and this finding of fact should not be overruled when the case has not progressed beyond a motion for preliminary injunction. *Meccano* v. *Wanamaker,* 253 U. S. 136.

It makes no difference in this respect whether a trade mark is protected upon the theory of safeguarding the public or upon the theory of protecting private property, namely the good-will of the owner of the trade mark, because the use of "Coty" and "L'Origan" to sell powders whose perfume has been injured is forbidden under either of these theories.

Trade marks are protected upon the theory that they are private property and the right to the exclusive use of a trade mark is a private monopoly, something akin to that based upon a patent. An unauthorized use will be enjoined even though the public is not injured and

even though the defendant is offering to the public goods similar to or identical with those provided by the owner of the trade mark. *Bourjois & Co.* v. *Katzel,* 260 U. S. 689; *International News Service* v. *Associated Press,* 248 U. S. 215; *Beecham* v. *Jacobs,* 221 U. S. 263; *Omega Oil Co.* v. *Wechsler,* 34 Misc. 441.

In the cases cited by the court below, the relief granted was similar to that granted in the instant case. Discussing: *Ingersoll* v. *Doyle,* 247 Fed. 620; *Coca-Cola Co.* v. *Bennett,* 238 Fed. 513; *Same* v. *Butler & Sons,* 229 Fed. 224; *Same* v. *Stevenson,* 276 Fed. 1010; *Coca-Cola Bottling Co.* v. *Coca-Cola Co.,* 269 Fed. 796; *Coca-Cola Co.* v. *Brown & Allen,* 274 Fed. 481.

The courts, in the *Coca-Cola Cases,* have never held that merely because the selling methods of the Coca-Cola Company afforded oportunity for unscrupulous retailers to deceive and adulterate, the Company should be deprived of its exclusive control over bottled beverages to which its trade mark was applied; and have refused to permit unauthorized rebottlers to use "Coca-Cola" on labels in any manner to designate a beverage made from the genuine "Coca-Cola" syrup.

Plaintiff may be safely entrusted to insure the genuineness of his products, and there is nothing in the record to show that adulteration has been permitted to go on unchecked by him. This defendant, and others in the same position, who have appeared before this Court in *Magnum Co.* v. *Coty,* 262 U. S. 159, cannot complain of plaintiff's lack of promptness and energy in protecting his good will.

The decisions in foreign jurisdictions have granted the same relief as that provided for in the instant case. Browne, Trade Marks, 2d ed., Supp. 1885-1898, § 910, p. 135.

Decisions to the effect that the protection granted to trade marks is limited to preventing the sale of the goods of one manufacturer as those of another, are not authori-

tative, in view of *International News Service* v. *Associated Press, supra;* and of *Bourjois & Co.* v. *Katzel, supra.* Distinguishing: *Hennessy* v. *White,* 6 W. W. & A'B. Eq. 216; *Russia Cement Co.* v. *Frauenhar,* 126 Fed. 228; 133 Fed. 518; *Same* v. *Katzenstein,* 109 Fed. 314; *Apollinaris Co.* v. *Scherer,* 27 Fed. 18; *Gretsch* v. *Schoening,* 238 Fed. 780; *Vitascope Co.* v. *U. S. Phonographic Co.,* 83 Fed. 30; *Societe Anonyme* v. *Consolidated Filters Co.,* 248 Fed. 358; *Condy* v. *Taylor,* 56 L. T. Rep. (N. S.) 891; *Farina* v. *Silverlock,* 6 De G. M. & G. 214. The court below did not overrule *Coty* v. *Ivory Co.,* 12 Trade Mark Rep. 284, because Judge Knox was there merely asked to follow the ruling of the District Court in the instant case.

A man's name, reputation and good will are his exclusive property irrespective of statute, and trespass is committed by one who uses that name, reputation or good will without permission. This is the clear intent of the Trade Mark Act.

The Trade Mark Statute forbids the acts complained of. Act of February 20, 1905, §§ 16, 19; Act of March 19, 1920, §§ 4, 6. Congress never intended that the owner of a trade mark could consent to the use thereof by another upon entirely independent goods. This would be contrary to the theory of a trade mark, which, by its nature, must be exclusive and a monopoly. What Congress had in mind was that the good will of the owner of the trade mark should not be used save as he permitted it.

The Acts of 1905 and 1920 forbid any unauthorized person to reproduce, counterfeit, copy or colorably imitate any trade mark. These words include every act of making every kind of likeness, whether with good intent or with bad intent. Since Congress forbade an unauthorized person to "reproduce" and brought in the idea of consent, it must have had something else in mind than merely passing off goods which were independently manufactured

in their entirety. "Reproduce" means to make a reproduction of, to cause to exist in the mind or imagination, and every act whereby an authorized person uses the reputation of another, as embodied in a registered mark, is forbidden. *Davids Co.* v. *Davids,* 233 U. S. 461. The statute, therefore, makes it unlawful to affix "Coty" or "L'Origan" by means of labels, without plaintiff's consent. Act of 1905, § 20. It makes no distinction upon the ground of explanatory matter being placed on the labels, packages, wrappers, etc.

The labels ordered by the District Court clearly permitted a violation of § 2354, of the Penal Law of New York, because the defendant was permitted to affix the trade marks of plaintiff without his consent. *People* v. *Luhrs,* 195 N. Y. 377.

No questions of constitutionality or of unlawful monopoly are here involved.

The registration for "L'Origan" is valid and is infringed by the use of "L'Origan" in different type upon the labels approved by the District Court.

Mr. George S. Hornblower, Mr. Raoul E. Desvernine and *Mr. Frederic D. McKenney,* by leave of Court, filed a brief as *amici curiae.*

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought by the respondent, Coty, a citizen of France, against Prestonettes, a New York corporation, having its principal place of business in the Southern District of New York. It seeks to restrain alleged unlawful uses of the plaintiff's registered trade marks, "Coty" and "L'Origan" upon toilet powders and perfumes. The defendant purchases the genuine powder, subjects it to pressure, adds a binder to give it coherence and sells the compact in a metal case. It buys

the genuine perfume in bottles and sells it in smaller bottles. We need not mention what labels it used before this suit as the defendant is content to abide by the decree of the District Court. That decree allowed the defendant to put upon the rebottled perfume "Prestonettes, Inc., not connected with Coty, states that the contents are Coty's—(giving the name of the article) independently rebottled in New York," every word to be in letters of the same size, color, type and general distinctiveness. It allowed the defendant to make compacts from the genuine loose powder of the plaintiff and to sell them with this label on the container: "Prestonettes, Inc., not connected with Coty, states that the compact of face powder herein was independently compounded by it from Coty's—(giving the name) loose powder and its own binder. Loose powder — per cent, Binder — per cent," every word to be in letters of the same size, color, type and general distinctiveness. The Circuit Court of Appeals, considering the very delicate and volatile nature of the perfume, its easy deterioration, and the opportunities for adulteration, issued an absolute preliminary injunction against the use of the above marks except on the original packages as marked and sold by the plaintiff, thinking that the defendant could not put upon the plaintiff the burden of keeping a constant watch. 285 Fed. 501. Certiorari granted, 260 U. S. 720.

The bill does not charge the defendant with adulterating or otherwise deteriorating the plaintiff's product except that it intimates rather than alleges metal containers to be bad, and the Circuit Court of Appeals stated that there were no controverted questions of fact but that the issue was simply one of law. It seemingly assumed that the defendant handled the plaintiff's product without in any way injuring its qualities and made its decree upon that assumption. The decree seems to us to have gone too far.

The defendant of course by virtue of its ownership had a right to compound or change what it bought, to divide either the original or the modified product, and to sell it so divided. The plaintiff could not prevent or complain of its stating the nature of the component parts and the source from which they were derived if it did not use the trade mark in doing so. For instance, the defendant could state that a certain percentage of its compound was made at a certain place in Paris, however well known as the plaintiff's factory that place might be. If the compound was worse than the constituent, it might be a misfortune to the plaintiff, but the plaintiff would have no cause of action, as the defendant was exercising the rights of ownership and only telling the truth. The existence of a trade mark would have no bearing on the question. Then what new rights does the trade mark confer? It does not confer a right to prohibit the use of the word or words. It is not a copyright. The argument drawn from the language of the Trade Mark Act does not seem to us to need discussion. A trade mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his. *United Drug Co.* v. *Theodore Rectanus Co.,* 248 U. S. 90, 97. There is nothing to the contrary in *Bourjois & Co.* v. *Katzel,* 260 U. S. 689. There the trade mark protected indicated that the goods came from the plaintiff in the United States, although not made by it, and therefore could not be put upon other goods of the same make coming from abroad. When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo. *Canal Co.* v. *Clark,* 13 Wall. 311, 327.

If the name of Coty were allowed to be printed in different letters from the rest of the inscription dictated by the District Court a casual purchaser might look no

further and might be deceived. But when it in no way stands out from the statement of facts that unquestionably the defendant has a right to communicate in some form, we see no reason why it should not be used collaterally, not to indicate the goods, but to say that the trade-marked product is a constituent in the article now offered as new and changed. As a general proposition there can be no doubt that the word might be so used. If a man bought a barrel of a certain flour, or a demijohn of Old Crow whiskey, he certainly could sell the flour in smaller packages or in former days could have sold the whiskey in bottles, and tell what it was, if he stated that he did the dividing up or the bottling. And this would not be because of a license implied from the special facts but on the general ground that we have stated. It seems to us that no new right can be evoked from the fact that the perfume or powder is delicate and likely to be spoiled, or from the omnipresent possibility of fraud. If the defendant's rebottling the plaintiff's perfume deteriorates it and the public is adequately informed who does the rebottling, the public, with or without the plaintiff's assistance, is likely to find it out. And so of the powder in its new form.

This is not a suit for unfair competition. It stands upon the plaintiff's rights as owner of a trade-mark registered under the act of Congress. The question therefore is not how far the court would go in aid of a plaintiff who showed ground for suspecting the defendant of making a dishonest use of his opportunities, but is whether the plaintiff has the naked right alleged to prohibit the defendant from making even a collateral reference to the plaintiff's mark. We are of opinion that the decree of the Circuit Court of Appeals must be reversed and that that of the District Court must stand.

Decree reversed.

Mr. Justice McReynolds dissents.

DILLINGHAM, AS PRESIDENT, ET AL. *v.* McLAUGHLIN, AS SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, ET AL.

McLAUGHLIN, AS SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, ET AL. *v.* DILLINGHAM, AS PRESIDENT, ET AL.

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

Nos. 690 and 691. Argued March 17, 1924.—Decided April 7, 1924.

1. Business so nearly akin to banking as to be equally clothed with a public interest may be brought under state supervision by confinement to corporations. P. 373.
2. So *held* of a business, conducted by a common-law trust, of soliciting and receiving loans in small monthly payments under loan contracts which entitled the respective lenders, when they had paid in a stated percentage, to borrow the face value of their contracts in the order of their applications therefor on real estate security, or, upon sale of this borrowing right, to receive the amounts paid in on their contracts with a problematical "bonus", or, by paying up contracts in full, to receive back their face value with a share in a "surplus,"—with provisions as to forfeiture, etc. *Id.*
3. A law of New York forbidding any individual, partnership or unincorporated association to engage in the business of receiving deposits or payments of money in installments, for coöperative, mutual loan, savings or investment purposes, in sums of less than $500 each, *held* not violative of the Equal Protection Clause in not applying to the business of receiving larger deposits, in view of the greater protection needed by small investors and the elements of chance, risk and delay to investors existing in this case. P. 374.
4. A party as to whom a statute is not unduly discriminative cannot contest its constitutionality upon the ground that it discriminates unduly against others. *Id.*
5. The operation of reasonable state laws for the protection of the public cannot be headed off by making contracts reaching into the future. *Id.*

Reversed.

Cross appeals from a decree of the District Court in a suit brought by Dillingham et al., trustees, against New York officials, to enjoin them from enforcing a New York statute making the continuance of the plaintiffs' business a misdemeanor. Laws, N. Y., 1923, c. 895.

Mr. Oliver D. Burden, with whom *Mr. Terry A. Lyon* was on the briefs, for appellants and cross-appellees.

Mr. Edward G. Griffin, Deputy Attorney General of the State of New York, with whom *Mr. Carl Sherman,* Attorney General, was on the brief, for appellees and cross-appellants.

Mr. Justice Holmes delivered the opinion of the Court.

The plaintiffs in this case are the president, vice-president and secretary and treasurer, who are also trustees, of the Mutual Benefit League of North America, described in the bill as a common law trust and sometimes denominated plaintiff. The defendants are the Superintendent of Banks of the State of New York, the Attorney General and the District Attorneys of the same State. The suit is a proceeding in equity brought to prevent the enforcement of an act of the state legislature approved June 1, 1923, Laws of 1923, c. 895, which makes the continuance of the plaintiffs' business a misdemeanor. The ground of the bill is that the statute impairs the obligation of contracts, deprives the plaintiffs and those whom they represent of their liberty and property without due process of law, and denies them the equal protection of the law, contrary to § 10, Article I, and the Fourteenth Amendment of the Constitution of the United States. The case was heard by three judges under § 266 of the Judicial Code, and an interlocutory injunction was issued against prosecuting " this plaintiff " and enforcing the law as to contracts actually entered into on or before June 25, 1923,

the date of the hearing, but except to that extent was denied. Both parties appeal.

The statute forbids any individual, partnership or unincorporated association to engage in the business of receiving deposits or payments of money in installments, for coöperative, mutual loan, savings or investment purposes in sums of less than five hundred dollars each; or to conduct a business similar to the business of a savings bank or a savings and loan association, or to promise to make loans upon real estate security for building &c. purposes as an inducement for the payment of such sums. There are amplifications to stop rat holes, but they need not be stated as it is not denied that the plaintiffs are within the act. The plaintiffs' business consists in soliciting and receiving payments under a complicated document which it is unlikely that the applicant will understand. It is called a three per cent. loan contract and bears the large letters "Face Value $—". The so-called face value is the amount ultimately to be paid by the applicant, and is $100 or more. One per cent. of the amount is to be paid by the applicant monthly. The contracts are placed in a series which is closed at $140,000. The first four and one-half payments are applied by the plaintiffs to the expenses of the business. The subsequent receipts go into a fund appropriated to the series, as do also interest on loans and lapses within the series. When that fund is equal to the face value of a contract, the first applicant in the order in time, if he has paid ten per cent., may borrow the face value of his contract at three per cent. on an approved first mortgage of real estate, repaying at least seven dollars per thousand every month, or he may permit the plaintiffs to sell his right, and receive the amount that he has paid in, with a problematical bonus that need not be described. If he prefers to keep on and pay the full face value the plaintiffs thirty months later will repay it without interest but with a share in

a surplus, if any, that we need not explain. Failure to pay five installments forfeits the contract, but after six payments the applicant may get a certificate for a considerably less sum than he has paid, increasing however with the increase in the number of the payments, and payable in one hundred months or less at the option of the trustees. Further particulars are superfluous, but it is obvious that the position and rights of the applicant are very largely dependent upon chance so far as he is concerned. It is true that his position in the series is certain, but it is extremely improbable that he is told what it will be, as a man would not be likely to come into a series if he knew that a large number of people were entitled ahead of him to whatever advantages the scheme offered. What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law. Otherwise insurance lost or not lost would not be a valid contract.

That however is not the question here. The statute in controversy is not aimed at gaming of any sort, but is a regulation of a business so far akin to banking as to be at least equally clothed with a public interest, and subject to regulation. A State may confine banking to corporations. *Shallenberger* v. *First State Bank of Holstein,* 219 U. S. 114. We see no reason why it may not confine the plaintiffs' business in the same way. It is argued that the business is prohibited altogether, because the statute makes "any person" violating it a criminal. It is said truly enough that a corporation is a person in the sense of the New York laws. But a corporation could not violate this law because its commands are addressed only to individuals, partnerships, and unincorporated associations. So far as this section is concerned it does not prevent the plaintiffs from going on with their business if they will subject themselves to the supervision incident to the corporate form.

The distinction between the businesses of receiving small deposits and those above five hundred dollars is legitimate. The small sums generally come from people without much knowledge of such affairs. Whatever may be one's own opinion about the wisdom of trying to save the ignorant and rash from folly, it is a recognized power that is used in many ways. We have adverted to the element of chance in this very undertaking because it is one not likely to be realized by an applicant. This and the long delay and loss that may ensue upon any particular deposit would be sufficient warrant for the State's effort at least to bring such business under supervision and control, if not to prevent it altogether. It is said that the statute as drawn extends to cases with which it would be irrational to interfere. The Judges below were careful to exclude such a construction, but at all events it is no concern of the plaintiffs. The statute so far as it applies to them must be upheld. *Engel* v. *O'Malley,* 219 U. S. 128.

We do not agree with the Court below as to present contracts. The operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future. *Manigault* v. *Springs,* 199 U. S. 473, 480. *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, 482. *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548, 558. *Denver & Rio Grande R. R. Co.* v. *Denver,* 250 U. S. 241, 244. We are of opinion that the injunction should have been denied altogether. If there are objections to the law under the the State constitution that we do not perceive, they will be open to the present plaintiffs when proceedings are instituted in the State Courts.

Decree reversed.

Preliminary injunction denied.

PANAMA RAILROAD COMPANY *v.* JOHNSON.

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

No. 369. Argued December 7, 1923.—Decided April 7, 1924.

1. As a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. P. 383.
2. Section 20 of the Act of March 4, 1915, as amended June 5, 1920, which allows a seaman suffering personal injury in his employment to sue his employer for damages, declares that " jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." *Held*, that the quoted provision (construed with Jud. Code, §§ 24 and 51,) relates only to venue, conferring a personal privilege which a defendant may waive, if he enters a general appearance before or without claiming it. *Id.*
3. Section 2 of Art. III of the Constitution, in extending the judicial power of the United States to " all cases of admiralty and maritime jurisdiction," by implication made the admiralty and maritime law the law of the United States, subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. P. 385.
4. This power of Congress extends to the entire subject, substantive and procedural, and permits of the exercise of a wide discretion, though subject to well recognized limitations, one of which is that there are boundaries to the maritime law and admiralty jurisdiction which cannot be altered by legislation, and another, that the enactments, when not relating to matters whose existence or influence is confined to a more limited field, shall be coextensive with and operate uniformly in the whole of the United States. P. 386.
5. The Act of March 4, 1915, § 20, as amended, provides that any seaman suffering personal injury in the course of his employment may, at his election, maintain an action at law, with the right of trial by jury, " and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

Held: (a) The statute is not objectionable as an attempted withdrawal of subject matter from the reach of the maritime law, but is a permissible addition to that law of new rules concerning the rights and obligations of seamen and their employers. P. 388.

(b) Congress has power to make maritime rules in relative conformity to the common law or its modifications, and to permit enforcement of rights thereunder through proceedings *in personam*, according to the course of the common law on the common law side of the courts. *Id.*

(c) The statute is not to be construed as restricting enforcement of the new rights to actions at law, (which might mean an unconstitutional encroachment on the maritime jurisdiction,) but as allowing the injured seaman to assert his right of action under it either on the common law side, with right of trial by jury, or on the admiralty side, with trial to the court. P. 389.

(d) A statute may adopt the provisions of other statutes by reference. P. 391.

(e) The reference in the above statute is to the Federal Employers' Liability Act and its amendments. *Id.*

(f) The statute, with the legislation it incorporates by reference, has the uniformity required of maritime enactments. P. 392.

(g) The statute does not conflict with the Fifth Amendment in permitting injured seamen to elect between varying measures of redress and different forms of action without according a corresponding right to their employers. *Id.*

289 Fed. 964, affirmed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment entered in the District Court for the Eastern District of New York on a verdict recovered by the plaintiff, Johnson, as damages resulting from personal injuries sustained at sea in the course of his employment by the defendant railroad company as a seaman. The action was based on § 20 of the Act of March 4, 1915, c. 153, 38 Stat. 1185, as amended by § 33 of the Act of June 5, 1920, c. 250, 41 Stat. 1007.

Mr. Richard Reid Rogers for plaintiff in error.

I. The act is unconstitutional, inasmuch as it is destructive of the admiralty and maritime jurisdiction of the

courts of the United States guaranteed by § 2, Art. III, of the Constitution.

The rights of seamen against the shipowner with respect to injuries sustained while in the service are well settled by the maritime law. They have remained virtually unchanged since the laws of Oleron, which provide (Art. VI) "that if a seaman in service of the ship happens to become wounded or otherwise hurt; in that case he shall be cured and provided for at the cost and charge of the said ship"; and (Art. VII) "that if sick he is to be set ashore and receive wages if the ship departs." As more specifically defined in *The Osceola,* 189 U. S. 158, they consist of a right to wages for the voyage and maintenance and cure, irrespective of fault on the part of the seaman; but to indemnity only in case of unseaworthiness or negligent medical treatment. The shipowner is not responsible for injuries to a seaman occasioned by the negligence of members of the crew, or ship's officers.

Under the railroad law there is of course no continuing obligation to pay wages or maintain and cure the employee, irrespective of the employer's fault; but upon the other hand the employer is responsible for the negligence of co-employees. There are other differences, as for example, the doctrine of comparative negligence, the non-assumption of the risk of appliances which fail to comply with statutory requirements, and the inability of the employer to limit his risk.

As the legal rights of the seaman under the act were construed below, the seaman alone is given the privilege of proceeding in admiralty for maintenance and cure if his case be one which would not justify a recovery under the railroad law, or upon the other hand, if his case be one which would not justify a recovery outside of maintenance and cure under the maritime law, of suing for full indemnity under the common law as modified by

the railroad law; as, to illustrate, where his injuries are due to the negligence of a co-employee. In other words, one party to a maritime contract or arrangement is given the right under the act in question of taking his case wholly from the jurisdiction and principles of the maritime law, and of transferring it to the jurisdiction of a common law court there to be decided under the principles of common law as modified or extended in the irrelevant field of railroad legislation.

But conceding that Congress may amend the maritime law by modifying the principle of *The Osceola* to the extent of holding the shipowner responsible for injuries received by one seaman through the negligence of another, nevertheless, in such a case it would be the maritime law itself, that was modified or amended. Under this act, however, the maritime law is not directly amended, but a cause of action essentially maritime in its nature is bodily removed, or, at the election of one of the parties, may be removed, to a common law court, there to be decided, not according to maritime principles, but according to the very different common law principles, as modified or extended, in the case of personal injuries to railway employees.

If Congress can take a cause of action essentially maritime and provide that it shall no longer be dealt with according to the principles of maritime law, but according to the principles of the common law, it could in the end destroy the entire constitutional jurisdiction of the courts of the United States over maritime causes of action. If Congress can authorize one party to remove his cause from the jurisdiction and principles of the maritime law, and have it treated according to the conflicting principles and rights of the common law, it could undoubtedly do the same thing directly without extending an election to the litigant. In other words, Congress could provide that in all cases of injuries sustained by seamen, such

cause of action should thereafter be tried in common law courts, according to common law principles, and there is no reason why it could not further provide that such causes could be tried according to common law principles in the courts of the several States. *New Jersey Steam Nav. Co.* v. *Merchants' Bank,* 6 How. 377.

Heretofore under the saving clause of the Judiciary Act of 1789, now Jud. Code, § 256, maritime rights could be prosecuted in common law courts where the common law gave an adequate remedy, but once there the litigant's rights would still be adjudicated according to the principles of the maritime law, *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; but under this act a common law procedure is not only authorized, but maritime rights are disregarded, and the very opposite common law rights or statutory modifications thereof, substituted in their place.

The Constitution is sufficiently broad to prevent the destruction in whole or in part of the maritime law and the jurisdiction of the courts of the United States with respect thereto. *The Lottawanna,* 21 Wall. 558; *The St. Lawrence,* 1 Black, 522; *Butler* v. *Boston & Savannah S. S. Co.,* 130 U. S. 527; *The Blackheath,* 195 U. S. 361.

The constitutional jurisdiction of the courts of the United States in maritime matters is exclusive. *The Moses Taylor,* 4 Wall. 411; *Martin* v. *Hunter's Lessee,* 1 Wheat. 304; *Claflin* v. *Houseman,* 93 U. S. 130; *Stevenson* v. *Fain,* 195 U. S. 165; *Farrell* v. *Waterman S. S. Co.,* 291 Fed. 604; *Butler* v. *Boston & Savannah S. S. Co.,* 130 U. S. 527; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Hanrahan* v. *Pacific Transport Co.,* 262 Fed. 951.

The difference between the creation of a right and the exercise of a common law remedy under the saving clause is well set forth in *Sudden & Christenson* v. *Industrial Accident Comm.,* 182 Cal. 437.

The argument against the statute is based not upon the lack of power of Congress to amend the maritime law, nor upon its lack of power to authorize a maritime right to be prosecuted in the common law courts, state or federal, but upon the right of Congress under the Constitution to destroy the substantive maritime law by substituting therefor the entirely distinct code of common law.

If the act be valid, it may be truly said that the judicial power of the United States no longer extends to *all* causes of admiralty and maritime jurisdiction, inasmuch as Congress has put it into the power of a seaman in a cause of action purely maritime in its nature, to take the case from out the jurisdiction of that law—the substantive law regulating his rights—and have it tried according to the principles of an entirely different system of law, in no sense maritime, and where the rights are quite diverse. State courts have assumed jurisdiction of seamen's actions brought under the act, *Lynott* v. *Great Lakes Trans. Co.*, 202 App. Div. 613; 234 N. Y. 626.

II. The act is in conflict with the Fifth Amendment.

The arbitrary and irrational discrimination carried by this law is apparent upon its face. If a privilege is to be given the plaintiff to try his cause of action under either one of two diverse systems of law, where not only the remedies but the rights are different, no sound reasoning can be advanced why a similar privilege should not be extended to the defendant. The law is confined to seamen alone, and does not protect any other class of employees engaged in the service of the ship, as, for example, stevedores.

III. The act is so vague and uncertain as not to constitute due process of law. Notwithstanding that the maritime law of the Constitution is universally recognized as an independent code with rights and remedies peculiar to itself, that law must now fluctuate accordingly as Congress may hereafter legislate with respect to employers

and employees in the entirely alien field of railroad employment. From now on, whenever Congress legislates upon that subject, it will unconsciously modify the maritime code as well. There is nothing in the act which limits the railroad legislation which affects the rights of seamen to the railroad legislation in force when the act was enacted.

This is the first case, so far as we have been able to ascertain, which has ever arisen, where Congress has endeavored to legislate concerning a fundamental constitutional power, or indeed upon any other subject, by the vague and confusing method of adopting *in solido* the general law relating to an entirely separate branch of jurisprudence. *Binghamton Bridge Case,* 3 Wall. 51, distinguished.

The act says that "all" statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. But the Safety Appliance Act, the Boiler Inspection Act, and the Hours of Service Act are statutes affecting the rights of railroad employers and their employees, and the language of this act is certainly broad enough to make all of these apply in the case where a seaman has sustained injury. Many of the provisions of these acts could have no conceivable application to the case of seamen, but what does or does not apply must remain at the present time a matter of doubt, and neither the seaman nor the shipowner has any longer before him a definite standard of legal duty or liability. Perhaps an even greater confusion will grow out of the application of the law of limited liability.

It is a general rule of constitutional law that an act which is so indefinite as to prescribe an obligation and set up no standard by which such obligation can be measured by court or jury, is invalid. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; *Standard Corp.* v. *Waugh*

Corp., 231 N. Y. 51; *Louisville & Nashville R. R. Co.* v. *Tennessee*, 19 Fed. 679; *Cook* v. *State*, 26 Ind. 278; *Succession of Pizzali*, 141 La. 647.

IV. The District Court which tried the case was without jurisdiction.

V. The evidence did not establish legal negligence upon the part of the defendant, and the jury should have been instructed to find a verdict for the defendant.

VI. The court erred in charging the jury upon the assumption of risk.

Mr. Wade H. Ellis, with whom *Mr. Silas Blake Axtell* was on the brief, for defendant in error.

Mr. John M. Woolsey and *Mr. Vernon S. Jones*, by leave of Court, filed a brief as *amici curiae*.

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action by a seaman against his employer, the owner of the ship on which he was serving, to recover damages for personal injuries suffered at sea while he was ascending a ladder from the deck to the bridge in the course of his employment,—the complaint charging that the injuries resulted from negligence of the employer in providing an inadequate ladder and negligence of the ship's officers in permitting a canvas dodger to be stretched and insecurely fastened across the top of the ladder and in ordering the seaman to go up the ladder. The employer was a New York corporation. The ship was a domestic merchant vessel which at the time of the injuries was returning from an Ecuadorian port. The action was brought on the common-law side of a District Court of the United States, and the right of recovery was based expressly on § 20 of the Act of March 4, 1915, c. 153, 38 Stat. 1185, as amended by § 33 of the Act of June 5, 1920, c. 250, 41 Stat. 1007, which reads as follows:

"Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The defendant unsuccessfully demurred to the complaint and then answered. The issues were tried to the court and a jury; a verdict for the plaintiff was returned, and a judgment was entered thereon, which the Circuit Court of Appeals affirmed. 289 Fed. 964. The defendant prosecutes this writ of error.

1. Apparently the action was not brought in the district of the defendant's residence or principal office as provided in the act; and on this ground the defendant objected that the District Court could not entertain it. The objection was not made at the outset on a special appearance, but after the defendant had appeared generally and demurred to the complaint. The court thought the objection went to the venue only and was waived by the general appearance; so the objection was overruled. 277 Fed. 859. Error is assigned on the ruling; but we think it was right.

The case arose under a law of the United States and involved the requisite amount, if any was requisite;[1] so

[1] See the first and third subdivisions of § 24 of the Judicial Code.

there can be no doubt that the case was within the general jurisdiction conferred on the District Courts by § 24 of the Judicial Code, unless, as the defendant contends, it was excluded by the concluding provision of the act, which says: "Jurisdiction of such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Although not happily worded, the provision, taken alone, gives color to the contention. But as a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed. See *United States* v. *Barnes,* 222 U. S. 513, 520; *United States* v. *Sweet,* 245 U. S. 563, 572. The rule is specially pertinent here. Beginning with the Judiciary Act of 1789, Congress has pursued the policy of investing the federal courts—at first the Circuit Courts, and later the District Courts—with a general jurisdiction expressed in terms applicable alike to all of them and of regulating the venue by separate provisions designating the particular district in which a defendant shall be sued, such as the district of which he is an inhabitant or in which he has a place of business,—the purpose of the venue provisions being to prevent defendants from being compelled to answer and defend in remote districts against their will. This policy was carried into the Judicial Code, and is shown in §§ 24 and 51, one embodying general jurisdictional provisions applicable to rights under subsequent laws as well as laws then existing, and the other containing particular venue provisions. A reading of the provision now before us with those sections, and in the light of the policy carried into

them, makes it reasonably certain that the provision is not intended to affect the general jurisdiction of the District Courts as defined in § 24, but only to prescribe the venue for actions brought under the new act of which it is a part. No reason why it should have a different purpose has been suggested, nor do we perceive any. Its use of the word " jurisdiction " seems inapt, and therefore not of special significance. The words " shall be " are stressed by the defendant, but as they are found also in the earlier provisions which uniformly have been held to relate to venue only, they afford no ground for a distinction.

By a long line of decisions, recently reaffirmed, it is settled that such a provision merely confers on the defendant a personal privilege which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters a general appearance before or without claiming his privilege. *Interior Construction & Improvement Co.* v. *Gibney,* 160 U. S. 217; *United States* v. *Hvoslef,* 237 U. S. 1, 11; *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co.,* 260 U. S. 261, 272, 275; *Lee* v. *Chesapeake & Ohio Ry. Co.,* 260 U. S. 653, 655.

2. The defendant objects that the statute whereon the plaintiff based his right of action is in conflict with § 2 of Article III of the Constitution, which extends the judicial power of the United States to " all cases of admiralty and maritime jurisdiction." Before coming to the particular grounds of the objection, it will be helpful to refer briefly to the purpose and scope of the constitutional provision as reflected in prior decisions.

As there could be no cases of " admiralty and maritime jurisdiction " in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in Colonial times and

during the Confederation and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this Court, gave effect to it. Practically therefore the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several States, but as having become the law of the United States,—subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that

the enactments,—when not relating to matters whose existence or influence is confined to a more restricted field, as in *Cooley* v. *Board of Wardens,* 12 How. 299, 319,—shall be coextensive with and operate uniformly in the whole of the United States. *Waring* v. *Clarke,* 5 How. 441, 457; *The Lottawanna,* 21 Wall. 558, 574, 577; *Butler* v. *Boston & Savannah S. S. Co.,* 130 U. S. 527, 556, 557; *In re Garnett,* 141 U. S. 1, 12; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 215; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 164; *Washington* v. *Dawson & Co., ante,* 219; 2 Story Const., 5th ed., §§ 1663, 1664, 1672.

In this connection it is well to recall that the Constitution, by § 1 of Article III, declares that the judicial power of the United States shall be vested in one Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish," and, by § 8 of Article I, empowers the Congress to make all laws which shall be necessary and proper for carrying into execution the several powers vested in the government of the United States. Mention should also be made of the enactment by the first Congress, now embodied in §§ 24 and 256 of the Judicial Code, whereby the District Courts are given exclusive original jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

The particular grounds on which a conflict with § 2 of Article III is asserted are that the statute enables a seaman asserting a cause of action essentially maritime to withdraw it from the reach of the maritime law and the admiralty jurisdiction, and to have it determined according to the principles of a different system applicable to a distinct and irrelevant field, and also disregards the restriction in respect of uniformity. For reasons which will be stated we think neither ground can be sustained.

The statute is concerned with the relative rights and obligations of seamen and their employers arising out of

personal injuries sustained by the former in the course of their employment. Without question this is a matter which falls within the recognized sphere of the maritime law, and in respect of which the maritime rules have differed materially from those of the common law applicable to injuries sustained by employees in nonmaritime service. But, as Congress is empowered by the constitutional provision to alter, qualify or supplement the maritime rules, there is no reason why it may not bring them into relative conformity to the common-law rules or some modification of the latter, if the change be country-wide and uniform in operation. Not only so, but the constitutional provision interposes no obstacle to permitting rights founded on the maritime law or an admissible modification of it to be enforced as such through appropriate actions on the common-law side of the courts,—that is to say, through proceedings *in personam* according to the course of the common law. *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 159. This was permissible before the Constitution, and it is still permissible. Judicial Code, §§ 24 and 256; *Waring* v. *Clarke*, 5 How. 441, 460; *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, 390; *Leon* v. *Galceran*, 11 Wall. 185, 188, 191; *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 646; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259; *Red Cross Line* v. *Atlantic Fruit Co.*, *ante*, 109.

Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as

modified, and not between that law and some nonmaritime system.

The source from which the new rules are drawn contributes nothing to their force in the field to which they are translated. In that field their strength and operation come altogether from their inclusion in the maritime law. *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, 303. True, they are not in so many words made part of that law; but an express declaration is not essential to make them such. As originally enacted, § 20 was part of an act the declared purpose of which was "to promote the welfare of American seamen." It then provided that in suits to recover damages for personal injuries "seamen having command shall not be held to be fellow-servants with those under their authority," and in *Chelentis* v. *Luckenbach S. S. Co.*, *supra*, p. 384, this Court treated it as part of the maritime law, but held it did not disclose a purpose "to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore." After that decision the section was reënacted in the amended form hereinbefore set forth as part of an act the expressed object of which was "to provide for the promotion and maintenance of the American merchant marine." In that form it makes applicable to personal injuries suffered by seamen in the course of their employment "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees." Thus its origin, environment and subject-matter show that it is intended to, and does, bring the rules to which it refers into the maritime law.

But it is insisted that, even if the statute brings those rules into that law, it is still invalid in that it restricts the enforcement of rights founded on them to actions at law,

and thereby encroaches on the admiralty jurisdiction intended by the Constitution. It must be conceded that the construction thus sought to be put on the statute finds support in some of its words, and also that if it be so construed a grave question will arise respecting its constitutional validity. But, as this Court often has held, "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 407–408; *Baender* v. *Barnett,* 255 U. S. 224. The question arises, therefore, whether the statute is fairly open to such a construction. There may be room for diverging opinions about the answer, but we think the better view is that it should be in the affirmative.

The course of legislation, as exemplified in § 9 of the Judiciary Act of 1789, §§ 563 (par. 8) and 711 (par. 3) of the Revised Statutes, and §§ 24 (par. 3) and 256 (par. 3) of the Judicial Code, always has been to recognize the admiralty jurisdiction as open to the adjudication of all maritime cases as a matter of course, and to permit a resort to common-law remedies through appropriate proceedings *in personam* as a matter of admissible grace. It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure,—that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissible. But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissive. It says "may maintain" an action at law "with the right of trial by

jury," the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident. The words "in such action" in the succeeding clause are all that are troublesome. But we do not regard them as meaning that the seaman may have the benefit of the new rules if he sues on the law side of the court, but not if he sues on the admiralty side. Such a distinction would be so unreasonable that we are unwilling to attribute to Congress a purpose to make it. A more reasonable view, consistent with the spirit and purpose of the statute as a whole, is that the words are used in the sense of "an action to recover damages for such injuries," the emphasis being on the object of the suit rather than the jurisdiction in which it is brought. So we think the reference is to all actions brought to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules, usually consisting of wages and the expense of maintenance and cure. See *The Osceola,* 189 U. S. 158; *The Iroquois,* 194 U. S. 240; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372. In this view the statute leaves the injured seaman free under the general law—§§ 24 (par. 3) and 256 (par. 3) of the Judicial Code—to assert his right of action under the new rules on the admiralty side of the court. On that side the issues will be tried by the court, but if he sues on the common-law side there will be a right of trial by jury. So construed, the statute does not encroach on the admiralty jurisdiction intended by the Constitution, but permits that jurisdiction to be invoked and exercised as it has been from the beginning.

Criticism is made of the statute because it does not set forth the new rules but merely adopts them by a generic reference. But the criticism is without merit. The reference, as is readily understood, is to the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and its

amendments. This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference. *Kendall* v. *United States,* 12 Pet. 524, 625; *In re Heath,* 144 U. S. 92; *Corry* v. *Baltimore,* 196 U. S. 466, 477; *Interstate Ry. Co.* v. *Massachusetts,* 207 U. S. 79, 84.

The asserted departure from the restriction respecting uniformity in operation is without any basis. The statute extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform. The national legislation respecting injuries to railway employees engaged in interstate and foreign commerce which it adopts has a uniform operation, and neither is nor can be deflected therefrom by local statutes or local views of common law rules. *Second Employers' Liability Cases,* 223 U. S. 1, 51, 55; *Baltimore & Ohio R. R. Co.* v. *Baugh,* 149 U. S. 368, 378. Of course that legislation will have a like operation as part of this statute.

A further objection urged against the statute is that it conflicts with the due process of law clause of the Fifth Amendment in that it permits injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers, and therefore is unreasonably discriminatory and purely arbitrary. The complaint is not directed against either measure of redress or either form of action but only against the right of election as given. Of course the objection must fail. There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation

of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought.

At the trial the defendant requested a directed verdict in its favor on the ground that no actionable negligence was shown, but the request was denied. Although approved by the Circuit Court of Appeals, the ruling is complained of here. In view of the concurring action of the two courts, we deem it enough to say that the record discloses sufficient evidence of negligence to warrant its submission to the jury.

The defendant also complains that two requests which it preferred on the subject of assumption of risk were denied. The requests were so framed that, considering the state of the evidence, they would not have conveyed a right understanding of the subject and might well have proved misleading. Their refusal was not error.

Judgment affirmed.

MR. JUSTICE SUTHERLAND did not hear the argument or participate in the decision.

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL. *v.* MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY.

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

No. 421. Argued March 5, 6, 1924.—Decided April 7, 1924.

1. Under the Louisiana Constitution of 1921, Art. XIV, § 22, the general control of its own streets is an ordinary governmental function of the City of New Orleans. P. 399.
2. The Louisiana Constitution of 1921 did not invest the State Public Service Commission with such control over streets within

New Orleans that it may compel a railroad company to repair and keep up a street viaduct constructed over its tracks by the city under a contract which granted that right to the city without expropriation or compensation upon the express condition that the city should pay the cost of the erection and subsequent maintenance of the viaduct. P. 399.

287 Fed. 390, affirmed.

APPEAL from a decree of the District Court enjoining the appellants from enforcing an order requiring the appellee railroad company (plaintiff below) to repair a viaduct over its tracks.

Mr. W. M. Barrow, with whom *Mr. A. V. Coco,* Attorney General of the State of Louisiana, was on the brief, for appellants.

Mr. Henry H. Chaffe, with whom *Mr. George Denegre, Mr. Victor Leovy, Mr. Harry McCall* and *Mr. Jas. Hy. Bruns* were on the brief, for appellee.

Mr. Ivy G. Kittredge, by leave of Court, filed a brief on behalf of the City of New Orleans, as *amicus curiae,* asserting its jurisdiction over the subject matter in question.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Court.

March 29, 1923, the appellant Commission issued an order which directed—

"That within fifteen days from the date of this order the Morgan's Louisiana and Texas Railroad and Steamship Company shall commence to repair and put in a safe and suitable condition for vehicular and other traffic, such repairs to be completed within a reasonable time thereafter, the existing viaduct over, above and across the properties of the said Morgan's Louisiana and Texas Railroad and Steamship Company in the Fifth Municipal

District of the City of New Orleans, known as Algiers, within the limits of the said property, which connects the two ends of Newton Street, and thereafter to maintain the same in a safe and suitable condition. This order shall become effective at once."

By an original bill filed in the court below appellee challenged the validity of the order because beyond the power of the Commission; and, if within such power, enforcement would deprive the Company of property without due process of law and impair the obligation of its contract with the City of New Orleans, contrary to the Federal Constitution. The allegations are sufficient to bring the controversy within the court's jurisdiction and empowered it to determine questions of both state and federal law. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508. A special court of three judges, Jud. Code, § 266, heard the issues, held the Commission lacked power to make the order and directed an interlocutory injunction. See 287 Fed. 390. The cause is here by direct appeal.

In 1878 the appellee Railroad Company acquired title to certain land now in New Orleans, fronting 375 feet on the Mississippi River and extending back 4,000 feet, and for forty years has held it under fence. Twenty tracks laid thereon are in constant use. During 1904 the City offered to sell the right to operate a street railway over this property, subject to part payment of the cost of constructing and the entire cost of maintaining the essential viaduct, which the City agreed to provide. This franchise was duly adjudicated, and in 1905 appellee, by definite contract, granted to the City the right to construct the present viaduct over its property at Newton Street, upon the express condition that the grantee should pay for both erection and subsequent maintenance. Under this contract, and not otherwise, without expropriation of the right of way by the public or compensation to the land

owner, the structure was erected. It is 2,000 feet long and extends several hundred feet on either side of appellee's land. For many years the street railway operated over its entire length. Finally, the portion over appellee's tracks fell into disrepair and both City and street railway company failed to restore it. Finding this situation, appellant issued the order copied above.

Art. VI, Louisiana Constitution of 1921 provides—

"Section 4. The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads . . . and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls or charges for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.

"The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission. . . ."

"Section 9. Until otherwise provided by the Legislature, all laws enacted by the General Assembly of the State of Louisiana since the adoption of the Constitution of 1898, and in effect at the time of the adoption of this Constitution, affecting, concerning, or relating to the Railroad Commission of Louisiana, not inconsistent with any of the provisions hereof, shall be construed as referring and applying to the Louisiana Public Service Commission, and nothing in this Constitution shall be construed as in any manner impairing or affecting such laws."

The Commission claims that the power which it undertook to exercise is conferred by these sections and that the Supreme Court of the State so held in *Gulf, C. & S. F.*

Ry. Co. v. *Louisiana Public Service Commission,* 151 La. 635.

The court below entertained another view of the constitutional grant and of the opinion relied upon. We think the conclusion which it reached is correct; and its decree must be affirmed.

Article 284, Louisiana Constitutions of 1898 and 1913—

"The power and authority is hereby vested in the Commission [Railroad, Express, Telephone, Telegraph, Steamboat and other Water Craft, and Sleeping Car Commission, created by Art. 283], and it is hereby made its duty to adopt, change or make reasonable and just rates, charges and regulations, to govern and regulate railroad, steamboat and other water craft, and sleeping car, freight and passenger tariffs and service, express rates, and telephone and telegraph charges, to correct abuses, and prevent unjust discrimination and extortion in the rates for the same, on the different railroads, steamboats and other water craft, sleeping car, express, telephone and telegraph lines of this State, and to prevent such companies from charging any greater compensation in the aggregate for the like kind of property or passengers, or messages, for a shorter than a longer distance over the same line, unless authorized by the Commission to do so in special cases; to require all railroads to build and maintain suitable depots, switches and appurtenances, wherever the same are reasonably necessary at stations, and to inspect railroads and to require them to keep their tracks and bridges in a safe condition, and to fix and adjust rates between branch or short lines and the great trunk lines with which they connect, and to enforce the same by having the penalties hereby prescribed inflicted through the proper courts having jurisdiction. . . ."

