UNITED STATES REPORTS

VOLUME 270

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1925

FROM JANUARY 12, 1926
TO AND INCLUDING (IN PART) APRIL 12, 1926

ERNEST KNAEBEL
REPORTER

GOVERNMENT PRINTING OFFICE
WASHINGTON
1926

ADDENDA

Add to the table of cases reported in 266 U. S.:

Compagnie Internationale *v.* Miller, p. 473.
Earles *v.* Drake Manufacturing Co., p. 616.
Ex parte Commonwealth-Atlantic National Bank, p. 617.
Leverkuhn *v.* United States, p. 603.
Marmarth Co-operative Exchange *v.* First National Bank, p. 635.
Milburn Co. *v.* Davis-Bournonville Co., p. 596.
United States *v.* Moser, p. 236.

Under the Act of May 29, 1926, c. 425, 44 St. 677, copies of this volume may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D. C.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

WILLIAM HOWARD TAFT, Chief 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.
HARLAN FISKE STONE, Associate Justice.

JOHN G. SARGENT, Attorney General.
WILLIAM D. MITCHELL, Solicitor General.
WILLIAM R. STANSBURY, Clerk.
FRANK KEY GREEN, Marshal.

---

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

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925 [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, HARLAN FISKE STONE, Associate Justice.

For the Third Circuit, LOUIS DEMBITZ BRANDEIS, 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, PIERCE BUTLER, Associate Justice.

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

For the Ninth Circuit, GEORGE SUTHERLAND, Associate Justice.

March 16, 1925.

---

[1] For next previous allotment, see 268 U. S., p. IV.

TABLE OF CASES REPORTED.

Page.

Abilene & Southern Ry. Co., United States *ex rel.*, *v.* Interstate Commerce Commission 650
Alexander Milburn Co. *v.* Davis-Bournonville Co... 390
American Manufacturing Co. *v.* City of St. Louis.... 660
American Refrigerator Transit Co. *v.* Wabash Ry. Co. 643
American Tobacco Co., Federal Trade Commission *v.* 638
Anderson, Powell, Trustee, *v* 649
Andrews, Britton, Receiver, *v* 644
Arizona Commercial Mining Co. *v.* Iron Cap Copper Co 642
Armour & Co. *v.* Fort Morgan S. S. Co 253
Armstrong, DeForest Radio Telephone & Telegraph Co. *v* 663
Ashe, Warden, *v.* United States *ex rel.* Valotta..... 424
Atchison, Topeka & Santa Fe Ry. Co. *v.* Button.... 670
Atchison, Topeka & Santa Fe Ry. Co. *v.* Loma Fruit Co 662, 663
Atlantic Coast Line R. R. Co., Vanderbilt and Wilson, Receivers, *v* 625
Atlantic Coast Line R. R. Co. *v.* Wimberley, Administrator 637

Backman, United States *v* 666
Bakelite Corp., Durez Co. *v* 657, 670
Baker & Holmes Co., Florida East Coast Ry. Co. *v*... 668
Baldwin, Missouri Pacific R. R. Co. *v* 645
Baltimore & Ohio R. R. Co., United States *v*..... 320
Baltimore S. S. Co. *v.* Phillips 638
Bank of Hawaii *v.* Wilder, Tax Assessor 652
Barnette *v.* Wells Fargo Nevada National Bank.... 438

Page.
Barr *v.* McCorkle, Warden 635
Beauchamp, Administratrix, *v.* Michigan Central R. R. Co 643
Beaver, Childers, State Auditor, *v* 555
Beltz, Administratrix, Lehigh Valley R. R. Co. *v* 641
Bergdoll, Harrigan, Trustee, *v* 560
Bewsher, Chicago & Northwestern Ry. Co. *v* 641
Blair, Commissioner, *v.* Dukich 670
Board of Tax Appeals, Goldsmith *v* 117
Bobe, Lloyds *v* 663
Boland *v.* Hill 658
Boone, Missouri Pacific R. R. Co. *v* 466
Bowers, Collector, National Paper & Type Co. *v* 630
Boyd *v.* Smythe, Judge 635
Braud, Millers' Indemnity Underwriters *v* 59
Bridgewater, Town of, *v.* Jardine, Secretary of Agriculture 653
Britton, Receiver, *v.* Andrews 644
Brotherhood of Locomotive Engineers, Burke *v* 629
Brown *v.* United States 644, 646
Brown, Trustees, Portneuf Marsh Valley Canal Co. *v.* 637
Buckenmeyer, United States *v* 649
Burke *v.* Brotherhood of Locomotive Engineers 629
Button, Atchison, Topeka & Santa Fe Ry. Co. *v* 670