By Act 132 of 1918 the General Assembly of Louisiana directed "that the powers and duties of the Railroad

Commission of Louisiana are hereby added to and enlarged; and the power and authority is hereby vested in the said Commission, and it is hereby made its duty to require the owner, possessor or operator of any railway, railroad, tram road, log road, transportation, irrigation or drainage canal or syphon, crossing any public road already constructed or which may hereafter be constructed, to construct and maintain a suitable and convenient crossing over such public road, the said crossing to extend to the limits of the right of way, or fifty feet from the center of such railway, railroad, tram road, log road, transportation, irrigation or drainage canal or syphon, in accordance with the standard specifications furnished by the State Highway Department of the Board of State Engineers in respect to such crossings." The act further empowered the Railroad Commission to require such crossings upon proper certificates of the police juries in the respective parishes.

The broad language of Art. 284, Constitutions of 1898 and 1913, was not regarded as sufficient to empower the Railroad Commission to require carriers to construct public crossings over their lines. To meet this situation and provide relief in the parishes the Act of 1918 was passed; and it was an order issued under this act which the Supreme Court sustained in *Gulf, C. & S. F. Ry. Co.* v. *Louisiana Public Service Commission.*

Art. XIV, § 22, Louisiana Constitution of 1921—

"The electors of the City of New Orleans and of any political corporation which may be established within the territory now, or which may hereafter be embraced within the corporate limits of said city, shall have the right to choose their public officers. This section shall not prohibit . . . nor shall it be construed as restricting the police power of the State, or as prohibiting the Legislature from appointing, or authorizing the appointment of, any board or commission with full au-

thority in the City of New Orleans other than that of controlling the ordinary governmental functions of municipal government."

Unless and until otherwise advised by the Supreme Court of Louisiana, we must conclude that the general control of its own streets is an ordinary governmental function of the City of New Orleans.

It would require more definite language than we find in the Constitution of 1921 or in *Gulf, C. & S. F. Ry. Co.* v. *Louisiana Public Service Commission* to convince us that the Commission has power to assume control over all those streets within New Orleans which approach or cross railroad tracks, and to disregard the solemn contracts of the municipality with respect thereto. That the liability which the Commission has undertaken to impose upon appellee conflicts with the contract under which the latter granted permission to construct the viaduct over its property, is not denied. Only very clear and definite words would suffice to show that the State had undertaken to authorize a thing so manifestly unjust and oppressive.

Affirmed.

RODMAN, UNITED STATES MARSHAL, *v.* POTHIER.

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

No. 546. Argued March 14, 1924.—Decided April 7, 1924.

Where a person was held for removal under an indictment charging murder on a military reservation under exclusive jurisdiction of the United States, and the existence of such exclusive jurisdiction involved consideration of many facts and seriously controverted questions of law, *held*, that determination of that issue was for the court where the indictment was found and was not open for decision in another district in *habeas corpus*. P. 402.

291 Fed. 311, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court dismissing a writ of *habeas corpus*, and ordered the prisoner discharged.

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

Mr. Louis Marshall, with whom *Mr. Davis G. Arnold* was on the brief, for respondent.

Mr. Jesse C. Adkins and *Mr. Frank F. Nesbit*, by leave of Court, filed a brief as *amici curiae*.

Mr. Louis Marshall, by leave of Court, filed a brief as *amicus curiae*.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Respondent Pothier and another were duly indicted—October 13, 1922—for the murder of Alexander P. Cronkhite, on October 25, 1918, "within and on lands theretofore acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, and within the Southern Division of the Western District of Washington, to wit, within and on the Camp Lewis Military Reservation." Pothier was arrested in the State of Rhode Island and, after hearings before the Commissioner and the District Court, a warrant for his removal was directed as provided by § 1014, Rev. Stats. By this *habeas corpus* proceeding the validity of the warrant is questioned and respondent's release sought. His contention is that the United States had not acquired exclusive jurisdiction over the place of the crime as alleged by the indictment because they had not then received a deed to the land.

The District Court said and held, 285 Fed. 632—

" The argument of the defense is that by the terms of the statute the passing of the deed is a prerequisite to the exclusive jurisdiction of the United States, and that as the deed postdates the time of the alleged murder the United States did not then have exclusive jurisdiction over the lands conveyed by said deed. But the evidence shows also that before the passage of the deeds, and before the date of the alleged murder, Pierce County, acting as the arm and agent of the State, had acquired by condemnation, and had turned over to the United States military authorities, many tracts of land comprised within the Camp Lewis Military Reservation, which had been selected by a representative of the Secretary of War, and which, when donated to the United States, the Secretary of War had been authorized to accept. Buildings had been erected and the camp permanently occupied before January 29, 1918, and before July, 1918, there were 50,000 men in camp. There is much evidence tending to show that as to a number of the tracts of land comprised in the camp there was, before the date of the alleged crime, a practical consummation of the donation, and that the agents of the county and of the United States had done all that it was necessary to do in order to vest title and exclusive jurisdiction in the United States, save the execution and recording of the deeds whereby the title of the United States should be evidenced. The contention of the United States that the evidence of *de facto* exercise of exclusive jurisdiction is sufficient in itself to show probable cause cannot be disregarded, in view of the *quaere* in *Holt* v. *United States,* 218 U. S. 245, 252: ' The documents referred to are not before us, but they properly were introduced, and so far as we can see justified the finding of the jury, even if the evidence of the *de facto* exercise of exclusive jurisdiction was not enough, or if the United States was called

on to try title in a murder case.' . . . I am of the opinion that the defendant has failed to overcome the *prima facie* case made by the indictment, and that the evidence fails to show the want of probable cause."

The Circuit Court of Appeals, 291 Fed. 311, was "of the opinion that no other conclusion can be drawn from the evidence than that, at the time the crime charged in the indictment was committed, the United States had acquired no title in the land embraced within Camp Lewis Military Reservation; that the sovereignty of the State over the tract had not then been yielded up and was not until the deed, map, etc., were filed in the office of the County Auditor of Pierce County for record, which was not until November 15, 1919, more than a year after the alleged murder. This being so, there is an absolute want of probable cause for the removal of the appellant to answer to the crime charged. *Greene* v. *Henkel,* 183 U. S. 249, 261." It accordingly reversed the judgment of the District Court and directed Pothier's discharge.

We think there was enough to show probable cause and that the judgment of the District Court is correct. Whether the *locus* of the alleged crime was within the exclusive jurisdiction of the United States demands consideration of many facts and seriously controverted questions of law. As heretofore often pointed out, these matters must be determined by the court where the indictment was found. The regular course may not be anticipated by alleging want of jurisdiction and demanding a ruling thereon in a *habeas corpus* proceeding. Barring certain exceptional cases (unlike the present one), this Court "has uniformly held that the hearing on *habeas corpus* is not in the nature of a writ of error nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or

the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court." *Henry* v. *Henkel,* 235 U. S. 219, 229; *Louie* v. *United States,* 254 U. S. 548.

Reversed.

DAVIS, AS AGENT, ETC. *v.* PORTLAND SEED COMPANY.

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

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY *v.* PARRINGTON.

DAVIS, AGENT UNITED STATES RAILROAD ADMINISTRATION, *v.* PARRINGTON.

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

GREAT NORTHERN RAILWAY COMPANY *v.* McCAULL-DINSMORE COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Nos. 114, 122, 123, 209. Argued February 20, 1924.—Decided April 7, 1924.

1. The long and short haul provision of the Interstate Commerce Act (§ 4) is violated, and the carrier incurs, *prima facie* at least, the penalties prescribed by § 10, by publishing, without authority from the Commission, a rate for a longer haul lower than that scheduled for a shorter haul of the same kind of property over the same line or route in the same direction. P. 424.
2. In such case a shipper who is charged the higher rate for the shorter haul is entitled, under § 8, to the full amount of his resulting damages, with reasonable counsel fees, but not to collect from the

carrier the difference between the rate paid and the lower rate published for the longer haul upon the theory that the latter was the only legal rate and the difference an illegal exaction recoverable without proof of damages or regard to the intrinsic reasonableness of the rate. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184. Pp. 415, 424.

3. The ruling in *Kansas City Southern Ry. Co.* v. *Wolf*, 261 U. S. 133, that actions of this kind are subject to the two year limitation (Act to Regulate Commerce, §§ 9 and 16,) is adhered to. P. 426.

281 Fed. 10; and 154 Minn. 28, reversed.

REVIEW of four judgments recovered by shippers as overcharges alleged to have been exacted by the respective defendant carriers in violation of the "long and short haul clause" of the Interstate Commerce Act.

No. 114 was an action in the District Court for the difference between the freight paid during federal control on a shipment of alfalfa seed to Walla Walla, Washington, from Roswell, New Mexico, and the amount that would have been paid if a lower rate scheduled from a more distant point over the same route had been applied.

Nos. 122 and 123 were like actions in the District Court, upon claims assigned by various shippers, in respect of sugar transported by the above-named steamship company, wholly by water, from San Francisco, California, to Portland and Astoria, Oregon, partly while that company and its northern rail connection, the Oregon-Washington Railroad & Navigation Company, were under federal control, and at times when the joint rate of these carriers from San Francisco to North Portland, a greater distance, as it was claimed, was less than the local rate paid for the water carriage to Portland and Astoria. In these three cases the judgments for the plaintiffs were affirmed by the Circuit Court of Appeals; and its judgments were brought here by error and certiorari.

In No. 209, here by certiorari, the Supreme Court of Minnesota affirmed a like judgment in favor of a shipper whose shipments of wheat, from Benchland, Montana, to

Minneapolis and Duluth, Minnesota, were charged for by the carrier at a published tariff rate higher than the published rate to the same destination from Billings, a more distant point.

Mr. John F. Finerty and *Mr. Arthur C. Spencer,* with whom *Mr. Henry W. Clark, Mr. C. E. Cochran* and *Mr. John F. Reilly* were on the briefs, for petitioner in No. 114 and plaintiffs in error in Nos. 122 and 123. See *post,* p. 601.

The District Court was without jurisdiction, exclusive original jurisdiction being lodged in the Interstate Commerce Commission. *Texas & Pac. Ry. Co.* v. *Abilene Co.,* 204 U. S. 426; *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.,* 215 U. S. 481; *Robinson* v. *Balt. & Ohio R. R. Co.,* 222 U. S. 506; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 304; *Texas & Pac. Ry. Co.* v. *American Tie Co.,* 234 U. S. 138; *Northern Pac. Ry. Co.* v. *Solum,* 247 U. S. 477; *Director General* v. *Viscose Co.,* 254 U. S. 498; *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184; *Same* v. *Puritan Coal Co.,* 237 U. S. 121; *Same* v. *Sonman Coal Co.,* 242 U. S. 120; *St. Louis, etc., Ry. Co.* v. *Hasty & Sons,* 255 U. S. 252.

Section 4 of the Commerce Act (the long and short haul clause), is a statute relating to a form of discrimination and not one merely declaring the intermediate rate unlawful. *Parsons* v. *Chicago & N. W. Ry. Co.,* 167 U. S. 447.

Discrimination may be removed either by raising one rate, lowering the other, or changing both, and the fact that a rate discriminates against one locality in favor of another one does not in itself entitle the first locality to the same rate as the tariff provides for the second. *American Exp. Co.* v. *Caldwell,* 244 U. S. 617; *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 144; *Hillsborough Mills* v. *Boston & Maine R. R.,* 269 Fed. 816.

Section 6 of the Commerce Act requires carriers to collect the rates published in their tariffs and forbids transportation except when an applicable rate is contained in a published tariff. In view of this section the carriers were compelled to collect their published rates or refuse to accept the commodities for shipment. Commerce Act, §§ 4, 6.

Under § 6 the carriers must collect their published rates, even though they are violative of other sections of the act. *Armour Co.* v. *United States,* 209 U. S. 56; *Pittsburgh, etc., Ry. Co.* v. *Fink,* 250 U. S. 577; *Keogh* v. *Chicago & N. W. Ry. Co.,* 260 U. S. 156; *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184; *Poor Grain Co.* v. *C. B. & Q. Ry. Co.,* 12 I. C. C. 418; *Interstate Remedy Co.* v. *American Exp. Co.,* 16 I. C. C. 436; *Crescent Coal Co.* v. *C. & E. I. Ry. Co.,* 24 I. C. C. 149.

Under plaintiff's theory that the rate from Roswell was not a legally published rate, there was no legally published rate at all—the transportation must therefore have been unlawful, and the courts will not aid shippers in collecting any part of the charges which they paid. *Payne* v. *Bassett,* 235 S. W. 917.

The mere fact that a rate is violative of the long and short haul clause, does not entitle shippers to an intermediate point to recover the excess over the rate to the more distant point. *Parsons* v. *Chicago & N. W. Ry. Co.,* 167 U. S. 447; *International Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 184; *Iten Biscuit Co.* v. *C. B. & Q. R. R. Co.,* 53 I. C. C. 729; *Topeka Banana Dealers' Assn.* v. *St. Louis, etc., R. R. Co.,* 13 I. C. C. 620.

The long line of decisions of the Interstate Commerce Commission in Fourth Section violation cases holding that mere proof of the difference in the rates is no evidence of damage, should be followed by this Court, because not manifestly incorrect. *Heath* v. *Wallace,* 138 U. S. 573; *United States* v. *Cerecedo,* 209 U. S. 337.

The Federal Control Act, § 10, and Transportation Act, 1920, § 206 (c), lodged exclusive original jurisdiction of cases against the Director General involving violations of the Commerce Act in the Interstate Commerce Commission. *Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135; *Alabama, etc., Ry. Co.* v. *Journey,* 257 U. S. 111; 25 R. C. L. 1010; *Phillips Co.* v. *Grand Trunk Ry. Co.,* 236 U. S. 662; *Kansas City So. Ry. Co.* v. *Wolf,* 261 U. S. 133; *Missouri Pac. R. R. Co.* v. *Ault,* 256 U. S. 554.

No violation of the Fourth Section was proved, because the evidence showed that there was no transportation from the more distant point, the rate being merely a paper rate. *Parsons* v. *Chicago & N. W. Ry. Co.,* 167 U. S. 447; Judson, Interstate Commerce, 3d ed., p. 529; *Topeka Banana Dealers' Assn.* v. *St. Louis, etc., R. R. Co.,* 13 I. C. C. 620; *Anaconda Copper Co.* v. *Director General,* 64 I. C. C. 136; *Lehigh Valley R. R. Co.* v. *Rainey,* 112 Fed. 487.

During federal control rates were initiated and maintained under order of the President, and the Fourth Section was therefore inapplicable to them. Federal Control Act, § 10; *Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135; *Missouri Pac. R. R. Co.* v. *Ault,* 256 U. S. 554; *Alabama, etc., Ry. Co.* v. *Journey,* 257 U. S. 111.

If there was a departure from the Fourth Section it was covered by appropriate orders of the Commission.

The measure of damages in Fourth Section cases is not the difference between rates. *Parsons* v. *Chicago & N. W. Ry. Co.,* 167 U. S. 447; *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184; *Hillsborough Mills* v. *Boston & Maine R. R.,* 269 Fed. 816; *Homestead Co.* v. *Des Moines Elec. Co.,* 226 Fed. 49; *Atchison, etc. Ry. Co.* v. *Spiller,* 246 Fed. 1; *Clark Bros. Coal Co.* v. *Pennsylvania R. R. Co.,* 238 Fed. 642; *Lehigh Valley R. R. Co.* v. *American Hay Co.,* 219 Fed. 539.

Under § 15 of the Commerce Act, as amended in 1910 and 1920, transportation wholly by water is not subject to the act, notwithstanding the provisions of the Panama Canal Act. Commerce Act, § 15, 36 Stat. 552; Transportation Act 1920, §§ 408, 412, 413, 418; 41 Stat. 482, 483, 485; Fed. Stats. Anno., 1920, Supp., pp. 104–106; Panama Canal Act, 37 Stat. 560, 566; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; 2 Lewis' Sutherland Statutory Constr., 2d ed., p. 667.

Assignments of claims against the Director General not complying with § 3477, Rev. Stats., are void. *Spoffard* v. *Kirk,* 97 U. S. 484; *National Bank* v. *Downie,* 218 U. S. 345; *Missouri Pac. R. R. Co.* v. *Ault,* 256 U. S. 554; *Seaboard Air Line Ry.* v. *United States,* 256 U. S. 655.

No liability can attach either to the Steamship Company or the Director General on shipments moving during the time the Steamship Company's vessels were being operated by the Shipping Board. *Missouri Pac. R. R. Co.* v. *Ault,* 256 U. S. 554; *Davis* v. *Zirkle,* 138 N. E. 266.

There was further no violation of the Fourth Section because the rates to Portland and Astoria were local rates and the paper rates to North Portland were joint rates. *Chicago & N. W. Ry. Co.* v. *Osborne,* 52 Fed. 912; *United States* v. *Mellen,* 53 Fed. 229; *Interstate Commerce Comm.* v. *Cincinnati, etc., Ry. Co.,* 56 Fed. 925; 162 U. S. 184; *Allen & Lewis Co.* v. *Oregon Ry. & Nav. Co.,* 98 Fed. 16; *Parsons* v. *Chicago & N. W. Ry. Co.,* 167 U. S. 447.

The carriers were required during the first six months after federal control to collect the rates which they found in the Director General's tariffs, whether they conformed to the Fourth Section or not. Transportation Act, § 208 (a); *Wasatch Coal Co.* v. *Baldwin,* 60 Utah, 397; *Public Service Comm.* v. *New York Cent. R. R. Co.,* 185 N. Y. S. 267.

All claims antedating February 12, 1919, are barred because not brought within two years. Commerce Act,

§ 16; *Phillips Co.* v. *Grand Trunk Ry. Co.,* 236 U. S. 662; *Kansas City So. Ry. Co.* v. *Wolf,* 261 U. S. 133; Transportation Act, § 206 (f); *Eberhart* v. *United States,* 204 Fed. 884.

Mr. F. G. Dorety, with whom *Mr. R. J. Hagman* was on the brief, for petitioner in No. 209.

Mr. James G. Wilson for respondent in No. 114 and defendant in error in Nos. 122 and 123.

The District Court had jurisdiction.

Where the practice is directly prohibited by statute, the person injured thereby need not go originally to the Commission but may sue directly in court. *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184; *Same* v. *Puritan Coal Co.,* 237 U. S. 121; *Same* v. *Sonman Coal Co.,* 242 U. S. 120; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 247; *Morrisdale Coal Co.* v. *Same,* 230 U. S. 304; *St. Louis, etc., Ry. Co.* v. *Hasty & Sons,* 255 U. S. 252; *Great Northern Ry. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285; Commerce Act, §§ 8, 9.

The transportation (in Nos. 122 and 123), though wholly by water, was subject to the Interstate Commerce Act.

The question whether the assignment of the claims against the Director General to the defendant in error (in No. 123) was void because not complying with § 3477, Rev. Stats., is not before this Court, it not having been raised in the lower court. Claims of this character may be sued upon by an assignee. *Spiller* v. *Atchison, etc., Ry. Co.,* 253 U. S. 134; *Missouri Pac. R. R. Co.* v. *Ault,* 256 U. S. 559; *Parrington* v. *Davis,* 285 Fed. 741; *Seaboard Air Line Ry.* v. *United States,* 256 U. S. 655.

Carriers (in Nos. 122 and 123) are liable notwithstanding certain of the boats on which part of the sugar was handled were under requisition of the United States Shipping Board for a portion of the period.

North Portland and Portland are on the same route, Portland being intermediate, on shipments from San Francisco to North Portland.

The actual showing that shipments have been made to North Portland as a condition to recovery is not necessary. *United States* v. *Louisville & Nashville R. R. Co.* 235 U. S. 322; *California Adjustment Co.* v. *Atchison, etc. Ry. Co.*, 179 Cal. 140.

The objection that certain of the claims sued on in Nos. 122 and 123 are barred by the statute of limitations, for the reason that the action was not commenced within two years was not properly made in the lower court, except as to those claims prior to January 1, 1918, in the case against the Steamship Company.

Reliance is had on *Kansas City So. Ry.* v. *Wolf,* 261 U. S. 133. That case had not been decided in this Court at the time the present cases were decided. The decision in that case in the lower court was to the contrary, as was the decision in the present cases. The Commerce Act itself does not specifically prescribe the limitation period for actions commenced by shippers before the court. The act does, by §§ 8 and 9, give a choice of forum either before the Commission or the District Court of the United States, but the act only specifically places a limitation upon proceedings before the Commission.

This Court, in the *Wolf Case,* bases its decision entirely upon its former decision in *Phillips Co.* v. *Grand Trunk Ry. Co.,* 236 U. S. 662; but that was a case on a claim which admittedly had to be commenced originally before the Commission. Such a case had been commenced before the Commission, not by the plaintiff in the *Phillips Case,* but by another plaintiff on a similar claim. The Commission had established the right to recover and the plaintiff in the *Phillips Case* commenced his action in court based upon the proceedings before the Commission, and the Court properly held that the per-

son commencing in the court could not have a different period of limitation than that before the Commission.

In the *Wolf Case* this Court holds that the same principle applies. We respectfully ask for a reconsideration of this ruling. The Court in the *Phillips Case* says that in those cases where the statute reads as does the Commerce Act, to-wit: that the proceeding shall be commenced within two years from the time the cause of action accrues and not after, the liability is destroyed. If this is the case, then we submit that the same rule should apply to all questions of damages in any case which might have been submitted to the Commission, whether it may be sued upon in the state court, the United States court, or before the Commission; and this Court has in several cases since the *Phillips Case* permitted recoveries in cases involving interstate traffic which could have been submitted to the Commission, but were commenced in the state courts, and recovery was permitted for periods considerably in excess of two years. *Pennsylvania R. R. Co.* v. *Puritan Coal Co.,* 237 U. S. 121; *Same* v. *Sonman Coal Co.,* 242 U. S. 120; *Same* v. *Stineman Coal Co.,* 242 U. S. 300.

This contention is further confirmed by consideration of *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 304; in connection with *Pennsylvania R. R. Co.* v. *Puritan Coal Co., supra;* and *Same* v. *Sonman Coal Co., supra.*

We respectfully submit that the rule should only be enforced as to those cases in which primary action must be brought before the Commission.

The Fourth Section order of the Interstate Commerce Commission, made in connection with the general advance in rates, can have no bearing in these cases, for the reason that it is not pleaded or relied on in the court below. *Robinson* v. *Balt. & Ohio R. R. Co.,* 222 U. S. 511. Furthermore, the order had not the general carry-all effect that opposing counsel contends for it.

As for the measure of damages, under the law the lower rate is the only rate which can be applied, as the higher rate did not exist. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314; *California Adjustment Co.* v. *Atchison, etc., Ry. Co.*, 179 Cal. 140; *Louisville & Nashville R. R. Co.* v. *Walker*, 110 Ky. 961.

It is true that the Interstate Commerce Commission has refused to follow this rule, basing its decisions upon *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184. That case, however, was not one for recovery of damages which were specifically provided by statute, but was an action for damage by one person who had been receiving a rebate on account of the fact that another shipper had received a greater rebate than he, and it was claimed that his measure of damages was the difference in the two rebates; but the Court held that, as neither person was claiming under a legal rate, he could only recover such damages as he could prove by reason of the fact that the other shipper had received a greater rebate. See *Southern Pacific Co.* v. *California Adjustment Co.*, 237 Fed. 965; *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 534.

In the present cases the plaintiffs have paid out of pocket an amount which the statute said should not be exacted of them, and their damages are definitely fixed by the statute.

The effect of § 10 of the Federal Control Act and an order made in 1918 increasing then existing rates, was not raised or relied on in the court below. Furthermore, the violations in question were not thus validated. *Missouri Pac. R. R. Co.* v. *Ault*, 256 U. S. 560; *Johnston* v. *Atchison, etc., Ry. Co.*, 51 I. C. C. 356; *Rice Potato Co.* v. *Balt. & Ohio R. R. Co.*, 51 I. C. C. 365.

Transportation Act of 1920, § 206, did not transfer the jurisdiction of these matters from the court to the Commission, but shows the intention of Congress that the

jurisdiction of all controversies remain in the same courts or tribunals as before or during federal control.

It is not necessary to prove actual shipments from the more distant point. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 322; *California Adjustment Co.* v. *Atchison, etc., Ry. Co.*, 179 Cal. 140; *Beeghly* v. *Public Util. Comm.*, 104 Oh. St. 158.

Mr. Frederick M. Miner, Mr. John P. Devaney, Mr. Dewitt Clinton Edwards and *Mr. Walter W. Patterson* filed a brief on behalf of the respondent in No. 209, resisting the petition for a writ of certiorari.

Mr. Frank R. Wehe and *Mr. Alfred J. Harwood,* by leave of Court, filed a brief as *amici curiae* in Nos. 122 and 123.

Mr. John F. Finerty, by leave of Court, filed a brief as *amicus curiae,* on behalf of the Director General of Railroads, in No. 209.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The courts below affirmed judgments for the plaintiffs in four separate actions brought to recover alleged overcharges on freight said to have been demanded by the respective carriers in violation of the long and short haul clause, Fourth Section, Interstate Commerce Act, c. 104, 24 Stat. 379, 380; c. 309, 36 Stat. 539, 547; c. 91, 41 Stat. 456, 480, which declares—

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater com-

pensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; [The Transportation Act, 1920, added] but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed. . . ."

All the cases involve the same fundamental question of law. The essential charge is that the carrier demanded and received greater compensation for transporting freight for a shorter distance than its published rate for transporting like property for a longer distance over the same route and in the same direction.

It will suffice to state the salient facts and issues disclosed by record No. 114—*Davis, Agent,* v. *Portland Seed Company.* They are typical.

Pecos is in Western Texas, 160 miles south of Roswell, N. M. A line of the Atchison, Topeka & Santa Fe Railway system joins these points and extends northward to Denver, Colorado, where it connects with the Union Pacific System which leads into the Northwest. January 4, 1919, the carrier received a car of alfalfa seed at Roswell for transportation to Walla Walla, Washington, by way of Denver. Three weeks later respondent Portland Seed Company received this car at destination and paid

freight charges reckoned at $2.44 per hundred pounds—the scheduled rate from Roswell. During all of January, 1919, the initial carrier's published schedule specified $1.515 per hundred pounds as the rate for transporting alfalfa seed from Pecos to Walla Walla through Roswell and Denver; and no application had been made to the Interstate Commerce Commission for permission to charge less for the longer than for the shorter haul. The Seed Company demanded judgment for the excess above the Pecos rate, as an overcharge illegally exacted and recoverable as money had and received.

The insistence is that under the long and short haul clause the lower published rate from Pecos became the maximum which the carrier could charge for the shipment from Roswell, notwithstanding the higher published rate therefor; that the sum charged above the Pecos rate amounted to an illegal exaction, recoverable without other proof of actual damage and without regard to the intrinsic reasonableness of either rate.

Relying on *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, the Interstate Commerce Commission has definitely rejected respondent's theory by many opinions, and holds that while a charge prohibited by the long and short haul clause, § 4, may subject the carrier to prosecution by the Government it does not afford adequate basis for reparation where there is no other proof of pecuniary damage. *Nix & Co.* v. *Southern Ry. Co.* (1914), 31 I. C. C. 145; *S. J. Greenbaum Co.* v. *Southern Ry. Co.,* 38 I. C. C. 715; *Chattanooga Implement & Mfg. Co.* v. *Louisville & Nashville R. R. Co.,* 40 I. C. C. 146; *LaCrosse Shippers' Assn.* v. *C. I. & L. Ry. Co.,* 43 I. C. C. 520; *Oregon Fruit Co.* v. *Southern Pacific Co.,* 50 I. C. C. 719; *Iten Biscuit Co.* v. *C. B. & Q. R. R. Co.,* 53 I. C. C. 729; *Illinois Brick Co.* v. *Director General* (1920), 57 I. C. C. 320, 323.

Counsel insist that under § 4 it was unlawful to charge compensation above the published Pecos rate for the

transportation from Roswell to Walla Walla. Therefore, the published Roswell rate being unlawful, non-existent indeed, the Pecos rate became the only one in force. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 322, 323, is relied upon; and it is said that the opinion there interprets the long and short haul clause as " absolutely prohibiting the existence " of higher rates for shorter hauls unless approved by the Commission. Read with the real issue in mind, the opinion gives no support to respondent's argument. The Interstate Commerce Commission held that certain reshipping privileges granted to Nashville but refused to Atlanta amounted to unreasonable preference under § 3 and ordered the carrier to discontinue them. The Commerce Court restrained the enforcement of this order. This Court declared that the challenged privileges were prohibited by the long and short haul clause; that § 4 controlled the right to grant them; that they had not been authorized by the Commission; and therefore it would be unlawful to continue them. Accordingly, the order to desist was approved and the decree of the Commerce Court reversed. No disagreement with *Pennsylvania R. R. Co.* v. *International Coal Co.* was suggested. The Court said—

(322–3) " The express or implied statutory recognition of the authority on the part of carriers to primarily determine for themselves the existence of substantially similar circumstances and conditions as a basis of charging a higher rate for a shorter than for a longer distance within the purview of § 4 of the Act to Regulate Commerce and the right to make a rate accordingly to continue in force until on complaint it was corrected in the manner pointed out by statute, ceased to exist after the adoption of the amendment to § 4 by the Act of June 18, 1910, c. 309, 36 Stat. 539, 547. This results from the fact that by the amendment in question the original power to determine

the existence of the conditions justifying the greater charge for a shorter than was exacted for a longer distance, was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibition efficacious it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. *Intermountain Rate Cases,* 234 U. S. 476. If then it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was, when originally established, an exertion of the authority conferred or recognized by § 4 of the act, as there is no pretense that permission for its continuance had been applied for as required by the amendment and the statutory period for which it could be lawfully continued without such permission had expired, it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below."

The opinion does not discuss the carrier's liability to shippers who had paid higher rates for the shorter hauls. No doubt similar relief would have been granted by the Commission if the situation here revealed had been brought before it.

Respondent has not asked an injunction against illegal rates. It seeks to secure something for itself without proof of pecuniary loss consequent upon the unlawful act. A similar effort failed in *Pennsylvania R. R. Co.* v. *International Coal Co., supra.* The International Company shipped 40,000 tons of coal from the Clearfield district, paying full schedule rates. The carrier had allowed other shippers from and to the same places at the same time rebates ranging from five to thirty-five cents per ton. Without alleging or proving pecuniary injury re-

sulting to itself from this unlawful action, the Company sought to recover like concessions upon all its shipments. Through Mr. Justice Lamar, this Court said—

(196–7) "The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. . . . The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

(200) "Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons* v. *Chicago & N. W. Railway,* 167 U. S. 447, 460, construing this section (8), 'before any party can recover under the Act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government. On the contrary, and in answer to the argument that damages might be a cover for rebates, the Act of June 18, 1910 (36 Stat. 539, c. 309),

provided that where a carrier misquotes a rate it should pay a penalty of $250, not to the shipper, but to the Government, recoverable by a civil action brought by the United States. 35 Stat. 166. Congressional Record (1910), 7569. The danger that payment of damages for violations of the law might be used as a means of paying rebates under the name of damages is also pointed out by the Commission in 12 I. C. C. 418–421, 423; 14 I. C. C. 82."

(200) "It is said, however, that it is impossible to prove the damages occasioned one shipper by the payment of rebates to another; and that if the plaintiff is not entitled to recover as damages the same drawback that was paid to its competitor, the statute not only gives no remedy but deprives the plaintiff of a right it had at common law to recover this difference between the lawful and the unlawful rate."

(200–1) "We are cited to no authority which shows that there was any such ancient measure of damages, and no case has been found in which damages were awarded for such discrimination. Indeed, it is exceedingly doubtful whether there was at common law any right of action for any sort of damages in a case like this, while this statute does give a clear, definite and positive right to recover for unjust discrimination."

(201–2) "*Union Pacific R. R.* v. *Goodridge*, 149 U. S. 680, 709, involved the construction of the Colorado statute, which did not, as does the Commerce Act, compel the carrier to adhere to published rates, but required the railroad to make the same concessions and drawbacks to all persons alike, and for a failure to do so made the carrier liable for three times the actual damage sustained or overcharges paid by the party aggrieved. This distinction is also to be noted in the English cases cited. The Act of Parliament did not require the carrier to maintain its published tariff but made the lowest rate the lawful rate.

Anything in excess of such lowest rate was extortion and might be recovered in an action at law as for an overcharge. *Denaby* v. *Manchester Ry.*, L. R. 11 App. Cases, 97, 116. But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion."

(202–3) "Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the Government and, in addition, was liable for all damages it thereby occasioned, the plaintiff or any other shipper. But, under § 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer, the carrier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered.

Whatever they were they could be recovered, because § 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be '*liable to the person injured thereby for the full amount of damages sustained in consequence of such violation, . . . together with reasonable attorney's fee.*' "

(206) "To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained,—whatever they might be and whether greater or less than the rate of rebate paid."

Southern Pacific Co. v. *Darnell-Taenzer Co.*, 245 U. S. 531, presents no conflict with *Pennsylvania R. R.* v. *International Coal Co.* There the shipper paid a published rate which the Commission afterwards found to be unrea-

sonable. This Court held he could recover, as the proximate damage of the unlawful demand, the excess above the rate which the Commission had declared to be reasonable. The opinion went no further. Certainly it did not suggest that the unreasonable rate was non-existent for any purpose because forbidden by law.

Section 6 of the Commerce Act directs—

"(1) That every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. . . . (3) No change shall be made in the rates, fares, and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission. . . . *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified. . . . (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion

of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

"Sec. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

"Sec. 10 (1). That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done or not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to

exceed five thousand dollars for each offense: *Provided,* That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

What liability did the carrier incur by publishing a rate from Pecos lower than the scheduled one from Roswell without the Commission's permission, and thereafter imposing and collecting the higher rate upon the shipment to Walla Walla?

Construing the words of § 4 literally, it is argued that unless some property moved over the longer distance at the lower rate before greater compensation was charged for transporting like property over a shorter one, there was no violation of law. We cannot accept this view. It does not accord proper weight to imperative requirements concerning publication of rates and subsequent observance of them. The Commission holds, for example, that although the schedule contains a plain clerical error, nevertheless no other charge may be demanded and the shipper may recover any excess. *Lamb-Fish Lumber Co.* v. *Y. & M. V. R. R. Co.,* 42 I. C. C. 470.

The record shows, we think, that the carrier violated the statute by publishing the lower rate for the longer haul without permission and, *prima facie* at least, incurred the penalties of § 10. Also, it became "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of . . . such violation," together with reasonable counsel fees, as provided by § 8. But mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the

lower one, as a supplement might have done, without regard to the reasonableness or unreasonableness of either.

With special knowledge of rate schedules and relying on *Pennsylvania R. R. Co.* v. *International Coal Co.,* the Interstate Commerce Commission for ten years has required proof of financial loss as a prerequisite to reparation for infractions of the Fourth Section. The rule is firmly established. Congress has not shown disapproval. The Transportation Act, 1920, with evident purpose to conserve the carriers' revenues, added the following to the proviso which gives power to exempt from the long and short haul clause: "But in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed." The rule adopted by the Commission follows the logic of the opinion relied upon and can be readily applied. The contrary view would not harmonize with other provisions of the act; and, put into practice, would produce unfortunate consequences.

The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified. It commanded adherence to the published rate from Roswell; § 6 forbade any other charge. Observance of the lower rate from Pecos, put in without authorization, might have been forbidden, as pointed out in *United States* v. *Louisville & Nashville R. R. Co., supra;* but it would be going too far to hold, as respondent insists, that the unauthorized publication established the lower rate as the maximum permissible charge from the intermediate point—the only rate therefrom which could be demanded.

If a lower rate published without authority becomes the maximum which may be charged from any inter-

mediate point, mistakes in schedules (and they are inevitable) may become disastrous. Suppose the rate from an obscure point in Maine to San Francisco via Boston, New York and Chicago should be printed at $15.00, instead of $150, and the error remain undiscovered for many months, could all who had paid more than $15.00 for passage along that route recover the excess without proof of pecuniary loss?

After the challenged judgments were entered, *Kansas City Southern Ry. Co.* v. *Wolf*, 261 U. S. 133, was decided. We adhere to the ruling there announced, and in view of it defenses in these causes based upon prescribed limitations must be determined.

The judgments below are reversed. The causes will be remanded with appropriate instructions for further proceedings.

Reversed.

MR. JUSTICE BRANDEIS dissents.

TAUBEL-SCOTT-KITZMILLER COMPANY, INC. *v.* FOX, ET AL., TRUSTEES IN BANKRUPTCY OF COWEN HOSIERY COMPANY, INC., BANKRUPT.

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

No. 188. Argued January 22, 23, 1924.—Decided April 7, 1924.

1. Section 67f of the Bankruptcy Act does not invalidate a lien obtained by levy of an execution within the four months preceding the filing of the petition in bankruptcy on which the judgment debtor is adjudged a bankrupt, if the debtor was in fact solvent when the levy was made. P. 429.
2. Congress has power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees in bankruptcy to property adversely claimed, even when not in the possession of the bankruptcy court, and may determine to what extent jurisdiction shall

be exercised by summary proceedings and to what extent by plenary suit. Pp. 430, 438.

3. But the bankruptcy court has not been given jurisdiction by summary proceedings or otherwise to avoid, under § 67f, a lien created by levy of an execution under a judgment of a state court within four months preceding the filing of the petition in bankruptcy, where the property is in the actual possession of the sheriff and neither he nor the judgment creditor has appeared in or consented to adjudication by the bankruptcy court, and where the claim of the creditor that the bankrupt was not insolvent at the time of judgment and levy is not colorable but substantially supported. *Id.*

4. Section 67f, in providing that the bankruptcy court may order that a lien void as against the trustee shall be preserved for the benefit of the estate, does not confer, by implication, jurisdiction to determine whether the lien is void, but grants substantive rights effected by means of subrogation. P. 435.

286 Fed. 351, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing, on petition to revise, an order of the District Court, in bankruptcy, which stayed a summary proceeding before the referee brought by trustees in bankruptcy for the purpose of having an execution declared void and to obtain possession of property upon which it had been levied.

Mr. Elkan Turk, with whom *Mr. Frank J. Hogan, Mr. Herman Goldman* and *Mr. Harry G. Liese* were on the brief, for petitioner.

Mr. David W. Kahn for respondents.

Mr. JUSTICE BRANDEIS delivered the opinion of the Court.

Taubel-Scott-Kitzmiller Co., Inc., recovered, in the Supreme Court of the State of New York, a judgment against Cowen Hosiery Co., Inc. Execution thereon was levied upon personal property of the defendant lying upon

premises occupied by it. The levy created a lien upon the property. New York Civil Practice Act, § 679. The sheriff took, and thereafter retained, exclusive possession and control of the property. Within four months of the date of the levy, the Cowen Co. filed, in the Southern District of New York, a voluntary petition in bankruptcy and was adjudged a bankrupt. Relying upon subdivision f * of § 67 of the Bankruptcy Act, the trustees sought, by a summary proceeding before the referee, to have the lien on execution declared void and to obtain possession of the property. The referee ordered that the judgment creditor show cause before him why this should not be done. Before the District Court, the judgment creditor seasonably challenged the jurisdiction of the referee and of the bankruptcy court; furnished substantial support for its claim that the debtor was solvent at the date of the entry of judgment and levy of execution thereon; and insisted that, since the bankrupt did not have, and the bankruptcy court did not acquire, possession of the property, the execution lien and the right to possession under

* "f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

the levy could not be assailed by the trustees except by a plenary suit in the appropriate forum. The trustees, on the other hand, urged that the referee had jurisdiction, even if the adverse claim by the judgment creditor be deemed a substantial one. The District Court sustained the contention of the judgment creditor and stayed the proceeding before the referee. Upon a petition to revise, its order was reversed by the Circuit Court of Appeals. 286 Fed. 351. The case is here on writ of certiorari. 260 U. S. 719.

A trustee seeking to have declared void, under subdivision f of § 67, a lien obtained through legal proceedings, and to recover possession of property, may be confronted with an adverse claim upon several grounds. It may be asserted that the lien attacked is of a character different from those provided for in that subdivision.[1] Or, although the lien (*e. g.*, that obtained by levy of execution) is clearly one to which subdivision f applies, that it is valid by reason of other facts. For the statute does not, as a matter of substantive law, declare void every lien obtained through legal proceedings within four months of the filing of the petition in bankruptcy. The lien may be valid, because the debtor was, in fact, solvent at the time the levy was made.[2] Or, although the debtor

[1] *Henderson* v. *Mayer*, 225 U. S. 631. Compare *City of Richmond* v. *Bird*, 249 U. S. 174, 175; *In re Emslie*, 102 Fed. 291; *In re Lillington Lumber Co.*, 132 Fed. 886; *In re Robinson & Smith*, 154 Fed. 343; *Kemp Lumber Co.* v. *Howard*, 237 Fed. 574, 577; *American Trust & Savings Bank* v. *Ruppe*, 237 Fed. 581.

[2] See *Simpson* v. *Van Etten*, 108 Fed. 199, 201; *Stone-Ordean-Wells Co.* v. *Mark*, 227 Fed. 975, 977; *Martin* v. *Oliver*, 260 Fed. 89, 93; *In re Community Stores*, 282 Fed. 328, 329. Cases like *Cook* v. *Robinson*, 194 Fed. 785, 792, and *In re Southern Arizona Smelting Co.*, 231 Fed. 87, 92, to the contrary, are not consistent with the express words of the act. In *Clarke* v. *Larremore*, 188 U. S. 486, it appeared (see original papers) that there was no contention that the bankrupt was solvent at the time of the levy. In *Hutchinson* v. *Otis*,

was then insolvent, because the property had passed into the hands of a *bona fide* purchaser.[3] Or, although the debtor was then insolvent and the levy was made within the four months, because inchoate rights by way of lien had been acquired earlier.[4] As the establishment of any one of these facts would bar recovery by the trustee, their assertion presents a judicial question. In this case, since the possession of the sheriff was the possession of the state court, the trustees' claim to the property would, under general principles of law, have to be litigated in the state court.[5] The question for decision is: Has Congress conferred upon the bankruptcy court, under these circumstances, jurisdiction to adjudicate the controverted rights by summary proceedings?

Congress has, of course, power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees to property adversely claimed. In matters relating to bankruptcy its power is paramount.[6] Hence, even if the property is not within the possession of the bankruptcy court, Congress can confer upon it, as upon any other lower federal court, jurisdiction of the controversy, by conferring jurisdiction over the person in

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190 U. S. 552, it was agreed (see original papers) that the debtor was insolvent at the date of the attachment. In *Chicago, Burlington & Quincy R. R. Co.* v. *Hall,* 229 U. S. 511, 514, it is found that the debtor was insolvent at the time of the garnishment. See *In re Ann Arbor Machine Co.,* 278 Fed. 749, 752. As against an adverse claimant, the mere adjudication of bankruptcy does not, even in involuntary proceedings, conclusively establish insolvency at the date of the attachment or levy. Compare *Gratiot State Bank* v. *Johnson,* 249 U. S. 246.

[3] *Jones* v. *Springer,* 226 U. S. 148.

[4] *Metcalf* v. *Barker,* 187 U. S. 165; *Pickens* v. *Roy,* 187 U. S. 177.

[5] *Taylor* v. *Carryl,* 20 How. 583, 595; *Covell* v. *Heyman,* 111 U. S. 176, 179. Compare *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, 88–90.

[6] *In re Watts & Sachs,* 190 U. S. 1, 27; *Robertson* v. *Howard,* 229 U. S. 254.

whose possession the property is. Congress has, also (subject to the constitutional guaranties), power to determine to what extent jurisdiction conferred, whether through possession of the *res* or otherwise, shall be exercised by summary proceedings and to what extent by plenary suit.[7] But Congress did not, either by § 2, § 23 of the Bankruptcy Act of 1898 or any other provision of the act, confer generally such broad jurisdiction over claims by a trustee against third persons.[8] Nor has it provided, in terms, that a substantial adverse claim to property which is not in the possession of the bankruptcy court and which is demanded by the trustee under subdivision f of § 67, may be litigated, without consent, by a summary proceeding. To sustain the judgment under review, a specific grant of power to so deal with such a controversy must be shown. The contention is that a specific grant of the power is implied in a clause contained in subdivision f. Before examining the clause, it will be helpful to consider the rules, established by decisions of this Court, governing like proceedings under provisions of the Bankruptcy Act cognate to subdivision f of § 67.

The Bankruptcy Act provides in subdivision e of § 67, in subdivision b of § 60 and in subdivision e of § 70, for the recovery by the trustee of property formerly belong-

[7] It has not done so in terms. In the absence of congressional definition of the scope of summary proceedings, it has been determined by decisions of this Court and the General Orders in Bankruptcy. The bankruptcy court may deal by summary proceeding with property in its possession in all matters administrative in their nature; and also with all matters judicial in their nature, to the extent commonly practiced in courts of equity. See *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 217; *Robertson* v. *Howard*, 229 U. S. 254, 260.

[8] *Harris* v. *First National Bank*, 216 U. S. 382; *Park* v. *Cameron*, 237 U. S. 616; *Kelley* v. *Gill*, 245 U. S. 116. Compare *Lovell* v. *Newman & Son*, 227 U. S. 412.

ing to the bankrupt and which, within four months of the commencement of the proceedings in bankruptcy, had been subjected, in some manner, to a lien. The substantive rights of the trustee under these provisions differ according to the nature of the lien or of the infirmity therein. Under subdivision e of § 67, where the lien was created *in pais,* it is voidable if it was made, within the four months, with the intent to hinder and defraud creditors, or if, within that period, it was made while insolvent under such circumstances that, under the laws of the State where the property is situated, it is void as to creditors. Under subdivision b of § 60, the lien is voidable, whether it was created *in pais* or through legal proceedings, if it was created within the four months while the debtor was insolvent and the effect of its enforcement would be to give a preference. Under subdivision e of § 70 a lien, however created, although not within the four months, is voidable by the trustee, if any creditor of the bankrupt might have avoided it. But the adjective rights of the trustee to litigate in the bankruptcy court claims incident to the lien were the same under these differing provisions.

By the Act of 1898, as originally enacted, the power of the bankruptcy court to adjudicate, without consent, controversies concerning the title, arising under either § 67 e or § 60 b, or § 70 e, was confined to property of which it had possession. The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee;[9] where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from

[9] *Page* v. *Edmunds,* 187 U. S. 596.

his custody;[10] where the property is in the hands of the bankrupt's agent or bailee;[11] where the property is held by some other person who makes no claim to it;[12] and where the property is held by one who makes a claim, but the claim is colorable only.[13] As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession actual or constructive.[14] It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court.[15]

Wherever the bankruptcy court had possession, it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision e of § 67, under subdivision b of § 60 and under subdivision e of § 70.[16] But in no case where it lacked possession,

[10] *White* v. *Schloerb,* 178 U. S. 542; *Fairbanks Shovel Co.* v. *Wills,* 240 U. S. 642. Compare *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S. 438, 442, 445; *Acme Harvester Co.* v. *Beekman Lumber Co.,* 222 U. S. 300, 307.

[11] *Mueller* v. *Nugent,* 184 U. S. 1, 15.

[12] *Babbitt* v. *Dutcher,* 216 U. S. 102, 105.

[13] Compare *In re Weinger, Bergman & Co.,* 126 Fed. 875; *In re Rudnick & Co.,* 158 Fed. 223; *In re Ransford,* 194 Fed. 658, 663; *In re Columbia Shoe Co.,* 289 Fed. 465.

[14] *Hebert* v. *Crawford,* 228 U. S. 204. Compare *Noble* v. *Union River Logging R. R. Co.,* 147 U. S. 165, 173; *Schweer* v. *Brown,* 195 U. S. 171; *In re Kramer,* 218 Fed. 138, 141.

[15] *In re Weinger, Bergman & Co.,* 126 Fed. 875; *In re Eddy,* 279 Fed. 919. Compare *In re Rockford Produce & Sales Co.,* 275 Fed. 811. Also *In re Yorkville Coal Co.,* 211 Fed. 619; *In re Goldstein,* 216 Fed. 887; *In re Goldstein* v. *Central Trust Co.,* 216 Fed. 889.

[16] *Murphy* v. *John Hofman Co.,* 211 U. S. 562, 569; *Hebert* v. *Crawford,* 228 U. S. 204; *Weidhorn* v. *Levy,* 253 U. S. 268, 271, 272; *Board of Trade of Chicago* v. *Johnson, ante,* 1. Compare *Whitney* v. *Wenman,* 198 U. S. 539, 553; *Matter of Loving,* 224 U. S. 183; *Houghton* v. *Burden,* 228 U. S. 161; *Lazarus* v. *Prentice,* 234 U. S. 263.

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could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim.[17] In the absence of possession, there was under the Bankruptcy Act of 1898, as originally passed, no jurisdiction, without consent, to adjudicate the controversy even by a plenary suit.[18] The Act of February 5, 1903, c. 487, § 8, 32 Stat. 797, 798, 800, together with the Act of June 25, 1910, c. 412, § 7, 36 Stat. 838, 840, conferred upon the bankruptcy court jurisdiction, under certain circumstances, against the adverse claimant, in a plenary suit under § 60, subdivision b, § 67, subdivision e, and § 70, subdivision e. But no amendment has conferred upon the bankruptcy court jurisdiction, even in a plenary suit, of proceedings under subdivision f of § 67.

The controversy presented when a trustee proceeding under subdivision f of § 67 is confronted with a substantial adverse claim to property not in his possession, does not differ in character from that presented by like proceedings under the other sections discussed. No reason is suggested why the Act of 1898 should have granted to the bankruptcy court jurisdiction in cases arising under § 67, subdivision f, while it did not in like cases arising under these other provisions. Nor is any reason suggested why Congress should have granted by that act power to adjudicate the controversy arising under subdivision f of § 67 in

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[17] *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18; *Jaquith* v. *Rowley,* 188 U. S. 620; *First National Bank* v. *Chicago Title & Trust Co.,* 198 U. S. 280, 289; *Galbraith* v. *Vallely,* 256 U. S. 46. In *Bryan* v. *Bernheimer,* 181 U. S. 188, 197, there was consent to the jurisdiction.

[18] *Bardes* v. *Hawarden Bank,* 178 U. S. 524; *Mitchell* v. *McClure,* 178 U. S. 539; *Wall* v. *Cox,* 181 U. S. 244; *Frank* v. *Vollkommer,* 205 U. S. 521; *Wood* v. *Wilbert's Sons Co.,* 226 U. S. 384, 389. Compare *Hicks* v. *Knost,* 178 U. S. 541; *Bush* v. *Elliott,* 202 U. S. 477; *Lovell* v. *Newman & Son,* 227 U. S. 412; *Collett* v. *Adams,* 249 U. S. 545; *Flanders* v. *Coleman,* 250 U. S. 223.

a summary proceeding, while it has never permitted a like controversy arising under any of the other provisions discussed above to be dealt with otherwise than in a plenary suit.[19]

The contention that Congress did confer upon the bankruptcy court the exceptional jurisdiction to determine in a summary proceeding substantial adverse claims arising under subdivision f, concerning the title and possession of property not in its possession, rests wholly on the following clause of that subdivision:

"the property affected by the levy [held void] . . . shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy . . . shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

The argument is that, since the bankruptcy court is expressly empowered to order that a lien void as against the trustee shall be preserved for the benefit of the estate, it was given, by implication, jurisdiction to determine whether the lien is void. The argument proceeds upon a misapprehension of the nature and purpose of the clause in question. It does not confer jurisdiction. It confers substantive and adjective rights. Its grant of substantive rights, effected by means of subrogation, is a grant of property interests which the bankrupt did not own at the

[19] The Act of 1841 was said, in *Ex parte Christy,* 3 How. 292, 312, to have conferred upon the bankruptcy court jurisdiction over adverse claims, although the property was not in its possession; and it was also said, that this jurisdiction might be exercised by summary proceeding. But see *Bardes* v. *Hawarden Bank,* 178 U. S. 524, 533, 534. The Act of 1867 conferred the jurisdiction upon the federal district and circuit courts; but required that the jurisdiction be exercised in a plenary suit. *Smith* v. *Mason,* 14 Wall. 419; *Marshall* v. *Knox,* 16 Wall. 551; *Lathrop* v. *Drake,* 91 U. S. 516.

time of filing the petition.[20] Thus, an execution lien upon property, owned by the debtor at the time of the levy and good as against a subsequent purchaser but void as against the trustee under subdivision f, may be preserved for the benefit of the estate. If the lien were not so preserved, the benefit resulting from nullifying it would enure to the purchaser. Subrogation is the process by which this substantive right is made available.[21] Where the bankrupt remained owner of the property until the commencement of the bankruptcy proceedings and the void lien remained the only encumbrance on the property, there is no need of preserving it. But in such a case it may be desirable to invoke the strictly adjective powers conferred by the clause, and to apply for an order that a release or conveyance be made so as to remove a cloud upon title.[22]

The substantive right of subrogation which the clause confers can come into effect only after the invalidity of the lien as against the trustee has been established either by an admission of the holder of the lien or by an adjudication. It is entirely immaterial, so far as concerns the enjoyment of the right of subrogation, in which of

[20] *First National Bank* v. *Staake*, 202 U. S. 141, 148; *McHarg* v. *Staake*, 202 U. S. 150. Compare *In re Hammond*, 98 Fed. 845.

[21] The void lien is not preserved for the estate unless the trustee requests that it be done. See *Goodnough Mercantile & Stock Co.* v. *Galloway*, 171 Fed. 940; *In re Walsh Bros.*, 195 Fed. 576; *In re Prentice*, 267 Fed. 1019, 1020. Compare *Thompson* v. *Fairbanks*, 196 U. S. 516, 527, 528; *Duffy* v. *Charak*, 236 U. S. 97, 100. The occasion for seeking subrogation under this clause of § 67, subdivision f, has been lessened by the amendment to § 47, clause 2, of subdivision a of the Act of June 25, 1910, c. 412, § 8, 36 Stat. 838, 840, by which a trustee in bankruptcy "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings." Compare *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 276.

[22] Compare *Chapman* v. *Brewer*, 114 U. S. 158, 170, 171; *De Friece* v. *Bryant*, 232 Fed. 233, 239.

these ways the invalidity is established. It is entirely immaterial, where it is established by an adjudication, whether it be that of a state court, the bankruptcy court or of the federal district court sitting at law or equity. In every case in this Court in which this right to subrogation has been exercised (and in most cases in the lower courts),[23] following an adjudication of invalidity made by the bankruptcy court, there had been either consent that jurisdiction be taken for that purpose [24] or there was possession of the *res* by that court.[25]

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[23] Invalidity was admitted in *First National Bank* v. *Staake,* 202 U. S. 141, 143; in *Rock Island Plow Co.* v. *Reardon,* 222 U. S. 354, 356; and in *Fallows* v. *Continental Savings Bank,* 235 U. S. 300 (see original papers). Compare *Miller* v. *New Orleans Fertilizer Co.,* 211 U. S. 496. It was admitted or assumed in *In re Alabama Coal & Coke Co.,* 210 Fed. 940, 942; *Bell* v. *Frederick,* 282 Fed. 232, 233. Compare *In re Francis-Valentine Co.,* 93 Fed. 953, 954; *In re Hammond,* 98 Fed. 845, 859; *Bear* v. *Chase,* 99 Fed. 920, 924; *In re Lesser,* 100 Fed. 433, 438; *In re Kemp,* 101 Fed. 689, 690; *In re Breslauer,* 121 Fed. 910, 913, 914; *In re Petersen,* 200 Fed. 739, 741; *In re Obergfoll,* 239 Fed. 850; *In re Community Stores,* 282 Fed. 328; *In re Chebot,* 288 Fed. 1006.

[24] Objections to the jurisdiction of the bankruptcy court were at first raised, but later withdrawn, and express consent given, in *Clarke* v. *Larremore,* 188 U. S. 486 (as the original papers disclose); *First National Bank* v. *Staake,* 202 U. S. 141 (see 126 Fed. 845, 846); *Rock Island Plow Co.* v. *Reardon* 222 U. S. 354, 356; *Globe Bank & Trust Co.* v. *Martin,* 236 U. S. 288, 293. Also *In re Porterfield,* 138 Fed. 192, 197. In other cases, the objection to the jurisdiction was waived, or the existence of jurisdiction was assumed. See *In re Beals,* 116 Fed. 530, 534; *In re Southern Arizona Smelting Co.,* 231 Fed. 87, 89; *Jones* v. *Ford,* 254 Fed. 645, 646; *In re Dukes,* 276 Fed. 724; *In re Ann Arbor Machine Co.,* 278 Fed. 749, 751. Compare *Knapp* v. *Milwaukee Trust Co.,* 216 U. S. 545, 552. Also *Wells & Co.* v. *Sharp,* 208 Fed. 393, 396; *In re Brantman,* 244 Fed. 101, 104; *In re Rockford Produce & Sales Co.,* 275 Fed. 811, 814.

[25] The property was in the actual possession of the bankruptcy court at the time of the adjudication of the adverse claim in *Fallows* v. *Continental Savings Bank,* 235 U. S. 300, 303, 304. Also

In this case, the sheriff had, before the filing of the petition in bankruptcy, taken exclusive possession and control of the property; and he had retained such possession and control after adjudication and the appointment of the trustees.[26] The bankruptcy court, therefore, did not have actual possession of the *res*. The adverse claim of the judgment creditor was a substantial one. The bankruptcy court, therefore, did not have constructive possession of the *res*. Neither the judgment creditor, nor the sheriff, had become a party to the bankruptcy proceedings.[27] There was no consent to the adjudication by the bankruptcy court of the adverse claim. The objection to the jurisdiction was seasonably made and was insisted upon throughout. The bankruptcy court, therefore, did not acquire jurisdiction over the controversy in summary proceedings. Nor did it otherwise.

Reversed.

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in *In re Fitzhugh Hall Amusement Co.*, 228 Fed. 169, 171; 230 Fed. 811. Compare *Henderson* v. *Mayer*, 225 U. S. 631, 632. In some other cases where subrogation was ordered, the bankruptcy court was deemed to have constructive possession, because the claim of the person in actual possession was held to be colorable. See *In re Weinger, Bergman & Co.*, 126 Fed. 875; *In re Graessler & Reichwald*, 154 Fed. 478.

[26] The fact that the property remained on premises formerly occupied by the bankrupt is, of course, immaterial. Compare *Duffy* v. *Charak*, 236 U. S. 97, 98; *In re Rhoads*, 98 Fed. 399, 400.

[27] Compare *Gratiot State Bank* v. *Johnson*, 249 U. S. 246, 249.

NYANZA STEAMSHIP COMPANY, LTD. *v.* JAHNCKE DRY DOCK No. 1, ET AL.

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

No. 307. Argued March 6, 1924.—Decided April 7, 1924.

The rule confining the jurisdiction of this Court by appeal to final judgments completely disposing of litigation, applies to jurisdictional appeals, under Jud. Code, § 238, in admiralty cases. P. 440.

Appeal dismissed.

APPEAL from a decree of the District Court dismissing, for want of admiralty jurisdiction, three of four causes of action contained in a single libel.

Mr. Richard B. Montgomery for appellant.

Mr. Walter Carroll, with whom *Mr. Geo. H. Terriberry* was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The owners of the Steamship Nyanza filed, in the Federal Court for Eastern Louisiana, against Jahncke Drydock No. 1 and the owners thereof a single libel setting forth these four causes of action: *in rem* for salvage, *in personam* for salvage, *in rem* for damage from collision, and *in personam* for such damage. The owners appeared as claimants. Excepting to the libel, they prayed that "in so far as the action is either *in rem* or *in personam* for salvage, and *in rem* for damage" it be dismissed for want of admiralty jurisdiction. The court maintained the exception; entered a decree of dismissal precisely as prayed for; and allowed an appeal under § 238 of the Judicial

Code, with a certificate that "in this decree the question of jurisdiction alone is in issue."

The decree leaves the cause of action *in personam* for damage undisposed of. For this reason the appeal must be dismissed for want of jurisdiction in this Court, although the objection was not taken by the appellee. This Court has jurisdiction under § 238, as under others, only of writs of error or appeals from final judgments. And the judgment must be not only in its nature final, but a complete disposition of the cause. *Collins* v. *Miller,* 252 U. S. 364, 370. This rule is applicable to appeals in admiralty. *Bowker* v. *United States,* 186 U. S. 135; *Oneida Navigation Corporation* v. *W. & S. Job & Co., Inc.,* 252 U. S. 521. There is nothing to the contrary in *Withenbury* v. *United States,* 5 Wall. 819, or in *The Pesaro,* 255 U. S. 216, 217. Counsel suggested that the dismissal of this premature appeal might somehow release the drydock, to libelant's prejudice. It obviously cannot have that effect.

Dismissed.

OLIVER AMERICAN TRADING COMPANY, INC. *v.* GOVERNMENT OF THE UNITED STATES OF MEXICO AND NATIONAL RAILWAYS OF MEXICO.

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

No. 662. Argued March 13, 1924.—Decided April 7, 1924.

1. On a jurisdictional review under Jud. Code, § 238, the District Judge's certificate of a jurisdictional question does not relieve this Court of the duty of determining for itself whether the question certified is one of the jurisdiction of the lower court as a federal court. P. 442.
2. Where an attachment suit in New York against the Government of Mexico was removed to the District Court and dismissed for lack

of jurisdiction upon the ground of sovereign immunity, *held,* that a writ of error from this Court would not lie under § 238, since the question was one of general law, applicable to state and federal courts alike; and that the case should be transferred to the Circuit Court of Appeals under Jud. Code, § 238(a). P. 442.
Case transferred to Circuit Court of Appeals.

ERROR to a judgment of the District Court dismissing, for want of jurisdiction, an action by attachment against the Government of Mexico, removed from a court of New York.

Mr. Alfred Hayes, with whom *Mr. Robert F. Greacen* was on the briefs, for plaintiff in error.

Mr. Jerome S. Hess, with whom *Mr. Harold B. Elgar, Mr. Ernest Angell* and *Mr. George F. Snyder* were on the brief, for defendants in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Oliver American Trading Company, Inc., a Delaware corporation, brought this suit, in the Supreme Court of New York, against the United States of Mexico and the National Railways of Mexico. Service was made by attaching tangible personal property and credits within the State alleged to belong to the defendants and summons. In the state court, the Government of Mexico, appearing specially, moved seasonably that the attachment be quashed and that the suit be dismissed. Before the motion was heard, the case was removed on its petition to the federal court for southern New York. There, Mexico, again appearing specially, procured a rule that the plaintiff show cause why the attachment should not be vacated and the suit dismissed, upon the ground that it is "an independent sovereign nation, . . . immune from process of the courts, except upon its consent."

The plaintiff asserted that at the time when the suit was begun and when the rule was returnable Mexico had not been recognized by our Government; and contended that, being a non-recognized foreign government, it was suable as a foreign corporation under subdivision 7 of § 7 of the Civil Practice Act of New York. It was conceded that National Railways of Mexico is merely a name for the system of railroads controlled and operated by the Mexican Government. After the hearing on the motion, but before entry of the judgment below, Mexico was duly recognized by the United States and diplomatic relations between the two governments were resumed. Thereupon, and solely upon this ground, the District Court held that Mexico was entitled to immunity from suit in the courts of the United States of America, unless upon its own consent; granted the motion to vacate the attachment and dismiss the suit; and issued the certificate of a jurisdictional question provided for in § 238 of the Judicial Code. Here, the defendants in error move to dismiss this writ of error for want of jurisdiction in this Court, on the ground that the case below did not present the question of jurisdiction of the district court as a federal court.

The fact that the District Judge issued the certificate does not relieve this Court from the duty of determining for itself whether the question which was certified is in truth one of the jurisdiction of the lower court as a federal court. *Bogart* v. *Southern Pacific Co.*, 228 U. S. 137, 144; *Smith* v. *Apple, ante* 274. Such a question is presented whenever there is in controversy the power of the court, as defined or limited by the Constitution or statutes of the United States, to hear and determine the cause. *The Pesaro,* 255 U. S. 216, 218. It is not presented where the question of jurisdiction to be decided turns upon matters of general law applicable alike to actions brought in other tribunals. *De Rees* v. *Costaguta,* 254 U. S. 166, 173. The question of sovereign immunity is such a question of gen-

eral law applicable as fully to suits in the state courts as to those prosecuted in the courts of the United States.[1]

As the writ of error from this Court was improvidently allowed, the case must be transferred to the Circuit Court of Appeals for the Second Circuit. Section 238(a) of the Judicial Code, Act of September 14, 1922, c. 305, 42 Stat. 837.

Case Transferred.

CHUNG FOOK *v.* WHITE, AS COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO.

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

No. 299. Argued February 26, 1924.—Decided April 7, 1924.

The proviso of § 22 of the Immigration Act of February 5, 1917, under which the wife of a "naturalized" citizen, married to him after his naturalization and sent for by him, may be admitted without detention for treatment in hospital though found to be affected with a contagious disorder, cannot be extended by judicial construction to include the wife of a native born citizen. P. 445.
287 Fed. 533, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court denying a petition for a writ of *habeas corpus*.

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

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[1] Cases like *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, and *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165, in which questions of the immunity of state officers from suit are considered by this Court on direct appeal under § 238, come here by that method because of the constitutional question involved. Compare *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28, 37, 38.

Mr. Assistant Attorney General Ottinger, with whom *Mr. Solicitor General Beck* and *Mr. Harvey B. Cox,* Special Assistant to the Attorney General, were on the brief, for respondent.

Mr. Justice Sutherland delivered the opinion of the Court.

Chung Fook is a native-born citizen of the United States. Lee Shee, his wife, is an alien Chinese woman, ineligible for naturalization. In 1922 she sought admission to the United States, but was refused and detained at the immigration station, on the ground that she was an alien, afflicted with a dangerous contagious disease. No question is raised as to her alienage or the effect and character of her disease; but the contention is that, nevertheless, she is entitled to admission under the proviso found in § 22 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 891. The section is copied in the margin.[1]

A petition for a writ of *habeas corpus* was denied by the Federal District Court for the Northern District of California, and upon appeal to the Circuit Court of Appeals, the judgment was affirmed. 287 Fed. 533.

The pertinent words of the proviso are: "That if the person sending for wife or minor children is naturalized,

[1] "Sec. 22. That whenever an alien shall have been naturalized, or shall have taken up his permanent residence in this country, and thereafter shall send for his wife or minor children to join him, and said wife or any of said minor children shall be found to be affected with any contagious disorder, such wife or minor children shall be held, under such regulations as the Secretary of Labor shall prescribe, until it shall be determined whether the disorder will be easily curable or whether they can be permitted to land without danger to other persons; and they shall not be either admitted or deported until such facts have been ascertained; and if it shall be determined that the disorder is easily curable and the husband or father or other responsible person is willing to bear the expense of the treatment, they may be accorded treatment in hospital until

a wife to whom married or a minor child born subsequent to such husband or father's naturalization shall be admitted without detention for treatment in hospital, . . ." The measure of the exemption is plainly stated and, in terms, extends to the wife of a naturalized citizen only.

But it is argued that it cannot be supposed that Congress intended to accord to a naturalized citizen a right and preference beyond that enjoyed by a native-born citizen. The court below thought that the exemption from detention was meant to relate only to a wife who by marriage had acquired her husband's citizenship, and not to one who, notwithstanding she was married to a citizen, remained an alien under § 1994, Rev. Stats.: "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." To the same effect, see *Ex parte Leong Shee,* 275 Fed. 364. We are inclined to agree with this view; but, in any event, the statute plainly relates only to the wife or children of a naturalized citizen and we cannot interpolate the words "native-born citizen" without usurping the legislative function. *Corona Coal Co.* v. *United States,* 263 U. S. 537; *United States* v. *First National Bank,* 234 U. S. 245, 259–260; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor,* 210 U. S.

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cured and then be admitted, or if it shall be determined that they can be permitted to land without danger to other persons, they may, if otherwise admissible, thereupon be admitted: *Provided,* That if the person sending for wife or minor children is naturalized, a wife to whom married or a minor child born subsequent to such husband or father's naturalization shall be admitted without detention for treatment in hospital, and with respect to a wife to whom married or a minor child born prior to such husband or father's naturalization the provisions of this section shall be observed, even though such person is unable to pay the expense of treatment, in which case the expense shall be paid from the appropriation for the enforcement of this Act."

281, 295; *Amy* v. *Watertown,* 130 U. S. 320, 327. The words of the statute being clear, if it unjustly discriminates against the native-born citizen, or is cruel and inhuman in its results, as forcefully contended, the remedy lies with Congress and not with the courts. Their duty is simply to enforce the law as it is written, unless clearly unconstitutional.

Affirmed.

UNITED STATES *v.* PAYNE.

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

No. 240. Argued February 25, 1924.—Decided April 7, 1924.

1. The United States, as guardian of tribal Indians, is bound to discharge its trust with good faith and fairness, and treaties made with them should be liberally construed. P. 448.
2. The treaty made in 1855 with the Quileute and other Indians, by which they surrendered broader claims for a limited reservation, provided for money "to clear, fence, and break up a sufficient quantity of land for cultivation," and authorized the President to assign "lands" in severalty to the Indians for permanent homes. *Held,* that timbered lands were not intended to be excluded from assignment. *Id.*
3. The General Indian Allotment Act should be construed when possible in harmony with previous Indian treaties. *Id.*
4. The General Allotment Act in limiting allotments to "eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian," was not meant to preclude an allotment of timbered lands, capable of being cleared and cultivated, but simply to differentiate, in the matter of area, between lands adaptable to agricultural uses and lands valuable only for grazing purposes. P. 449.

284 Fed. 827, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court for the plaintiff and appellee, Payne, in his suit to determine his right to an allotment of land in an Indian Reservation.

Mr. H. L. Underwood, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. Arthur E. Griffin, with whom *Mr. Arthur R. Griffin* was on the brief, for appellee.

Mr. Justice Sutherland delivered the opinion of the Court.

Appellee, an Indian of the Quileute tribe, brought suit in the Federal District Court for the Western District of Washington to determine his right to an allotment of an eighty-acre tract of land in the Quinaielt Indian Reservation in that State. Authority for bringing the suit is found in 28 Stat. 305, c. 290, as amended by 31 Stat. 760, c. 217. The treaty with the Quileute and other Indians, made in 1855, among other things, provides for the removal and settlement of these Indians upon a reservation to be selected for them by the President, and for the payment by the United States of $2,500 " to clear, fence, and break up a sufficient quantity of land for cultivation." 12 Stat. 971, Articles 2 and 5. The President is authorized by Article 6 of the treaty, at his discretion, to cause the reserved lands to be surveyed and assign the same to individual Indians or families for permanent homes on the same terms and under the same conditions as are provided in Article 6 of the treaty with the Omahas, concluded in 1854. 10 Stat. 1043, 1044. By the General Allotment Act, as amended, it is provided:

" In all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to

cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian . . ." 24 Stat. 388, c. 119, as amended by 26 Stat. 794, c. 383, and 36 Stat. 859–860, c. 431.

The land in question was selected by Payne in 1911, after survey, through and with the approval of an allotting agent of the United States. It is of mixed character, forty or fifty acres being timbered, and the remainder being bottom land, lying along the Raft River.

The sole question we are called upon to decide is whether the land, being timbered, is to be excluded from the operation of the Allotment Act which speaks only of agricultural and grazing lands. Both courts below determined the question in the negative, 284 Fed. 827, and we agree with them. The treaty makes no restriction in respect of the character of the land to be "assigned"; and while the Allotment Act, being later, must control in case of conflict, it should be harmonized with the letter and spirit of the treaty so far as that reasonably can be done, since an intention to alter, and, *pro tanto,* abrogate, the treaty, is not to be lightly attributed to Congress. These Indians yielded whatever claims they may have had to a valuable and extensive area in exchange for a relatively small reservation, relying upon what they undoubtedly understood to be an assurance on the part of the general government that they would be given individual and permanent homes therein. They are an unlettered people, unskilled in the use of language, *Jones* v. *Meehan,* 175 U. S. 1, 10–11, with regard to whom the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness. *Choctaw Nation* v. *United States,* 119 U. S. 1, 28. Construing the treaty liberally in

favor of the rights claimed under it, as we are bound to do, *Hauenstein* v. *Lynham,* 100 U. S. 483, 487, we conclude that the character of the lands thereafter to be set apart for them severally was not restricted. The authority of the President is, broadly, to assign " lands," and that it was not meant to exclude timber lands is borne out by the provision for a payment " to *clear,* fence, and break up a sufficient quantity of land for cultivation," which may well mean to " clear " it of timber. It follows, that if the Allotment Act is now construed to exclude such lands from allotment, a materially restrictive change will have been wrought in the terms of the treaty. Such a construction is to be avoided, if possible. *Chew Heong* v. *United States,* 112 U. S. 536, 541.

It is common knowledge that vast bodies of land, originally covered with timber, in some of the public land States, including eastern Washington, have been acquired by private entry, cleared and brought under cultivation. The view that such lands were open to entry for agricultural purposes seems to have been generally recognized and acted upon (see *Johnson* v. *Bridal Veil Lumber Co.,* 24 Oreg. 182, 184–186); and, so far as we are advised, has never been questioned by the Land Department of the United States. We are, therefore, constrained to reject the rigidly literal interpretation of the Allotment Act for which the Government here contends. It is not an unreasonable view of the requirement that an allotment shall not " exceed eighty acres of agricultural or one hundred and sixty acres of grazing land " to say that it was meant not to preclude an allotment of timbered lands, capable of being cleared and cultivated, but simply to differentiate, in the matter of area, between lands which may be adapted to agricultural uses and lands valuable only for grazing purposes.

The decree of the Circuit Court of Appeals is

Affirmed.

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FIRST NATIONAL BANK OF GREELEY *v.* BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD.

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

No. 180. Argued January 18, 21, 1924.—Decided April 7, 1924.

An action by a national bank to recover the amount of taxes levied by a State and paid under protest, upon the ground that they were excessive, discriminatory and violative of Rev. Stats., § 5219, *held* not maintainable in the District Court, where the plaintiff failed to avail itself of an administrative remedy afforded by the state law as conclusively established by a decision of the State Supreme Court. P. 453.

Affirmed.

ERROR to a judgment of the District Court sustaining a demurrer and dismissing the complaint in an action by the bank to recover money paid under protest as taxes.

Mr. Harry N. Haynes, with whom *Mr. Ralph L. Dougherty* was on the briefs, for plaintiff in error.

Mr. William R. Kelly and *Mr. Charles Roach,* Deputy Attorney General of the State of Colorado, with whom *Mr. Russell W. Fleming,* Attorney General, and *Mr. Riley R. Cloud,* Assistant Attorney General, were on the brief, for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action to recover the amount of certain taxes levied for the fiscal years 1913 and 1914 and paid under protest. The court below sustained a demurrer to the amended complaint, and, plaintiff electing to stand thereon, entered judgment of dismissal.

Reversal of the judgment is sought here on the ground that the taxes were assessed and collected in contravention of the due process and equal protection clauses of the Fourteenth Amendment and of § 5219, U. S. Rev. Stats.

Under the Colorado statute, R. S. Colo. 1908, c. 122, a bank is required to make a list of its shares, stating their market value, and of its shareholders for the information of the county assessor, who is thereupon directed to assess such shares for taxation in all respects the same as similar property belonging to other corporations and individuals. §§ 5754, 5756. If any taxpayer is of the opinion that his property has been assessed too high, or otherwise illegally assessed, he may appear before the assessor and have the same corrected. § 5639. The County Commissioners of each county are constituted a Board of Equalization, with power to adjust and equalize the assessment among the several taxpayers; with reference to which any dissatisfied taxpayer may be heard. § 5761.

The State Tax Commission, created in 1911, is authorized to supervise the administration of and enforce the tax laws, and exercise supervision over county assessors and boards of equalization, to the end that all assessments be made relatively just and uniform and at their true and full cash value. Comp. L. Colo. 1921, c. 155, § 7334, par. 1. The Commission may raise or lower the assessed value of any property, first giving notice to the owner thereof and fixing a time and place for hearing. *Id.* par. 7. Authority is conferred upon the Commission to receive complaints and examine into all cases where it is alleged that property has been fraudulently, or improperly or unfairly assessed. § 7336. It shall, on or before the first day of October of each year, increase or decrease the valuation of the property in any county by such rate per cent. or such amount as will place the same on the assessment roll at its full and true cash value, § 7352; and must thereupon transmit to the State Board of

Equalization a statement of the amount to be added or deducted. § 7353. It then becomes the duty of the State Board of Equalization to examine the abstracts of assessment submitted by the Commission, and certify to the county assessor of each county a record of its action thereon. § 7354. The Commission is required to be in session every day except Sundays, and may hold sessions anywhere in the State. § 7330.

The essential averments of the complaint may be shortly stated: Plaintiff made and delivered to the County Assessor of Weld County the statement required by law. The Assessor thereupon fixed the value of its shares, as well as that of the shares of other banks within the county, at their full cash and market value; but fixed the assessed value of the property of the remaining taxpayers in the county at 61%, for 1913, and 80%, for 1914, of such cash and market value. The County Board of Equalization accepted this assessment without change. The Assessor thereupon transmitted to the Tax Commission the abstracts required by law. The Tax Commission determined that the property of the county as a whole had been underassessed, and recommended a horizontal increase of 63% in 1913 and 25% in 1914, as necessary to bring it to the full cash value. This determination was approved by the State Board of Equalization and the County Assessor was directed to make the increase, with the result, as alleged, that plaintiff's assets, and those of all other banks in the county, were in fact assessed at an amount 63% in excess of their value for the year 1913 and 25% in excess thereof for the year 1914. In other counties of the State, either no increase of valuation was made or the increase was comparatively small. The result was that the banks of Weld county were assessed and compelled to pay upon a valuation grossly in excess of that put upon other property in the same county and likewise in excess of that put upon other banks in other

counties of the State. It does not appear from the complaint that plaintiff applied to any of the taxing authorities to reduce the assessment of its property or correct the alleged inequalities, prior to the final levy of the tax; but sometime after such levy had been completed, it made application for abatement and rebate, which application was approved by the County Board but disallowed by the State Tax Commission.

We are met at the threshold of our consideration of the case with the contention that the plaintiff did not exhaust its remedies before the administrative boards and consequently cannot be heard by a judicial tribunal to assert the invalidity of the tax. We are of opinion that this contention must be upheld.

The Supreme Court of Colorado, in a suit brought by this plaintiff against the County Assessor, involving the same tax for 1913, and presenting the same questions here involved, sustained the refusal of a lower court to enjoin the collection of the tax, and held: (a) That the flat increase made by the Tax Commission was in strict conformity with the state statutes; (b) That this action being approved by the State Board of Equalization constituted a final assessment; (c) That under the statute the plaintiff was bound to know the authority of these taxing agencies in the premises and that they were required to meet at certain places, on certain days, and complete their labors within designated dates; and (d) "With full knowledge of the respective powers of these several boards to make corrections in assessments and adjustments in equalization, essential to bring about a complete and equitable assessment of all property within the state, it remained inactive until long after the tax was laid, when it applied for an abatement or rebate of the tax. The aforesaid tribunals were open to plaintiff in error prior to the laying of the tax, but it refrained from seeking relief therein, and may not now complain." *First National Bank* v. *Patterson,* 65 Colo. 166, 172–173.

The effect of this is to hold that an administrative remedy was in fact open to plaintiff under the statutes of the State, and by this construction, upon well settled principles, we are bound. *McGregor* v. *Hogan,* 263 U. S. 234; *Farncomb* v. *Denver,* 252 U. S. 7, 10; *Londoner* v. *Denver,* 210 U. S. 373, 374; *Price* v. *Illinois,* 238 U. S. 446, 451; *Western Union Tel. Co.* v. *Gottlieb,* 190 U. S. 412, 425.

Plaintiff seeks to excuse its failure to apply to the County Board for an equalization by saying that this was a public duty of the Board and not a private remedy; and *Greene* v. *Louisville & I. R. R. Co.,* 244 U. S. 499, 521, is relied upon as authority. The most cursory examination of that case, however, will disclose its inapplicability. There the divergent assessments were made by two assessing boards, neither having control or supervision of the other; and it was held that complainants, whose property had been assessed by one of these boards, were not entitled, under the Kentucky statutes, to complain to the other board that its assessments were too low. A very different question is presented here, where the same board has affirmed both assessments, is expressly vested by statute with the power of equalization and may exert its power at the instance of anyone aggrieved. *Hallett* v. *County Commissioners,* 27 Colo. 86, 93; *Barnett* v. *Jaynes,* 26 Colo. 279, 282.

It is urged further that it would have been futile to seek a hearing before the State Tax Commission because, first, no appeal to a judicial tribunal was provided in the event of a rejection of a taxpayer's complaint; and, second, because the time at the disposal of the Commission for hearing individual complaints was inadequate. But, aside from the fact that such an appeal is not a matter of right, but wholly dependent upon statute, 2 Cooley on Taxation, 3d ed., p. 1393, we cannot assume that if application had been made to the Commission proper relief

would not have been accorded by that body, in view of its statutory authority to receive complaints and examine into all cases where it is alleged that property has been fraudulently, improperly or unfairly assessed. *Collins* v. *City of Keokuk,* 118 Iowa, 30, 35. Nor will plaintiff be heard to say that there was not adequate time for a hearing, in the absence of any effort on its part to obtain one. In any event the decision of the State Supreme Court in the *Patterson Case,* that such remedies were, in fact, available, is controlling here.

It is contended, however, that the decision in that case turns upon the point that plaintiff had an adequate remedy at law, and not that it had lost its right by neglecting to seek an administrative remedy. It is true the court, after the statement quoted above, proceeds to say that plaintiff cannot have relief in equity, but this seems to be put forth as an independent ground for affirming the judgment below. It follows the unqualified statement that plaintiff, having refrained from seeking the administrative relief open to it, " may not now complain;" and is introduced by the words (p. 174): " But apart from this, if the tax was not legally laid, plaintiff in error could, upon payment thereof, recover the same from the county under the provisions of § 5750 R. S. 1908." It is not suggested that in so doing the requirement, already broadly recognized, that administrative remedies must be exhausted as a necessary prerequisite to a judicial challenge of the tax, could be dispensed with. And, accepting the decision of the state court that such remedies were, in fact, open and available under the Colorado statutes, it could not be dispensed with. *McGregor* v. *Hogan, supra; Farncomb* v. *Denver, supra,* p. 11; *Stanley* v. *Supervisors of Albany,* 121 U. S. 535; *Petoskey Gas Co.* v. *Petoskey,* 162 Mich. 447, 452; *Township of Caledonia* v. *Rose,* 94 Mich. 216, 218; *Hinds* v. *Township of Belvidere,* 107 Mich. 664, 667; *Ward* v. *Alsup,* 100 Tenn. 619, 746.

Plaintiff not having availed itself of the administrative remedies afforded by the statutes, as construed by the state court, it results that the question whether the tax is vulnerable to the challenge in respect of its validity upon any or all of the grounds set forth, is one which we are not called upon to consider. The judgment of the District Court is accordingly

Affirmed.

E. I. DUPONT DE NEMOURS & COMPANY *v.* DAVIS, DIRECTOR GENERAL OF RAILROADS, AGENT.

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

No. 517. Argued March 14, 1924.—Decided April 7, 1924.

1. In a complaint showing by apt allegation that the plaintiff sues as the Director General of Railroads continued in that office by the President under §§ 202 and 211 of the Transportation Act, a description of him "as agent", appointed under § 206 of the act, may be rejected as surplusage. P. 459.
2. Paragraph (3), added by the Transportation Act to § 16 of the Interstate Commerce Act and providing: "All actions at law by carriers subject to this Act for recovery of their charges . . . shall be begun within three years from the time the cause of action accrues, and not after", does not apply to an action by the Director General of Railroads to recover demurrage charges accrued to the United States during the period of federal control of railroads. *Id.*

287 Fed. 522, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court sustaining a demurrer to the complaint in an action by the Director General of Railroads to recover demurrage charges.

Mr. Clifford H. Browder and *Mr. C. A. Cunningham,* with whom *Mr. Z. B. Harrison* was on the brief, for petitioner.

It was within the power of this Court to grant the writ of certiorari, though the judgment of the Circuit Court of Appeals did not dispose of the case, it being one where original jurisdiction was based only on diversity of citizenship. Jud. Code, §§ 128, 240; *American Constr. Co.* v. *Jacksonville, etc., Ry. Co.,* 148 U. S. 372; *Forsyth* v. *Hammond,* 166 U. S. 506; *Denver* v. *New York Trust Co.,* 229 U. S. 123; *The Three Friends,* 166 U. S. 1; *The Conqueror,* 166 U. S. 110; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U. S. 251.

The Circuit Court of Appeals erred in determining that § 16(3) of the Commerce Act, as amended by the Transportation Act, is not applicable to suits by the Director General of Railroads for charges accruing during federal control.

It was the policy of the Congress and the President to operate federally controlled roads without the usual immunity of the sovereign from legal liability. 39 Stat. 619; President's Proclamations, December 26, 1917, and April 11, 1918; Federal Control Act, §§ 8–10; *Director General* v. *Viscose Co.,* 254 U. S. 498; *Missouri Pac. R. R. Co.* v. *Ault,* 256 U. S. 554.

Section 16(3) of the Commerce Act is retrospective. *Sohn* v. *Waterson,* 17 Wall. 596; *United States* v. *Director General,* 80 I. C. C. 143; *Phillips Co.* v. *Grand Trunk Ry. Co.,* 236 U. S. 662; *Louisville Cement Co.* v. *Interstate Commerce Comm.,* 246 U. S. 638; *Kansas City So. Ry. Co.* v. *Wolf,* 261 U. S. 133.

The Director General is bound by the limitation in § 16(3) of the act. *United States* v. *Director General,* 80 I. C. C. 143; *Davis* v. *Dupont,* 287 Fed. 522; Transportation Act, § 206; *Northern Pac. Ry. Co.* v. *North*

Dakota, 250 U. S. 135; *North Carolina R. R. Co.* v. *Lee,* 260 U. S. 16; *In re Tidewater Coal Exchange,* 280 Fed. 648; *In re Hibner Oil Co.,* 264 Fed. 667; *Davis* v. *Pullen,* 277 Fed. 650.

The Government stood in the shoes of the carriers during federal control and was included in the word "carriers" in § 16(3). Federal Control Act, § 10; *Missouri Pac. R. R. Co.* v. *Ault,* 256 U. S. 554.

A receiver is a carrier under the Commerce Act. *United States* v. *Ramsey,* 197 Fed. 144; *United States* v. *Nixon,* 235 U. S. 231; *Rutherford* v. *Union Pac. Ry. Co.,* 254 Fed. 880; *Evans* v. *Union Pacific Ry. Co.,* 6 I. C. C. 520.

The exclusion of the Director General from certain obligations in the Commerce Act shows that he was subjected to all other rights and duties in said act, including the restrictions in § 16(3). *Director General* v. *Viscose Co.,* 254 U. S. 498.

Section 16(3) should be construed to avoid discrimination and absurdity. *United States* v. *Southern Pac. R. R. Co.,* 230 Fed. 270.

The Transportation Act established no new limitation in Arkansas. *Cattle Raisers Assn.* v. *Chicago, etc. Ry. Co.,* 10 I. C. C. 83; *Chicago, etc. Ry. Co.* v. *Lena Lumber Co.,* 99 Ark. 105.

The decision of the Circuit Court of Appeals that Davis, Director General, in his capacity as federal agent, was the proper party plaintiff, was based on an erroneous construction of the law. Transportation Act, §§ 202, 206, 211; *Director General* v. *Struthers Furnace Co.,* 271 Fed. 792; *Phila. & Read. Ry. Co.* v. *Laurel Coal Co.,* 276 Fed. 1019; 25 R. C. L. 981, par. 229.

Mr. George B. Pugh and *Mr. A. A. McLaughlin,* with whom *Mr. Thos. S. Buzbee* and *Mr. H. T. Harrison* were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action to recover demurrage charges accrued at Little Rock, Arkansas, during May, June and July, 1918, on certain shipments of cotton linters. The defendant, petitioner here, demurred to the complaint on the grounds: (a) That the cause of action was barred by the statute of limitations; and (b) That plaintiff was without authority to bring the action. The District Court sustained the demurrer but was reversed by the Court of Appeals. 287 Fed. 522.

There is nothing in the second point and we dispose of it at once. The contention is that the authority to maintain the action is vested in the Director General of Railroads, originally designated under the Federal Control Act and continued by the President under §§ 202 and 211 of Transportation Act, 1920, c. 91, 41 Stat. 459, 469; and not in Davis, as Agent, appointed under § 206 of the latter act. Apt allegations, however, are found in the body of the complaint to bring the plaintiff, Davis, within the provisions of §§ 202 and 211. At most the words " as agent " are surplusage; and it is impossible that defendant could have been prejudiced by their use. Act of February 26, 1919, c. 48, 40 Stat. 1181.

The action was brought more than three years after the cause of action accrued. The statute relied upon as a bar is § 424, Transportation Act, 1920, 41 Stat. 491–492, being a new paragraph added to § 16 of the Interstate Commerce Act by way of amendment. The pertinent words are: "(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." It is insisted that the United States—or the Director General, representing the United States—is included in the provision as a carrier

subject to the act. Our opinion is otherwise. The act consists of five titles. Title II is devoted exclusively to the subject of the termination of federal control, which it is declared shall take place at 12.01 a. m., March 1, 1920,—the act becoming effective February 28, 1920. Title III deals only with the subject of disputes between carriers and their employees and subordinate officials, creates Railroad Boards of Labor Adjustment and a Railroad Labor Board, and vests them with appropriate powers. Title IV consists entirely of amendments to the Interstate Commerce Act and includes § 424, here relied upon. While these three titles are concerned with related subjects, they are entirely distinct one from another. Title II, which is complete in itself, among other things, provides, § 200, that after the termination of federal control, the President shall have no power to use or operate the railroads or systems of transportation, or to control or supervise the carriers or their business affairs; and directs him, § 202, to adjust, settle, liquidate and wind up all matters and all questions and disputes, of whatsoever nature, arising out of or incident to federal control *as soon as practicable* after the termination thereof. The only provision prescribing a period of limitation definitely in respect of such matters, is found in § 206 (a); and it relates only to actions, suits and proceedings brought *against* an agent to be designated by the President for that purpose, and fixes as the period of limitation that now prescribed by state or federal statutes, but not later than two years from the passage of the act. In this Title, thus specifically devoted to the subject of winding up matters arising out of federal control, nothing is to be found which suggests any limitation of time within which actions, suits or proceedings shall be brought to enforce liabilities arising out of federal control, in favor of the United States.