California, Wolfgang *v* 627
Cambria Steel Co., Graves *v* 669
Central California Canneries, Dunkley Co. *v* 646
Carbon County Land Co. *v.* United States and Carbon County 639
Catchings, *Ex parte* 631
Cauthen, St. Louis-San Francisco Ry. Co. *v* 656
Central New England Ry. Co., United States *v* 320
Central R. R. Co. of New Jersey, United States *v* ... 644, 667, 668
Central State Bank *v.* United States Fidelity & Guaranty Co 656

Page.
Chamberlain & Co. *v.* Gloyd, Director of Agriculture. 625
Chamberlain Machine Works *v.* United States..... 347
Chapin *v.* Walker, Marshal..... 659
Chapin, Trustees, Portneuf Marsh Valley Canal Co. *v*..... 637
Chapman *v.* Scott..... 657
Cherokee Nation *v.* United States..... 476
Chesapeake & Ohio Canal Co. *v.* Great Falls Power Co..... 650
Chesapeake & Ohio Ry. Co. *v.* Thompson Manufacturing Co..... 416
Chesapeake & Ohio Ry. Co. *v.* Westinghouse, Church, Kerr & Co..... 260
Chicago & Eastern Illinois Ry. Co. *v.* Chicago Heights Terminal Transfer R. R. Co..... 626
Chicago & Northwestern Ry. Co. *v.* Bewsher..... 641
Chicago, City of, Wisconsin Lime & Cement Co. *v*... 626
Chicago Heights Terminal Transfer R. R. Co., Chicago & Eastern Illinois Ry. Co. *v*..... 626
Chicago, Indianapolis & Louisville Ry. Co. *v.* United States..... 287
Chicago, Milwaukee & St. Paul Ry. Co., Risty, Commissioners, *v*..... 378
Chicago, Rock Island & Pacific Ry. Co. *v.* Elder.... 611
Chicago, Rock Island & Pacific Ry. Co., Risty, Commissioners, *v*..... 378
Chicago, Rock Island & Pacific Ry. Co., Seaboard Rice Milling Co. *v*..... 363
Chicago, Rock Island & Pacific Ry. Co. *v.* Schendel, Administrator..... 611
Chicago, St. Paul, Minneapolis & Omaha Ry. Co., Risty, Commissioners, *v*..... 378
Childers, State Auditor, *v.* Beaver..... 555
Chile Copper Co., Edwards, Collector, *v*..... 452
Christie-Myers Feed Co. *v.* Cleveland Grain & Milling Co..... 647
Christy, Goldman *v*..... 662

Page.
Ciechowski, Lehigh Valley R. R. Co. *v*..... 654
Cincinnati, Indianapolis & Western R. R. Co. *v.* Indianapolis Union Ry. Co..... 107
Cities Service Oil Co. *v.* City of Marysville..... 665
Cleveland Grain & Milling Co., Christie-Myers Feed Co. *v*..... 647
Coghlan *v.* United States..... 656
Cohn, United States *v*..... 339
Cole *v.* Norborne Drainage District..... 45
Collins *v.* Town of Perry..... 631
Collins *v.* United States..... 647
Collins, Prohibition Director, Dowling *v*..... 660
Commonwealth Trust Co., Glavin *v*..... 664
Community Building Co., Maryland Casualty Co. *v*. 652
Consolidated Coal Co. *v.* United States..... 664
Convoy S. S. Co. *v.* Pfizer & Co..... 641, 665
Cornell Steamboat Co. *v.* Long Island R. R. Co.... 647
Cornell Steamboat Co. *v.* Slayne..... 647
Cox, McCarl, Comptroller General, *v*..... 652
Crawford, Southern Surety Co. *v*..... 655
Crook Co. *v.* United States..... 4
Curran, Commissioner, United States *ex rel.* Markin *v*..... 647