Turning now to Title IV, amending the Interstate Commerce Act, the declaration at the beginning is that its

provisions " shall apply to common carriers " engaged in various enumerated kinds of transportation. § 400, p. 474. There is to be found in this Title no provision specifically relating to the period of federal control or dealing with the question of liability to or of the Government in respect of any matter arising during such control. If Congress had intended to fix a period of limitation applicable to actions, suits or proceedings brought in behalf of the United States in respect of liabilities arising out of federal control, we should naturally expect to find it in Title II, where such matters are exclusively dealt with; and not in Title IV, which deals with common carriers entirely apart from such control. It may not have been unusual in common speech, to describe the Director General as a carrier while he was operating the railroads; but it is clear that he was not intended to be included by that term as it is generally employed in acts of Congress. The Federal Control Act, c. 25, 40 Stat. 451, repeatedly recognizes a distinction between the President—including, of course, the Director General—and the carriers. The first section itself limits the meaning of the word " carriers " to railroads and systems of transportation, which as carriers had been taken over by the President. Accurately speaking, the Director General was not a carrier, but an operator of carriers. The distinction to which we have referred, constantly appears in the provisions of the act, as, for example: " The President may nevertheless pay to any carrier while under Federal control an annual amount," etc. § 2; " On the application of the President or of any carrier," etc., § 3; " Carriers while under Federal control shall be subject to all laws and liabilities as common carriers," etc., § 10; " actions at law or suits in equity may be brought by and against such carriers," etc., § 10; " moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States," § 12.

In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, " under a right in the nature of eminent domain," *North Carolina R. R. Co.* v. *Lee,* 260 U. S. 16; *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554; *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135; *In re Tidewater Coal Exchange,* 280 Fed. 648, 649; and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during federal control, as we have seen, are the property of the United States. § 12, 40 Stat. 457. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity, (*Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123, 126; *In re Tidewater Coal Exchange, supra*) and, therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it. *United States* v. *Nashville, C. & St. L. Ry. Co.,* 118 U. S. 120, 125; *United States* v. *Whited & Wheless, Ltd.,* 246 U. S. 552, 561. Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government. *United States* v. *Whited & Wheless, Ltd., supra.*

The foregoing analysis of the acts of Congress viewed in the light of the principles just stated, demonstrates that § 424 has no application to an action of the kind here involved; but applies to common carriers apart from their operation under federal control, and we so hold.

Affirmed.

WEBSTER ELECTRIC COMPANY *v.* SPLITDORF ELECTRICAL COMPANY.

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

No. 93. Argued March 6, 7, 1924.—Decided April 7, 1924.

1. Upon a review by certiorari, the Court is not called upon to consider questions not raised by the petition for the writ. P. 464.
2. Claims 7 and 8 of Patent No. 1,280,105, issued to Kane, September 24, 1918, for a rigid unitary and integral support for mounting parts of an electrical ignition device, *held* void because of laches in presenting them to the Patent Office. P. 465.
3. The rule that a reissue patent, expanding the patentee's original claims, will be invalidated by a delay of two years in applying for it unless special circumstances be proven justifying a longer delay, is applicable also to patents issued on divisional applications. *Chapman* v. *Wintroath,* 252 U. S. 126, explained. P. 469.

283 Fed. 83, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals, in a patent infringement suit, reversing the District Court and directing dismissal of the bill.

Mr. Albert G. McCaleb and *Mr. Lynn A. Williams* for petitioner.

Mr. Charles L. Sturtevant, with whom *Mr. Eugene G. Mason, Mr. David B. Gann* and *Mr. Ballard Moore* were on the brief, for respondent.

Mr. Edwin J. Prindle, by leave of Court, filed a brief as *amicus curiae.*

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This writ brings up for review the decree of the court below in a patent suit, 283 Fed. 83, reversing a decree of the Federal District Court for the Northern District

of Illinois, 255 Fed. 907, and directing a dismissal of the bill. Three patents were involved. The decision in respect of two of them turned upon the question whether a license contract between the patentees, Henry and Emil Podlesak, and petitioner, had the effect of precluding an assignment of patent rights made by the Podlesaks to respondent. But the petition upon which the writ was granted challenged the decision below only in respect of the third patent; and we are not called upon to consider the contentions now advanced as to the others. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242.

The bill alleges that the Splitdorf Electrical Company had infringed claims 7 and 8 of Kane patent No. 1,280,105, issued September 24, 1918, for a rigid unitary and integral support for mounting the various parts of an electrical ignition device. The original application was filed by Kane February 2, 1910, on which patent No. 1,204,573 was granted November 14, 1916. On October 24, 1914, Kane endeavored to amend his application by introducing six claims copied from Milton's patent, issued May 12, 1914, for the purpose of securing an interference. The amendment was refused and Kane was directed by the examiner to file a divisional application if he desired to contest an interference with Milton. This was done. The Webster Company, however, acquired the rights of both Milton and Kane and through their attorneys conducted the proceedings for both sides in the Patent Office, resulting in an award of priority in favor of Kane.

Subsequently, in 1915, Kane filed a divisional application, presenting nine additional claims, copied from Podlesaks' patent No. 1,055,076, issued March 4, 1913, and reissue patent No. 13,878, dated February 9, 1915; all of which claims were ultimately decided in favor of the Podlesaks. Thereafter, on June 17, 1918, an amendment was filed embracing the new and broader claims here in question, which were allowed upon an ex parte showing and,

as already stated, patent issued September 24, 1918, to the petitioner, to whom all rights had been assigned. The original bill was filed in 1915; and claims 7 and 8 were brought into the suit by a supplemental bill filed October 25, 1918.

It will thus be seen that claims 7 and 8 were for the first time presented to the Patent Office, by an amendment to a divisional application eight years and four months after the filing of the original application, five years after the date of the original Podlesak patent, disclosing the subject matter, and three years after the commencement of the present suit. A comparison of these claims, as set forth in the patent, with the claims in the original application, to say the least, leaves in doubt the question whether they were not so materially enlarged as to preclude their allowance on the original application. *Railway Co.* v. *Sayles,* 97 U. S. 554, 563; *Hobbs* v. *Beach,* 180 U. S. 383, 396; *Dunham* v. *Dennison Manufacturing Co.,* 154 U. S. 103, 110; *Michigan Cent. R. Co.* v. *Consolidated Car-Heating Co.,* 67 Fed. 121, 126. But this aside, the evidence establishes to our satisfaction that Kane did not originally intend to assert these amended claims, because he considered their subject matter one merely of design and not of invention; and the inference is fully warranted that the intention to do so was not entertained prior to 1918. During all of this time their subject matter was disclosed and in general use; and Kane and his assignee, so far as claims 7 and 8 are concerned, simply stood by and awaited developments. We are not here dealing, therefore, with the simple case of a division of a single application for several independent inventions, Patent Office Rules 41 and 42; *Bennet* v. *Fowler,* 8 Wall. 445, 448; *American Laundry Machinery Co.* v. *Prosperity Co., Inc.,* 295 Fed. 819, but with a case of unreasonable delay and neglect on the part of the applicant and his assignee in bringing forward claims broader than those

originally sought. The repeated assertion of interferences in narrower terms, resulting in delays incident to their determination, affords no just excuse for the failure to assert the broader claims, 7 and 8, at an earlier date. The subject matter of these claims is not of such complicated character that it might not have been readily described in the original application or in one of the subsequent applications—in 1915, for example,—as it was described in 1918; and the long delay of Kane and his assignee in coming to the point tends strongly to confirm the view that the final determination to do so was an exigent afterthought, rather than a logical development of the original application. We have no hesitation in saying that the delay was unreasonable, and, under the circumstances shown by the record, constitutes laches, by which the petitioner lost whatever rights it might otherwise have been entitled to.

We do not overlook the importance of not applying so narrowly the patent law as to discourage the inventor from exercising his creative genius, or the manufacturer or capitalist from assisting in the necessary work of bringing the invention into beneficial use; but it is no less important that the law shall not be so loosely construed and enforced as to subvert its limitations, and bring about an undue extension of the patent monopoly against private and public rights. In suits to enforce reissue patents, the settled rule of this Court is that a delay for two years or more will "invalidate the reissue, unless the delay is accounted for and excused by special circumstances, which show it to have been not unreasonable." *Wollensak* v. *Reiher,* 115 U. S. 96, 101. In that case it appeared that the reissue patent was issued to complainant December 26, 1882, upon the surrender of the original patent of March 10, 1874. The Patent Office decided that because of special circumstances the applicant was not guilty of laches; but this Court held otherwise. The claims alleged

to have been infringed were expansions of the original claims as embraced within the invention set forth in the original patent. This Court (pp. 99–100) said:

" It follows from this, that if, at the date of the issue of the original patent, the patentee had been conscious of the nature and extent of his invention, an inspection of the patent, when issued, and an examination of its terms, made with that reasonable degree of care which is habitual to and expected of men, in the management of their own interests, in the ordinary affairs of life, would have immediately informed him that the patent had failed fully to cover the area of his invention. And this must be deemed to be notice to him of the fact, for the law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it.

" Not to improve such opportunity, under the stimulus of self-interest, with reasonable diligence, constitutes laches which in equity disables the party, who seeks to revive a right which he has allowed to lie unclaimed, from enforcing it to the detriment of those who have, in consequence, been led to act as though it were abandoned.

" This general doctrine of equity was applied with great distinctness to the correction of alleged mistakes in patents, by reissues, in the case of *Miller* v. *Brass Company,* 104 U. S. 350. It was there declared, that where the mistake suggested was merely that the claim was not as broad as it might have been, it was apparent upon the first inspection of the patent, and, if any correction was desired, it should have been applied for immediately; that the granting of a reissue for such a purpose, after an unreasonable delay, is clearly an abuse of the power to grant reissues, and may justly be declared illegal and void; that, in reference to reissues made for the purpose of enlarging the scope of the patent, the rule of laches should be strictly applied, and no one should be relieved who has

slept upon his rights, and has thus led the public to rely on the implied disclaimer involved in the terms of the original patent; and that when this is a matter apparent on the face of the instrument, upon a mere comparison of the original patent with the reissue, it is competent for the courts to decide whether the delay was unreasonable and whether the reissue was, therefore, contrary to law and void.

"This doctrine has been reiterated in many cases since, and at the present term has been reconsidered and emphatically repeated as the settled law, in the case of *Mahn* v. *Harwood,* 112 U. S. 354, where it is said, by Mr. Justice Bradley, delivering the opinion of the court: 'We repeat, then, if a patentee has not claimed as much as he is entitled to claim, he is bound to discover the defect in a reasonable time, or he loses all right to a reissue; and if the Commissioner of Patents, after the lapse of such reasonable time, undertakes to grant a reissue for the purpose of correcting the supposed mistake, he exceeds his power, and acts under a mistaken view of the law; and the court, seeing this, has a right, and it is its duty, to declare the reissue *pro tanto* void, in any suit founded upon it.' It was also there said, that, while no invariable rule can be laid down as to what is reasonable time within which the patentee should seek for the correction of a claim which he considers too narrow, a delay of two years, by analogy to the law of public use before an application for a patent, should be construed equally favorable to the public, and that excuse for any longer delay than that should be made manifest by the special circumstances of the case."

In *Ives* v. *Sargent,* 119 U. S. 652, 661, the duty of the patentee to examine his letters patent within a reasonable time to ascertain whether the latter fully covered his invention was reiterated. And where this was neglected for a period of three years, when, finding the real invention

had been infringed but without infringing the patent as originally granted, an application for a reissue was made and allowed, it was held that the patentee was guilty of laches and the reissue came too late. The doctrine of *Wollensak* v. *Reiher* was restated (p. 662) to the effect that while no invariable rule can be laid down, a delay of two years, by analogy to the law of public use before an application for a patent, will be fatal unless excuse for a longer delay shall be made manifest by the special circumstances of the case. See also *Topliff* v. *Topliff,* 145 U. S. 156; *Wollensak* v. *Sargent,* 151 U. S. 221.

While the analogy between the case of a reissue patent and that of copying for interference is not always an exact one, it is sufficiently so, as applied to the present case, to make these decisions pertinent; and the principle which they announce is controlling. We brought this case here by certiorari because of the claim that the decision of the Court of Appeals rested primarily on *Chapman* v. *Wintroath,* 252 U. S. 126; and the contention was that the opinion there had been misunderstood and misapplied.[1] The question as thus presented, was important and one which it was thought should be authoritatively determined. The court below finally put its decision substantially on the ground which we have stated as the basis of our conclusion. But before doing so, it said (283 Fed. 93): "Appellants contend, however, and we agree with the courts that have passed upon the question, that the effect of the holding [in the *Wintroath Case*] is to fix the period during which such application must be filed at *two* years from the date of the issuance of the other patent. No other deduction can fairly or logically be drawn from the discussion of the question in that opinion." But *Chapman* v. *Wintroath* is not to be so narrowly construed.

[1] See also *American Laundry Machinery Co.* v. *Prosperity Co., Inc.,* 294 Fed. 144; reversed by a decision of the Circuit Court of Appeals for the Second Circuit, cited *supra.*

The facts of the case were: The Chapmans filed their application in 1909. The invention was a complicated one and the application met with much difficulty in the Patent Office, and, though regularly prosecuted, no patent had been issued in 1915 when the controversy arose. Wintroath filed an application in 1912. His invention was also elaborate and intricate. Twenty months after this latter application, the Chapmans filed a divisional application in which the claims of the Wintroath patent were copied and an interference was declared. The examiner without hearing evidence, entered judgment in favor of Wintroath on the ground that the failure of the Chapmans to present the interference issue for more than a year after the date of the Wintroath patent constituted laches, and that they were estopped. This decision was reversed by the Commissioner of Patents, and his decision, in turn, was reversed by the Court of Appeals of the District of Columbia, that court holding that the one year period should apply, on the ground that the divisional application was to be regarded substantially as an amendment to the parent application, and that it would be inequitable to permit a longer time than that allowed by Rev. Stats. § 4894, for further prosecution of an application after office action. This Court, in reversing the decision of the Court of Appeals, referred to § 4886, as amended, March 3, 1897, c. 391, 29 Stat. 692, and §§ 4887, 4897 and 4920 of the Revised Statutes, all of which contain provisions for a time limit of two years for filing applications, and said (p. 136): "Thus through all of these statutes runs the time limit of two years for the filing of an application, there is no modification in any of them of the like provisions in Rev. Stats. § 4886, as amended, and no distinction is made between an original and a later or a divisional application, with respect to this filing right."

If this were all, it might justify the conclusion that a hard and fast time limit of two years is to be applied in

every case of a divisional application. But a reading of the entire opinion demonstrates that this conclusion is erroneous. The Court proceeds to say that divisional applications are not to be dealt with in a hostile spirit, but are to be "favored to the extent that where an invention clearly disclosed in an application . . . is not claimed therein but is subsequently claimed in another application, the original will be deemed a constructive reduction of the invention to practice and the later one will be given the filing date of the earlier, with all of its priority of right." Reference is made to *Wollensak* v. *Reiher, supra,* and other reissue cases, which, as we have seen, adopt the two-year time limit by analogy to the law of public use before application for patent; and, while it is not said in terms, the plain import of the citation of and reliance upon these cases is that the effect of the two years' delay, as recognized in those cases, may be overcome where it "is accounted for and excused by special circumstances, which show it to have been not unreasonable;" and, properly understood, there is nothing in the opinion to the contrary.

Our conclusion, therefore, is that in cases involving laches, equitable estoppel or intervening private or public rights, the two-year time limit *prima facie* applies to divisional applications and can only be avoided by proof of special circumstances justifying a longer delay. In other words, we follow in that respect the analogy furnished by the patent reissue cases.

Affirmed.

STATE OF GEORGIA *v.* CITY OF CHATTANOOGA, TENNESSEE.

IN EQUITY.

No. 21, Original. Argued on motion to dismiss December 3, 1923.—Decided April 7, 1924.

1. Land acquired and held for railway purposes by one State within the borders of another with the latter's consent remains subject to the eminent domain of the State in which it lies and subject to be condemned by that State, or her authorized municipality, for a public street, in proceedings against the owner State, even though she has not consented to be sued. P. 479.
2. Acceptance by Georgia of permission given her to acquire railroad land in Tennessee, is inconsistent with an assertion of her own sovereign privileges in respect of such land, and amounts to consent that it may be condemned as may like property of others. P. 482.
3. Lack of opportunity to be heard before passage of an ordinance opening a street furnishes no ground of complaint, since the taking is a legislative and not a judicial function and an opportunity to be heard in advance need not be given. P. 483.
4. In condemnation proceedings, personal service upon the owner is not essential; notice by publication is sufficient. *Id.*
5. A suit brought by a State in this Court to enjoin proceedings to condemn her land in another State begun by a city, will be dismissed for want of equity where no complaint is made that the laws do not afford reasonable notice and opportunity to be heard before final determination of judicial questions involved in the condemnation proceedings, and where these afford a plain, adequate and complete remedy at law. *Id.*

Bill dismissed without prejudice.

On defendant's motion to dismiss a bill filed in this Court by the State of Georgia to enjoin the City of Chattanooga from prosecuting, in a court of Tennessee, proceedings to condemn part of a railroad yard, owned by the plaintiff within the City, and from interfering with the possession of the plaintiff and its lessee, etc.

Mr. Sam E. Whitaker, for defendant, in support of the motion to dismiss the bill.

I. The courts of Tennessee had jurisdiction to entertain the petition for condemnation and, that jurisdiction hav-

ing been invoked, this Court is without power to enjoin the proceedings in the state court. *Harkrader* v. *Wadley,* 172 U. S. 148; *Wallace* v. *McConnell,* 13 Pet. 136; *Chittenden* v. *Brewster,* 2 Wall. 191; *Orton* v. *Smith,* 18 How. 263; *Freeman* v. *Howe,* 24 How. 450; *Peck* v. *Jennis,* 7 How. 612; *Taylor* v. *Carryl,* 20 How. 583; *Wiswall* v. *Sampson,* 14 How. 52; *Covell* v. *Heyman,* 111 U. S. 176; *Heidritter* v. *Elizabeth Co.,* 112 U. S. 294; *Riggs* v. *Johnson County,* 6 Wall. 166; *Moran* v. *Sturges,* 154 U. S. 256; *In re Chetwood,* 165 U. S. 443.

The sovereignty of Georgia cannot be extended within the boundaries of Tennessee so as to prevent Tennessee from exercising its eminent domain over all lands within its borders by whomsoever owned. The courts of Tennessee, therefore, have authority to entertain petitions for condemnation of such lands.

II. Georgia had acquired these lands within Tennessee on the express condition that, as to them, it should be subject to suit as private railroad corporations were subject to suit, and the courts of Tennessee, having authority to entertain petitions for condemnation of the lands of private railroad corporations, had the power to condemn the lands of the plaintiff State. *East Tenn., etc., Ry. Co.* v. *Nashville, etc., Ry. Co.,* 51 S. W. 202; *Western & Atlantic R. R. Co.* v. *Taylor,* 6 Heisk. 408; *South Carolina* v. *United States,* 199 U. S. 437; *United States* v. *Planters' Bank,* 9 Wheat. 904; *Kentucky Bank* v. *Wister,* 2 Pet. 318; *Louisville, etc. R. R. Co.* v. *Letson,* 2 How. 497; *Pennsylvania* v. *Wheeling Bridge Co.,* 13 How. 518.

III. This Court has no power to enjoin the proceedings in the courts of Tennessee, being prohibited from doing so by § 720, Rev. Stats.

This section applies to the Supreme Court as well as to other federal courts. *Slaughter-House Cases,* 10 Wall. 273.

The gravamen of the relief sought by the bill is an injunction against the proceedings in the state court, and

the transfer of the litigated questions to this Court. This is prohibited by Rev. Stats., § 720. *Dial* v. *Reynolds,* 96 U. S. 340; *Haines* v. *Carpenter,* 91 U. S. 254; *United States* v. *Parkhurst-Davis Co.,* 176 U. S. 317; *Hull* v. *Burr,* 234 U. S. 712.

The parties are the same in the action pending in this Court and in the state court and the matter in controversy is the same. *Tennessee Cent. R. R. Co.* v. *Campbell,* 109 Tenn. 640; *Watson* v. *Jones,* 13 Wall. 679; *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322.

An injunction by this Court would not be one to protect its jurisdiction previously acquired. *French* v. *Hay,* 22 Wall. 250; *Dietzsch* v. *Huidekoper,* 103 U. S. 494; *Julian* v. *Central Trust Co.,* 193 U. S. 93; *Madisonville Trac. Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239.

The suit in the state court had been commenced prior to the institution of this suit and, therefore, this case does not come within those decisions permitting an injunction against the commencement of suits in a state court on an alleged unconstitutional state statute. *Ex parte Young,* 209 U. S. 123; *Truax* v. *Raich,* 239 U. S. 33.

The alleged unconstitutionality of a statute under which a suit has been begun affords no reason for the issuance of an injunction against a suit already begun. *Robb* v. *Connolly,* 111 U. S. 624; *Fitts* v. *McGhee,* 172 U. S. 516; *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210; *Singer Sewing Mach. Co.* v. *Benedict,* 229 U. S. 481.

This case is unlike *Simon* v. *Southern Ry. Co.,* 236 U. S. 115, where an injunction was issued against the enforcement of a void judgment.

Comity requires that this Court should not interfere with the suit in the state court. *Wells Fargo Express Co.* v. *Taylor,* 254 U. S. 175; *Moran* v. *Sturges,* 154 U. S. 168; *Riggs* v. *Johnson County,* 6 Wall. 166.

IV. The Court is prohibited by the Eleventh Amendment from assuming jurisdiction over proceedings begun or pending in state courts.

The issuance of an injunction against the suit in the state court, begun by a citizen of Tennessee against the State of Georgia, would be an assumption of jurisdiction over that suit within the prohibition of the Eleventh Amendment. *Gunter* v. *Atlantic Coast Line Co.,* 200 U. S. 273.

A decision on the merits of the controversy pending in the state court and raised here, whether or not an injunction is issued, would be an assumption of jurisdiction over that suit within the prohibition of the Eleventh Amendment.

The effect of an injunction against the suit in the state court and the assumption of jurisdiction over the controversy by this Court would be to remove the case from the state court to this Court, and this Court is without power to remove a case brought in a state court by a citizen of one State against another State. *Postal Telegraph Cable Co.* v. *Alabama,* 155 U. S. 482; *Tennessee Cent. R. R. Co.* v. *Campbell,* 109 Tenn. 640.

V. The defenses set up in the bill to the petition for condemnation can be fully made and adequate relief obtained in the Circuit Court for Hamilton County, Tennessee, where the petition has been filed. The plaintiff here therefore has an adequate and complete remedy at law, and this being so, equity will not intervene, even if the plaintiff in the action at law threatens to invade some constitutional right of the defendant. *Singer Sewing Mach. Co.* v. *Benedict,* 229 U. S. 481; *Robb* v. *Connolly,* 111 U. S. 624.

The plaintiff in this suit can make in the state court every defense raised to the defendant's effort to condemn its property. *Tennessee Cent. R. R. Co.* v. *Campbell,* 109 Tenn. 640.

Mr. George M. Napier, Attorney General of the State of Georgia, and *Mr. William L. Frierson,* with whom *Mr. Robert H. Williams* and *Mr. Joe V. Williams* were on the

brief, for complainant, in opposition to the motion to dismiss the bill.

I. The Eleventh Amendment is clearly inapplicable.

II. The state court has not acquired, and cannot acquire, jurisdiction of the State of Georgia, without its consent. And the pendency of the proceeding in that court cannot take from this Court its jurisdiction to determine the controversy presented by the bill.

It will not be denied that Georgia is not subject to be sued by a citizen of another State in any court without its consent. It follows that, without such consent, no court can ever acquire jurisdiction of a suit by a citizen to which that State is a necessary party. The owner of land is always a necessary party to a proceeding to condemn the land. Assuming that the necessary consent has not been given, the prosecution of the proceeding in the state court will be an idle ceremony, for any judgment appropriating plaintiff's land will be a nullity. The pendency of that proceeding, therefore, cannot deprive this Court of its jurisdiction to determine the controversy when properly presented.

If it be conceded that § 720, Rev. Stats., forbids this Court to enjoin the City from prosecuting its void proceeding to final judgment, the jurisdiction to enjoin the use of that judgment to obtain plaintiff's property cannot be doubted. *Simon* v. *Southern Ry. Co.*, 236 U. S. 115.

Georgia could doubtless prevent a judgment by submitting to the jurisdiction of the Tennessee court. But it prefers not to waive its right to have the controversy determined by this Court which, at its instance, has jurisdiction. Being unwilling to enter its appearance in the state court, it can only expect that judgment by default will go against it. And, though the judgment will be void, defendant will, at once, proceed to execute it by taking plaintiff's land. Hence, even if defendant cannot be enjoined from prosecuting its proceeding to judgment, it

can and ought to be enjoined from interfering with plaintiff's possession until this Court determines the controversy.

But § 720, Rev. Stats., does not really forbid an injunction against prosecuting the condemnation proceeding. As said in *Simon* v. *Southern Ry. Co., supra,* the inhibition is against staying "proceedings" in a state court, and this means a proceeding of which the court has jurisdiction.

The same conclusion results from another consideration. This Court has taken jurisdiction of the controversy and will use such process as may be necessary to protect its jurisdiction. True, an injunction will not issue to restrain proceedings previously begun in another court of concurrent jurisdiction. In other words the jurisdiction of such a court, if first acquired, will be respected. But here, when the bill was filed the state court had not acquired and was powerless to acquire jurisdiction to determine the rights of Georgia. *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175.

III. The State of Georgia has not consented to be sued, either in its own legislation or by inference from the enabling acts under which it extended its road into Tennessee.

It is insisted that in *East Tennessee, etc., Ry. Co.* v. *Nashville, etc., Ry. Co.,* 51 S. W. 202, the Supreme Court of Tennessee has construed the enabling acts as making Georgia subject to suit, with respect to its railroad, in Tennessee. But this contention cannot be maintained. There the State, by filing an answer, consented to the jurisdiction; there was no occasion to consider whether it had previously consented, and the court obviously did not consider it. Certainly the court did not sustain the jurisdiction on any construction of the enabling acts. See *Tappan* v. *Railroad Co.,* 3 Lea, 106.

There has been no authoritative construction of these acts by the court of last resort and the only fair construc-

tion of them is that no consent on the part of Georgia to submit to the jurisdiction of the Tennessee courts is to be implied except, perhaps, in cases in which it, itself, seeks to condemn property.

IV. It is said that this suit cannot be maintained because there is an adequate remedy at law; that Georgia may go into the Tennessee court and, by way of defense, have determined the same questions it has brought to this Court. If the Tennessee court had jurisdiction of Georgia there might be force in this suggestion. But Georgia cannot be forced to submit to the jurisdiction of that court. It has before it the threat that through the void judgment of a court, without jurisdiction of it, it will be dispossessed of its property. It asserts that, since it is unwilling to waive its rights, this is the only court which may rightfully determine the controversy it submits.

Mr. Justice Butler delivered the opinion of the Court.

The State of Georgia obtained leave to file its bill of complaint in this Court in a suit against the City of Chattanooga to enjoin it from appropriating for street purposes certain lands constituting a part of a railroad yard which that State owns in Chattanooga.

The substance of the bill may be stated briefly. In 1837, Georgia undertook the construction of a railroad, known as the Western and Atlantic Railroad, extending from Atlanta to Chattanooga. The legislature of Tennessee granted to Georgia the right to acquire the necessary right of way from the state line to Chattanooga and also land for terminal facilities. In 1852, Georgia purchased about 11 acres, then in the outskirts of that city, on which is located its railroad yard. The city has grown and this tract of land is now near the business center. Georgia owns and formerly operated the railroad, but since 1870, it has been operated by lessee companies; and now the Nashville, Chattanooga & St. Louis Railway Company operates it under a lease which will expire in 1969.

For some years, there has been a demand for extending one of the principal streets of the city through this railroad yard. Georgia denies the power of the city to condemn the necessary right of way for the street. It says that the right of Tennessee to condemn this land or to authorize the city to condemn it is not involved. But it asserts that the State has not authorized the city to condemn this land; that the city has been granted power of eminent domain only to the extent that it is granted by general statutes to corporations; that these statutes do not confer the power to appropriate land already devoted to public use; that such land can be taken only when specifically authorized and that no power has been delegated to take property which the State has permitted a sister State to acquire. It is stated that the city officials have assumed by ordinance to open the street in such a way as will destroy the yard for railroad purposes, and that, prior to the filing of the bill in this case, the city commenced proceedings in the Circuit Court of Hamilton County, Tennessee, to condemn the right of way for the proposed street extension, and in its petition named the State of Georgia and its lessee as defendants, and caused publication to be made for that State as a non-resident defendant. The bill alleges that Georgia has never consented to be sued in the courts of Tennessee, and prays for a decree enjoining the city from prosecuting the proceedings, and from interfering with Georgia or its lessee in the possession and use of the land, and decreeing that its land which the city seeks to appropriate is not subject to condemnation. The city moves to dismiss the bill. The motion must be granted.

1. The power of Tennessee, or of Chattanooga as its grantee, to take land for a street is not impaired by the fact that a sister State owns the land for railroad purposes. Having acquired land in another State for the purpose of using it in a private capacity, Georgia can claim no sov-

ereign immunity or privilege in respect to its expropriation. The terms on which Tennessee gave Georgia permission to acquire and use the land and Georgia's acceptance amount to consent that Georgia may be made a party to condemnation proceedings.

The power of eminent domain is an attribute of sovereignty, and inheres in every independent State. See *Boom Co.* v. *Patterson,* 98 U. S. 403, 406; *United States* v. *Jones,* 109 U. S. 513, 518; *Shoemaker* v. *United States,* 147 U. S. 282, 300; *Cincinnati* v. *Louisville & Nashville R. R. Co.,* 223 U. S. 390, 404. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State. It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will. *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20; *Galveston Wharf Co.* v. *Galveston,* 260 U. S. 473. It is superior to property rights (*Kohl* v. *United States,* 91 U. S. 367, 371) and extends to all property within the jurisdiction of the State,—to lands already devoted to railway use, as well as to other lands within the State. *United States* v. *Gettysburg Electric Ry. Co.,* 160 U. S. 668, 685; *Adirondack Ry. Co.* v. *New York State,* 176 U. S. 335, 346. Land acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership. The proprietary right of the owning State does not restrict or modify the power of eminent domain of the State wherein the land is situated. See *Burbank* v. *Fay,* 65 N. Y. 57, 62; *United States* v. *Railroad Bridge Co.,* 6 McLean, 517, 533; *United States* v. *Chicago,* 7 How. 185, 194. Tennessee by giving Georgia permission to construct a line of railroad from the state boundary to Chattanooga did not surrender any of its territory or give up any of its governmental power over the right of way and other lands to be acquired by Georgia

for railroad purposes. The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity. *Bank of the United States* v. *Planters' Bank,* 9 Wheat. 904, 907; *Bank of Kentucky* v. *Wister,* 2 Pet. 318, 323; *Louisville, C. & C. R. R. Co.* v. *Letson,* 2 How. 497, 550; *South Carolina* v. *United States,* 199 U. S. 437, 463. Undoubtedly Tennessee has power to open roads and streets across the railroad land owned by Georgia.

Chattanooga contends that Georgia has consented to be sued in the courts of Tennessee in respect of its railroad in that State. This claim is based upon the terms of the permission. Chapter 1, Tennessee Laws 1845–6, created the Nashville & Chattanooga Railroad Company for the purpose of constructing and operating a line of railroad between Nashville and Chattanooga, and among other things made it capable in law of suing and being sued. Chapter 195, Tennessee Laws 1847–8, provides that "all the rights, privileges and immunities, with the same restrictions which are given and granted to the Nashville and Chattanooga Rail Road Company by the act [Chapter 1 above-mentioned] . . . are, so far as they are applicable, hereby given to and conferred upon the State of Georgia, to be enjoyed and exercised by that State in the construction of that part of the Western and Atlantic Rail Road, lying in Hamilton county, Tennessee, and in the management of its business." *East Tennessee, Virginia and Georgia Railway Company* v. *Nashville, Chattanooga and Saint Louis Railway Company,* and others, including the State of Georgia (Court of Chancery Appeals, Tennessee, 1897, 51 S. W. 202) was a suit concerning the administration of this railroad owned by Georgia in Tennessee. (page 211.) Georgia insisted that, being

a sovereign State, it could not be sued in Tennessee. (page 203.) The court said that the act last above mentioned "includes among the rights and restrictions the right to sue and be sued. This includes, namely, the courts of Tennessee along with other courts." (page 211.) The case was taken to the Supreme Court of the State, where a decree was entered affirming the lower court (with modifications) in which it was said, "The relief allowed as to the State of Georgia does not touch her sovereignty, but concerns only her contracts as to the operation of the Union Depot situated in the City of Chattanooga. . . ." These decisions support the contention that Georgia has consented to be sued in the courts of Tennessee in respect of its railroad property in that State.

But we need not decide the broad question whether Georgia has consented generally to be sued in the courts of Tennessee in respect of all matters arising out of the ownership and operation of its railroad property in that State. The Circuit Court of Hamilton County had jurisdiction in the matter of the condemnation of land for streets by the City of Chattanooga, and exercised it prior to the filing of the bill of complaint in this Court. The State of Georgia and its lessee were named as parties. Notice was given to Georgia as a non-resident by publication. Having divested itself of its sovereign character, and having taken on the character of those engaged in the railroad business in Tennessee (*Bank of the United States* v. *Planters' Bank, supra*), its property there is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. The power of the city to condemn does not depend upon the consent or suability of the owner. Moreover, the acceptance by Georgia of the permission given it to acquire the railroad land in Tennessee is inconsistent with an assertion of its own sovereign privileges in respect of that land and precludes a claim that it is not

subject to taking for the use of the public, and amounts to a consent that it may be condemned as may like property of others.

2. There is such a want of equity that the bill will be dismissed. The lack of opportunity to be heard before the passage of the ordinance opening the street furnishes no ground for complaint. The taking is a legislative and not a judicial function, and an opportunity to be heard in advance need not be given. *Bragg* v. *Weaver,* 251 U. S. 57, 58. Personal service upon the owner is not essential; publication of notice is sufficient. *Bragg* v. *Weaver, supra,* 59, 61. No complaint is made that the laws of Tennessee do not afford the State of Georgia and other owners reasonable notice and opportunity to be heard before the final determination of judicial questions that may be involved in the condemnation proceedings, e. g., whether the State has delegated to the city the power to condemn; whether the taking is for a public purpose; (*Rindge Co.* v. *Los Angeles,* 262 U. S. 700, 705; *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598, 606) and the amount of the compensation. *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 304. Georgia has been given notice and has the right voluntarily to appear. See *Clark* v. *Barnard,* 108 U. S. 436, 447. All its objections and defenses may be interposed in the Tennessee court. It appears on the face of the bill of complaint that, if it so elects, Georgia has a plain, adequate and complete remedy in the condemnation proceedings instituted by the city. Its contention that the requisite power to condemn has not been delegated to the city involves a consideration of the meaning and proper application of the laws of Tennessee, and it is especially appropriate that the Tennessee courts shall first decide that question. The decision of its highest court on that question would be followed by this Court. *Maguire* v. *Reardon,* 255 U. S. 271; *Cusack Co.* v. *Chicago,* 242 U. S. 526, 529; *Reinman* v.

Little Rock, 237 U. S. 171, 176; *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548, 555. If the decision of that court shall deny to Georgia any rights secured to it by the Constitution and laws of the United States, the case may be brought here for reëxamination and review. That suits in equity will not be sustained in any case where a plain, adequate and complete remedy may be had at law is declared by statute (Judicial Code, § 267) and established by decisions of this Court so numerous that citation is not necessary.

Bill dismissed without prejudice.

McCURDY, COUNTY TREASURER, OSAGE COUNTY, OKLAHOMA, ET AL. *v.* UNITED STATES.

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

No. 135. Argued January 4, 1924.—Decided April 7, 1924.

1. Lands in Oklahoma allotted in severalty to the Osage Indians were not taxable by the State while the title was held in trust by the United States. P. 486.
2. Under the Osage Allotment Act of June 28, 1906, title to surplus allotments did not pass from the United States until execution and delivery of deeds of the Principal Chief approved by the Secretary of the Interior (§ 8). *Id.*
3. The above act makes homestead allotments nontaxable, and surplus allotments nontaxable within three years from the approval of the act, "except where certificates of competency are issued or in case of the death of the allottee", the distinction between homestead and surplus depending on designation by the allottee evidenced in the allotment certificates and deeds. *Held,* that tracts allotted and deeded as surplus were not made taxable within the three year period, by the death of the allottees, where this occurred before the allotments had been completed and approved. P. 487.
4. The title acquired by an Osage Indian through the execution and delivery of the deed prescribed by this act cannot be related back to the time of the completion of allotments for the purpose of

validating taxes sought to be imposed while the land was held in trust by the United States. P. 487.

280 Fed. 103, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which reversed a decree of the District Court dismissing a suit brought by the United States to enjoin collection of taxes, cancel tax sale certificates and recover taxes paid, on lands allotted to members of the Osage Tribe of Indians.

Mr. Elmer E. Grinstead, for appellants, submitted. *Mr. Charles L. Roff, Jr.,* and *Mr. Eugene F. Scott* were also on the brief.

Mr. S. W. Williams, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The United States, as guardian and trustee for the Osage Indians, brought this suit against the county treasurer and taxing officers of Osage County, Oklahoma, and others, to restrain collection of unpaid taxes, to cancel certain tax sale certificates, and to recover sums paid as taxes on land in that county, which had been allotted to members of the Osage Tribe. The District Court dismissed the cause. The Circuit Court of Appeals reversed the decree and remanded the cause with instructions to grant the relief prayed.

The question is whether the allotted lands were subject to taxation for 1909. Under the state laws, land was taxable as of March 1 of that year. In 1883, these lands were purchased from the Cherokee Nation by the United States for the benefit of the Osage and Kansas Indians. Chapter 3572, 34 Stat. 539, approved June 28, 1906, known as the Osage Allotment Act, provided for the division of lands belonging to the Osage Tribe among its

members. (§ 2.) Each member was entitled to make three selections and was permitted to designate one as a homestead, which was required to be so designated in his certificate and deed, and it was provided that the homestead would be inalienable and nontaxable until otherwise provided by act of Congress. The other land allotted to each member was known as surplus land. (Subd. 4, § 2.) The Secretary of the Interior in his discretion and upon the petition of any adult member of the tribe, was empowered to issue to such member a certificate of competency authorizing him to sell and convey any of the lands "deeded him by reason of this Act." It was provided that "the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress." (Subd. 7, § 2.) Further, that the lands of any deceased member should descend to his or her legal heirs according to the laws of Oklahoma,—except in certain cases not here material (§ 6), and that "All deeds . . . shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior." (§ 8.)

The allotments were completed and approved by the Secretary November 19, 1908. All allottees had died prior to that date. All of the lands taxed were allotted as surplus lands. Deeds were not signed by the principal chief until May and June, 1909; and they were not approved by the Secretary until July 30 of that year. None of the allottees received a certificate of competency.

Title was in the United States on the date as of which the assessment was made, and did not pass until the execution and delivery of the deeds. (§ 8.) The lands were not taxable while held in trust by the United States. *United States* v. *Rickert,* 188 U. S. 432. See also *The Kansas Indians,* 5 Wall. 737; Oklahoma Enabling Act, 34

Stat. 267, § 1, c. 3335, approved June 16, 1906; Oklahoma Constitution, Art. 1, § 3; Art 10, § 6.

The death of the allottees before completion of the allotment did not make the lands taxable as of March 1, 1909. The allotment was made about two and a half years after the approval of the act and after the death of all of the allottees. The three-year provision applies to surplus and not to homestead lands. This classification depends on selection and designation by the allottee, to be evidenced in the certificates of allotment and the deeds. It was impossible to ascertain as of March 1, 1909, what lands were surplus.

Appellants suggest that the title which passed at the time of the execution and delivery of the deed should be held to relate back and take effect at the time of the completion of the allotments. The doctrine of relation gives effect to an act done at one time as if it had been done at another. It is a legal fiction adopted by courts solely for purposes of justice,—to avoid denial or loss of right; but not to impose burdens. Its application depends on some antecedent right. *Gibson* v. *Chouteau,* 13 Wall. 92, 100; *Lykins* v. *McGrath,* 184 U. S. 169; *United States* v. *Atchison, T. & S. F. Ry. Co.,* 142 Fed. 176, 187; *Powers* v. *Hurmert,* 51 Mo. 136. There is nothing in the Osage Enrollment Act, or in the situation, requiring application of the doctrine of relation against the Indians. The provision empowering the Secretary of the Interior to issue certificates authorizing members found to be competent and capable to sell and convey the "lands deeded" makes ownership and right to sell depend on the deeds. If, on execution and delivery of deeds, title shall be deemed to have passed prior to March 1, 1909, while in fact the land was held in trust by the United States, the lands will be burdened with taxes, which otherwise they would not be subject to. We hold that the doctrine of relation should not be applied.

Affirmed.

SPERRY OIL & GAS COMPANY ET AL. *v.* CHISHOLM ET AL.

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

No. 164. Argued January 16, 1924.—Decided April 7, 1924.

1. A final decree of the Circuit Court of Appeals in a suit removed to the District Court upon the ground that it arose under the laws of the United States, *held* reviewable here by appeal and not by certiorari. P. 490.
2. Under the constitution and statutes of Oklahoma, the family homestead of an Indian may include his tribal "homestead" allotment as well as his tribal "surplus" allotment; and a lease, invalid because executed by the husband alone, may be set aside in a suit brought by the husband and wife, unless she is estopped by her acts and conduct from asserting its invalidity. P. 492.
3. The power of Congress to deal with the Indians in Oklahoma as a dependent people and legislate concerning their property with a view to their protection, was reserved by the Oklahoma Enabling Act, the terms of which were accepted by an ordinance of the constitutional convention of Oklahoma later ratified with the constitution of the State. P. 493.
4. The authority given by the Act of Congress of May 27, 1908, to a Cherokee Indian of the half-blood to make an oil and gas lease upon his restricted "homestead" allotment, with the approval of the Secretary of the Interior, cannot be limited or contravened by the provision of the Oklahoma law attaching to the execution of a lease upon the family homestead the condition that it must be also executed by his wife. P. 494.
5. The provision of the Oklahoma Enabling Act that all laws in force in Oklahoma Territory at the time of the admission of the State should be in force throughout the State, "except as modified or changed by this Act or by the constitution of the State", related only to laws affecting the citizens of the State generally, and did not authorize the application of such laws in contravention of acts passed by Congress in reference to the property of Indians under the power expressly reserved in the Enabling Act itself. P. 496.
6. The provision in the Oklahoma constitution that nothing in the laws of the United States shall deprive any Indian or other allottee

of the benefit of the homestead laws of the State cannot give validity to laws of the State repugnant to the reserved powers of the United States in legislating in respect of the lands of Indians. P. 497.

7. The "surplus" allotment of a half-blood Cherokee, upon being freed from all federal restrictions by the Act of May 27, 1908, *supra*, became subject to the laws of Oklahoma like property of other citizens, including the law (*supra*, par. 2) restricting the disposition of family homesteads. P. 497.
8. Regulations of the Secretary of the Interior providing that if restrictions were removed from part of the land included in an oil and gas lease, the entire lease should continue subject to approval and supervision and all royalties thereunder be paid to the Indian agent until lessor and lessee arranged for separate accountings upon the restricted and unrestricted land, *held* not to relieve a lease, as to the unrestricted land included, from invalidity under the Oklahoma family homestead law. P. 498.
9. Where an oil and gas lease of land is found invalid under the family homestead law, the court cannot permit the lessees to continue extracting oil and gas upon the condition that they do not interfere with the owners' use of the surface as a homestead. P. 498.

282 Fed. 93, affirmed in part and reversed in part; certiorari dismissed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court, which canceled a lease made by an Indian of his homestead and surplus allotments,—together constituting his family homestead,—upon the ground that, not being executed by his wife, the instrument was invalid under the Oklahoma family homestead law. Certiorari also was granted.

Mr. Preston C. West, with whom *Mr. Alvin Richards* and *Mr. A. A. Davidson* were on the brief, for appellants and petitioners.

Mr. H. L. Underwood, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States, by special leave of Court, as *amici curiae*.

Mr. J. Howard Langley, with whom *Mr. Harve N. Langley, Mr. S. R. Lewis* and *Mr. O. S. Booth* were on the brief, for appellees and respondents.

Mr. Justice Sanford delivered the opinion of the Court.

The appellees, Webster Chisholm, a half-blood Cherokee Indian, and his wife, brought this suit in a state court of Oklahoma to cancel a supplemental instrument modifying and extending an oil and gas lease previously executed by him upon his "homestead" and "surplus" allotments of tribal lands. It was removed to the Federal District Court. That court, upon final hearing, entered a decree adjudging this instrument to be entirely null and void, and enjoining interference with the plaintiffs' possession of the premises.[1] This decree was affirmed by the Circuit Court of Appeals. 282 Fed. 93. An appeal to this Court was allowed by a Circuit Judge; and thereafter the appellants were also granted a writ of certiorari. 261 U. S. 611.

As the suit was removed to the federal court upon the ground that it arose under the laws of the United States,[2] the decree of the Circuit Court of Appeals was not made final by the provisions of § 128 of the Judicial Code and § 3 of the Act of September 6, 1916, c. 448, 39 Stat. 726. *Southern Pacific Co.* v. *Stewart,* 245 U. S. 562. Therefore the appeal was properly allowed under § 241 of the Judicial Code; and the writ of certiorari must be dismissed.

Chisholm is an enrolled citizen of the Cherokee Nation, of the half-blood. Pursuant to the Cherokee Agreement—embodied in the Act of July 1, 1902, c. 1375, 32

[1] See *Chisholm* v. *Creek & Indiana Development Co.* (D. C.) 273 Fed. 589, the opinion on interlocutory hearing. The Development Co., although named as a defendant in the original petition, was not served with process and did not enter its appearance, and the case was heard only as to the other two defendants, the appellants here.

[2] See *McCune* v. *Essig,* 199 U. S. 382.

Stat. 716—he was allotted two tracts of tribal lands: one of thirty acres designated as a "homestead"; and another adjoining tract of fifty acres designated as "surplus". The alienation of both of these tracts was then restricted. In 1904, while unmarried, he executed an oil and gas lease for a term of fifteen years to the Creek & Indiana Development Co., covering, as an entirety, the eighty acres of his two allotments. It contained no provision for an extension or renewal. This lease was approved by the Secretary of the Interior. Chisholm married in 1911. In 1912, he and his wife moved upon the leased land, and have since that time occupied and claimed the entire eighty acres as a family homestead. Their residence is upon the "homestead" thirty acres, the cultivated land and pasture extending upon the "surplus" fifty acres. Neither owns any other land. In 1914—more than five years before the expiration of the lease—the lessee having found oil in paying quantities and completed the drilling of five wells, Chisholm executed a written instrument modifying the terms of the lease, in accordance with regulations prescribed by the Secretary of the Interior, so as to provide for an increased royalty and extend the lease as long as oil or gas should be found in paying quantities. This instrument—hereinafter called the extension lease—was approved by the Secretary of the Interior as to the "homestead" thirty acres, which was still restricted land; but was neither approved nor disapproved by him as to the "surplus" fifty acres, from which the restrictions had previously been removed. It was not, however, executed or joined in by his wife. Later in the same year the Development Company assigned the lease to the Sperry Oil & Gas Co.; and that Company in 1918 assigned it to the Oklahoma Producing & Refining Corporation. The suit was commenced in 1919, about three months after the expiration of the term of the original lease. The lessees had then driven eleven wells on the leased premises

and removed a large amount of oil. All royalty due under the leases at the original and increased rates had been paid by the lessees to Chisholm, or to the Indian agent for his benefit, and had been received by Chisholm; and such payments were continued to the time of the trial. His wife, however, received no part of this royalty, and did not learn that he had extended the original lease until shortly before the commencement of the suit.

1. The ground of decision in both the lower courts was that the extension lease executed by Chisholm was void under the provisions of the constitution and laws of Oklahoma relating to family homesteads because it was not joined in or consented to by his wife. The constitution of Oklahoma provides that the rural homestead of any family in the State "shall consist of not more than one hundred and sixty acres of land, . . . in one or more parcels, to be selected by the owner;" and that "nothing in the laws of the United States . . . shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the State." Art. 12, § 1. These provisions are also contained in the state statutes. 1 Rev. Laws, 1910, § 3343, p. 834. The family homestead of an Indian under the state law may include his tribal "homestead" allotment as well as his tribal "surplus" allotment. *Hyde* v. *Ishmael,* 42 Okla. 279; *Norton* v. *Kelley,* 57 Okla. 222; *Belt* v. *Bush* (Okla.), 176 Pac. 935. It is further provided by a statute originating in the territorial session laws of 1901, c. 10, p. 78, that "no deed, mortgage or contract relating to the homestead", except a lease for not exceeding one year, "shall be valid unless in writing and subscribed by both husband and wife." 1 Rev. Laws, 1910, § 1143, p. 292. This applies to oil and gas leases covering the homestead. *Carter Oil Co.* v. *Popp* (Okla.), 174 Pac. 747; *Rich* v. *Doneghey* (Okla.), 177 Pac. 86; *Treese* v. *Shoemaker,* 80 Okla. 235. And, the interest of the husband and wife in

the homestead not being severable, a lease or other contract relating to the homestead executed by the husband alone, may be set aside in an action brought by the husband and wife, unless she is estopped by her acts and conduct from asserting its invalidity. *Hall* v. *Powell,* 8 Okla. 276; *Kelly* v. *Mosby,* 34 Okla. 218; *Brusha* v. *Board of Education,* 41 Okla. 595; *Hyde* v. *Ishmael, supra; Carter Oil Co.* v. *Popp, supra.*

2. In our opinion, however, these provisions of the constitution and laws of Oklahoma have no application to so much of the extension lease as covers the tribal "homestead" of thirty acres.

By the Oklahoma Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267, it was provided that nothing in the constitution of the State should be construed to limit or affect the authority of the Government of the United States to make any law or regulations respecting the Indians of the Territory, their lands, property or other rights, which it would otherwise have been competent to make. (§ 1.) The terms and conditions of the Enabling Act were accepted by the Constitutional Convention of Oklahoma by an "irrevocable" ordinance, which was ratified with the constitution itself. *Coyle* v. *Oklahoma,* 221 U. S. 559, 564; *Jefferson* v. *Winkler,* 26 Okla. 653, 662; *Molone* v. *Wamsley,* 80 Okla. 181, 182. Congress was thus careful to preserve to the United States the authority over the Indians, their lands and property, which it possessed prior to the passage of the Enabling Act: retaining full power, which it had exercised from the earliest period, to deal with them as a dependent people and legislate concerning their property with a view to their protection; with the right to determine when, in their interest, the Government guardianship should cease, and plenary authority, notwithstanding the bestowal of federal citizenship upon them, to place restrictions upon their right of alienating the lands allotted to them. *Tiger* v. *Western*

Investment Co., 221 U. S. 286, 309; *Heckman* v. *United States*, 224 U. S. 413, 416. And in all matters relating to the restrictions upon their allotted lands resort must be had to the acts of Congress and to those acts alone. *Walker* v. *Brown*, 43 Okla. 144; *Collins Inv. Co.* v. *Beard*, 46 Okla. 310; *Wilson* v. *Greer*, 50 Okla. 387; *Smith* v. *Williams*, 78 Okla. 297; *Molone* v. *Wamsley*, *supra*.

By the Act of May 27, 1908, c. 199, 35 Stat. 312—which was in force when the extension lease was executed—it was provided that the "homesteads" allotted to members of the Five Civilized Tribes of the half-blood should not be subject to alienation or incumbrance prior to April 26, 1931, unless such restrictions were removed by the Secretary of the Interior; but all restrictions upon the alienation or incumbrance of their other allotted lands were removed. § 1. And it was further provided that "leases of restricted lands for oil, gas or other mining purposes . . . may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise". § 2. No other conditions were attached to the making of such leases.

The authority thus given by the act of Congress to an Indian of the half-blood to make an oil and gas lease upon his restricted "homestead" allotment, with the approval of the Secretary of the Interior, cannot be limited or contravened by the provision of the Oklahoma law attaching to the execution of a lease upon the family homestead the condition that it must also be executed by his wife. This added requirement is inconsistent with the authority given the allottee by the act of Congress to make such lease when approved by the Secretary of the Interior, and, if the wife does not consent to the lease, would entirely defeat the purpose of Congress. As applied to an oil and gas lease made by such an allottee upon his restricted "homestead", the provision of the Oklahoma

law is hence invalid because of its repugnancy to the paramount act of Congress. "The power of Congress to impose restrictions on the right of Indian wards of the United States to alien or lease lands allotted to them in the division of the lands of their tribe is beyond question; and of course it is not competent for a State to enact or give effect to a local statute which disregards those restrictions or thwarts their purpose." *Bunch* v. *Cole,* 263 U. S. 250, 252.

On the precise question of the effect of a state law which, if applicable, adds a condition to the exercise by an Indian allottee of rights granted him by an act of Congress, the decision in *Blanset* v. *Carden,* 256 U. S. 319, 324, 326, is controlling. There an act of Congress gave Indians the right to dispose of their restricted allotments by will, in accordance with the regulations prescribed by the Secretary of the Interior and subject to his approval. And it was held that a will made by an Indian woman, which was approved by the Secretary of the Interior, devising her restricted lands to others than her husband, was not invalidated by a provision of the Oklahoma code that no married woman should bequeath more than two-thirds of her property away from her husband. The Court said: "The Secretary of the Interior made regulations which were proper to the exercise of the power conferred upon him . . . and it would seem that no comment is necessary to show that [the provision of the Oklahoma Code] is excluded from pertinence or operation. . . . In a word, the act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code. . . . Our conclusion is . . . that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under

this act of Congress, free from restrictions on the part of the State as to the portions to be conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior."

So it was the intention of Congress that Indian allottees of the half-blood should have the right to make oil and gas leases upon their restricted "homestead" allotments, provided they are in accordance with the regulations of the Secretary of the Interior and are approved by him.

To the same effect are the decisions of the Supreme Court of Oklahoma. In *Walker* v. *Brown, supra,* at p. 146, the court, in holding that a restrictive provision of an Oklahoma statute was not intended to apply to the will of an Indian woman devising her "homestead" allotment under the authority given by the acts of Congress, said: "This court has repeatedly held that acts of Congress supplant the laws of Oklahoma in relation to Indians; that certain state laws which are applicable to every other citizen are not in force as against or pertaining to the Indians of the Five Civilized Tribes, and that we have here, respecting some matters, two classes of citizens and two legislative sovereignties. . . . It is obvious that, if the state law were given the construction contended for, it would have the effect of interfering with the policy of the Congress toward the Indians in the matter of the alienation of their allotted lands." This case was approved and followed in *Brock* v. *Keifer,* 59 Okla. 5, 8. And in *Molone* v. *Wamsley, supra,* at p. 183, it was said that it is "beyond the power of the Legislature to enact any law invalidating or affecting" conveyances by Indian heirs "made and approved in conformity with the acts of Congress." And see *Haddock* v. *Johnson,* 80 Okla. 250.

The Oklahoma statute derives no additional force as a restriction upon leases made by Indian allottees because it was in force as a territorial law at the time the Enabling

Act was passed, and that act provided that all laws in force in the Territory at the time of the admission of the State into the Union should be in force throughout the State "except as modified or changed by this act or by the constitution of the State." (§ 21.) Manifestly this provision related only to statutes affecting the citizens of the State generally and was not intended to authorize the application of such laws in contravention of the acts passed by Congress in reference to the property of Indians under the power expressly reserved in the Enabling Act itself. Nor can it have that effect. See *Truskett* v. *Closser,* 236 U. S. 223.

Nor is the validity of the extension lease affected by the provision in the Oklahoma constitution that nothing in the laws of the United States shall deprive any Indian or other allottee of the benefit of the homestead laws of the State. Whether or not this provision was intended to do more than to protect the allottees from the enforced seizure of their homesteads, it is sufficient to say that, whatever its purpose, it can have no more effect than the Oklahoma statute in giving validity to laws of the State repugnant to the reserved power of the United States in legislating in respect to the lands of Indians. Neither the constitution of a State nor any act of its legislature, whatever rights it may confer on Indians or withhold from them, can withdraw them from the operation of an act which Congress passes concerning them in the exercise of its paramount authority. *United States* v. *Holliday,* 3 Wall. 407, 419.

It results that the extension lease executed by Chisholm in 1914, which was made under the regulations of the Secretary of the Interior and was approved by him as to the "homestead" allotment of thirty acres, must be held to be valid as to such allotment.

3. As to the fifty acres of the "surplus" allotment, also included in the extension lease, an entirely different

question is presented. All restrictions upon this land had been removed by the Act of 1908. When the extension lease was executed there was no limitation under the acts of Congress upon Chisholm's right to alienate, encumber or lease this tract. It had become in all respects subject to his control, under the laws of the State, just as the property of other citizens. *Jefferson* v. *Winkler,* 26 Okla. 653, 664. All questions pertaining to its disposal fell under the scope and operation of those laws. *Dickson* v. *Luck Land Co.,* 242 U. S. 371, 375. And since his wife did not join in the execution of the extension lease, and there is nothing in her acts and conduct which estops her from asserting its invalidity, under the provisions of the Oklahoma statute, as interpreted and applied by the courts of the State, it must be held to be invalid as to the "surplus" allotment; and it was to that extent properly set aside.

The fact that the regulations of the Secretary of the Interior provided that if the restrictions were removed from a part of the land included in an oil and gas lease, the entire lease should continue subject to the approval and supervision of the Secretary of the Interior and all royalties thereunder should be paid to the Indian agent until the lessor and lessee made adequate arrangements to account for the oil and gas upon the restricted land separately from that upon the unrestricted, obviously adds nothing to the force of the extension lease in so far as it includes the fifty acres of "surplus" lands, and can have no effect in relieving it as to such lands from the invalidity attaching by reason of the noncompliance with the laws of the State.

And the extension lease being entirely invalid as to the "surplus" fifty acres, the court is without authority to permit the lessees to continue to extract oil and gas therefrom although done in such manner as not to interfere with the plaintiff's use of the surface as a homestead.

The decree of the Circuit Court of Appeals is affirmed as to so much of the extension lease as covers the fifty acres of the "surplus" allotment, and reversed as to so much of said lease as covers the thirty acres of the "homestead" allotment.

Affirmed in part.
Reversed in part.

MEEK *v.* CENTRE COUNTY BANKING COMPANY ET AL., BANKRUPTS.

DALE *v.* CENTRE COUNTY BANKING COMPANY ET AL., BANKRUPTS.

BREEZE *v.* CENTRE COUNTY BANKING COMPANY ET AL., BANKRUPTS.

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

Nos. 590–592. Motions to dismiss submitted March 10, 1924; argued March 13, 1924.—Decided April 7, 1924.

Where a partner filed a petition to have himself, the partnership, and the other partners declared bankrupt, and died pending review by this Court of orders overruling motions to dismiss the petition in the last two aspects, *Held:*

(1) That § 8 of the Bankruptcy Act, providing that the death of a bankrupt shall not abate the proceedings, was inapplicable to so much of the petition as sought the bankruptcy of the firm and the other partners, they not consenting to such adjudications. P. 502.

(2) That the question whether the petitioner's right, if any he had, to maintain the petition as against his partners and the partnership, abated with his death or survived to his proper representatives in the property involved, so that the bankruptcy proceeding might be continued in their names, should not be decided *ex parte;* but opportunity to appear in this Court and be heard upon it would be afforded such representatives, before remanding the cause for dismissal as to the partnership and non-consenting partners. P. 503.

Motions to dismiss denied. The opinion below is reported in 292 Fed. 116.

CERTIORARI to orders of the Circuit Court of Appeals which sustained, on petitions to revise, orders of the District Court declining to dismiss a petition in bankruptcy in so far as it sought an adjudication against the above-named petitioners individually or against a partnership of which they and Shugert, (respondent here and petitioner in the District Court,) were the members.

Mr. Mortimer C. Rhone and *Mr. Ellis L. Orvis,* with whom *Mr. Harry Keller* was on the brief, for petitioners.

Mr. Samuel D. Gettig and *Mr. Newton B. Spangler* for respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

These three cases—which were heard together in the Circuit Court of Appeals and are included here in one record—arose out of a petition in bankruptcy filed by the respondent Shugert in a Federal District Court in Pennsylvania. In this petition he alleged that he and the present petitioners, Meek, Dale and Breeze—hereafter called the defendants—were members of a partnership styled the Centre County Banking Company; that the partnership and each of the defendants were insolvent; and that he and the partnership desired to obtain the benefits of the bankruptcy law. He prayed that the partnership and he and the defendants individually be adjudged bankrupt.[1] Subpoenas were issued for the defendants. All appeared and resisted the petition in so far as it sought to have the partnership and themselves

[1] The petition combined a "debtors petition" (Form No. 1), a "partnership petition" (Form No. 2), and a petition against the defendants individually. There was no allegation that either the partnership or the defendants had committed an act of bankruptcy.

adjudged bankrupt;[2] and each made a motion to dismiss the petition to that extent upon the grounds, among others, that it was not authorized by the Bankruptcy Act and the court had no jurisdiction under it to adjudge either the partnership or a non-consenting member bankrupt. These motions were denied by the District Court. On petitions by the defendants to revise the orders of the District Court denying their motion, the Circuit Court of Appeals, being of opinion that the petition in bankruptcy was maintainable under § 5 of the Bankruptcy Act and General Order in Bankruptcy No. 8,[3] affirmed the orders of the District Court. 292 Fed. 116. These writs of certiorari were then granted the defendants. 263 U. S. 696.

Shugert thereafter died. And the defendants have moved that the proceeding in bankruptcy be dismissed as to them, both individually and as members of the partnership, on the ground that to that extent it should abate. These motions have been answered by the attorney who formerly represented Shugert, as now representing his "interests," and by an attorney representing a "Creditors' Committee," who insist that under § 8 of the Bankruptcy Act the proceeding in bankruptcy was not abated by Shugert's death and may be continued without making Shugert's personal representative a party. While neither of these attorneys represents any party now before

[2] Two of them denied that they were members of the partnership.

[3] Section 5 of the act provides that "a partnership . . . may be adjudged a bankrupt."

General Order No. 8 provides that: "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as . . . in the case of a debtor petitioned against; and he shall have the right to appear . . . and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act." 210 U. S., App., 570.

the Court,[4] we treat their answer as the suggestion of *amici curiae.*

Section 8 of the Bankruptcy Act provides that: "The death . . . of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died." It is clear, however, that, whatever may be the effect of this provision, when construed in the light of § 1a(4) of the act defining the term "bankrupt", it can have no application except to that part of the petition in bankruptcy in which Shugert sought to have himself adjudged a voluntary bankrupt—a matter not in issue under the motions to dismiss and not now before us. Even if one partner may maintain a petition such as this to have the partnership adjudicated a bankrupt—a question not now determined—yet to the extent that it seeks to have the partnership adjudged bankrupt as against non-consenting partners resisting such an adjudication, it is, manifestly, an involuntary proceeding. *Re Murray* (D. C.), 96 Fed. 600, 602. And see *Re Carleton* (D. C.), 115 Fed. 246, 249. In *Medsker* v. *Bonebrake,* 108 U. S. 66, 71, involving a bankruptcy proceeding brought by one partner against another under the Act of 1867, this Court said: "It is not a voluntary bankruptcy if the man is forced into it against his will by his partner, any more than by any one else; and it is compulsory and involuntary if he refuses to join in such case and is forced into it, as much as in any other enforced bankruptcy." And, *a fortiori,* such a petition as this is an involuntary proceeding to the extent that it also seeks to have the non-consenting partners adjudged bankrupt as individuals.

In other words, in so far as Shugert's petition sought not merely to have the partnership adjudged bankrupt as

[4] The record does not show that any creditor appeared in the proceeding in the District Court.

against the defendants, but also to have them adjudged as individuals, it was clearly an antagonistic proceeding. To that extent Shugert was not the "bankrupt", but stood in a position analogous to that of a creditor seeking the involuntary adjudication of his debtor. Even in so far as the petition sought to have the partnership adjudged bankrupt, the defendants, as non-consenting partners, were entitled, under the specific provision of General Order No. 8, to make defense "in the same manner as if the petition had been filed by a creditor of the partnership." Note 3, p. 501, *supra.* Such a proceeding, as any other litigated matter, requires adversary parties; and manifestly, in the very nature of things, can only be continued as long as there are adversary parties. In the proceeding in the District Court and in the Circuit Court of Appeals Shugert was the petitioner in the bankruptcy proceeding, affirmatively seeking relief against his partners by subjecting their property to the payment of the partnership debts, and actively engaged in the prosecution of his petition against them. As the cases now stand, however, by reason of his death there is no longer any petitioner seeking the bankruptcy of the firm or of the defendants; no adversary party in so far as the defendants are concerned.

The question whether Shugert's right to maintain the petition in bankruptcy for the purpose of having the partnership and the defendants adjudged bankrupt—if any he had—is one which abated with his death, or one which survives to his proper representatives in the personalty or realty involved so that the bankruptcy proceeding may be continued in their names, is not, however, free from difficulty. It is, so far as we are advised, one of first impression. And it is one which we think should not be determined *ex parte,* if there are any persons claiming to be proper representatives of his interest in the pro-

ceeding who desire to be admitted as parties for the purpose of continuing it in his stead.

Under the circumstances we conclude that we should now deny the motions to dismiss the proceeding; with leave to any persons claiming to be the proper representatives of Shugert's interest to appear in this Court within thirty days from this date, setting forth the capacity in which they so claim, and applying for leave to be admitted as parties for the purpose of continuing the proceeding. If this is done the question whether the proceeding should be dismissed as to the partnership and the defendants or continued as to them by such representatives, will then be determined. But if no one thus appears, these cases will be remanded with instructions to dismiss the proceeding in so far as the petition seeks to have the partnership and the defendants adjudged bankrupt; following, by analogy, the practice established in cases that have become moot. *Heitmuller* v. *Stokes,* 256 U. S. 359, 363; *Harlan* v. *Harlan,* 263 U. S. 681.

The attorneys who filed the answer to the defendants' motion will forthwith give notice of this ruling to the representatives of Shugert's interest in the property involved, and also to not less than three creditors of the partnership; and will, within such thirty days, file with the clerk of this Court a verified return showing to whom such notices were given.

It is so ordered.

JAY BURNS BAKING COMPANY ET AL. *v.* BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 94. Argued October 19, 1923.—Decided April 14, 1924.

1. The power of a State to protect the public from imposition by sale of short-weight loaves of bread cannot be exerted in such a way as arbitrarily to prohibit or interfere with, or impose unrea-

sonable and unnecessary restrictions upon, the business of making and selling it. P. 513.

2. It is the duty of the court to determine whether a regulation challenged under the Constitution has a reasonable relation to, and a real tendency to accomplish, the purpose for which it was enacted. *Id.*

3. A statute of Nebraska prescribes the minimum weights of loaves of bread to be made, or offered, for sale in the State, and, in order to prevent the palming off of smaller for larger sizes, fixes a maximum for each class, by allowing a "tolerance" of only two ounces per pound in excess of the minimum, the weights to be determined by averaging loaves of each class in lots of twenty-five, and to apply for twenty-four hours after baking. The evidence demonstrated that owing to normal evaporation from bread under conditions of temperature and humidity often prevailing in Nebraska, it is impossible to manufacture good bread in the regular way without frequently exceeding the prescribed tolerance and incurring the burden of penalties prescribed by the statute, and that compliance would necessitate selection of ingredients making an inferior and unsalable bread, or wrapping the loaves, although wrapping is not required by the statute and unwrapped loaves are wholesome food in much demand by consumers. *Held*, That, in the circumstances, the provision that average weights shall not exceed these maxima is not necessary to protect purchasers against imposition and fraud by short weights, and not calculated to effectuate that purpose; and that it subjects bakers and sellers of bread to restrictions essentially unreasonable and arbitrary; and is therefore repugnant to the Fourteenth Amendment. P. 514.

108 Neb. 674, reversed.

ERROR to a judgment of the Supreme Court of Nebraska affirming a decree dismissing a suit brought by bakers and sellers of bread against state officials to restrain enforcement of a statute regulating the weights of loaves.

Mr. Matthew A. Hall, with whom *Mr. Raymond G. Young* and *Mr. Carroll S. Montgomery* were on the briefs, for plaintiffs in error.

Laws fixing specific weights for loaves of bread are construed to be only against short weights, and do not prohibit greater weights than the standards provided.

People v. *Wagner,* 86 Mich. 594; *State* v. *Huber,* 4 Boyce, 259; *Allion* v. *Toledo,* 99 Oh. St. 416; *Chicago* v. *Schmidinger,* 243 Ill. 167; *Schmidinger* v. *Chicago,* 226 U. S. 578; *Chicago* v. *Schweifurth,* 174 Ill. App. 64.

The same is true in regard to other articles. *Spokane* v. *Arnold,* 73 Wash. 256; *State* v. *Co-Operative Store Co.,* 123 Tenn. 399.

A law fixing a maximum as well as a minimum weight for a loaf is illegal and invalid. *Harwood* v. *Williamson,* 1 Sask. L. Rep. 66.

Dangerous articles are subject to regulation by law, where harmless articles are exempt. *Williams* v. *Walsh,* 79 Kan. 212; s. c. 222 U. S. 415.

There must be some logical connection between the object sought to be accomplished by the law and the means prescribed. *Chicago* v. *Chicago, etc. Ry. Co.,* 275 Ill. 30; *Chicago, etc. Ry. Co.* v. *State,* 47 Neb. 549.

The right to contract is property. Taylor, Due Process of Law, § 265, pp. 490, 491; *State* v. *Goodwill,* 33 W. Va. 179; *Braceville* v. *People,* 147 Ill. 66.

Laws enacted under the guise of police regulation must have some relation to the public health, welfare or safety. *Smiley* v. *McDonald,* 42 Neb. 5; *Wenham* v. *State,* 65 Neb. 394; *Union Pacific Ry. Co.* v. *State,* 88 Neb. 247; *State* v. *Withnell,* 91 Neb. 101; *Urbach* v. *Omaha,* 101 Neb. 314; *Mugler* v. *Kansas,* 123 U. S. 623.

The regulation must not be an arbitrary and unreasonable interference with the rights of individuals. *In re Anderson,* 69 Neb. 686; *Lawton* v. *Steele,* 152 U. S. 133; *Connecticut Co.* v. *Stamford,* 95 Conn. 26.

Police power means the power of the State to prohibit all things hurtful to the comfort, safety or welfare of the community. *License Cases,* 5 How. 504.

The police power does not justify an enactment merely because there is a possibility of danger which it is sought to avert. *Ex parte Whitewell,* 98 Cal. 73; Freund, Police

Power, § 494; *State* v. *Sperry,* 94 Neb. 785; *Young* v. *Commonwealth,* 101 Va. 853; *State* v. *Ramseyer,* 73 N. H. 31.

If an invalid portion of an act formed an inducement to the passage of the act, the whole act will be declared invalid. *Trumble* v. *Trumble,* 37 Neb. 340; *State* v. *Poynter,* 59 Neb. 417; *State* v. *Junkin,* 85 Neb. 1.

The Constitution is violated when persons engaged in the same business are subjected to different restrictions. *Soon Hing* v. *Crowley,* 113 U. S. 703; *Louisville & Nashville R. R. Co.* v. *Bosworth,* 230 Fed. 191; *Standard Oil Co.* v. *Red River Parish Police Jury,* 140 La. 42; *Black* v. *State,* 113 Wis. 205; *In re Von Horne,* 74 N. J. Eq. 600.

A law palpably unreasonable and arbitrary and exceeding all reasonable classification, is not within the police power of a State. *Price* v. *Illinois,* 238 U. S. 446; *Meyer* v. *Nebraska,* 262 U. S. 390; *Mugler* v. *Kansas,* 123 U. S. 623.

Determination by the legislature of what constitutes proper exercise of police power is subject to supervision by the courts. *Meyer* v. *Nebraska, supra; Mugler* v. *Kansas, supra.*

The business of baking is not clothed with a public interest. *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522.

Freedom of contract is the general rule, and restraint is the exception; and restraint can only be justified by exceptional circumstances. *Adkins* v. *Children's Hospital,* 261 U. S. 525; *State* v. *Edgecomb,* 108 Neb. 859.

Only public necessity can justify the exercise of the police power by a State. *Chicago, etc. Ry. Co.* v. *Drainage Commissioners,* 200 U. S. 561; *State* v. *Edgecomb, supra; People* v. *Klinck,* 214 N. Y. 121.

The constitutionality of a law may depend upon the result of its practical operation. *Erickson* v. *Nine Mile Irrig. Dist.,* 192 N. W. 694.

Mr. Lloyd Dort, Assistant Attorney General of the State of Nebraska, with whom *Mr. O. S. Spillman,* Attorney General, was on the brief, for defendants in error.

Equity will not interfere with the enforcement of criminal statutes.

The mere possibility that property rights of an individual may be affected is not sufficient.

In the present case no criminal prosecution had been instituted and even before the law was in operation it was attacked. The bakers have never made any *bona fide* effort to comply with the law.

The law in question does not violate the Constitution of the United States nor that of Nebraska.

The law is a regulatory law and it does not in any manner confiscate the property or business of the bakers nor prohibit them from continuing their occupation.

It is claimed that the law makes no provision for the punishment of nonresidents of the State. It is not required, however, that the law be uniform except as operating within the jurisdiction of the State.

It has been definitely decided that the regulation of the manufacture and sale of food articles, bread in particular, is a proper subject of legislation. *Schmidinger* v. *Chicago,* 226 U. S. 578; *Chicago* v. *Schmidinger,* 243 Ill. 167; *People* v. *Wagner,* 86 Mich. 594; *State* v. *Normand,* 76 N. H. 541; *State* v. *Layton,* 160 Mo. 474.

The bread law is not invalid under § 14, Art. III, of the Constitution of Nebraska, which provides that no bill shall contain more than one subject and that the same shall be clearly expressed in the title. *Merrill* v. *State,* 65 Neb. 1.

The law does not deprive the bakers of their vested property rights without compensation. *Enos* v. *Hanff,* 95 Neb. 184; *Chicago, etc. Ry. Co.* v. *State,* 47 Neb. 549.

The law cannot be held unreasonable because it limits the size of the loaves to specified weights or because it

does not permit loaves of other weights to be made for sale by special contract. *Schmidinger* v. *Chicago,* 226 U. S. 578.

The mere fact that there may be expense in connection with change of appliances and equipment of the bakeries does not constitute a taking of vested property rights without compensation, in violation of law. The right to operate any business is always dependent upon the general welfare of the people and the operation of the police power. The legislature has determined that the law is necessary on account of the frauds being perpetrated upon the purchasing public and in order that the public may be advised of the merchandise which they receive for the purchase price.

This being true, it appears that any of the property of the bakers which can be used only for the baking of bread which is in fraud of the public would have been used in the perpetration of a fraud upon the public in the production of short weight loaves.

It is contended by the bakers that they fluctuated the sizes of the loaves to meet the cost of the ingredients. The legislature, however, has said with good reasoning that it is just as easy for the bakers to give a standard weight loaf and to fluctuate the price instead of the weight of the loaves.

Considering the minimum weight provision in the law, it has been decided that laws prescribing standard size loaves of bread and prohibiting with minor exceptions the sale of other sizes, should be sustained. *Schmidinger* v. *Chicago, supra; Mobile* v. *Yuille,* 3 Ala. 137; *Chicago* v. *Schmidinger,* 243 Ill. 167; *People* v. *Wagner, supra; Commonwealth* v. *McArthur,* 152 Mass. 522.

The law is uniform in operation within the State.

Necessity for the law is exclusively a legislative question. *State* v. *Morehead,* 99 Neb. 527; *Schultz* v. *State,* 89 Neb. 34; *State* v. *Collum,* 138 La. 395; *Halter* v. *State,* 74 Neb. 757; 205 U. S. 34.

Plaintiffs in error have introduced much evidence concerning the scientific baking of bread. If, after frequent attempts to bake bread which complies with the provisions of the law, they had failed, such evidence would have some bearing. They failed to make one attempt to comply with the law. The evidence shows that bread may easily be baked within the two ounce tolerance.

MR. JUSTICE BUTLER delivered the opinion of the Court.

An act of the legislature of Nebraska, approved March 31, 1921 (Laws 1921, c. 2, p. 56)[1] provides that every loaf of bread made for the purpose of sale, or offered for sale, or sold, shall be one-half pound, one pound, a pound and a half, or exact multiples of one pound, and prohibits loaves of other weights. It allows a tolerance in excess of the specified standard weights at the rate of two ounces per pound

[1] An Act establishing a standard weight loaf of bread for the State of Nebraska and providing a penalty. . . .

Section 1. Department of agriculture to enforce.—It shall be the duty of the Department of Agriculture to enforce all provisions of this Act. It shall make or cause to be made all necessary examinations and shall have authority to promulgate such rules and regulations as are necessary to promptly and effectively enforce the provisions of this Act.

Sec. 2. Bread, standards of weight.—Every loaf of bread made or procured for the purpose of sale, sold, exposed or offered for sale in the State of Nebraska shall be the following weights avoirdupois, one-half pound, one pound, one and one-half pounds, and also in exact multiples of one pound and of no other weights. Every loaf of bread shall be made of pure flour and wholesome ingredients and shall be free from any injurious or deleterious substance. Whenever twin or multiple loaves are baked, the weights herein specified shall apply to each unit of the twin or multiple loaf.

Sec. 3. Tolerance, how determined.—A tolerance at the rate of two ounces per pound in excess of the standard weights herein fixed shall be allowed and no more, provided that the standard weights herein prescribed shall be determined by averaging the weight of not less than twenty-five loaves of any one unit and such average shall not

and no more, and requires that the specified weight shall be the average weight of not less than 25 loaves, and that such average shall not be more than the maximum nor less than the minimum prescribed. Violations of the act are punishable by a fine or imprisonment.

Four of the plaintiffs in error are engaged in Nebraska in the business of baking and selling bread for consumption there and in other States. Their total annual output is alleged to be 23,500,000 pounds. The other plaintiff in error is a retail grocer at Omaha, and sells bread to consumers principally in single loaf lots. They brought this suit against the Governor and the Secretary of the Department of Agriculture of the State to restrain the enforcement of the act on the ground, among others, that it is repugnant to the due process clause of the Fourteenth Amendment. The State Supreme Court sustained the act. The case is here on writ of error.

Plaintiffs in error do not question the power of the State to enact and enforce laws calculated to prevent the sale of loaves of bread of less than the purported weight; but they contend that the provision fixing the maximum weights in this statute is unnecessary, unreasonable and arbitrary.

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be less than the minimum nor more than the maximum prescribed by this Act. All weights shall be determined on the premises where bread is manufactured or baked and shall apply for a period of at least twenty-four hours after baking. Provided, that bread shipped into this state shall be weighed where sold or exposed for sale.

Sec. 4. Penalties for violation.—Any person, firm or corporation violating any of the provisions of this Act, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail for not more than thirty days. Provided, however, that upon the second and all subsequent convictions for the violation of any of the provisions of this Act such offender shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail for not more than ninety days.

The brief of the Attorney General states that the law is concerned with weights only. The State Supreme Court said (108 Nebr. 674, 678): "It is to prevent a loaf of one standard from being increased in size until it can be readily sold for a loaf of a larger standard that a maximum weight is fixed. The test is reasonableness. . . . (p. 679.) The statutory margin or tolerance being two ounces to the pound, can bakers, for example, make a loaf 18 ounces in weight that will weigh not less than 16 ounces 24 hours after it is baked? The tests and proofs on behalf of the State tend to show that the regulation is reasonable and can be observed at all times. [In most of these tests, wrapped loaves were used.] It is fairly inferable from the evidence adduced by plaintiffs that compliance with the regulation is practicable most of the time, but that tested by their experiments as made, there are periods when the operation of natural laws will prevent compliance with legislative requirements. There are a number of reasons, however, why the tests made to prove unreasonableness should not be accepted as conclusive. If correctly understood, these tests were made with bread manufactured in the regular course of business, without any attempt to change ingredients or processes or to retard evaporation of moisture in loaves by the use of wax-paper or other means. . . . (p. 680.) The act of the legislature does not fix prices but leaves bakers free to make reasonable charges for bread wrapped in inexpensive wax-paper for its preservation in transportation and in the markets. . . . Precautions to retard evaporation of moisture in bread for the purpose of keeping it in a good state of preservation for 24 hours may be required as an incidental result of a police regulation establishing standards of maximum weights for loaves of bread. Palatableness, a quality demanded by the public, is affected by excessive evaporation, if food value is not. . . . The evidence does not prove that, if reasonable means or precautions are taken by plaintiffs

and other bakers to retard evaporation, they cannot comply with the act of the legislature, or that the regulation is unreasonable."

Undoubtedly, the police power of the State may be exerted to protect purchasers from imposition by sale of short weight loaves. *Schmidinger* v. *Chicago,* 226 U. S. 578, 588. Many laws have been passed for that purpose. But a State may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. *Lawton* v. *Steele,* 152 U. S. 133, 137; *Meyer* v. *Nebraska,* 262 U. S. 390, 399. Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted. *Meyer* v. *Nebraska, supra; Welch* v. *Swasey,* 214 U. S. 91, 105; *Dobbins* v. *Los Angeles,* 195 U. S. 223, 236; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 556; *Lawton* v. *Steele, supra.*

The loaf is the usual form in which bread is sold. The act does not make it unlawful to sell individual loaves weighing more or less than the standard weights respectively. Loaves of any weight may be sold without violation of the act, if the average weight of not less than 25 does not exceed the permitted maximum or fall short of the specified nominal weights during 24 hours after baking. Undoubtedly, very few private consumers purchase at one time as many as 25 loaves of the same standard size or unit. And it is admitted that the sale of a lesser number not within the permitted tolerance does not constitute an offense. Plaintiffs in error do not claim that it is impossible to make loaves which for at least 24 hours after baking will weigh not less than the specified minimum weights, but they insist that the difference per-

mitted by the act between the weight of loaves when taken from the oven and their weight 24 hours later is too small, and that it is impossible for bakers to carry on their business without sometimes exceeding the maximum or falling short of the minimum average weights. Any loaves of the same unit at any time on hand during 24 hours after baking may be selected to make up the 25 or more to be weighed in order to test compliance with the act. Therefore, if only a small percentage of the daily output of the loaves in large bakeries shall exceed the maximum when taken from the oven or fall below the minimum weight within 24 hours, it will always be possible to make up lots of 25 or more loaves whose average weight will be above or below the prescribed limits.

The parties introduced much evidence on the question whether it is possible for bakers to comply with the law. A number of things contribute to produce unavoidable variations in the weights of loaves at the time of and after baking. The water content of wheat, of flour, of dough [2] and of bread immediately after baking varies substantially and is beyond the control of bakers. Gluten is an important element in flour, and flour rich in gluten requires the addition of more water in breadmaking and makes better bread than does flour of low or inferior gluten content. Exact weights and measurements used

[2] Wheat bread dough is the dough consisting of a leavened and kneaded mixture of flour, potable water, edible fat or oil, sugar and / or other fermentable carbohydrate substance, salt, and yeast, with or without the addition of milk or a milk product, of diastatic and / or proteolytic ferments, and of such limited amounts of unobjectionable salts as serve solely as yeast nutrients, and with or without the replacement of not more than three per cent of the flour ingredient by some other edible farinaceous substance. (Definition of Joint Committee on Definitions and Standards, September 28, 1922, and approved by the Association of American Dairy Food and Drug Officials, October 5, 1922, and by the Association of Official Agricultural Chemists, November 17, 1922.)

in doughmaking cannot be attained. Losses in weight while dough is being mixed, during fermentation and while the bread is in the oven, vary and cannot be avoided or completely controlled. No hard and fast rule or formula is followed in breadmaking. There are many variable elements. Bread made from good flour loses more weight by evaporation of moisture after baking than does bread made from inferior flours. Defendants' tests were made principally with loaves which were wrapped so as to retard evaporation; and it was shown that by such wrapping the prohibited variations in weight may be avoided. On the other hand, the evidence clearly establishes that there are periods when evaporation under ordinary conditions of temperature and humidity prevailing in Nebraska exceeds the prescribed tolerance and makes it impossible to comply with the law without wrapping the loaves or employing other artificial means to prevent or retard evaporation. And the evidence indicates that these periods are of such frequency and duration that the enforcement of the penalties prescribed for violations would be an intolerable burden upon bakers of bread for sale. The tests which were described in the evidence and referred to in the opinion are not discredited because "made with bread manufactured in the regular course of business." The reasonableness of the regulation complained of fairly may be measured by the variations in weight of bread so made. The act does not require bakers to select ingredients or to apply processes in the making of bread that will result in a product that will not vary in weight during 24 hours after baking as much as does bread properly made by the use of good wheat flour. As indicated by the opinion of the State Supreme Court, ingredients selected to lessen evaporation after baking would make an inferior and unsalable bread. It would be unreasonable to compel the making of such a product or to prevent making of good bread in order to comply

with the provisions of the act fixing maximum weights. The act is not a sanitary measure. It does not relate to the preservation of bread in transportation or in the market; and it applies equally whether the bread is sold at the bakeries or is shipped to distant places for sale. Admittedly, the provision in question is concerned with weights only. The act does not regulate moisture content or require evaporation to be retarded by the wrapping of loaves or otherwise. The uncontradicted evidence shows that there is a strong demand by consumers for unwrapped bread. It is a wholesome article of food, and plaintiffs in error and other bakers have a right to furnish it to their customers. The lessening of weight of bread by evaporation during 24 hours after baking does not reduce its food value. It would be unreasonable to prevent unwrapped bread being furnished to those who want it in order technically to comply with a weight regulation and to keep within limits of tolerance so narrow as to require that ordinary evaporation be retarded by wrapping or other artificial means. It having been shown that during some periods in Nebraska bread made in a proper and usual way will vary in weight more than at the rate of two ounces to the pound during 24 hours after baking, the enforcement of the provision necessarily will have the effect of prohibiting the sale of unwrapped loaves when evaporation exceeds the tolerance.

No question is presented as to the power of the State to make regulations safeguarding or affecting the qualities of bread. Concretely, the sole purpose of fixing the maximum weights, as held by the Supreme Court, is to prevent the sale of a loaf weighing anything over nine ounces for a one pound loaf, and the sale of a loaf weighing anything over eighteen ounces for a pound and a half loaf, and so on. The permitted tolerance, as to the half pound loaf, gives the baker the benefit of only one ounce

out of the spread of eight ounces, and as to the pound loaf the benefit of only two ounces out of a like spread. There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a nine and a half or a ten ounce loaf for a pound (16 ounce) loaf, or an eighteen and a half or a 19 ounce loaf for a pound and a half (24 ounce) loaf; and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception. Imposition through short weights readily could have been dealt with in a direct and effective way. For the reasons stated, we conclude that the provision, that the average weights shall not exceed the maximums fixed, is not necessary for the protection of purchasers against imposition and fraud by short weights and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is therefore repugnant to the Fourteenth Amendment.

Judgment reversed.

MR. JUSTICE BRANDEIS, (with whom MR. JUSTICE HOLMES concurs) dissenting.

The purpose of the Nebraska standard-weight bread law is to protect buyers from short weights and honest bakers from unfair competition. It provides for a few standard-size loaves, which are designated by weight, and prohibits, as to each size, the baking or selling of a loaf which weighs either less or more than the prescribed weight. *Schmidinger* v. *Chicago,* 226 U. S. 578, settled that the business of making and selling bread is a permissible subject for regulation; that the prevention of short weights is a proper end of regulation; that the fixing of standard sizes and weights of loaves is an appropriate means to that end; and that prevalent marketing frauds make the enactment of some such protective legislation

permissible. The ordinance there upheld, besides defining the standard-weight loaf, required that every loaf should bear a label stating the weight; and to sell a loaf weighing less than the weight stated in the label was made a misdemeanor.

The Nebraska regulation is in four respects less stringent than the ordinance upheld in the *Schmidinger Case:* (1) It provides for a tolerance. That is, it permits a deviation from the standard weight of not more than two ounces in a pound, provided that the prescribed standard weight shall be determined by averaging the weights of not less than twenty-five loaves of any one unit. (2) The prescribed weight applies for only twenty-four hours after the baking. (3) The weight is to be ascertained by weighing on the premises where the bread is baked. (4) No label stating the weight is required to be affixed to the loaf. That is, as a representation of the weight, the familiar size of the loaf is substituted for the label. On the other hand, the Nebraska requirement is more stringent than the Chicago ordinance, in that it prohibits making and selling loaves which exceed the prescribed weight by more than the tolerance. This prohibition of excess weights is held to deny due process of law to bakers and sellers of bread. In plain English, the prohibition is declared to be a measure so arbitrary or whimsical that no body of legislators acting reasonably could have imposed it. In reaching this conclusion, the Court finds specifically that this prohibition "is not necessary for the protection of purchasers against imposition and fraud by short weight"; that it "is not calculated to effectuate that purpose"; and that the practical difficulties of compliance with the limitation are so great that the provision "subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary."