Damon *v.* Johnson, Commissioner..... 665
Daniel Sons & Palmer Co., Holt *v*..... 642
Daugherty, Administratrix, Schaff, Receiver, *v*..... 642
Davis-Bournonville Co., Alexander Milburn Co. *v*... 390
Davis, Director General, United States *ex rel.* Rauch *v*..... 653
Davis, Secretary of War, Kelley *v*..... 668
Day, Sheriff, General American Tank Car Corp. *v*... 367
DeCastro *v.* Fernandez, Administratrix..... 657
Deering, Sanchez *v*..... 227
Defore *v.* State of New York..... 657
DeForest Radio Telephone & Telegraph Co. *v.* Armstrong..... 663

Page.
Delpark, Luckett *v.* 496
Dillingham *v.* United States 646
District of Columbia, Ferguson *v.* 633, 657
Donner Steel Co. *v.* Interstate Commerce Commission 651
Donner Steel Co. *v.* United States 643
Doughton, Commissioner, Rhode Island Hospital Trust Co. *v.* 69
Dowling *v.* Collins, Prohibition Director 660
Dukich, Blair, Commissioner, *v.* 670
Dunkley Co. *v.* Central California Canneries 646
Durez Co. *v.* Bakelite Corp. 657, 670

Edenfield *v.* United States 638
Edwards, Collector, *v.* Chile Copper Co. 452
Elder, Chicago, Rock Island & Pacific Ry. Co. *v.* 611
Erie R. R. Co., Northern Ohio Traction & Light Co. *v.* 650
Evansville Oil & Grease Co. *v.* Miller, Commissioner. 633
Ex parte Benjamin Catchings 631

Faircloth *v.* Lovett, Trustee 659
Federal Reserve Bank *v.* Idaho Grimm Alfalfa Seed Growers' Association 646
Federal Trade Commission *v.* American Tobacco Co. 638
Federal Trade Commission, Hills Brothers *v.* 662
Felder *v.* United States 648
Ferguson *v.* District of Columbia 633, 657
Fernandez, Administratrix, DeCastro *v.* 657
Fidelity & Deposit Co. *v.* Tafoya, Chairman 426
Fidelity Trust Co., Rooker *v.* 633, 657
Fire Association of Philadelphia, Nime *v.* 661
First Moon *v.* United States 243
First Moon *v.* White Tail 243
Fishlander, United States *ex rel.*, *v.* Hecht, Marshal. 629
Fleischmann Construction Co. *v.* United States to the use of Forsberg 349
Florida East Coast Ry. Co. *v.* Baker & Holmes Co. . 668

Page.
Forbes *v.* United States 655
Fort Morgan S. S. Co., Armour & Co. *v.* 253
Fort Smith, City of, *v.* Southwestern Bell Telephone Co 627
Fort Worth & Denver City Ry. Co. *v.* Stovall, Administratrix 660
Fort Worth & Denver City Ry. Co. *v.* Williams 661
Franklin Sugar Refining Co., Straesser-Arnold Co. *v.* 642
Frey, Woodworth, Collector, *v.* 669
Fry *v.* United States 646

General American Tank Car Corp. *v.* Day, Sheriff .. 367
Georgia, Hughes *v.* 665
Girard Trust Co. *v.* United States 163
Glavin *v.* Commonwealth Trust Co 664
Globe & Rutgers Fire Insurance Co. *v.* Winter Garden Co 654
Gloyd, Director of Agriculture, Chamberlain & Co. *v.* 625
Gloyd, Director of Agriculture, Northern Cedar Co. *v.* 625
Gloyd, Director of Agriculture, Yakima County Horticultural Union *v.* 625
Goldman *v.* Christy 662
Goldsmith *v.* Board of Tax Appeals 117
Gould-Mersereau Co. *v.* Williams Brothers Aircraft Corp 638
Gratz *v.* McKee 664
Graves *v.* Cambria Steel Co 669
Graves *v.* Minnesota 669
Gray, Administratrix, Mellon, Director General, *v.* .. 638
Great Falls Power Co., Chesapeake & Ohio Canal Co. *v.* 650
Great Northern Ry. Co. *v.* Reed 539
Great Northern Ry. Co., Risty, Commissioners, *v.* .. 378
Green River Gas Co. *v.* White 660
Gulf, Colorado & Santa Fe Ry. Co., Texas & Pacific Ry. Co. *v.* 266