To bake a loaf of any size other than the standard is made a misdemeanor. Why baking a loaf which weighs

less than the standard size should be made a crime is obvious. Such a loaf is a handy instrument of fraud. Why it should be a crime to bake one which weighs more than the standard is not obvious. The reason given is that such a loaf, also, is a handy instrument of fraud. In order that the buyer may be afforded protection, the difference between the standard sizes must be so large as to be evident and conspicuous. The buyer has usually in mind the difference in appearance between a one-pound loaf and a pound-and-a-half loaf, so that it is difficult for the dealer to palm off the former for the latter. But a loaf weighing one pound and five ounces may look so much like the buyer's memory of the pound-and-a-half loaf that the dealer may effectuate the fraud by delivering the former. The prohibition of excess weight is imposed in order to prevent a loaf of one standard size from being increased so much that it can readily be sold for a loaf of a larger standard size.[1]

With the wisdom of the legislation we have, of course, no concern. But, under the due process clause as construed, we must determine whether the prohibition of excess weights can reasonably be deemed necessary; whether the prohibition can reasonably be deemed an appropriate means of preventing short weights and incidental unfair practices; and whether compliance with the limitation prescribed can reasonably be deemed practicable. The determination of these questions involves an enquiry into

[1] See Charles C. Neale, "Weight Standardization of Bread", 13 Conf., Weights & Measures, pp. 115, 116; C. J. Kremer, "Bread Weight Legislation and Retail Bakers", 16 Conf., Weights & Measures, pp. —; Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 11, 12. Compare 4 Conf., Weights & Measures, pp. 18, 19; 5 Conf., Weights & Measures, p. 113; 1914 Wisconsin Dairy, Food and Weights and Measures Dept., Bul. No. 14, p. 18; 1920 New Jersey Weights and Measures Dept., p. 18; 1921 Chicago Weights and Measures Dept., p. 4.

facts. Unless we know the facts on which the legislators may have acted, we cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious. Knowledge is essential to understanding; and understanding should precede judging. Sometimes, if we would guide by the light of reason, we must let our minds be bold. But, in this case, we have merely to acquaint ourselves with the art of breadmaking and the usages of the trade; with the devices by which buyers of bread are imposed upon and honest bakers or dealers are subjected by their dishonest fellows to unfair competition; with the problems which have confronted public officials charged with the enforcement of the laws prohibiting short weights, and with their experience in administering those laws.

First. Why did legislators, bent only on preventing short weights, prohibit, also, excessive weights? It was not from caprice or love of symmetry. It was because experience had taught consumers, honest dealers and public officials charged with the duty of enforcing laws concerning weights and measures that, if short weights were to be prevented, the prohibition of excessive weights was an administrative necessity. Similar experience had led to the enactment of a like prohibition of excess quantities in laws designed to prevent defrauding, by short measure, purchasers of many other articles.[2] It was similar ex-

[2] A similar policy, enacted by statute or regulation, is applied to fish, pork, milk, gasoline, hay, fruits, vegetables and other commodities. See Maryland, Laws of 1817 (Session of December, 1817 to February, 1818), c. 114, § 1; New York, Laws of 1910, c. 470, §§ 5a, 5b, Laws of 1912, c. 81, §§ 240, 252, 1911 Weights and Measures Dept., p. 46; Maine, 1913 Pub. Laws, c. 81, § 1, 1916 Rev. Stat. c. 37, § 20, 1919 Rev. Stat. c. 37, § 20; Arizona, 1913 Laws, § 26; Massachusetts, 1921 Gen. Laws, c. 23, § 85, c. 98, § 15. See specifications and tolerances adopted by the department of weights and measures in Arizona, 1921; California, 1914, 1915, 1919, Report of Dept. Weights & Measures, 1917–1918, p. 65; Indiana, 1913; Massachusetts, 1917,

perience which had led those seeking to prevent the sale of intoxicating liquor to enact the law which prohibits the sale of malt liquor, although not containing any alcohol (sustained in *Purity Extract Co.* v. *Lynch,* 226 U. S. 192), and that which prohibits the sale of liquor containing more than one-half of one per cent. of alcohol (sustained in *Ruppert* v. *Caffey,* 251 U. S. 264). Compare *Armour & Co.* v. *North Dakota,* 240 U. S. 510.

In January, 1858, the late corporation of Washington adopted an ordinance fixing a standard-weight loaf, and establishing an excess tolerance.[3] The standard-weight bread ordinance adopted by Chicago in 1908 and sustained in the *Schmidinger Case* is said to have been the first standard-weight bread law in the United States enacted in this century.[4] Prior thereto many different kinds of legislation had been tried in the several States and cities

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Report of Sealer of Weights and Measures for Worcester, Mass., 1905, p. 5; New York, 1910, 1913, 1915; North Dakota, 1919; Pennsylvania, 1921; Tennessee, 1914; Vermont, 1920; Washington, 1913; Wisconsin, 1911, 1913; District of Columbia, 1897, 1901. See, also, regulations promulgated by the Secretary of Agriculture pursuant to § 4 of the Standard Container Act, Aug. 31, 1916, c. 426, 39 Stat. 673; specifications and tolerances adopted by the Conference on Weights and Measures, 1915, 1916, 1920. And see Report, Conf. Weights & Measures, 1911, pp. 127, 129; 1913, pp. 278, 284, 289; 1914, p. 57, *et seq.;* 1916, p. 130 *et seq.;* 1919, p. 169, *et seq.;* 1920, p. 110. Compare *Turner* v. *Maryland,* 107 U. S. 38, 50, 51, note, 53 note, 54, 56.

[3] Permitted a tolerance in excess of 2 ounces on the 1 pound loaf; 3 ounces on the 2 pound loaf; and 4 ounces on the 4 pound loaf. The ordinance, promulgated by the mayor and aldermen of the late corporation of Washington, Jan. 7, 1858, was not questioned until Aug. 31, 1908. In *District of Columbia* v. *Hauf,* 33 App. D. C. 197, it was held that the Organic Act of Feb. 21, 1871, 16 Stat. 419, repealed this ordinance by implication. Up to the date of the decision, its operation had been entirely satisfactory. See statement of W. C. Haskell, 5 Conf., Weights & Measures, pp. 19–22.

[4] See Hearings on H. R. 4533, Feb. 18, 19, 1924, p. 18; 5 Conf., Weights & Measures, pp. 26–29.

with a view to preventing short weights.[5] Experience had shown the inefficacy of those preventive measures. Experience under the Chicago ordinance indicated the value of introducing the standard-weight loaf; but it proved, also, that the absence of a provision prohibiting excess weights seriously impaired the efficacy of the ordinance.[6] When in 1917 the United States Food Administration was established, pursuant to the Lever Act (August 10, 1917, c. 53, 40 Stat. 276), the business of baking came under its supervision and control; and provision was made for licensing substantially all bakers.[7] The protection of buyers of bread against the fraud of short weight was deemed essential.[8] After an investigation which occupied three months, the Food Administration issued the regu-

[5] See *Mayor and Aldermen of Mobile* v. *Yuille*, 3 Ala. 137; *Kansas* v. *McCool*, 83 Kans. 428; *Guillotte* v. *New Orleans*, 12 La. Ann. 432; *Commonwealth* v. *McArthur*, 152 Mass. 522; *People* v. *Wagner*, 86 Mich. 594; *Paige* v. *Fazackerly*, 36 Barb. 392. Also brief for plaintiff in error (appendix) in *Schmidinger v. Chicago*, 226 U. S. 578. Compare *Harwood* v. *Williamson*, 1 Sask. L. Rep. 66.

[6] See Report Chicago Dept. Weights & Measures, 1913, p. 6; 1917, p. 6; 1918, p. 3. See also 1911 New York Dept. Weights & Measures, p. 46; "Weights and Prices of Wheat Bread in Mass.," compiled by director of Standards, Jan. 1, 1924. Compare Report, Conf. on Weights & Measures, 4, pp. 18, 19; 6, p. 47; 8, pp. 18, 19; 9, pp. 20, 22; 14, pp. 30, 35. The new ordinance in Chicago is operating successfully. See 1921 Chicago Dept. Weights & Measures, p. 4; 14 Conf., Weights & Measures, p. 36.

[7] See 1917 Report U. S. Food & Fuel Administrations, pp. 10, 11, 36–38.

[8] The license regulations issued by Herbert Hoover, with the approval of the President, on November 16, 1917 were "worked out to a large degree with the bakers themselves with the co-operation of the Federal Trade Commission and the Agricultural Department." See Letter of Herbert Hoover to the President, Nov. 6, 1917. They were aided by a Consumers' Committee. The Food Administration had, also, the results of an investigation, which had been theretofore conducted by Benj. R. Jacobs of the Bureau of Chemistry, on the marketing of bread in the City of Washington. In his "Preliminary Report,

lations by which licensees were to be governed. No standard-weight bread statute had then been enacted in

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B. R. Jacobs to Duncan McDuffie, Aug. 14, 1917," he recommended: "The standardization of the loaf of bread by weight . . . (c) because when weights are declared they are made in such small-size type that it is very difficult for the consumer to see it and also when the weight is declared the bakers seem to enter into an agreement whereby they all mark the same weight on the bread regardless of the size, thus nullifying to a great extent the value of this declaration."

The "Preliminary Report on the Bread Problem, September 29, 1917," of Duncan McDuffie includes the following recommendation (p. 47): "The Food Administration is charged, not only with seeing that the public secures its bread at the lowest possible price, but that in making its purchases of this commodity it receives a square deal. In my opinion, both these objects can best be obtained by permitting bread to be sold only in units of fixed weight. As these units I recommend loaves weighing, twelve hours after being baked, not less than 16 nor more than 17 ounces, and not less than 24 or more than 25½ ounces and multiples of both these weights."

Ordinances in force, at that time, in Chicago, Dallas, Detroit, Jackson, Minneapolis, Seattle, Tacoma and Washington, and the statutes of Kansas, Idaho, Nevada and North Dakota provided for a few standard size loaves; and some of these provided, further, that the loaves must be labeled with the weight, if not in these units. (See Appendix.) Referring to such regulations, the report says (p. 49): "Many of these regulations permit the manufacture of bread of other sizes provided that bread is labeled with its exact weight. Tolerances are also permitted in some instances on account of shrinkage of weight due to evaporation of the moisture contained in the bread. Many of these regulations provide merely that bread shall not be produced in units weighing less than those fixed. The result of this regulation has been that bakers labeled the bread with the unit weight next below its actual weight, thus making standardization ineffective.

"In many instances these regulations have not produced satisfactory results. This may be attributed to lack of universality, evasion on the part of the baker, or failure of the law to provide an upper as well as a lower limit of weight. There is no reason to think that a regulation, providing that bread shall be sold in units of fixed weight with a limited upward variation to provide for inequalities of evaporation and scaling, if applied universally, will not prove an

any State.[9] The regulations adopted established standard-weight loaves; prohibited the sale of loaves other than of the standard weights; and limited the excess weight to not more than one ounce to the pound.[10] This provision remained in force unchanged until the licensing system was abrogated on December 19, 1918 (after the Armistice).[11]

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effective protection of the public and assist in reducing the cost of bread through fixing competition on price alone."

See "Report of the Federal Trade Commission on Bakery Business in United States," Nov. 3, 1917, made at the request of Mr. Hoover, and published by the United States Food Administration with "Report of Bakery Section of Food Administration," November, 1917. In the latter, Duncan McDuffie (pp. 20–21) recommended the following regulation as to weights:—"All bread should be baked in loaves weighing, unwrapped, 12 hours after baking, not less than 16 nor more than 17 and not less than 24 nor more than 25½ ounces and multiples thereof. Any greater variation in weights than those indicated may defeat the whole object of standardization."

[9] See "Preliminary Report on the Bread Problem, Sept. 29, 1917," Appendix. In 1916, the California state superintendent of weights and measures promulgated a regulation fixing a standard-weight loaf and permitting a tolerance in excess. It was not enforced, because of the opinion expressed by the attorney general that the regulation was beyond the scope of the official's authority. See 1915–16 Calif. Dept. Weights & Measures, pp. 63–66. In 1917, due to the influence of the bakers of the State, the legislature passed an amendment to the California weights and measures law which would clearly prevent the state superintendent from fixing a standard-weight loaf. An ordinance, fixing a standard-weight loaf with an excess tolerance, was prepared by the state superintendent and was "enacted in all large counties, cities and many towns throughout the state and has been effective in the uniform enforcement of a standard of weight for bread." 1919–20, *op. cit.*, pp. 30–31. In 1921, a law was passed incorporating these same features. Act of June 2, 1921, c. 704.

[10] The first "Rules and Regulations Governing Licensees Manufacturing Bakery Products," effective Dec. 10, 1917, issued by the United States Food Administration, adopted the recommendation of the November Report, which limited the tolerance for excess weights to one ounce in the pound.

[11] In some other respects, the regulations were changed from time to time. See "Revised Rules and Regulations, etc.," effective Feb-

The efficacy of the prohibition of excess weights as a means of preventing short weights having been demonstrated by experience during the period of Food Administration control, a widespread demand arose for legislative action in the several States to continue the protection which had been thus afforded. Dissatisfaction with the old methods of regulation was expressed in a number of States.[12] During the years 1919 to 1923, standard-weight bread laws, containing the prohibition of excess weights, were enacted in twelve States.[13] Similar bills were introduced in others.[14] Congress enacted such a law for the

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ruary 1, 1918, pp. 14, 15; "Special License Regulations, No. XIII, Manufacturers of Bakery Products," including May 3, 1918, Rule 2, p. 8; "Special License Regulations, No. XIII, Manufacturers of Bakery Products," Second Issue, effective September 1, 1918, Rule 2, p. 5.

[12] Washington changed from a law permitting the sale of any weight bread provided that it is properly labeled to a law fixing a standard-weight loaf with an excess tolerance. See Laws of 1913, c. 52, § 9; Laws of 1923, c. 126, § 1. West Virginia, Utah, Nevada, Detroit and Milwaukee desire to do likewise. See 1922, W. Va. Dept. Weights & Measures, pp. 14–15; 1920 Utah Dept. Weights & Measures, p. 61; 13 Conf., Weights & Measures, pp. 188, 189; Hearings on H. R. 4533, Mar. 3, 1924. In New Jersey, the department of weights and measures opposed a law similar to the Massachusetts act which embodied an alternative provision. See Report, Dept. Weights & Measures, 1921, p. 20; 1922, p. 14.

[13] See Indiana, Laws of 1919, c. 56, § 9; Montana, Laws of 1919, c. 155, § 1; Oregon, Laws of 1919, c. 82, § 1; South Dakota, Laws of 1921, c. 239, § 1; California, Laws of 1921, c. 704, §§ 1, 2; Connecticut, Laws of 1921, c. 261, §§ 2, 3, 4; Nebraska, Laws of 1921, c. 2, §§ 2, 3; Ohio, Laws of 1921, §§ 16, 17, pp. 604, 607; Texas, Gen. Laws, 1921, c. 63, p. 129; Massachusetts, Laws of 1922, c. 186, §§ 1, 2, 3; Washington, Laws of 1923, c. 126, § 1, Rem. Comp. Stat., § 11,612; Wisconsin, Laws of 1923, c. 123, §§ 1, 2.

[14] Standard weight bread legislation was recommended in the reports of the departments of weights and measures in Arizona, 1922, pp. 13, 14; District of Columbia, 1914, pp. 3, 6; 1916, p. 4; 1917, p. 6; Maine, 1913, p. 1; Massachusetts, 1916, p. 16; 1917, pp. 14, 15; 1919, p. 14; New Jersey, 1913, p. 24; 1916, p. 11; 1920, p. 18; 1921,

District of Columbia.[15] Hawaii and Porto Rico did likewise.[16] The national conference on weights and measures indorsed a similar provision.[17] A bill embodying the same principles, applicable to sales of bread in interstate commerce, prepared by the Department of Agriculture and the Department of Commerce, was introduced in 1923 and is now pending.[18] At the congressional hearings thereon, it was shown that the provision against excess weights is deemed necessary by a large majority of the bakers, as well as by consumers and by local public officials charged with the duty of preventing short weights.[19] In Nebraska the demand for the legislation under review was general and persistent. It was enacted

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p. 22; 1922, p. 14; New York, 1911, pp. 12, 40–41; Oregon, 1917, p. 7; Utah, 1920, p. 61; Vermont, 1920, p. 57; West Virginia, 1922, p. 14; Wisconsin, 1916–1917, p. 137, 1919–1920, pp. 18, 34. Bills were introduced in the legislatures of Maine, Maryland, Mississippi, New Jersey, New York, Pennsylvania, Vermont, West Virginia and Wisconsin. See 6 Conf., Weights & Measures, p. 22; 5 *ibid*, p. 88; 1919–1920 Wisconsin Weights & Measures, p. 147; 1922 New Jersey Weights & Measures, p. 14; 1921, *ibid*, p. 19. See Hearings on H. R. 4533, Feb. 18, 19, testimony of Congressman Brand of Ohio, pp. 9, 10; F. C. Blenck, Bureau of Chemistry, Department of Agriculture, pp. 11–15; F. S. Holbrook, Chief of the Weights and Measures Division, Bureau of Standards, pp. 16–19.

[15] See Act of March 3, 1921, c. 118, § 13, 41 Stat. 1217, amended Aug. 24, 1921, c. 92, 42 Stat. 201.

[16] See Hawaii, Laws of 1919, Act 176, § 1; Porto Rico, Laws of 1917, Act No. 13, §§ 1, 2, 3.

[17] See 14 Conf., Weights & Measures, pp. 72, 73, 81; 15 *ibid*, p. 79. See also 13 *ibid*, p. 174. The conference changed from an alternative measure, like the Massachusetts law, to a standard weight measure with an excess tolerance. See 8 Conf., Weights & Measures, pp. 278, 284, 289; 6 *ibid*, pp. 132, 133, 157.

[18] H. R. 4533, Sixty-eighth Congress, first session. See Hearing before the Committee on Agriculture, H. R. 4533, Feb. 18, 19, Mar. 3, 1924.

[19] See Hearings on H. R. 4533, Feb. 18, 19, pp. 11, 12, 16, 20. The opponents of the bill did not question the necessity of an excess weight prohibition. See Hearing of March 3, 1924.

after a prolonged public discussion carried on throughout the State as well as in the legislature.[20] Can it be said, in view of these facts, that the legislators had not reasonable cause to believe that prohibition of excess weights was necessary in order to protect buyers of bread from imposition and honest dealers from unfair competition?

Second. Is the prohibition of excess weights calculated to effectuate the purpose of the act? In other words, is it a provision which can reasonably be expected to aid in the enforcement of the prohibition of short weights? That it has proved elsewhere an important aid is shown by abundant evidence of the highest quality. It is shown by the fact that the demand for the legislation arose after observation of its efficacy during the period of Food Administration control.[21] It is shown by the experience

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[20] See Nebraska State Journal, Jan. 11, 16; Feb. 9, 11, 13, 19, 23, 24; March 2, 4, 7, 8, 9, 13, 15, 16, 17, 21, 23, 30, 31; April 1, 1921. See also Bakers Weekly, Feb. 19, 1921, p. 52; Feb. 26, 1921, p. 42; Mar. 12, 1921, p. 48.

[21] "What the bakers had thought impossible before the creation of the Food Administration worked like a charm, and the trade, being relieved of the destructive competition in weight and the necessity of constantly watching the juggling of weight by their competitors, could settle down to the more important problem of furnishing the people, even under adverse conditions, with quality bread, at a price which, despite the extraordinary and oftentimes exasperating circumstances, made bread still the cheapest and best food on the American table. . . . This standard weight insisted upon by the Food Administration is one of the regulations referred to as having been found so advantageous by the majority of bakers that in a great many cities the rule has been either voluntarily adopted as a sound business practice by the bakers or, at the instance of the trade, has been incorporated into new afterwar bakery laws and regulations." See 14 Conf., Weights & Measures, p. 27. See also Bakers Weekly, Dec. 20, 1919, p. 49. There is a similar movement in England to incorporate war experience (Bread Order, May 18, 1918, No. 547 (8)) into permanent legislation. See Bakers Weekly, Jan. 15, 1921, p. 40. The Montana bakers in convention approved a law similar to the

of the several communities in which the provision has since been in operation: Chicago; [22] California; [23] Ohio; [24]

Nebraska act. See Bakers Weekly, Feb. 1, 1919, p. 55. The present Oregon law was sponsored by the bakers. See Bakers Weekly, Mar. 15, 1919, p. 42. The "Federal Bread Bill" has the approval of the retail bakers of the country. See Hearings on H. R. 4533, Mar. 3, 1924. See also Statements by E. M. Rabenold, 14 Conf., Weights & Measures, pp. 43, 74–75; Charles C. Neale, "Weight Standardization of Bread", 13 *ibid*, p. 115.

[22] See testimony of William F. Cluett, Chief Deputy Inspector of Weights and Measures for Chicago, Record, pp. 56–59.

[23] See Statement of C. M. Fuller, Sealer of Weights and Measures of Los Angeles County, California, 14 Conf., Weights & Measures, p. 37: "The following suggestions in regard to the enforcement of bread legislation, including tolerances, are offered as a result of five years' successful enforcement of a standard-weight bread law. The law itself provides that the standard weights of all loaves of bread within twelve hours after baking shall be 16 ounces . . . or multiples of the 16 ounce size. A tolerance of one ounce above the standard weight is allowed for each 16 ounce unit. No stated tolerance below the standard weight is allowed, for the reason that were there such a tolerance, certain unscrupulous bakers would not hesitate to scale their bread that amount short. . . . In the enforcement of this act we have convicted 25 bakers, $535 in fines being paid, and several thousand loaves of bread confiscated and turned over to charity. It is interesting to note that the act has worked out so successfully in eliminating the unfair competition of bakers who would cut the price by selling an underweight loaf, that even those firms which were first opposed to the idea of a standard weight bread law are now in favor of it. And I have before me a communication from the Secretary of the Southern California Bakers' Association stating that at a meeting of the Wholesale and Retail Bakers' Association a unanimous resolution was passed indorsing this law." See also Bakers Weekly, Jan. 17, 1920, p. 43.

[24] See Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 3–6, 20. Also Statement of John M. Mote, Chief Inspector of Weights and Measures of Ohio, 15 Conf., Weights & Measures, pp. 88, 89, 90, 91: "During the period of the war control of the bakers by the United States Food Administration it was clearly demonstrated that it was entirely feasible for bakers to bake loaves to a uniform size, and this is also admitted by the bakers themselves. This indicates that the

Indiana; [25] and the District of Columbia.[26] The value of the prohibition is shown, also, by the fact that, after

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proposal to standardize the weight of loaves of bread presents no difficulties of manufacture which may not readily be adjusted. . . .

"Eight months ago the standard-weight bread law became effective in Ohio. We cannot say that this law is perfect in every detail—very few laws are—but we can today realize the great benefits of standardization. . . . On May 1 a questionnaire was mailed to city and county sealers of Ohio, making inquiry as to the attitude of the public and the baking industry relative to the standard-weight provision, and every reply brought the answer of complete satisfaction to both bakers and the general public. We cannot find that the standard of quality has been in any way lowered, due to standardization of weight. With only the two factors of quality and price to be considered, the purchasing public is well able to determine for itself the fairness of the prices charged. With hearty co-operation of 98% of the baking industry, and having the support of the general public, we can safely say this is one of the best statutes enacted in Ohio in recent years." See also 126 Northwestern Miller, pp. 908, 1390.

[25] See I. L. Miller, "Results of the Indiana Model Bakery Law", Bakers Weekly, Jan. 15, 1921, p. 47. The writer says that the law works well and "rarely do we find an instance in which the standard weight requirement is being violated"; that only one case of short weight had to be prosecuted; that the law itself came into existence through the desire of the bakers of the State for a system "of control that would elevate the industry by eliminating certain objectionable trade practices"; that the law has placed the industry on a fair basis; that volume of business no longer depends on shrewd but objectionable trade practices, but upon quality of product; that the size of the loaf does not grow smaller in greater proportion than the price; that the law has been a protection to the consumers and has the approval of at least 98 per cent. of the bakers. See also Bakers Weekly, Feb. 7, 1920, p. 67. The Indiana Bakers Association unanimously adopted a resolution expressing satisfaction with the operation of the standard-weight bread law of Indiana, and offered their assistance and the benefit of their experience to other States attempting to settle the question. See 15 Conf., Weights & Measures, p. 90. See also Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 3–6; 12 Conf., Weights & Measures, pp. 32, 33.

[26] See testimony of George M. Roberts, Superintendent of Weights and Measures for the District of Columbia, Hearings on H. R. 4533,

extensive application and trial, it has been endorsed by the national conference on weights and measures and is included in the proposed "Federal Bread Law." Can it be said, in view of these facts, that the legislature of Nebraska had no reason to believe that this provision is calculated to effectuate the purpose of the standard-weight bread legislation?

Third. Does the prohibition of excess weight impose unreasonable burdens upon the business of making and selling bread? In other words, would compliance involve bakers in heavy costs; or necessitate the employment of persons of greater skill than are ordinarily available? Or, would the probability of unintentional transgression be so great as unreasonably to expose those engaged in the business to the danger of criminal prosecution? Facts established by widespread and varied experience of the bakers under laws containing a similar provision, and the extensive investigation and experiments of competent scientists, seem to compel a negative answer to each of

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Feb. 18, 19, 1924, p. 51: "I am firmly of the opinion that the law is very well enforced in the District of Columbia . . . I had totaled up the other day a list of weights that came into my office in one day, for two hundred and some odd loaves, I think it was 250 loaves, and, of course, the weights would vary a little, but I do not believe that there were a dozen of those loaves that were out of the legal tolerance. My recollection is that none of them were out more than one-tenth of an ounce. The average weight was 16.03 ounces. That indicates to my mind how the law is being observed here. The bakers generally, while they are opposed to the law, were very much disturbed when the law was first passed, and made strenuous efforts to have it amended. Congress did not amend it. So far as I know the law has proven very satisfactory. I cannot speak for the bakers, but I do not recall that I have ever had a complaint come into my office from a consumer about the law. They seem to be very well satisfied and the law is very well observed. The bakers have gone along and observed the law very well. We have found it necessary to institute very few prosecutions, and those only for very minor infractions of the law against a few small bakers . . ."

these questions. But we need not go so far. There is certainly reason to believe that the provision does not subject the baker to an appreciable cost;[27] that it does not require a higher degree of skill than is commonly available to bakery concerns;[28] and that it does not expose honest

[27] Standard-weight legislation does away with the necessity for frequent pan changes. See Bakers Weekly, Nov. 29, 1919, p. 37. The prevailing bread prices in Ohio and Indiana are 8¢ for a 16 oz. loaf and 12¢ for a 24 oz. loaf. In New York, the same prices are charged for loaves running two ounces short on the average. See Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 3, 8. Prevailing bread prices in Wisconsin are 7–10¢ for the 16 oz. loaf and 10–15¢ for a 24 oz. loaf; California, 7½–9¢ and 10–13¢; District of Columbia, 9¢ and 13¢; Chicago, 8¢ and 12¢; Texas, 8¢; and Washington, 10¢ and 15¢. But in Iowa, the prices in the larger cities are 9¢ and 12¢ for a 16 oz. and 24 oz. loaf and, in the smaller cities, 8–10¢ for a 14 oz. loaf and 13¢ for a 20 oz. loaf; Idaho, 10¢ and 15¢; Nevada, 10¢ and 15¢; Virginia, 9¢ and 16¢ (18 oz.). See Information received by Director, Bureau of Standards, Dec., 1923–Jan., 1924, on file Mar. 25, 1924.

[28] While there are a large number of uncertain factors connected with the art of breadmaking, reasonable legislation fixing standard weights is practicable. See C. J. Kremer, "Bread Weight Legislation and Retail Bakers," 16 Conf., Weights & Measures, p. —. At the hearings on the "Federal Bread Bill," this was not disputed. See Hearings on H. R. 4533, Mar. 3, 1924. It is generally conceded that the baker can predetermine with great accuracy the weight of a loaf of bread immediately after baking. See 14 Conf., Weights & Measures, p. 77; 15 *ibid*, pp. 80–84. Neither can it be reasonably contended that a 2 oz. tolerance is not enough to cover shrinkage after baking. For, pursuant to a resolution adopted at the Fourteenth Conference on Weights and Measures (p. 87), a series of scientific experiments were conducted. See 15 Conf., Weights & Measures, pp. 80–84. The committee on specifications and tolerances recommended to the conference a tolerance not in excess of the one here allowed. See *ibid*, p. 79. An investigation on the shrinkage of white bread, conducted in the District of Columbia by the Bureau of Standards, showed that the shrinkage, during the first twenty-four hours, from a one-pound loaf, round top, not wrapped, was 4.4%; round top, wrapped, 2.7%; lunch, not wrapped, 5.7%; one-and-one-

bakers to the danger of criminal proceedings.[29] As to these matters, also, the experience gained during the period of Food Administration control, and since then in the several States, is persuasive. For under the Food Administration, and in most of the States, the business was successfully conducted under provisions for tolerances which were far more stringent than that enacted in Nebraska. In the Food Administration regulation, and in most of the statutes, the tolerance was one ounce in the pound.[30] In Nebraska it is two. In some States the weight is taken of the individual loaf.[31] In Nebraska it is the average of at least twenty-five loaves. In some States in which the average weight is taken, it is computed on a less number of loaves than twenty-five.[32] In some, where an average of twenty-five is taken the tolerance is

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half pound loaf, round top, not wrapped, 4.1%; and round top unwrapped, 3.0%. See Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 62–64. On file at the Bureau of Standards, Mar. 15, 1924, is a record of a large number of experiments conducted in Chicago to the same effect. See also Mass. Dept. Weights and Measures, Bul. No. 4, March, 1915, pp. 7–8.

[29] Bakers have found very little difficulty in complying with the measures where enacted. See Hearings on H. R. 4533, Feb. 18, 19, 1924, p. 31, Mar. 3, 1924; H. E. Barnard, "Bread Legislation from the Standpoint of the Baker," 14 Conf., Weights & Measures, p. 24. The regulations promulgated by the Food Administration had the approval of the bakers. See Report of the Bakery Division, Nov. 1, 1917, to May 31, 1918. Also in Ohio. See 15 Conf., Weights & Measures, pp. 88–91. See also 5 *ibid*, pp. 19–22; 1917 Oregon Dept. Weights & Measures, pp. 7–9.

[30] California, Connecticut, and old Washington Corporation ordinance. See Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 12–18, 38.

[31] Connecticut, District of Columbia, Indiana, Texas, and old Washington Corporation ordinance.

[32] Chicago (see letter of Wm. F. Cluett to Geo. K. Burgess, Director, Bureau of Standards, Dec. 28, 1923), Connecticut, Massachusetts, Model Bread Law (see 15 Conf., Weights & Measures, p. 79), Washington and Wisconsin.

smaller.[33] Moreover, even if it were true that the varying evaporation made compliance with the law difficult, a sufficiently stable weight can, confessedly, be secured by the use of oil paper wrapping (now required in several States for sanitary reasons[34]), which can be inexpensively supplied.[35] Furthermore, as bakers are left free to charge for their bread such price as they choose, enhanced cost of conducting the business would not deprive them of their property without due process of law. Can it be said, in view of these facts, that the legislature of Nebraska had no reason to believe that the excess weight provision would not unduly burden the business of making and selling bread?

Much evidence referred to by me is not in the record. Nor could it have been included. It is the history of the experience gained under similar legislation, and the result of scientific experiments made, since the entry of the judgment below. Of such events in our history, whether occurring before or after the enactment of the statute or of the entry of the judgment, the Court should acquire knowledge, and must, in my opinion, take judicial notice, whenever required to perform the delicate judicial task here involved. Compare *Muller* v. *Oregon,* 208 U. S. 412, 419, 420; *Dorchy* v. *Kansas, ante,* 286. The evidence contained in the record in this case is, however, ample to sustain the validity of the statute. There is in the record some evidence in conflict with it. The legislature and the lower courts have, doubtless, considered that. But

[33] Ohio and "Federal Bread Bill." See also Hawaii, Montana, Oregon and Washington.

[34] Wrapping is required by statute or regulation in Louisiana, Maine, Maryland, New Hampshire, Ohio, South Dakota, Vermont and West Virginia. See Hearings, H. R. 4533, Feb. 18, 19, 1924, pp. 11, 16.

[35] See Bakers Weekly, Oct, 16, 1920, p. 61; Hearings on H. R. 4533, Feb. 18, 19, 1924, pp. 16, 20, Mar. 3, 1924; "Report of Federal Trade Commission on Bakery Business in United States," Nov. 3, 1917, p. 13.

with this conflicting evidence we have no concern.[36] It is not our province to weigh evidence. Put at its highest, our function is to determine, in the light of all facts which may enrich our knowledge and enlarge our understanding, whether the measure, enacted in the exercise of an unquestioned police power and of a character inherently unobjectionable, transcends the bounds of reason. That is, whether the provision as applied is so clearly arbitrary or capricious that legislators acting reasonably could not have believed it to be necessary or appropriate for the public welfare.

To decide, as a fact, that the prohibition of excess weights "is not necessary for the protection of the purchasers against imposition and fraud by short weights"; that it "is not calculated to effectuate that purpose"; and that it "subjects bakers and sellers of bread" to heavy burdens, is, in my opinion, an exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review.

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[36] For arguments in favor of standard-weight loaf law, see Bakers Weekly, Nov. 29, 1919, p. 37; Dec. 20, 1919, pp. 37, 49; Apr. 24, 1920, p. 69; June 26, 1920, p. 49; July 3, 1920, pp. 39, 40; Aug. 7, 1920, p. 55; Jan. 22, 1921, p. 62. For the arguments urged against the legislation, see Northwestern Miller, Vol. 122, pp. 1381, 1401; Vol. 123, p. 406; Vol. 126, p. 398; Bakers Weekly, May 8, 1920, p. 65; May 15, 1920, p. 61. It is interesting to note that none of the writers contend that the tolerance provision is unreasonable. See also Hearings on H. R. 4533, Mar. 3, 1924. There is a great contrariety of opinion among bakers themselves as to the advisability of the legislation and the limits of a reasonable tolerance. "Tolerances of some kind are absolutely necessary, but in view of the conflicting opinion of bakers, weights and measures officials, chemists and others interested in solving the problem, a 'reasonable' tolerance is about as hard to determine as the traditional age of Ann." See 134 Northwestern Miller, p. 1373. Also Bakers Weekly, Jan. 11, 1919, pp. 51, 54; Jan. 18, 1919, pp. 35, 45; Feb. 1, 1919, pp. 46, 50, 55; Mar. 15, 1919, pp. 42, 52; Jan. 17, 1920, p. 43; Mar. 27, 1920, p. 57; May 22, 1920, p. 40; June 12, 1920, p. 57; June 26, 1920, pp. 45, 49; Aug. 7, 1920, p. 39; Jan. 1, 1921, pp. 39–40; Jan. 22, 1921, p. 37.

Counsel for Parties.

SOUTHEASTERN EXPRESS COMPANY *v.* ROBERTSON, STATE REVENUE AGENT.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 201. Argued March 5, 1924.—Decided April 21, 1924.

1. An objection that a state taxing statute violated due process of law because of its vagueness, *held* to have been obviated by elucidation of the statute by the state court in this case. P. 539.
2. A state constitutionally may condition the right of an express company to enter upon and transact intrastate business, by requiring antecedent payment of a tax based on the number of miles of railroad tracks in the State over which the business is to be operated, and varied according to a classification of the tracks made for the purposes of railroad taxation and as to which neither notice nor opportunity to be heard is vouchsafed the express company. P. 539.
3. Because of the differences between express and railroad companies, the former are not denied the equal protection of the laws by refusing to them, while allowing to the latter, the right to be heard concerning a classification of railroad tracks upon which the calculation of the privilege taxes of each in part depends. P. 540.
4. Nor is the Equal Protection Clause violated by a penalty provision applicable to a newcomer who does not pay his license tax before beginning the express business, but inapplicable to those already in the business, who pay and renew within thirty days after their taxes accrue each year. P. 540.

130 Miss. 305, affirmed.

ERROR to a judgment of the Supreme Court of Mississippi holding the Express Company liable for a license tax, and for a like amount as damages for not having paid the license tax before beginning business in the State, as required by §§ 21, 73, c. 104, Miss. Laws 1920. See also the next following case. Mr. Miller, successor in office to Mr. Robertson, was substituted in this Court.

Mr. Sanders McDaniel, with whom *Mr. A. S. Bozeman* and *Mr. H. L. Greene* were on the brief, for plaintiff in error.

Mr. R. A. Collins, for defendant in error, submitted. *Mr. C. C. Dunn* and *Mr. A. B. Amis* were also on the brief.

Mr. Justice McKenna delivered the opinion of the Court.

Error to review the judgment of the Supreme Court of Mississippi holding the Express Company liable for a privilege tax for doing business without first having paid the tax imposed by the laws of the State, and for damages. § 21, c. 104, Laws of 1920, Hemingway's Code Supplement 1921, § 6512, and § 73, c. 104, Laws of 1920, Hemingway's Code Supplement 1921, § 6630.

There is an agreed statement of facts. The Express Company is a common carrier of freight of various kinds over certain lines of railroads in the State in both interstate and intrastate commerce. It commenced business May 1, 1921.

Section 21, c. 104, provides as follows: "Express companies—On each express company transporting freight or passengers from one point to another in this State $500.00. And six dollars per mile on all first class railroad tracks in this State over which the business is operated, and three dollars per mile on all second or third class railroad tracks in this State over which the business is operated."

By § 73, c. 104, it is provided that all persons or corporations liable for privilege taxes "who shall fail to procure the license therefor before beginning the business taxed, or who shall fail to renew, during the month in which it is due, the license on a business on which he has theretofore paid a privilege tax, shall in each or either such instance be liable for double the amount of the tax, and it is hereby made the duty of the tax collector of the county in which such business is conducted to collect the amount, issue a separate license therefor, and to endorse across its face, the words: 'Collected as damages.'"

The Express Company did not pay any privilege tax before commencing business May 1, 1921, nor obtain the license which issues on such payment.

Robertson, predecessor of the present defendant in error, acting in his capacity of State Revenue Agent, made an assessment against the company for the sum of $4,325.33 as the tax under § 21, c. 104, and a like sum as damages under § 73.

The Company tendered the amount assessed as the tax but declined to pay the amount assessed as damages. The tender was refused and this action was brought, resulting in the judgment we have indicated.

There is agreement as to the railroads over which the Express Company carries express and the number of miles the express is carried. And it is agreed that it carries express over all of the railroad tracks, but intrastate express only from station to station in the State.

It is also agreed that under the laws of Mississippi, the Railroad Commission of the State on the first Monday of August, 1920, classified the railroads of the State according to their charters and the gross earnings of each for the purpose of levying a privilege tax on the railroads, the classification being set out, for the year beginning the first Monday of August, 1920. The number of miles of track of each is given. No other or further classification of the railroads was made until August 1, 1921, when they were again classified.

It is also agreed that no classification of the railroad tracks under the laws of the State of 1920, under § 21, c. 104, or otherwise, has ever been made by the Railroad Commission, with reference to the operation of the Express Company or of any other express company over the tracks. And it is agreed that the sum of $4,325.33 imposed, and for which the action was brought, was for the year beginning May 1, 1921, and ending May 1, 1922.

The business done by the Company for the six months beginning July 1, 1921, and ending December 1, 1921, is given.

The court directed a verdict in the sum of $4,383.50, refusing to direct for the penalty. For that amount only was judgment entered.

Robertson and the Express Company each prosecuted an appeal—Robertson to reverse so much of the judgment as denied his right to recover damages or penalty, that is, which limited his recovery to the taxes only; the Express Company to reverse so much of the judgment as was against it. Robertson succeeded in his appeal: the Express Company failed.

The contention of the Company is that the statute denies to the Express Company due process, in that: (a) it is so vague, uncertain and indefinite as to be void; (b) it provides no measure or standard by which to distinguish the railroads in connection with an express business, "and no provision of law is elsewhere found by which it can be ascertained as to what are first class railroad tracks and second and third class railroad tracks in connection with an express business;" (c) although the Supreme Court of Mississippi has held that first, second and third class railroads referred to in § 21 are those required by § 45 to be classified by the Railroad Commission, and although the effect of said holding may be to engraft upon § 21, § 45, even assuming that the connection between the section and their purposes be thus conclusively established by the decision of the Supreme Court of Mississippi, "there still is found neither measure nor standard for classifying railroad trackage for the purpose of taxing the express business operated over such trackage, inasmuch as the classification of railroads under § 45, c. 104, etc., is for the sole purpose '*of levying a privilege tax on railroads;*'" (d) if the classification of railroads despite its purpose can be so extended, there is

no provision for notice and hearing to express companies when the classification of railroads is made.

There is the further contention that plaintiff in error is denied the equal protection of the laws in that: (a) damages in an amount equal to the privilege tax are allowed against it because it failed to pay the privilege tax before entering business on May 1, 1921, while other express companies as well as all other persons and corporations subject to privilege taxes already in business are allowed thirty days after the privilege tax accrues annually within which to pay the same, and "that the discrimination under the law in this respect is arbitrary and unwarranted by any sound reason or principle of distinction;" (b) railroads are accorded the right to be heard upon the correctness of the classification made by the commission which governs the classification under the law for the purpose of levying privilege taxes upon them, while express companies are not accorded a hearing when the classification is made upon them, and are not allowed to present facts either as to the value of particular trackage relative to an express business, or that which under the law governs the classification for the purpose of levying privilege taxes upon railroads.

The Supreme Court of the State held adversely to all of these contentions and we think in correct estimate of them.

If it can be conceded to the Express Company that the statute had vagueness, it was competent for the court to resolve it to clearness, which it did by an explanation of the laws and the relation of their provisions, and deduced therefrom their constitutionality and freedom from the objections urged against them. We are not disposed to an enumeration of the objections. They are somewhat involved. A prominent one is, and it is variously expressed, that the Express Company was not heard in the classification of railroads, it being insisted that between the latter fact and the express business there is intimate

relation and therefore the same right of hearing to the Express Company as to railroads. But the fact of the classification of railroads was one that preceded the Express Company, of which it was aware, and was an element in the estimate of the privilege that was to be granted, for only over the railroads the privilege could be exercised. There was no element of judicial inquiry. The tax was the condition of a privilege to carry on a business—might, indeed, be denominated a license, but call it privilege or license, it was a condition the State could impose, and having the option to impose it, could fix its amount directly or by reference to a standard. *Hagar* v. *Reclamation District,* 111 U. S. 701; *Ohio Tax Cases,* 232 U. S. 576.

The objection that the Express Company was not given a hearing upon the classification of railroads is made a basis for the contention that the Express Company is denied the equal protection of the laws. In specification of this it is said that railroads are entitled to be heard upon their classification, and, therefore, upon the condition upon which the amount of the privilege tax upon them depends, while a hearing is denied to express companies when necessarily the classification is as intimate to and a condition of the tax upon them as upon the railroads. The Supreme Court of the State found reasons for the difference, and there is certainly a difference between railroads and express companies of themselves and necessarily in their relations to their respective businesses, and, against the action of the State and the judgment of its courts, the difference cannot be regarded as not of legal consideration in the imposition of an excise upon the express companies.

It is further urged that there is a discrimination offensive to the Fourteenth Amendment in the laws of Mississippi permitting damages against the Express Company in an amount equal to the privilege tax because it failed to pay the tax before entering, May 1, 1921, while

other companies, persons and corporations already in business are allowed thirty days after the taxes accrue annually within which to pay them. The Supreme Court of the State decided against the contention, and we think that there is difference enough in the situations to justify the difference in the provision and exempt it from the charge of unconstitutionality.

The court thereupon reversed the judgment of the court below and rendered judgment in favor of Robertson for both the tax and damages sued for and, under the practice of the court, entered judgment to that effect with interest and costs.

Judgment affirmed.

SOUTHEASTERN EXPRESS COMPANY *v.* ROBERTSON, STATE REVENUE AGENT, ET AL.

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

No. 216. Submitted April 7, 1924.—Decided April 21, 1924.

Decided upon the authority of *Southeastern Express Co.* v. *Robertson, ante,* 535.

Affirmed.

Appeal from a decree of the District Court denying an interlocutory injunction in a suit to restrain the enforcement of a privilege tax. Mr. Miller, successor in office to Mr. Robertson, and Mr. Riley, successor in office to Mr. Miller as state auditor, were substituted in this Court.

Mr. Sanders McDaniel and *Mr. A. S. Bozeman* for appellant. *Mr. H. L. Greene* was also on the brief.

Mr. R. H. Thompson for appellees. *Mr. Jas. A. Alexander* and *Mr. Julian P. Alexander* were also on the brief.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

This case involves the consideration of the privilege tax passed upon in *Southeastern Express Co.* v. *Robertson*, just decided, *ante*, 535.

It is a suit in equity which seeks to have the tax decreed "illegal, void and unenforceable." An interlocutory injunction was petitioned and the district judge called to his assistance two other judges in accordance with § 266 of the Judicial Code to hear the application. A preliminary restraining order was granted.

The application for injunction coming on subsequently to be heard, was denied, and from the order and decree denying it this appeal was granted and is prosecuted.

The grounds of appeal and assignments of error are the same as in the other case, except as we shall notice, the difference being only in the nature of the suit and procedure—in this case a bill in equity to enjoin the enforcement of the second year's tax; in that, grounds of defense against the collection of the first year's tax, the facts being stipulated. In this they are alleged in the bill of complaint.

In that case all the grounds relied on in this case were decided adversely to the Express Company, that is, the tax was adjudged to be legal, and the judgment was affirmed by the opinion just delivered, and on the authority of that decree the decree in this case may be based.

It may be well to observe, to avoid misunderstanding, that in the order and decree denying the interlocutory injunction the statute of Mississippi was held constitutional against the charge of violation of the Fourteenth Amendment and also of being a charge against Article I, § 8, Clause 3, being the commerce clause of the Constitution of the United States. The ruling in the latter respect is assailed and assigned as error in the record but not in the argument and we therefore do not discuss it. It will be observed besides that the tax imposed is on business done between stations in the State. § 21, c. 104, Laws of 1920.

Affirmed.

THE CHASTLETON CORPORATION ET AL. *v.* SINCLAIR ET AL., RENT COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL.

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

No. 467. Argued March 12, 13, 1924.—Decided April 21, 1924.

1. The remedy by appeal from orders of the Rent Commission afforded by the District of Columbia Rent Act, *held* not an adequate remedy at law precluding equity jurisdiction of a suit attacking an order upon the grounds that the statute itself is unconstitutional and that the order affects parties who were strangers to the proceedings in which it was made. P. 547.
2. The Act of October 22, 1919, regulating rents in the District of Columbia, and upheld as an emergency measure in *Block* v. *Hirsh*, 256 U. S. 135, was continued in force by a subsequent act until May 22, 1922, on which day a third act, declaring that the emergency still existed, reënacted the law with amendments and provided that it continue until May 22, 1924. *Held:*

(a) A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change. P. 547.

(b) Where an order of the Rent Commission, although retrospective, was passed some time after the last of the above mentioned statutes, it was open to the courts to inquire whether the exigency still existed upon which continued operation of the law depended. P. 548.

(c) Allegations in the bill in this case that the emergency had ceased in 1922, cannot be declared offhand to be unmaintainable, in view of judicial knowledge of present conditions in Washington. *Id.*

(d) This Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law. *Id.*

(e) But where it was material to know conditions at different dates in the past, *held* that, for convenience, the facts should be gathered and weighed by the court of first instance and the evidence preserved for consideration by this Court if necessary. P. 549.

290 Fed. 348, reversed.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District, which dismissed on motion a bill to restrain the enforcement of an order of the Rent Commission cutting down the rents in an apartment house.

Mr. W. Gwynn Gardiner for appellants.

The facts alleged by the bill and admitted by the motion to dismiss establish that no emergency existed in the District of Columbia, at the time of the passage of the Rent Act in question, at the time of the proceedings before the Rent Commission involving the property in question, or at the time of the filing of this suit.

In like manner it is an admitted fact that the demand for apartments in the District of Columbia at the time of the filing of this bill and at the time of the passage of the act was not as great as the number of apartments offered for rent.

While a declaration by a legislature concerning public conditions is entitled to at least great respect, yet it may not be held conclusive by the courts when the facts in the record show contrary conditions to exist. See *Shoemaker* v. *United States,* 147 U. S. 282; *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598; *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210; *Producers Transp. Co.* v. *Railroad Comm.,* 251 U. S. 228; *Block* v. *Hirsh,* 256 U. S. 135; *Mugler* v. *Kansas,* 123 U. S. 661; *Buchanan* v. *Warley,* 245 U. S. 60.

There being no emergency, enforcement of the act becomes violative of the Fifth Amendment. *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 403; *Wilkinson* v. *Leland,* 2 Pet. 627; *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312; *Ochoa* v. *Hernandez,* 230 U. S. 139; *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393.

Mr. Chapin Brown and *Mr. Robert H. McNeill* for appellees.

The Rent Act and amendments provide for a full judicial hearing by appeal.

The Rent Commission acquired full jurisdiction over the parties in interest, and the subject matter to be adjudicated.

When this Court, in *Block* v. *Hirsh,* 256 U. S. 135, held the Rent Act of October 22, 1919, constitutional, it necessarily decided that, when the same or similar conditions exist, Congress has the constitutional right to enact the same or similar legislation, either of a temporary or a permanent duration.

Acting upon this constitutional right, Congress, by Act of August 24, 1921, first extended the Rent Act for seven months, and by the Act of May 22, 1922, extended it for two more years, to May 22, 1924. In the last mentioned act, Congress determined: "That it is hereby declared that the emergency described in Title II of the Food Control and the District of Columbia Rents Act still exists and continues in the District of Columbia, and that the present housing and rental conditions therein require the further extension of the provisions of such title."

This Court has decided that such a legislative declaration is binding upon the courts. *United States* v. *Des Moines Nav. & Ry. Co.,* 142 U. S. 510; *Moeschen* v. *Tenement House Dept.,* 203 U. S. 583; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Holden* v. *Hardy,* 169 U. S. 391; *Gardner* v. *Michigan,* 199 U. S. 325; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242.

The power of Congress over the District of Columbia (Const. Art. I, § 8) is greater than that which the States may exercise within their dominions. It is practically a war power, even in times of peace, because the right "to exercise exclusive legislation in all cases whatsoever, over forts," etc., is in fact a war power, and Congress has the same power to enact such legislation for the District of Columbia, at all times.

The allegation in the bill that no emergency exists is a mere conclusion, not admitted by the motion to dismiss. Such allegations cannot overcome the solemn determination of Congress. *United States* v. *Des Moines Nav. & Ry. Co.*, 142 U. S. 510.

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought to restrain the enforcement of an order of the Rent Commission of the District of Columbia cutting down the rents for apartments in the Chastleton apartment house in this city. The defendants are the Rent Commission and the tenants of the building. The order was passed on August 7, 1922, and purports to fix the reasonable rates from the preceding first of March. The bill seems to have been filed on October 27, 1922, and seeks relief on several grounds. The first and most important is that the emergency that justified interference with the ordinarily existing private rights in 1919 had come to an end in 1922, and no longer could be applied consistently with the Fifth Amendment of the Constitution. Subordinate ones are that the plaintiff Hahn bought the premises on September 25, 1922, it would seem under foreclosure of a preëxisting mortgage or deed of trust, and that he and his grantee, the Chastleton Corporation, were strangers to the proceeding before the Commission and not bound by it, but that the tenants not only were relying upon it but were making it a ground for demanding repayment from the Corporation of rents paid in excess of the sums fixed by the Commission after March 1, 1922, although the Corporation did not receive them. On motion the bill was dismissed by the Courts below, the Court of Appeals, in view of *Block* v. *Hirsh*, 256 U. S. 135, leaving it for this Court to say whether conditions had so far changed as to affect the constitutional applicability of the law. The allegations do not make the position of the

Chastleton Corporation and Hahn sufficiently clear and therefore we feel bound to consider the constitutional question that the bill seeks to raise.

It is objected that the plaintiffs have an adequate remedy at law by way of appeal. But apart from the fact that it is doubtful whether the Chastleton Corporation and Hahn were not entitled to treat the order as a nullity so far as they were concerned, it is open to equal doubt whether in a proceeding under the law they could assail its validity. There are many tenants to be dealt with. However looked at a bill in equity is the natural and best way of settling the parties' rights. See e. g. *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170.

The original Act of October 22, 1919, c. 80, Title II, 41 Stat. 297, considered in *Block* v. *Hirsh,* was limited to expire in two years. § 122. The Act of August 24, 1921, c. 91, 42 Stat. 200, purported to continue it in force, with some amendments, until May 22, 1922. On that day a new act declared that the emergency described in the original Title II still existed, reënacted with further amendments the amended Act of 1919, and provided that it was continued until May 22, 1924. Act of May 22, 1922, c. 197, 42 Stat. 543.

We repeat what was stated in *Block* v. *Hirsh,* 256 U. S. 135, 154, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. 256 U. S. 154. *Chas. Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, 536. And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though

valid when passed. *Perrin* v. *United States,* 232 U. S. 478, 486, 487. *Missouri* v. *Chicago, Burlington & Quincy R. R. Co.,* 241 U. S. 533, 539, 540. In *Newton* v. *Consolidated Gas Co.,* 258 U. S. 165, a statutory rate that had been sustained for earlier years in *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, was held confiscatory for 1918 and 1919.

The order, although retrospective, was passed some time after the latest statute, and long after the original act would have expired. In our opinion it is open to inquire whether the exigency still existed upon which the continued operation of the law depended. It is a matter of public knowledge that the Government has considerably diminished its demand for employees that was one of the great causes of the sudden afflux of people to Washington, and that other causes have lost at least much of their power. It is conceivable that, as is shown in an affidavit attached to the bill, extensive activity in building has added to the ease of finding an abode. If about all that remains of war conditions is the increased cost of living, that is not in itself a justification of the act. Without going beyond the limits of judicial knowledge, we can say at least that the plaintiffs' allegations cannot be declared offhand to be unmaintainable, and that it is not impossible that a full development of the facts will show them to be true. In that case the operation of the statute would be at an end.

We need not enquire how far this Court might go in deciding the question for itself, on the principles explained in *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 227. See *Gardner* v. *Collector,* 6 Wall. 499. *South Ottawa* v. *Perkins,* 94 U. S. 260. *Jones* v. *United States,* 137 U. S. 202. *Travis* v. *Yale & Towne Manufacturing Co.,* 252 U. S. 60, 80. These cases show that the Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law, and if the question

were only whether the statute is in force today, upon the facts that we judicially know we should be compelled to say that the law has ceased to operate. Here however it is material to know the condition of Washington at different dates in the past. Obviously the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the District than here. The evidence should be preserved so that if necessary it can be considered by this Court.

Judgment reversed.

MR. JUSTICE BRANDEIS, concurring in part.

So far as concerns The Chastleton Corporation and Hahn, I agree that the decree should be reversed. So far as concerns the plaintiff Lake, the bill was properly dismissed for want of equity; among other reasons, because his administrative appeal from the order of the Rent Commission was pending in the Supreme Court of the District when this suit was begun, and still remains undisposed of. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210.

If protection of the rights of The Chastleton Corporation and Hahn required us to pass upon the constitutionality of the District Rent Acts, I should agree, also, to the procedure directing the lower court to ascertain the facts. But, in my opinion, it does not. For (on facts hereinafter stated which appear by the bill and which were, also, admitted at the bar) the order entered by the Commission is void as to them, even if the Rent Acts are valid. To express an opinion upon the constitutionality of the acts, or to sanction the enquiry directed, would, therefore, be contrary to a long-prevailing practice of the Court.[1]

[1] "It [the Court] has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that

The District Rent Act of 1921 (which was in force when the proceeding before the Commission was begun, and thereafter until May 22, 1922) provides, that in all "cases the commission shall give notice personally or by registered mail and afford an opportunity to be heard to all parties in interest." Act of October 22, 1919, c. 80, Title II, § 106, 41 Stat. 297, 300, as amended by Act of August 24, 1921, c. 91, 42 Stat. 200. The District Rent Act of 1922 (which was in force when the order of the Commission was entered) amended this clause concerning notice by adding thereto the words: "*Provided,* That notice given by the commission to an agent for the collection of rents due his principal shall be deemed and held to be good and sufficient notice to the principal." Act of May 22, 1922, c. 197, § 7, 42 Stat. 543, 546.

The proceeding in which the order of the Rent Commission issued was begun January 25, 1922. Its order was entered August 7, 1922. When the proceeding before the Commission was begun, the plaintiff Lake was the owner of the property subject to mortgages theretofore executed

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jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Steamship Co.* v. *Emigration Commissioners,* 113 U. S. 33, 39.

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity . . ." *Chicago & Grand Trunk Ry. Co.* v. *Wellman,* 143 U. S. 339, 345. Compare *Atherton Mills* v. *Johnston,* 259 U. S. 13.

and duly recorded. After the order was entered (and while that proceeding was pending on appeal in the Supreme Court of the District) the plaintiff Hahn purchased the property under the foreclosure of one of these mortgages. Thereafter, and before the institution of this suit, Hahn conveyed the property to his co-plaintiff, The Chastleton Corporation. Hahn and the corporation do not claim title under Lake. They claim title as purchasers under the foreclosure of a mortgage which antedated Lake's purchase. Notice of the proceedings before the Commission was never served on the holder of the mortgage; and, of course, not on Hahn or on The Chastleton Corporation. The only notice ever served on anyone was that given, on January 25, 1922, "To the F. H. Smith Co., Agent".—That company was then the rental agent of the property for Lake. It had no authority to represent in any way either the mortgagee or those claiming under him.

As the required notice was not served on the mortgagee, nor on those claiming under him, and as F. H. Smith Co. was not the agent of any of them, the order is necessarily void as to The Chastleton Corporation and Hahn. The doctrine of *lis pendens* has no application to persons so situated. *Terrell* v. *Allison,* 21 Wall. 289; *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Long Island Loan & Trust Co.,* 172 U. S. 493. And Congress did not undertake to make the proceeding one *in rem* binding upon all the world regardless of lack of notice.

HOFFMAN ET AL. *v.* McCLELLAND, JR., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, TRANSFERRED FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 190. Argued January 23, 1924.—Decided April 21, 1924.

1. A decree of the District Court refusing leave to file a bill of intervention upon the theory that there is no basis on which the court, as a federal tribunal, could adjudicate the matter presented by it, rests on a jurisdictional ground and is appealable directly to this Court under Jud. Code, § 238. P. 557.
2. Where, in the progress of a suit in a federal court, property has been drawn into the court's custody and control, third persons claiming interests in or liens on the property may be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims, although the court could not consider their claims if it had not impounded the property. P. 558.
3. But this rule does not apply, where the court has not impounded the property in question but has merely adjudicated a controversy concerning it and retained jurisdiction of the suit to insure obedience to its decree. P. 559.

Affirmed.

APPEAL from a decree of the District Court refusing leave to file a petition of intervention, for want of jurisdiction. The appeal was first taken to the Circuit Court of Appeals and was transferred to this Court under Jud. Code, § 238a. See the opinion of the Circuit Court of Appeals, reported in 284 Fed. 837.

Mr. Tom Connally, with whom *Mr. D. A. Kelley, Mr. Robert H. Rogers* and *Mr. M. C. H. Park* were on the brief, for appellants.

Admitting that our bill of intervention is not ancillary, that no federal question is involved, and that there is no diversity of citizenship, we still contend that the court below had, and has, jurisdiction.

When this case was first instituted by Peter McClelland, Jr., against John K. Rose, trustee, the federal court found the property in question in the possession of the trustee, Rose, who had been appointed and bonded by a state court of competent jurisdiction, and in the execution of a trust which the federal court found to be valid; and, having determined that the plaintiff is the sole owner of the property, but not entitled to the possession thereof during the continuance of the trust, the court was without power or authority to dispossess the trustee. But inasmuch as the state courts held, and were holding, that the legal title was vested in the trustee, that the plaintiff was excluded by his father's will "from ever taking," which holdings by the state courts are repeated and emphasized in the opinion of the case of *Lindsey* v. *Rose,* 175 S. W. 832, it became necessary for the federal court to assume such authority and control over the trustee and his disposition of the property after the termination of the trust as will enable the federal court to see that those who, according to its holding, will take at plaintiff's death, receive the same without having to litigate the ownership with those whom the state courts hold entitled. This the federal court has done, and so effectually done that Rose, the trustee, will have to deliver the property, at the termination of the trust, to the heirs, devisees, legatees, or vendees of plaintiff, according to the holding and orders of the federal court, before he can go into the state court which appointed him and ask for a discharge of himself and his bondsmen. This is as complete and as comprehensive an impounding as the federal court could make. And to hold that after such impounding the federal court cannot protect a creditor of plaintiff, who has a lien on a part of the impounded property and who is without remedy in any other court, is to take issue with the federal decisions. *Compton* v. *Jesup,* 68 Fed. 279; *Gumbel* v. *Pitkin,* 124 U. S. 131.

The court below dismissed our bill, because (as the record shows) the court did not think our bill showed jurisdiction. But it was our allegation of impounding that the court was passing upon, not the fact of impounding, which may be shown by other evidence than that contained in the small part of the record before this Court. We, however, contend that even the record before this Court abundantly shows an impounding.

While the court has no authority to destroy the trust in Rose, it has the authority to recognize, and has recognized, the right of plaintiff, to sell subject to that trust, and it should and must recognize the right of his creditors to sell in like manner, subject to the trust and without disturbing the possession of the trustee during the continuance of the trust. And holding, as it does, that plaintiff is the sole and only beneficiary of the trust, it has assumed the jurisdiction and power to protect his devisees and heirs, as well as his vendees, against the collateral heirs of his father by controlling the disposition of the property to be made by the trustee after the termination of the trust. It has even gone further and ordered and decreed that "no portion of the *corpus* of the said estate shall be delivered to, or be surrendered over during the lifetime of the plaintiff to the said plaintiff, or his vendees, except upon the further order of this court."

These orders and decrees, if they mean anything, mean that the court has assumed control of the trustee and of the estate he holds in trust, both during and after the termination of the trust.

Mr. Joseph Manson McCormick, with whom *Mr. Marshall Surratt* and *Mr. Francis Marion Etheridge* were on the brief, for appellees.

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

This is an appeal from a decree of the District Court for the Western District of Texas refusing leave to file a bill proffered as a petition of intervention in a designated suit in that court. The appeal was taken to the Circuit Court of Appeals and was by that court transferred here according to § 238a of the Judicial Code, c. 305, 42 Stat. 837, on the ground that it should have been taken directly to this Court under § 238. 284 Fed. 837.

The suit in which intervention was sought already had been prosecuted to a final decree; but the decree contained a provision whereby jurisdiction was retained for limited purposes, one of which will be hereinafter shown. The suit arose out of conflicting claims asserted under the will of Peter McClelland, Sr., a resident of McLennan County, in the Western District of Texas, who died in 1886 seized of valuable real property in that county. The will put the property in a so-called spendthrift trust of which Peter McClelland, Jr., the testator's son and only child, was the beneficiary. Through an order of the state court in McLennan County, John K. Rose, a citizen of Texas, became the substituted trustee under the will, and as such was holding the property and administering the trust when the suit was begun. The son, who was a citizen of California, was the plaintiff, and the substituted trustee and the testator's collateral kin were the defendants. Diverse citizenship was the sole basis of the District Court's jurisdiction. The object of the suit was to obtain a construction of the will, to have that construction made binding on the trustee, and to establish the son's ownership, subject to the trust, of all the property as against the collateral kin. The proceedings and the decree are shown in *McClelland* v. *Rose,* 208 Fed. 503; 222 Fed. 67; and 247 Fed. 721; and *Rose* v. *McClelland,* 241 U. S. 668. The decree determined that the trust was to con-

tinue for the natural life of the son; that the trustee was to hold the property, collect the rents and make discretionary advances to the son during that period, and that the son was the true and sole owner, subject to the trust, of all the property. One paragraph of the decree read as follows:

"It is further ordered, adjudged and decreed by the court, that the said John K. Rose, as substitute trustee aforesaid, may, without further order of this court, make from time to time such advances to said plaintiff, Peter McClelland, Jr., not to exceed the net rent revenues and income from the said estate, as he may think right and proper; but no portion of the corpus of the said estate shall be delivered to, or be surrendered over during the lifetime of the plaintiff to the said plaintiff, or his vendees, except upon the further order of this court; and this court hereby retains jurisdiction of this cause to the end that it may, from time to time as occasion may require, exercise its power of direction and control over said trustee in this respect."

The persons who sought to intervene were creditors of the son, and were citizens of Texas. They had brought an action on their claim in the state court for McLennan County, had caused a writ of attachment to be issued in that action and levied on part of the real property in the possession of the trustee, and had prosecuted the action to a judgment directing that the son's interest in the attached property be sold to satisfy their claim. The son had not been served with process in that action, nor had he appeared therein; so the judgment had no force save such as may have arisen from the attachment. Afterwards, in a suit by the trustee against the attaching creditors and the sheriff, the same state court granted a permanent injunction against a sale under the judgment,—the grounds assigned for granting the injunction being that the son's interest in the property could not be

sold to pay his debts while he was living, and that the trustee was entitled to prevent such a sale in the son's lifetime, even though there was no purpose to disturb the trustee's possession or the administration of the trust. On an appeal to the Court of Civil Appeals that decision was affirmed, *Hoffman* v. *Rose,* 217 S. W. 424, and an application for a further review was denied by the Supreme Court of the State.

It was after these proceedings that the creditors sought to intervene in the suit in the District Court. They set forth in their proffered bill all that was done in the state court, including the attachment and judgment and the subsequent injunction, and also alleged that by the attachment and judgment they had acquired a lien on the attached property which was in no way avoided or affected by the injunction; that by the prior proceedings in the District Court the property had been drawn into that court's custody and control and thereby effectually impounded; that they had no means of enforcing their lien during the life of the son, save through the interposition and aid of the District Court; that the lien probably would be lost unless that court recognized and protected it, and that to postpone its enforcement until after the death of the son would not be equitable. The relief prayed was that the lien be recognized and protected and the remainder interest of the son in the attached property be ordered sold under the lien to satisfy their claim.

In refusing leave to file the bill the District Court put its decision on the ground that it was without jurisdiction to entertain the bill in that (a) the bill was not ancillary or dependent in the sense that it could be entertained in virtue of the jurisdiction acquired in the earlier suit, and (b) the citizenship of the parties and the nature of the matter presented were not such that the bill could be dealt with as an original and independent bill.

As leave to file the bill was not refused as a matter of discretion but on the theory that there was no basis on

which the court, as a federal tribunal, could proceed to an adjudication of the matter presented, it is apparent that the petitioning creditors were shut out on a jurisdictional ground in the sense of §238 of the Judicial Code, and so were entitled to bring that ruling here for review by a direct appeal.

The record makes it plain and counsel agree that there was an absence of jurisdictional requisites for dealing with the bill as an original and independent bill; so we come at once to the question whether it could be entertained as an ancillary or dependent bill.

It is settled that where in the progress of a suit in a federal court property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene *pro interesse suo* or by a dependent bill. But in either case the proceeding is purely ancillary. *Oklahoma* v. *Texas,* 258 U. S. 574, 581; *Minnesota Co.* v. *St. Paul Co.,* 2 Wall. 609, 632; *Krippendorf* v. *Hyde,* 110 U. S. 276, 281; *Compton* v. *Jesup,* 68 Fed. 263, 279; *Sioux City Co.* v. *Trust Co.,* 82 Fed. 124, 128; *Minot* v. *Mastin,* 95 Fed. 734, 739; Street Fed. Eq. Pr. §§ 1229, 1245–1247, 1364.

The proffered bill shows that it was drafted to obtain the benefit of that rule, and, if its allegations were all that could be considered, there might be good ground for thinking it could be entertained in virtue of the jurisdiction acquired in the earlier suit. But the bill did not rightly state the nature and effect of the proceedings in that suit; and of course the District Court could not accept a mistaken description or characterization of them,

but was required to give effect to what its own records disclosed. The pleadings, orders and decree in that suit, which were before the court at the time, are set forth in the present record, and they show that the property was not impounded in that suit. The trustee, who was holding the property and administering the trust, was not an appointee of the District Court but of the state court of McLennan County. The District Court had not taken over the administration of the trust, nor had it otherwise drawn unto itself the custody and control of the property. It had determined a controversy between the son on the one hand and the trustee and the collateral kin on the other respecting the nature and duration of the trust; had adjudged that, subject to the trust, the son was the true and sole owner of the property and that the collateral kin had no interest therein; had prohibited the trustee from delivering or surrendering any part of the corpus of the estate to the son, or his vendees, during his lifetime, except on its order; and had retained jurisdiction of the suit to the end that it might compel full adherence to that prohibition. But it did not acquire or assume any other power of direction or control over the property, nor did it withdraw the son's remainder interest in the property from the reach of process issuing from other courts. The petitioning creditors evidently proceeded on this view throughout the proceedings in the state court, for they not only caused a part of the property to be attached under process issued from that court but sought to have the son's remainder interest in it sold under such process without asking the leave of the District Court. True, the sale was prevented by an injunction, but that was because the state court which granted the injunction was of opinion that under the provisions of the will such a sale during the son's life would be inadmissible and ineffectual, and not because it regarded the property as impounded by the proceedings in the District Court. Only after they had

met with that decision in the state court did the creditors conclude to resort to the District Court. Even if that decision was wrong, as they seem to think, it did not change or affect the situation in the District Court.

In our opinion the bill could not be entertained as an ancillary or dependent bill.

Judgment affirmed.

DAVIS, AS AGENT OF THE PRESIDENT OF THE UNITED STATES UNDER THE TRANSPORTATION ACT OF 1920, *v.* CORNWELL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 297. Argued February 26, 1924.—Decided April 21, 1924.

A contract by a railroad to furnish cars on a certain day for interstate transportation as common carrier, is void if not provided for in the published tariffs. *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155. P. 561.

66 Mont. 100, reversed.

CERTIORARI to a judgment of the Supreme Court of Montana affirming a judgment against the agent appointed by the President under the Transportation Act on a special contract to furnish cars, made by a station agent with the plaintiff during the period of federal control of railroads.

Mr. I. Parker Veazey, Jr., with whom *Mr. F. G. Dorety* was on the brief, for petitioner.

Mr. George E. Hurd, with whom *Mr. Edwin L. Norris* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

While the railroads were under federal control, Cornwell ordered of a station agent empty cars to be ready

October 2, 1918, for loading with cattle to be transported in interstate commerce as common carrier. This action against Davis, the agent of the President designated under Transportation Act, 1920, was brought in a state court of Montana to recover damages for failure to supply the cars. The plaintiff sued on an express contract to furnish them on the day named. It was not shown, or contended, that the published tariffs governing the contemplated shipment provided in terms for such a contract. The defendant asked for a directed verdict; the request was refused; and the jury was instructed that, if the promise was made, the defendant was liable for its breach, even if the carrier was unable to furnish the cars. A verdict was rendered for the plaintiff; the judgment entered thereon was affirmed by the highest court of the State; and the case is here on writ of certiorari under § 237 of the Judicial Code as amended. 262 U. S. 740. Whether, under the Interstate Commerce Act as amended, the express promise to furnish cars was valid is the only question requiring decision.

The transportation service to be performed was that of common carrier under published tariffs, not a special service under a special contract, as in *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher,* 248 U. S. 359. The agent's promise that the cars would be available on the day named was introduced to establish an absolute obligation to supply the cars, not as evidence that the shipper had given due notice of the time when the cars would be needed, or as evidence that the carrier had not made reasonable efforts to supply the cars. The obligation of the common carrier implied in the tariff is to use diligence to provide, upon reasonable notice, cars for loading at the time desired. A contract to furnish cars on a day certain imposes a greater obligation than that implied in the tariff. For, under the contract, proof of due diligence would not excuse failure to perform.

Chicago & Alton R. R. Co. v. *Kirby*, 225 U. S. 155, settled that a special contract to transport a car by a particular train, or on a particular day, is illegal, when not provided for in the tariff. That the thing contracted for in this case was a service preliminary to the loading is not a difference of legal significance. The contract to supply cars for loading on a day named provides for a special advantage to the particular shipper, as much as a contract to expedite the cars when loaded. It was not necessary to prove that a preference resulted in fact. The assumption by the carrier of the additional obligation was necessarily a preference. The objection is not only lack of authority in the station agent. The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery.[1]

Reversed.

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[1] Compare *Saitta & Jones* v. *Pennsylvania R. R. Co.*, 179 N. Y. S. 471; *Underwood* v. *Hines*, 222 S. W. (Mo.) 1037; *Chicago, Rock Island & Pacific Ry. Co.* v. *Beatty*, 42 Okla. 528, 533, 534. Of the cases relied upon by respondent, *Wood* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 68 Iowa, 491; and *Harrison* v. *Missouri Pacific Ry. Co.*, 74 Mo. 364, arose before the enactment of the Act to Regulate Commerce; *Easton* v. *Dudley*, 78 Tex. 236; *Nichols* v. *Oregon Short Line R. R. Co.*, 24 Utah, 83; *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Racer*, 10 Ind. App. 503; *Mathis* v. *Southern Ry. Co.*, 65 S. Car. 271; *International & Great Northern R. R. Co.* v. *Young*, 28 S. W. (Tex. C. A.) 819; *Outland* v. *Railroad Co.*, 134 N. C. 350; *Chattanooga Southern R. R. Co.* v. *Thompson*, 133 Ga. 127; *Midland Valley R. R. Co.* v. *Hoffman Coal Co.*, 91 Ark. 180; and *Oregon R. R. & Nav. Co.* v. *Dumas*, 181 Fed. 781, were decided after the enactment of the Act to Regulate Commerce, but before the decision of the *Kirby Case* (1912); *McNeer, Talbott & Johnson* v. *Chesapeake & Ohio Ry. Co.*, 76 W. Va. 803, and *Stewart* v. *Chicago, Rock Island & Pacific Ry. Co.*, 172 Iowa, 313, were decided after the *Kirby Case;* but the rule there declared appears not to have been called to the attention of the court. *Clark* v. *Ulster & Delaware R. R. Co.*, 189 N. Y. 93; *Texas Midland R. R.* v. *O'Kelley*, 203 S. W. (Tex. C. A.) 152, dealt with intrastate shipments.

UNITED STATES *v.* VALANTE.

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

No. 218. Argued April 8, 1924.—Decided April 21, 1924.

Defendant, having been tried for a misdemeanor before one federal judge and having consented to the substitution of another who received the verdict and imposed sentence of imprisonment, sought *habeas corpus* upon the ground that the substitution was contrary to the constitutional provision for trial of all crimes by jury. *Held*, that the error, if any, did not go to the jurisdiction of the court, or render the judgment void, and that review should have been sought by writ of error. P. 564.

Reversed.

APPEAL from an order of the District Court discharging the appellee from custody, in a *habeas corpus* proceeding.

Mr. George Ross Hull, Special Assistant to the Attorney General, for the United States.

Mr. Abner Siegal, for appellee, submitted.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This is an appeal from an order sustaining a writ of *habeas corpus* and discharging Valante from custody.

He was tried in the District Court upon a criminal information charging him with misdemeanors under the National Prohibition Act. The judge of another federal district presided. The testimony was heard; and the jury was charged and retired to deliberate. Not having agreed upon a verdict by the time that the judge was to return to his home, it was stipulated by the district attorney and Valante's counsel that any other federal judge might receive the verdict and impose sentence, if necessary. The

jury later returned a verdict of "guilty". A judge of the district then presiding received the verdict, and, although his authority so to do was at that time challenged, sentenced Valante to thirty days' imprisonment in the city prison. There was no motion for a new trial or application for a writ of error. Valante was surrendered to the marshal and delivered into the custody of the warden of the prison for the purpose of serving the sentence. He thereupon presented a petition for a writ of *habeas corpus*, alleging that he had been illegally sentenced in violation of his "constitutional rights and privileges" in that the verdict was received and sentence imposed by a judge having no jurisdiction. The writ was issued; and upon a hearing on the petition and the return made by the warden, the writ was sustained and Valante was discharged from custody. The United States has appealed directly to this Court. Judicial Code, § 238; *McCarthy* v. *Arndstein*, 262 U. S. 355.

Valante's contention is that the constitutional provision that the trial of all crimes shall be by jury (Art. III, § 2, cl. 3), requires the continuous presence of the same judge throughout the trial until the final judgment, and that, although this was a misdemeanor case, the substitution of another judge before the verdict was received and the sentence imposed, was not a mere irregularity which could be waived by his consent, but a violation of the constitutional provision for a jury trial. Without intimating that there is anything of substance in this contention, it is clear that the error, if any was committed, did not go to the jurisdiction of the court or render the judgment void, but was, at the most, one which could have been corrected on a review by writ of error. It is "the well-established general rule that a writ of *habeas corpus* cannot be utilized for the purpose of proceedings in error." *Craig* v. *Hecht*, 263 U. S. 255, 277, and cases there cited. And see *Riddle* v. *Dyche*, 262 U. S. 333, 335. There are no

circumstances in the present case sufficiently extraordinary to bring it within any class of "exceptional cases" or make "the general rules of procedure" inapplicable. *Craig* v. *Hecht, supra,* p. 277.

The writ of *habeas corpus* could not be used in this case as a substitute for a writ of error. The order sustaining the writ and discharging Valante from custody is accordingly reversed; and the cause will be remanded to the District Court with instructions to vacate the order, discharge the writ, and remand Valante to the custody of the warden.

Reversed and remanded.

STATE OF OKLAHOMA *v.* STATE OF TEXAS. UNITED STATES, INTERVENER.

IN EQUITY.

No. 15, Original. Order entered April 25, 1924.

Order that reports by commissioners, with accompanying maps, respecting the running, etc., of the boundary line along the Big Bend Area, and of part of the medial line in the river bed, be received and filed, and limiting the time for objections or exceptions.

(Order announced by MR. CHIEF JUSTICE TAFT.)

The commissioners heretofore designated to run, locate and mark upon the ground portions of the boundary line between the States of Texas and Oklahoma, where it follows the course of the Red River, having this day presented a report, with accompanying maps, showing that they have run, located and marked upon the ground the portion of the boundary along the Big Bend Area, and also a report, with accompanying map, showing that they have surveyed, run upon the ground and platted the medial line between such state boundary and the north-

erly bank of the river for a length of three miles at and in the vicinity of the river bed oil wells;

And it further appearing from such reports that the said commissioners have transmitted copies of such reports, with the accompanying maps, by registered mail to the Attorney General of the United States, the Attorney General of the State of Texas, and the Attorney General of the State of Oklahoma, and have lodged with the clerk fifty additional copies of such reports and maps for the use of such private interveners as may apply for them—

It is ordered that the said reports, with the accompanying maps, be received and filed by the clerk.

And it is further ordered that all objections or exceptions to such reports or either of them, if there be any such objections or exceptions, shall be presented to the Court or filed with the clerk within a period of four weeks from this date; and the periods heretofore fixed for presenting or filing such objections or exceptions are limited and modified accordingly.

DECISIONS PER CURIAM, FROM JANUARY 29, 1924, TO AND INCLUDING APRIL 27, 1924, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. —, Original. *Ex parte:* IN THE MATTER OF ROTAX COMPANY, INC., PETITIONER. Submitted January 28, 1924. Decided February 18, 1924. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. Frederick P. Warfield, Mr. Holland S. Duell* and *Mr. Leonard A. Watson* for petitioner.

No. 136. STATE OF ARKANSAS ON THE RELATION OF JEFFERSON BLACK *v.* BOARD OF DIRECTORS OF SCHOOL DISTRICT NO. 16, OF MONTGOMERY COUNTY, ARKANSAS. Error to the Supreme Court of the State of Arkansas. Submitted January 4, 1924. Decided February 18, 1924. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 112, 115–116; *Appleby* v. *Buffalo,* 221 U. S. 524, 529; *Cleveland & Pittsburgh R. R. Co.* v. *Cleveland,* 235 U. S. 50, 53; *Hiawassee Power Co.* v. *Carolina-Tennessee Co.,* 252 U. S. 341, 344. *Mr. R. G. Davies* for plaintiff in error. *Mr. James E. Hogue* for defendant in error.

No. 264. L. SANTIAGO CARMONA ET AL., COMPOSING THE WORKMEN'S RELIEF COMMISSION OF PORTO RICO, ET AL. *v.* AMERICAN RAILROAD COMPANY OF PORTO RICO. Appeal from the District Court of the United States for Porto Rico. Motion submitted February 18, 1924. Decided February 25, 1924. Motion to transfer this cause to the Circuit Court of Appeals for the First Circuit granted,

pursuant to the Act of Congress of September 14, 1922, c. 305, 42 Stat. 837. *Mr. F. G. Munson* and *Mr. Grant T. Trent* for appellants. *Mr. Francis H. Dexter* and *Mr. H. Lewis Brown* for appellee.

No. —, Original. *Ex parte:* IN THE MATTER OF DE-FOREST RADIO TELEPHONE & TELEGRAPH COMPANY, PETITIONER. Submitted February 18, 1924. Decided February 25, 1924. Motion for leave to file petition for writ of mandamus herein denied. *Mr. A. Leo Everett* and *Mr. Samuel E. Darby, Jr.,* for petitioner.

No. 143. FRED P. VIOLETTE *v.* CHARLES A. RASMUSSON, COLLECTOR OF INTERNAL REVENUE, ETC. Appeal from the Circuit Court of Appeals for the Ninth Circuit. Submitted February 21, 1924. Decided February 25, 1924. *Per Curiam.* Decree reversed with costs; and cause remanded to the District Court of the United States for the District of Montana for further proceedings. *Lipke* v. *Lederer,* 259 U. S. 557. *Mr. Joseph W. Cox* and *Mr. Charles A. Russell* for appellant. *Mr. Chas. N. Madeen, Mr. H. H. Clarke,* and *Mr. Dan J. Heyfron* were also on the brief. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for appellee.

No. 161. ANN S. O'DONNELL *v.* NED T. POWELL, AS TREASURER, ETC., ET AL. Appeal from the Circuit Court of Appeals for the Ninth Circuit. Argued February 21, 1924. Decided February 25, 1924. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Miller* v. *Cornwall R. R. Co.,* 168 U. S. 131, 134; *New York Central R. R. Co.* v. *New York,* 186 U. S. 269, 273; *Thomas* v. *Iowa,* 209 U. S. 258, 263; *Consolidated Turn-*

pike Co. v. *Norfolk, etc., Ry. Co.*, 228 U. S. 326, 331. *Mr. Delphin M. Delmas* for appellant. *Mr. Jess E. Stephens* and *Mr. Lucius P. Green* appeared for appellees.

No. —, Original. *Ex parte:* IN THE MATTER OF DAVID S. SEAMAN ET AL., COEXECUTORS, ETC., PETITIONERS. Submitted February 28, 1924. Decided March 3, 1924. Motion for leave to file a petition for a writ of prohibition and/or a writ of mandamus herein denied. *Mr. Randolph Laughlin, Mr. Abram M. Frumberg, Mr. Henry W. Blodgett, Mr. Alexander R. Russell, Mr. Walter N. Fisher* and *Mr. Ephrim Caplan* for petitioners.

No. 162. WILLARD H. STIMSON ET AL. *v.* CITY OF LOS ANGELES ET AL. Appeal from the District Court of the United States for the Southern District of California. Argued February 21, 25, 1924. Decided March 3, 1924. *Per Curiam.* Reversed with costs; and cause remanded with directions to dismiss for lack of a substantial federal question. *Pacific Electric Ry. Co.* v. *Los Angeles,* 194 U. S. 112, 118; *South Covington Ry. Co.* v. *Newport,* 259 U. S. 97, 99; *Blumenstock Bros.* v. *Curtis Publishing Co.,* 252 U. S. 436, 441. *Mr. Delphin M. Delmas* for appellants. *Mr. Jess E. Stephens* and *Mr. Lucius P. Green* for appellees.

No. 253. RAYMOND MOORE *v.* STATE OF IDAHO. Error to the Supreme Court of the State of Idaho. Submitted February 25, 1924. Decided March 3, 1924. *Per Curiam.* Judgment affirmed with costs upon the authority of (1) *Crane* v. *Campbell,* 245 U. S. 304; (2) *Vigliotti* v. *Pennsylvania,* 258 U. S. 403; *United States* v. *Lanza,* 260 U. S. 377. *Mr. Karl Paine* and *Mr. Edwin Snow* for plaintiff in error. *Mr. A. H. Conner* for defendant in error.

No. 343. PETERSON OIL COMPANY *v.* GUY G. FRARY, STATE INSPECTOR, ETC. Error to the Supreme Court of the State of South Dakota. Argued February 29, 1924. Decided March 3, 1924. *Per Curiam.* Affirmed with costs, upon the authority of *Texas Co.* v. *Brown,* 258 U. S. 466. *Mr. Blaine Simons,* with whom *Mr. Robert J. Gamble* and *Mr. Theodore R. Johnson* were on the briefs, for plaintiff in error. *Mr. Clarence C. Caldwell,* for defendant in error, submitted. *Mr. Buel F. Jones* and *Mr. Charles V. Caldwell* were also on the brief.

No. 656. UNITED STATES FIDELITY & GUARANTY COMPANY *v.* JOE H. STRAIN, BANK COMMISSIONER OF THE STATE OF OKLAHOMA, ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Argued February 29, 1924. Decided March 3, 1924. *Per Curiam.* Decree affirmed with costs, upon authority of *United States* v. *Oklahoma,* 261 U. S. 253. *Mr. C. B. Ames,* with whom *Mr. Jos. A. McCullough* was on the brief, for appellant. *Mr. George F. Short,* with whom *Mr. M. W. McKenzie* was on the brief, for appellees.

No. 310. CHARLES J. WEBB & COMPANY *v.* PINGREE CATTLE LOAN COMPANY. Error to the Supreme Court of the State of Idaho. Argued February 27, 1924. Decided March 3, 1924. *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. S. L. Hodgin,* with whom *Mr. C. S. Wesley* was on the brief, for plaintiff in error. *Mr. J. H. Peterson* and *Mr. T. C. Coffin* appeared for defendant in error.

No. 312. GREAT NORTHERN RAILWAY COMPANY *v.* GALBREATH CATTLE COMPANY ET AL. On writ of certiorari to the Supreme Court of the State of Montana. Argued February 27, 1924. Decided March 3, 1924. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana,* 226 U. S. 99, 101; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 418, 419; *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U. S. 251, 255; *Bruce* v. *Tobin,* 245 U. S. 18, 19. *Mr. I. Parker Veazey, Jr.,* with whom *Mr. F. G. Dorety* was on the brief, for petitioner. *Mr. E. E. Enterline* and *Mr. Samuel Herrick* appeared for respondents.

No. 693. TACOMA GRAIN COMPANY *v.* NORTHERN PACIFIC RAILWAY COMPANY. Error to the Supreme Court of the State of Washington. Motion to dismiss or affirm submitted February 18, 1924. Decided March 10, 1924. Dismissed for the want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. Charles W. Bunn,* for defendant in error, in support of the motion. *Mr. John E. Belcher* and *Mr. Merritt J. Gordon,* for plaintiff in error, in opposition to the motion.

No. —, Original. *Ex parte:* IN THE MATTER OF RAYMOND MCGONIGLE, PETITIONER. Submitted March 3, 1924. Decided March 10, 1924. Motion for leave to file a petition for a writ of habeas corpus herein denied. *Mr. Frans E. Lindquist* for petitioner.

No. 565. CHARLES D. NEWTON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL. *v.* CONSOLIDATED GAS COMPANY OF NEW YORK. Appeal from the District

Court of the United States for the Southern District of New York. Argued March 4, 1924. Decided March 10, 1924. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Masterson* v. *Herndon,* 10 Wall. 416; *Hardee* v. *Wilson,* 146 U. S. 179, 180; *Sipperley* v. *Smith,* 155 U. S. 86, 89; *Maytin* v. *Vela,* 216 U. S. 598, 601. *Mr. Harry Hertzoff,* with whom *Mr. Carl Sherman, Mr. George P. Nicholson, Mr. Wilber W. Chambers* and *Mr. James A. Donnelly* were on the brief, for appellants. *Mr. John A. Garver* for appellee. [See 265 U. S. 78.]

No. 337. UNITED STATES FIDELITY & GUARANTY COMPANY ET AL. *v.* MARY L. MORRELL. Error to the Superior Court of the State of Rhode Island. Argued March 6, 1924. Decided March 10, 1924. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. E. B. Moulton,* with whom *Mr. George H. Huddy, Jr.,* and *Mr. Frank F. Mason* were on the brief, for plaintiffs in error. *Mr. Henry C. Hart,* with whom *Mr. Theodore F. Green, Mr. Patrick P. Curran* and *Mr. Hoyt W. Clark* were on the brief, for defendant in error.

No. 208. GEORGE L. MESKER AND GEORGE HEILMAN, THE LATTER AS TRUSTEE, ETC. *v.* OHIO RIVER SAND COMPANY ET AL. Appeal from the Circuit Court of Appeals for the Sixth Circuit. Argued March 11, 1924. Decided March 17, 1924. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Rouse* v. *Letcher,* 156 U. S. 47, 49; *Gregory* v. *Van Ee,* 160 U. S. 643, 645; *Ohio R. R. Comm.* v. *Worthington,* 225 U. S. 101, 103–104; *Begg* v. *New York City,* 262 U. S. 196, 198–199. *Mr. Helm Bruce,* with whom *Mr. O. W. McGinnis* was on

the brief, for appellants. *Mr. John Bryce Baskin* for appellees.

No. 468. GULF REFINING COMPANY OF LOUISIANA *v.* W. N. MCFARLAND, SUPERVISOR OF PUBLIC ACCOUNTS. Error to the Supreme Court of the State of Louisiana. Motion to dismiss or affirm submitted March 10, 1924. Decided March 17, 1924. *Per Curiam.* Affirmed upon authority of (1) *Choctaw & Gulf R. R. Co.* v. *Harrison,* 235 U. S. 292; *Lacoste* v. *Department of Conservation of Louisiana,* 263 U. S. 545; (2) *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, 482; *Chicago & Alton R. R. Co.* v. *Tranbarger,* 238 U. S. 67, 76–77; *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* 248 U. S. 372, 375; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242, 247. *Mr. A. V. Coco, Mr. Harry P. Sneed* and *Mr. S. L. Herold,* for defendant in error, in support of the motion. *Mr. D. Edward Greer,* for plaintiff in error, in opposition to the motion.

No. —, Original. *Ex parte:* IN THE MATTER OF MODERN WORKMEN OF THE WORLD, ET AL., PETITIONERS. Submitted March 17, 1924. Decided April 7, 1924. Motion for leave to file a petition for a writ of mandamus herein denied. *Mr. W. Bissell Thomas* for petitioners.

No. 603. W. F. RICHARDSON, JR., COMPANY, INC. *v.* WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, ETC;

No. 604. MAYO MILLING COMPANY, INC. *v.* WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, ETC;

No. 605. ADAMS GRAIN & PROVISION COMPANY *v.* WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, ETC; and

No. 606. ADAMS GRAIN & PROVISION COMPANY *v.* JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS, ETC. Error to the Circuit Court of Appeals for the Fourth Circuit. Motion to dismiss submitted March 17, 1924. Decided April 7, 1924. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *United States* v. *Krall,* 174 U. S. 385, 389–391; *German National Bank* v. *Speckert,* 181 U. S. 405, 409; *United States* v. *Beatty,* 232 U. S. 463, 466; *Arnold* v. *Guimarin & Co.,* 263 U. S. 427. And see decision this day announced in *Dupont de Nemours & Co.* v. *Davis, ante,* 456. *Mr. David H. Leake* and *Mr. Walter Leake,* for defendants in error, in support of the motion. *Mr. Robert H. Talley,* for plaintiffs in error, in opposition to the motion.

No. —, Original. *Ex parte:* IN THE MATTER OF WILLIAM A. HIGGINS, ET AL., PETITIONERS. Submitted April 7, 1924. Decided April 14, 1924. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. Mark Stearman* and *Mr. Emanuel J. Myers* for petitioners. *Mr. Wolcott H. Pitkin* and *Mr. Samuel J. Rosensohn* for respondent.

No. —, Original. *Ex parte:* IN THE MATTER OF A. A. SANDER, PETITIONER. Submitted April 7, 1924. Decided April 14, 1924. Motion for leave to file a petition for a writ of habeas corpus herein denied. *Mr. A. A. Sander* pro se.

No. 3, Original. STATE OF NEW MEXICO, COMPLAINANT, *v.* STATE OF TEXAS. In Equity. Order entered April 14, 1924. Motion of the State of New Mexico to take additional testimony of the witness R. J. Owen granted, to be limited to the subject matter detailed in his affidavits,

dated November 26, 1923, and filed with the motion, his examination and cross-examination to be completed within the month of May, with the right on the part of the State of Texas to introduce rebuttal to Owen's testimony during the month of June. New Mexico to pay all the costs of the additional testimony, both that of Owen and of witnesses called in rebuttal to his evidence. *Mr. Frank W. Clancy* and *Mr. W. R. Reber* for complainant. *Mr. W. A. Keeling, Mr. W. W. Turney,* and *Mr. C. W. Taylor* for defendant.

No. —, Original. *Ex parte:* In the matter of the Government of the Republic of Portugal, et al., Petitioners. Submitted April 7, 1924. Decided April 14, 1924. Motion for leave to file petition for writ of mandamus herein denied. *Mr. F. Dudley Kohler* for petitioners.

No. 735. Flo LaChapelle, as Administratrix, etc. *v.* Union Pacific Coal Company. Error to the Supreme Court of the State of Wyoming. Submitted on merits and on motion to dismiss for want of jurisdiction April 7, 1924. Decided April 14, 1924. *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. Petition for certiorari denied. *Mr. John A. Shelton* for plaintaiff in error. *Mr. N. H. Loomis* and *Mr. John W. Lacey* for defendant in error.

No. 640. James C. Davis, Agent, etc. *v.* Dexter & Carpenter, Inc. Error to the District Court of the United States for the District of Maryland. Motion to

dismiss or affirm submitted April 7, 1924. Decided April 14, 1924. *Per Curiam.* Transferred to the Circuit Court of Appeals for the Fourth Circuit upon the authority of (1) *Brown* v. *Alton Water Co.,* 222 U. S. 325; *Union Trust Co.* v. *Westhus,* 228 U. S. 519; (2) Act of September 14, 1922, c. 305, 42 Stat. 837. *Mr. Otto Schlobohm* and *Mr. William B. Symmes, Jr.,* for defendant in error, in support of the motion. *Mr. Duncan K. Brent,* for plaintiff in error, in opposition to the motion.

No. 504. CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK *v.* WILHELMINA WERNER ET AL. Error to the Supreme Court of the State of Idaho. Argued April 11, 1924. Decided April 14, 1924. *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. Petition for certiorari denied. *Mr. Edward A. Walters,* with whom *Mr. Oliver O. Haga* and *Mr. R. P. Parry* were on the brief, for plaintiff in error. *Mr. W. G. Bissell,* with whom *Mr. Wm. W. Ray* and *Mr. M. F. Ryan* were on the brief, for defendants in error.

No. 432. LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* GARFIELD LADNER. Error to the Supreme Court of the State of Mississippi. Motion to dismiss submitted April 14, 1924. Decided April 21, 1924. *Per Curiam.* Affirmed upon the authority of *Central Vermont Ry. Co.* v. *White,* 238 U. S. 507, 515; *Minneapolis, etc., R. R. Co.* v. *Bombolis,* 241 U. S. 211; *Dickinson* v. *Stiles,* 246 U. S. 631. *Mr. W. J. Gex,* for defendant in error, in support of the motion. *Mr. Gregory L. Smith,* for plaintiff in error, in opposition to the motion.

PETITIONS FOR CERTIORARI GRANTED, FROM JANUARY 29, 1924, TO AND INCLUDING APRIL 27, 1924.

No. 718. YADKIN RAILROAD COMPANY ET AL. *v.* ADA SIGMON, ADMINISTRATRIX, ETC. February 18, 1924. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted. *Mr. H. O'B. Cooper, Mr. S. R. Prince, Mr. B. S. Womble* and *Mr. L. E. Jeffries* for petitioners. *Mr. T. D. Maness* for respondent.

No. 736. WONG DOO *v.* UNITED STATES. February 18, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted; and cause placed on the summary docket and assigned for argument on Monday, April 7 next, after the cases heretofore assigned for that day. *Mr. Jackson H. Ralston, Mr. George W. Hott* and *Mr. William J. Dawley* for petitioner. *The Attorney General* for the United States.

No. 757. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT, ETC. *v.* TIMOTHY DONOVAN, AS OWNER OF THE DECK SCOW "MARY ETHEL," ET AL. February 18, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted; and cause placed on the summary docket and assigned for argument on Monday, April 7 next, after the cases heretofore assigned for that day. *Mr. Evan Shelby, Mr. A. A. McLaughlin* and *Mr. John E. Walker* for petitioner. *Mr. George V. A. McCloskey* for respondents.

No. 784. MARGARET C. LYNCH, EXECUTRIX, ETC. *v.* ALWORTH-STEPHENS COMPANY. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Ap-

peals for the Eighth Circuit granted. *Mr. Solicitor General Beck* for petitioner. No appearance for respondent.

No. 807. HENRY LEWIS *v.* DAVIS ROBERTS, JR., AS TRUSTEE, ETC. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Claude D. Ritter* for petitioner. No appearance for respondent.

No. 818. L. H. MYERS ET AL. *v.* CHARLES H. ANDERSON ET AL., ETC. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. George C. Bedell* and *Mr. I. L. Purcell* for petitioners. *Mr. Giles J. Patterson* for respondents.

No. 819. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* CORONA COAL COMPANY. March 17, 1924. Petition for a writ of certiorari to the Court of Appeal, Parish of Orleans, State of Louisiana, granted. *Mr. George Denegre, Mr. Victor Leovy* and *Mr. Henry H. Chaffe* for petitioner. *Mr. Richard B. Montgomery* for respondent.

No. 840. SAMUEL FRESHMAN *v.* W. S. ATKINS. April 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Joseph Manson McCormick* and *Mr. Francis Marion Etheridge* for petitioner. No appearance for respondent.

No. 856. CONCRETE APPLIANCES COMPANY ET AL. *v.* JOHN E. GOMERY ET AL. April 7, 1924. Petition for writ of certiorari to the Circuit Court of Appeals for the Third

Circuit granted. *Mr. Stephen J. Cox, Mr. Arthur M. Hood* and *Mr. Cyrus M. Anderson* for petitioners. *Mr. George Bayard Jones, Mr. Thomas F. Sheridan* and *Mr. William S. Jackson* for respondents.

No. 864. CLAY COOKE *v.* UNITED STATES. April 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. J. A. Templeton, Mr. E. C. Brandenburg, Mr. Charles A. Boynton* and *Mr. E. Howard McCaleb* for petitioner. No brief filed for the United States.

No. 879. NORTH CAROLINA RAILROAD COMPANY *v.* C. D. STORY, SHERIFF OF ALAMANCE COUNTY, NORTH CAROLINA, ET AL. April 7, 1924. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted. *Mr. S. R. Prince, Mr. H. O'B. Cooper, Mr. W. M. Hendren* and *Mr. L. E. Jeffries* for petitioner. *Mr. W. P. Bynum* and *Mr. R. C. Strudwick* for respondents.

No. 883. ROSCOE IRWIN, FORMER COLLECTOR, ETC. *v.* E. PALMER GAVIT. April 14, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. Sewall Key* for petitioner. *Mr. Neile F. Towner* for respondent.

No. 778. AMERICAN RAILWAY EXPRESS COMPANY *v.* COMMONWEALTH OF KENTUCKY. April 21, 1924. Petition for a writ of certiorari to the Court of Appeals of the State of Kentucky granted. *Mr. Charles W. Stockton* for petitioner. No brief filed for respondent.

No. 917. UNITED STATES EX REL. HYMAN PATTON, ETC. *v.* ROBERT E. TOD, AS COMMISSIONER OF IMMIGRATION. April 21, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. A. S. Gilbert* for petitioner. No brief filed for respondent.

No. 915. SOUTHERN UTILITIES COMPANY *v.* CITY OF PALATKA. April 21, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Florida granted. *Mr. J. T. G. Crawford* and *Mr. W. B. Crawford* for petitioner. *Mr. P. H. Odom* for respondent.

PETITIONS FOR CERTIORARI DENIED, FROM JANUARY 29, 1924, TO AND INCLUDING APRIL 27, 1924.

No. 709. NICIE HOMER *v.* D. B. LESTER ET AL. February 18, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Guy H. Sigler* for petitioner. *Mr. W. A. Ledbetter, Mr. H. A. Ledbetter* and *Mr. J. R. Cottingham* for respondents.

No. 728. CLIFFORD E. BLACK *v.* UNITED STATES. February 18, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. W. Morrow* for petitioner. No brief filed for the United States.

No. 732. GEORGE ROBINSON *v.* UNITED STATES. February 18, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Abner H. Ferguson* and *Mr. John F. Dore* for

petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 733. PENNSYLVANIA RAILROAD COMPANY *v.* CLARK T. MCDONALD. February 18, 1924. Petition for a writ of certiorari to the Court of Appeals, Third Appellate District, of the State of Ohio, denied. *Mr. J. H. Goeke* for petitioner. *Mr. D. J. Cable* and *Mr. John L. Cable* for respondent.

No. 737. BANK OF ITALY *v.* MERCHANTS NATIONAL BANK. February 18, 1924. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. M. C. Elliott* for petitioner. *Mr. Marion H. Fisher* for respondent.

No. 742. A. SCHRADER'S SON, INC. *v.* JAMES MARTIN CORPORATION ET AL. February 18, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William A. Redding, Mr. Arthur C. Fraser* and *Mr. Eugene V. Myers* for petitioner. *Mr. Hugh C. Lord* and *Mr. William S. Pritchard* for respondents.

No. 743. UNITED STATES EX REL. ADOLPH PALEAIS *v.* JESSE D. MOORE, U. S. MARSHAL, ETC. February 18, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph G. M. Browne* and *Mr. Barnett E. Kopelman* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. Harvey B. Cox* for respondent.

No. 744. JOHN L. MCLEAN, AS TRUSTEE, ETC. *v.* COMMONWEALTH OF AUSTRALIA ET AL. February 18, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ira Bronson* and *Mr. H. B. Jones* for petitioner. *Mr. Corwin S. Shank* for respondents.

No. 771. JOHN T. SMITH *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY. February 18, 1924. Petition for a writ of certiorari to the District Court of Renville County, State of Minnesota, denied. *Mr. Tom Davis, Mr. Ernest A. Michel* and *Mr. Robert M. Haines* for petitioner. *Mr. F. W. Root* and *Mr. O. W. Dynes* for respondent.

No. 776. PIEDMONT COAL COMPANY ET AL. *v.* JAMES EDGAR HUSTEAD ET AL. February 18, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. David A. Reed* for petitioners. *Mr. Charles McCamic* and *Mr. James Morgan Clarke* for respondents.

No. 731. MOUNTAIN STATES POWER COMPANY *v.* A. L. JORDAN LUMBER COMPANY ET AL. February 25, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. B. S. Grosscup, Mr. John H. Roemer* and *Mr. R. M. Campbell* for petitioner. *Mr. C. H. Foot* for respondents.

No. 746. PATRICK J. DONOVAN *v.* CUNARD STEAMSHIP COMPANY, LIMITED. February 25, 1924. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Joseph A. Burdeau* for petitioner. *Mr. Lucius H. Beers* for respondent.

No. 748. STEAMER "SPOKANE", HER ENGINES, ETC. *v.* CHARLES STEINER ET AL. February 25, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ray M. Stanley* for petitioner. *Mr. Joseph A. Wechter* for respondents.

No. 749. WILL AVERY *v.* UNITED STATES. February 25, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John R. Cooper* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 754. WILLIAM GILLESPIE ET AL., DOING BUSINESS AS GILLESPIE BROTHERS & COMPANY, *v.* J. ARON & COMPANY, INC. February 25, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George F. Canfield* and *Mr. R. Randolph Hicks* for petitioners. *Mr. Cletus Keating, Mr. John M. Woolsey* and *Mr. Theodore M. Hequembourg* for respondent.

No. 755. ROLLIN ABELL *v.* GENERAL MOTORS CORPORATION. February 25, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. John L. Hall* and *Mr. Charles P. Curtis, Jr.,* for petitioner. *Mr. John Thomas Smith* and *Mr. Weld A. Rollins* for respondent.

No. 756. ARTHUR A. KEMP, ADMINISTRATOR, ETC. *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY. February 25, 1924. Petition for a writ of cer-

tiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. William Newcorn* for petitioner. No appearance for respondent.

No. 758. THOMAS R. WHEELER *v.* UNITED STATES. February 25, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Niel P. Sterne* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 759. WILBUR L. BALL, RECEIVER, ETC. *v.* BREED, ELLIOTT & HARRISON. February 25, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Markham Marshall* and *Mr. Louis B. Wehle* for petitioner. *Mr. Henry A. Wise* and *Mr. Cola G. Parker* for respondent.

No. 779. DELIA HOLT, BY HER NEXT FRIEND DELIA HOLT, *v.* MISSOURI PACIFIC RAILROAD COMPANY. February 25, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William H. Arnold* for petitioner. No appearance for respondent.

No. 801. LOUIS COHEN *v.* UNITED STATES. February 25, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward F. Colladay* and *Mr. Michael J. Heintz* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 760. DAVID J. SHEEHAN *v.* BRADDOCK COAL COMPANY. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Frederick E. Shaw* for petitioner. *Mr. Jasper N. Johnson* for respondent.

No. 769. CLAUDE W. JOHNSON, TRUSTEE, ETC. *v.* LOUISVILLE TRUST COMPANY ET AL. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. David R. Castleman* and *Mr. Emile Steinfeld* for petitioner. *Mr. Eugene R. Attkisson* and *Mr. Elliott K. Pennebaker* for respondents.

No. 770. JOHN E. MATHEWSON, AS ADMINISTRATOR, ETC. *v.* ELIZABETH JANE RICHARDS. March 3, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied. *Mr. Jacob A. Overlander* and *Mr. Roger Foster* for petitioner. No appearance for respondent.

No. 773. GEORGE D. PROCTOR *v.* M. WILLIAM ROSSI ET AL. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph A. Seidman* for petitioner. *Mr. Moses Cohen* for respondents.

No. 777. READING COMPANY, SUCCESSOR TO PHILADELPHIA & READING RAILWAY COMPANY, *v.* ESTHER H. FESSLER, AS ADMINISTRATRIX, ETC. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William Clarke Mason* for petitioner. *Mr. Frank F. Davis* for respondent.

No. 787. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION *v.* CHASE NATIONAL BANK OF THE CITY OF NEW YORK ET AL. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Solicitor General Beck, Mr. Harlan F. Stone, Mr. Chauncey G. Parker, Mr. Henry M. Ward* and *Mr. Paul W. McQuillen* for petitioner. No appearance for respondents.

No. 791. SAFE-CABINET COMPANY *v.* GLOBE-WERNICKE COMPANY. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James L. Stewart* for petitioner. *Mr. Robert H. Parkinson* and *Mr. Wallace R. Lane* for respondent.

No. 814. ANGLO-AMERICAN OIL COMPANY, LIMITED, *v.* R. J. GREEN, CLAIMANT OF THE STEAMSHIP "G. R. CROWE," HER ENGINES, ETC. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. W. H. McGrann* and *Mr. John M. Woolsey* for petitioner. *Mr. Roscoe H. Hupper* and *Mr. Charles C. Burlingham* for respondent.

No. 768. M. E. MONTGOMERY ET AL. *v.* PACIFIC ELECTRIC RAILWAY COMPANY. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Albert E. Sherman* for petitioners. *Mr. Frank Karr* and *Mr. Oscar Lawler* for respondent.

No. 798. C. A. LEEPER COMPANY ET AL. *v.* LEMON G. NEELY COMPANY ET AL. March 3, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the

Sixth Circuit denied. *Mr. V. B. Archer* for petitioners. No appearance for respondents.

No. 803. ERIE RAILROAD COMPANY *v.* JOHN STRAKER. March 3, 1924. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Bertha J. Strootman* and *Mr. John W. Ryan* for petitioner. *Mr. Hamilton Ward* for respondent.

No. 808. UNITED STATES EX REL. GREYLOCK MILLS *v.* DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE. March 3, 1924. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. James Craig Peacock* and *Mr. John W. Townsend* for petitioner. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. Sewall Key* for respondent.

No. 812. ROYAL ITALIAN GOVERNMENT *v.* NATIONAL BRASS & COPPER TUBE COMPANY, INC. March 10, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied, for failure to file within the time prescribed by the statute. *Mr. Samuel F. Frank* for petitioner. *Mr. Harlan F. Stone* for respondent.

No. 752. THOMAS S. MEDHURST *v.* S. S. "SOUTH AMERICAN" ET AL. March 10, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied, for failure to file within the time prescribed by the statute. *Mr. Challen B. Ellis* and *Mr. Silas B. Axtell* for petitioner. *Mr. Bertrand L. Pettigrew* for respondents.

No. 809. JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT, *v.* JOHN P. BARBEE. March 10, 1924. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied. *Mr. H. O'B. Cooper, Mr. W. M. Hendren* and *Mr. A. A. McLaughlin* for petitioner. *Mr. R. C. Strudwick* for respondent.

No. 821. KANSAS CITY TERMINAL RAILWAY COMPANY ET AL. *v.* CENTRAL UNION TRUST COMPANY OF NEW YORK, TRUSTEE, ETC., ET AL. March 10, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edward J. White, Mr. N. H. Loomis, Mr. Bruce Scott, Mr. Gardiner Lathrop, Mr. Samuel W. Sawyer, Mr. H. H. Field, Mr. W. F. Dickinson, Mr. N. S. Brown* and *Mr. F. H. Moore* for petitioners. *Mr. Edward Cornell, Mr. Edward C. Eliot* and *Mr. Leonard D. Adkins* for respondents. *Mr. Joseph M. Bryson* and *Mr. C. S. Burg,* by leave of Court, as *amici curiae.*

No. 833. PITTSBURGH & LAKE ERIE RAILROAD COMPANY *v.* JACOB MCDONALD. March 10, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. William A. Seifert* for petitioner. *Mr. Cornelius D. Scully* for respondent.

No. 822. GEORGE F. ROCKHOLD, TRUSTEE, *v.* ISAAC DANIEL BUIE, BANKRUPT. March 10, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. F. M. Etheridge* and *Mr. J. M. McCormick* for petitioner. No appearance for respondent.

No. 828. FARMERS & MECHANICS NATIONAL BANK *v.* W. W. WILKINSON, TRUSTEE. March 10, 1924. Petition

for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edwin C. Brandenburg* and *Mr. Charles A. Boynton* for petitioner. *Mr. Mark McMahon* for respondent.

No. 829. HUGHES ELECTRIC COMPANY *v.* LENA GREYERBIEHL. March 10, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Aubrey Lawrence* and *Mr. Matthew W. Murphy* for petitioner. *Mr. A. L. Knauf* for respondent.

No. 847. T. HOGAN & SONS, INC. *v.* JOSEPH MILLER ET AL. March 10, 1924. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Eli J. Blair* for petitioner. *Mr. Harold R. Medina* for respondents.

No. 657. HORACE VAN DEVENTER *v.* WHOLESALE MERCHANTS WAREHOUSE COMPANY. March 17, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. Edward A. Harriman* for petitioner. *Mr. Thomas H. Malone* for respondent.

No. 792. GULF & SHIP ISLAND RAILROAD COMPANY ET AL. *v.* W. E. POWELL. March 17, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Mr. L. L. Mayes, Mr. B. E. Eaton, Mr. T. J. Wills, Mr. Francis Raymond Stark* and *Mr. Joseph L. Egan* for petitioners. *Mr. R. L. McLaurin* for respondent.

No. 797. WELCH, FAIRCHILD & COMPANY, INC. *v.* PHILIPPINE NATIONAL BANK. March 17, 1924. Petition

for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. James Ross* and *Mr. Timothy T. Ansberry* for petitioner. No appearance for respondent.

No. 802. SALT LAKE COUNTY *v.* UTAH COPPER COMPANY. March 17, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles C. Richards* for petitioner. *Mr. A. C. Ellis, Jr.,* for respondent.

No. 832. JOHN DOUGLAS, JR. *v.* UNITED STATES. March 17, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George H. Rankin* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 837. SAVANNAH CHEMICAL COMPANY *v.* W. R. GRACE & COMPANY. March 17, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. A. Lawrence* for petitioner. *Mr. Paul E. Seabrook* for respondent.

No. 843. CONRON BROS. & COMPANY *v.* FARMERS LOAN & TRUST COMPANY, TRUSTEE, ETC., ET AL. March 17, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Mark Ash* and *Mr. Edward Ash* for petitioner. *Mr. Mansfield Ferry, Mr. George S. Graham* and *Mr. George H. Richards* for respondents.

No. 857. COMMONWEALTH STEAMSHIP COMPANY, LIMITED, CLAIMANT OF S. S. "TURRET CROWN," ETC. *v.* PATENT VULCANITE ROOFING COMPANY, INC.;

No. 858. COMMONWEALTH STEAMSHIP COMPANY, LIMITED, CLAIMANT OF S. S. "TURRET CROWN," ETC. *v.* CARLO REPETTO;

No. 859. COMMONWEALTH STEAMSHIP COMPANY, LIMITED, CLAIMANT OF S. S. "TURRET CROWN," ETC. *v.* SACCO & PALMIERO; and

No. 860. COMMONWEALTH STEAMSHIP COMPANY, LIMITED, CLAIMANT OF S. S. "TURRET CROWN," ETC. *v.* J. ARON & COMPANY, INC. March 17, 1924. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John M. Woolsey, Mr. Charles R. Hickox* and *Mr. Theodore M. Hequembourg* for petitioner. *Mr. D. Roger Englar* for respondents.

No. 804. NEVADA STATE JOURNAL PUBLISHING COMPANY *v.* CHARLES B. HENDERSON. April 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James Glynn, Mr. E. E. Roberts* and *Mr. Richard A. Ford* for petitioner. No appearance for respondent.

No. 825. VERNOR HALL, TRUSTEE, *v.* LYNN REAGOR, BANKRUPT. April 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. Rutledge, Jr.,* and *Mr. J. E. Gilbert* for petitioner. *Mr. Francis Marion Etheridge* and *Mr. Joseph Manson McCormick* for respondent.

No. 850. ADOLPH PALEAIS *v.* LEWIS H. SAPER. April 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr.*

Joseph G. M. Browne and *Mr. Barnett E. Kopelman* for petitioner. *Mr. Archibald Palmer* for respondent.

No. 851. David A. Manville & Company, Inc. *v.* Francis Oil & Refining Company. April 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph G. M. Browne* for petitioner. No appearance for respondent.

No. 876. M. Massei, Jr. *v.* United States. April 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert H. Talley* for petitioner. No brief filed for the United States.

No. 729. Joseley Tiger *v.* Aaron Drumright et al. Error to the Supreme Court of the State of Oklahoma. April 14, 1924. Petition for a writ of certiorari herein denied. *Mr. Lewis C. Lawson* for plaintiff in error, in support of the petition. No appearance for defendants in error.

No. 831. Thomas Joyce *v.* United States. April 14, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Marshall B. Woodworth* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 854. J. W. Ward Farming Company et al., etc. *v.* W. E. Lowry et al. April 14, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. B. Lewright* for petitioners. *Mr. A. J. Brooks* for respondents.

No. 874. E. W. CLARK & COMPANY *v.* AUGUSTA M. SLAYMAKER ET AL. April 14, 1924. Petition for a writ of certiorari to the Court of Appeals of Franklin County, State of Ohio, denied. *Mr. Joseph S. Clark, Mr. T. R. White* and *Mr. Talfourd P. Linn* for petitioner. *Mr. Edward C. Turner, Mr. Albert M. Calland, Mr. F. S. Monnett* and *Mr. David F. Pugh* for respondents.

No. 875. IVER OLBERS *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION ET AL. April 14, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Silas B. Axtell* for petitioner. *Mr. George H. Emerson* and *Mr. Roscoe H. Hupper* for respondents.

No. 882. RALEIGH MONROE FALCONER *v.* UNITED STATES. April 14, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ivan L. Hyland* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 884. E. INGRAHAM COMPANY *v.* IDA SILVER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF IDEAL CRYSTAL & MACHINE MANUFACTURING COMPANY. April 14, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. O. Ellery Edwards* for petitioner. No appearance for respondent.

No. 885. J. L. MACDANIEL (FIRST NAME UNKNOWN) *v.* UNITED STATES. April 14, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth

Circuit denied. *Mr. Robert R. Nevin* and *Mr. Earl H. Turner* for petitioner. No brief filed for the United States.

No. 889. JOHN E. WINKELMAN *v.* LAURA M. WINKELMAN. April 14, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Mr. John E. Hughes* for petitioner. No appearance for respondent.

No. 893. SOUTHERN RAILWAY COMPANY *v.* MARGARET E. KIRKLAND ET AL., EXECUTORS, ETC. April 14, 1924. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied. *Mr. S. R. Prince, Mr. H. O'B. Cooper, Mr. F. G. Tompkins* and *Mr. L. E. Jeffries* for petitioner. *Mr. A. S. Harby* for respondents.

No. 894. GREENSBORO WAREHOUSE & STORAGE COMPANY *v.* JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC., ET AL. April 14, 1924. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied. *Mr. Frank P. Hobgood, Jr., Mr. William P. Bynum* and *Mr. Sidney S. Alderman* for petitioner. No appearance for respondents.

No. 735. FLO LACHAPELLE, AS ADMINISTRATRIX, ETC. *v.* UNION PACIFIC COAL COMPANY. [See *ante*, 575.]

No. 504. CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK *v.* WILHELMINA WERNER ET AL. [See *ante*, 576.]

No. 739. WILSON CLINTON, AN INCOMPETENT, BY EDMOND HILL, HIS NEXT FRIEND AND GUARDIAN, ET AL. *v.* GYPSY OIL COMPANY. Error to the Supreme Court of the State of Oklahoma. April 21, 1924. Petition for a writ of certiorari herein denied. *Mr. Horace H. Hagan,* for plaintiffs in error, in support of the petition. *Mr. James B. Diggs* for defendant in error.

No. 826. HERSCHELL NORMAN *v.* STATE OF OHIO. April 21, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. Frank Davis, Jr., Mr. Hollis C. Johnston* and *Mr. James C. Nicholson* for petitioner. *Mr. Wm. J. Hughes* and *Mr. Wm. J. Hughes, Jr.,* for respondent.

No. 853. CHARLES E. SCHAFF, AS RECEIVER, ETC. *v.* S. H. HUDGINS ET AL., COPARTNERS, ETC. April 21, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Alexander Britton, Mr. Joseph M. Bryson, Mr. Maurice D. Green* and *Mr. Charles S. Burg* for petitioner. *Mr. Bird McGuire* for respondents.

No. 895. JULES ARNSTEIN, ALIAS NICKEY ARNSTEIN, ET AL. *v.* UNITED STATES. April 21, 1924. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Henry E. Davis* and *Mr. T. Morris Wampler* for petitioners. *Mr. Solicitor General Beck, Mr. Peyton Gordon* and *Mr. William E. Leahy* for the United States.

No. 896. PANAMA RAILROAD COMPANY *v.* OLD DOMINION TRANSPORTATION COMPANY. April 21, 1924. Petition for a writ of certiorari to the Circuit Court of Ap-

peals for the Fourth Circuit denied. *Mr. Richard Reid Rogers* for petitioner. *Mr. Leon T. Seawell* for respondent.

No. 897. JOHN RANDOLPH, ADMINISTRATOR, ETC., ET AL. *v.* BOUKER CONTRACTING COMPANY, AS OWNER OF SCOW 84-H. April 21, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Herman S. Hertwig* for petitioners. *Mr. George V. A. McCloskey* for respondent.

No. 904. JOHN COOK, ADMINISTRATOR, ETC. *v.* WASHINGTON, BALTIMORE & ANNAPOLIS ELECTRIC RAILROAD COMPANY. April 21, 1924. Petition for a writ of certiorari to the Court of Appeals of the State of Maryland denied. *Mr. J. Wethered Barroll* for petitioner. No appearance for respondent.

No. 907. JOE WIGINGTON *v.* UNITED STATES. April 21, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert H. Talley* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 908. F. P. BURTON, TRUSTEE, ETC., ET AL. *v.* J. D. WEATHERMAN. April 21, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Samuel A. Anderson* for petitioners. No appearance for respondent.

No. 913. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, *v.* WILLIAM RADFORD COYLE, TRUSTEE, ETC. April

21, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Evan Shelby, Mr. John F. Finerty* and *Mr. John E. Walker* for petitioner. *Mr. Emory R. Buckner* for respondent.

No. 914. DETROIT CARRIER & MANUFACTURING COMPANY *v.* JOHN G. PERRIN. April 21, 1924. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Melville Church* for petitioner. *Mr. Albert M. Austin* for respondent.

No. 916. LEON SIGMAN *v.* MABEL G. REINECKE, ETC., COLLECTOR OF INTERNAL REVENUE. April 21, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. M. Sternhagen* and *Mr. Arnold R. Baar* for petitioner. *Mr. Solicitor General Beck* for respondent.

No. 781. EASTMAN KODAK COMPANY OF NEW YORK *v.* SOUTHERN PHOTO MATERIALS COMPANY. Error to the Circuit Court of Appeals for the Fifth Circuit. April 21, 1924. Petition for a writ of certiorari herein denied. *Mr. John W. Davis, Mr. Alex. W. Smith, Mr. Frank L. Crawford* and *Mr. Clarence P. Moser,* for plaintiff in error, in support of the petition. *Mr. Daniel MacDougald,* for defendant in error, in opposition to the petition.

No. 926. W. & A. FLETCHER COMPANY *v.* INTERNATIONAL MERCANTILE MARINE COMPANY. April 21, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ira A. Campbell, Mr. John M. Woolsey* and *Mr. Clarence Bishop*

Smith for petitioner. *Mr. Charles C. Burlingham, Mr. Chauncey I. Clark* and *Mr. Ray Rood Allen* for respondent.

No. 948. CRAWFORD COUNTY LEVEE & DRAINAGE DISTRICT No. 1 *v.* J. R. HUTSON ET AL. April 21, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Wisconsin denied. *Mr. Charles E. Buell* and *Mr. Frank W. Lucas* for petitioner. *Mr. Harry L. Butler* for respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 29, 1924, TO AND INCLUDING APRIL 27, 1924.

No. 457. HENRY E. DEKAY *v.* WILLIAM R. RODMAN, U. S. MARSHAL. Appeal from the District Court of the United States for the District of Rhode Island. February 18, 1924. Dismissed with costs, on motion of counsel for appellant. *Mr. William L. Wemple* for appellant. *The Attorney General* for appellee.

Nos. 766 and 767. WHITNEY-CENTRAL NATIONAL BANK *v.* THE BANK OF AMERICA. On petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit. February 18, 1924. Petition dismissed, on motion of counsel for petitioner. *Mr. J. Blanc Monroe* and *Mr. Roberts C. Milling* for petitioner. *Mr. H. Generes Dufour* and *Mr. Henry Root Stern* for respondent.

No. 715. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* J. FRED DRAYTON. Error to the Circuit Court of Appeals for the Eighth Circuit. February 18,

1924. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Alexander Britton* and *Mr. Gardiner Lathrop* for plaintiff in error. No appearance for defendant in error.

No. 199. C. HENRY SMITH *v.* ALFRED GREENEBAUM. Error to the District Court of Appeal, First Appellate District, of the State of California. February 25, 1924. Dismissed with costs, on authority of counsel for plaintiff in error. *Mr. Samuel Knight* for plaintiff in error. *Mr. William Denman* for defendant in error.

No. 309. FREDERICK HOLLISTER *v.* EDWIN REED, ADMINISTRATOR, ETC. Error to the Supreme Court of the State of Oregon. February 27, 1924. Dismissed with costs, on authority of plaintiff in error. *Mr. Charles L. McNary* for plaintiff in error. No appearance for defendant in error.

No. 848. JAMES SEWARD *v.* RAYMOND H. BRADY, SHERIFF, ETC. Error to the Supreme Court of the State of Missouri. March 3, 1924. Dismissed with costs, on motion of *Mr. Frans E. Lindquist* for plaintiff in error. *Mr. Jesse W. Barrett* for defendant in error.

No. 95. PIEL BROTHERS *v.* RALPH A. DAY, FEDERAL PROHIBITION DIRECTOR, ETC. Appeal from the Circuit Court of Appeals for the Second Circuit. March 4, 1924. Dismissed with costs, on motion of counsel for appellant. *Mr. Walter E. Ernst* and *Mr. Nathan Ballin* for appellant. *Mr. Solicitor General Beck, Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, and *Mr. Mahlon D. Kiefer* for appellee.

No. 165. CENTRAL NATIONAL BANK OF TULSA, OKLAHOMA, *v.* UNITED STATES. Error to the Circuit Court of Appeals for the Eighth Circuit. March 5, 1924. Dismissed, on motion of counsel for plaintiff in error. *Mr. James W. Beller, Mr. Preston C. West* and *Mr. A. A. Davidson* for plaintiff in error. *The Attorney General* for the United States.

No. 836. ARTURO F. LAPHAM *v.* UNITED STATES EX REL. ANTONIO ESCUDERO ET AL. Appeal from the District Court of the United States for the Eastern District of Louisiana. March 17, 1924. Dismissed, on motion of counsel for appellant. *Mr. Henry Mooney* for appellant. No appearance for appellees.

No. 507. CENTRAL LUMBER COMPANY ET AL. *v.* CHARLES CARLISLE. Error to the Supreme Court of the State of Mississippi. March 17, 1924. Dismissed with costs, per stipulation. *Mr. T. Brady, Jr.,* and *Mr. Robert H. Thompson* for plaintiffs in error. No appearance for defendant in error.

No. 763. SANTA CLARA VALLEY LAND COMPANY *v.* ARTHUR MEEHAN, AS CITY MARSHAL, ETC., ET AL. Error to the District Court of Appeal, First Appellate District, of the State of California. April 14, 1924. Dismissed, per stipulation. *Mr. Louis V. Crowley* for plaintiff in error. No appearance for defendants in error.

No. 842. SOL D. SNITOW *v.* HARRY L. WISSING, TRUSTEE. On petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. April 14, 1924. Petition dismissed, per stipulation. *Mr. Charles Hershenstein* and *Mr. Samuel Hershenstein* for petitioner. *Mr. Samuel Conrad Cohen* for respondent.

APPENDIX.

In *Davis* v. *Portland Seed Co., ante,* p. 403, *Mr. John F. Finerty,* as counsel for Davis, Agent etc. and Director General of Railroads, took a position respecting important questions involved differing from that advanced by counsel representing the railroads. The following summary is taken from his supplemental briefs.

1. Under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or because greater than the aggregate-of-intermediates, but, in either such event, a shipper may make claim for damages under §§ 8 or 16 of the act. Under no circumstances is the charging and collecting of such published rate an overcharge in violation of § 6 but, on the contrary, it is made mandatory by § 6 itself.

2. There is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

(*a*) The long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(*b*) The aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

3. While there is thus a distinction as to what constitutes a violation of the respective clauses, once a viola-

tion of either is established the measure of damages is substantially the same.

That is, in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

4. There is no violation of the fourth section and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short-haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

5. Even where the fourth section is not violated, because of relief granted by the Commission from its provisions, or in addition, as to the long-and-short-haul clause, because no proof that the lower rate was actually charged or received from the more distant point, the shipper may still be entitled to damages if, in the case of the long-and-short-haul clause the higher rate for the shorter distance, or in the case of the aggregate-of-intermediates clause, the higher through rate, is unreasonable under § 1, or discriminatory or unduly prejudicial under §§ 2 and 3.

6. The Director General should not be held to have been subject to the Fourth Section, because that section

in providing for application to the Commission as a condition precedent to the publication of lawful rates departing from the long-and-short-haul and aggregate-of-intermediates prohibitions of that section, is in direct conflict with the unrestricted powers conferred upon the President by § 10 of the Federal Control Act, to initiate lawful rates by merely filing them with the Interstate Commerce Commission.

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STRIKES. See **Constitutional Law**, I, 5, 6; XIV, 4.

SUBPOENA. See **Interstate Commerce Acts**, II, 4.

SURPLUSAGE. See **Pleading**, 5.

SURVEY. See **Boundaries.**

TARIFFS. See **Interstate Commerce Acts**, I, 1, 2, 5.

TAXATION:

I. **Federal Taxation.**

1. *Revenue Act 1918; Estate Tax; Nature of.* Tax is not a succession tax upon benefits received by devisees and legatees, but an excise upon transfer of decedent's estate. *Y. M. C. A.* v. *Davis*..... 47

2. *Id. Religious and Charitable Bequests; Exemption.* Provision for deduction in determining value of net estate, § 403 (3), does not exempt recipients of charitable gifts from burden of tax if placed upon them by will. *Id.*

3. *Id. Residuary Gifts.* Where taken into account in ascertaining net taxable estate and amount of tax, the tax may be charged against gross estate and specific bequests may be satisfied in full, before charitable gifts are satisfied. *Id.*

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4. *Id. Charitable Bequests,* deductible from gross estate in fixing net taxable estate, deducted without diminution on account of tax itself, even though bequests, being residuary, will ultimately bear tax burden. *Edwards* v. *Slocum*..... 61

II. **State Taxation.**

Challenging constitutionality; exhausting administrative remedies. See **Jurisdiction,** VI, 19.
Brokers and commission merchants. See **Constitutional Law,** III, 2, 3; XIV, 27.
Indian allotments. See **Indians,** 15–18.
License tax; steamship agents. See **Constitutional Law, III,** 4.
Sales of gasoline. See *id.,* XIV, 15.
Street railways; discrimination by taxing entire property as personalty. See *id.,* XIV, 22–24.

1. *Vague Taxing Statute,* not violative of due process when elucidated by state court. *Southeastern Express Co.* v. *Robertson*..... 535, 541

2. *Id. Express Company. Privilege Tax,* may be made condition to entering on intrastate business, measured according to mileage of railroad tracks operated over, and varied according to classification of tracks made for purpose of taxing railroad. *Id.*

3. *Id. Notice of Tax Assessment.* Classification of tracks for purpose of taxing railroad may be made without notice to express company whose privilege tax is affected by such classification. *Id.*

4. *Id. Privilege Taxes; Express and Railroad Companies.* Differences between, justify discrimination in notifying latter but not former of proceedings to make classification of railroad tracks by which taxes of both are affected. *Id.*

5. *Id. Time of Payment.* Express company may be compelled to pay tax before beginning business while established companies have 30 days each year to renew. *Id.*

TELEGRAPH COMPANIES:

1. *Limitation of Liability; Unrepeated Interstate Message.* Contract, on form approved by Interstate Commerce Commission, limiting liability for mistakes, delays or non-deliv-

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ery, *held* valid and applicable although message never transmitted, due to inadvertence of employee. *Western Union Tel. Co.* v. *Czizek* 281

2. *Id. Negligence. Quaere:* Whether agreed limitation would not have applied even if failure to transmit had been due to gross negligence? *Id.*

3. *Id. Reasonableness,* of limitation, determined as of date of contract, not by later, prospective rules of Commission. *Id.*

4. *Id. Liability for Charges. Semble,* that stipulation limiting liability for non-delivery to amount received for sending it, was invalid. *Id.*

5. *Id. Notice of Claim.* Stipulation requiring claim in writing within sixty days after filing message, is inapplicable where filing by plaintiff's agent was unknown to plaintiff during sixty days and plaintiff thereafter was diligent in presenting claim. *Id.*

TEXAS. See **Procedure,** I.

TIMBER. See **Indians,** 4, 5.

TIME. See **Adverse Possession; Interstate Commerce Acts,** I, 3, 4; **Jurisdiction,** IV, 27; **Patents for Inventions,** 3, 4.

TITLE. See **Adverse Possession; Assignments; Bankruptcy Act,** 4–12; **Boundaries,** 3; **Indians,** 15, 16.

TORTS. See **Contracts,** 1; **Negligence.**

TRADE MARKS:

1. *Repacking and Sale by Purchaser; Use of Mark on Labels.* Owner of registered mark may not prevent purchaser who repacks and sells goods from using mark to show their true origin, if manner of use does not deceive public. *Prestonettes, Inc.* v. *Coty* 359

2. *Id.* No new right under trade mark evoked from fact that goods are liable to be spoilt or adulterated. *Id.*

TRANSFER OF CAUSES. See **Jurisdiction,** IV, 21.

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TRANSPORTATION ACT. See **Carriers, 1; Interstate Commerce Acts,** II, 5–7.

TREATIES. See **Indians,** 2–4.

TRIAL:

Jury. See **Admiralty,** 3 *et seq.;* **Contempt.**

TRUSTS AND TRUSTEES. See **Bankruptcy Act,** 5–12; **Indians, 1,** 6–18.

UNFAIR COMPETITION. See **Constitutional Law,** III, 1; **Trade Marks.**

1. *Federal Trade Commission Act; Inspection of Corporate Papers.* Authority to investigate violations of Anti-Trust Acts when directed by Congress, will not support demand by Commission for disclosure of records in investigation not based on such violation. *Federal Trade Comm.* v. *American Tobacco Co*..... 298

2. *Id. Relevancy of Documents.* Access to documentary evidence of corporations confined to documents relevant as evidence to inquiry before Commission. *Id.*

3. *Id. Unlawful Search. Congressional Intent,* to grant to subordinate agency power to examine corporate papers, on possibility that they may disclose evidence of crime, must be clearly expressed. *Id.*

UNITED STATES. See **Aliens; Contracts; Indians; Navy; Public Lands; Taxation,** I; **Treaties.**
Judicial power; admiralty. See **Constitutional Law,** II.
Suit by; corporate instrumentalities. See **Jurisdiction,** VI, 9–11.
Suit against; orders of Interstate Commerce Commission. See **Parties,** 5.
Director General of Railroads; action by. See **Carriers,** 1, 2.
Emergency Fleet Corporation. See **Eminent Domain,** 4.
Federal Reserve Board. See **Banks and Banking,** 7.
Military reservations. See **Criminal Law,** 2.

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VENUE. See **Jurisdiction,** III; VI, 18.

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WARRANT. See **Aliens, 11, 12; Habeas Corpus.**

WEIGHTS AND MEASURES. See **Constitutional Law,** XIV, 5, 6.

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2. "Country." See *Mensevich* v. *Tod*..... 134
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