Page.
Hackethal *v.* United States..... 663
Hadsell *v.* United States..... 656
Hanover National Bank, Mazukiewicz *v*..... 643
Harrell *v.* Prairie Oil & Gas Co..... 648
Harrigan, Trustee, *v.* Bergdoll..... 560
Harrison *v.* Ohio..... 632
Hecht, Marshal, United States *ex rel.* Fishlander *v*.. 629
Hecht, Marshal, United States *ex rel.* Newman *v*... 629
Hendrix, Missouri Pacific R. R. Co. *v*..... 651
Henry, Trustee, *v.* Irwin and Payne..... 636
Higgins, Marsino *v*..... 627
Hill, Boland *v*..... 658
Hills Brothers *v.* Federal Trade Commission..... 662
Holt *v.* Daniel Sons & Palmer Co..... 642
Holt State Bank, United States *v*..... 49
Huben, Administratrix, Lehigh Valley R. R. Co. *v*... 641
Huff *v.* Page, Receiver.....670, 671
Hughes *v.* Georgia..... 665
Hummel, Trustee, Shire, Trustee, *v*..... 663
Hussey, Mellon, Director General, *v*..... 659

Idaho Grimm Alfalfa Seed Growers' Association, Federal Reserve Bank *v*..... 646
Illinois, Michigan *v*..... 631
Illinois and Sanitary District of Chicago, Wisconsin *v*.....634
Illinois Bell Telephone Co., Smith *v*..... 587
Independent Coal & Coke Co. *v.* United States and Carbon County..... 639
Independent Wireless Telegraph Co. *v.* Radio Corporation of America..... 84
Indianapolis Union Ry. Co., Cincinnati, Indianapolis & Western R. R. Co. *v*..... 107
International Salt Co., Phillips, Collector, *v*..... 639
Interocean Oil Co. *v.* United States..... 65
Interstate Commerce Commission, Donner Steel Co. *v*..... 651

Page.
Interstate Commerce Commission, United States *ex rel.* Abilene & Southern Ry. Co. *v.* 650
Iron Cap Copper Co., Arizona Commercial Mining Co. *v.* 642
Irwin, Henry, Trustee, *v.* 636
Iselin *v.* United States 245

Jardine, Secretary of Agriculture, Town of Bridgewater *v.* 653
Jarman, United States *ex rel.*, *v.* Work, Secretary of Interior 655
Johnson, Commissioner, Damon *v.* 665
Johnson Lighterage Co., State Industrial Board *v.* ... 655
Joines *v.* Patterson 639
Jones & Co. *v.* West Publishing Co 665
Jones, Trustee, *v.* Ready 652

Kelly *v.* Davis, Secretary of War 668
Kettle, Wise, Trustee, *v.* 655
Koenig Coal Co., United States *v.* 512
Kuhn, Pickands, Mather & Co. *v.* 654

Lakewood Engineering Co. *v.* Stein 661
Land *v.* March Oil Co 658
Lee *v.* March Oil Co 658
Lehigh Valley R. R. Co. *v.* Beltz, Administratrix 641
Lehigh Valley R. R. Co. *v.* Ciechowski 654
Lehigh Valley R. R. Co. *v.* Huben, Administratrix ... 641
Lewiston, City of, Porter *v.* 671
Liberato *v.* Royer 535
Littlejohn & Co. *v.* United States 215
Lloyds *v.* Bobe 663
Loma Fruit Co., Atchison, Topeka & Santa Fe. Ry. Co. *v.* 662, 663
Long Island R. R. Co., Cornell Steamboat Co. *v.* 647
Louisville & Nashville R. R. Co., United States *v.* 645, 669

Page.
Lovett, Trustee, Faircloth *v*. 659
Luckenbach S. S. Co. *v*. United States. 662
Luckett *v*. Delpark. 496

Maccieno *v*. United States. 629, 637, 668
Madjorus *v*. Ohio. 662
Mandelbaum *v*. United States. 7
Mann *v*. United States. 648
March Oil Co., Land *v*. 658
March Oil Co., Lee *v*. 658
Marcusson *v*. United States. 648
Marion & Rye Valley Ry. Co. *v*. United States. 280
Markin, United States *ex rel.*, *v*. Curran, Commissioner 647
Marr *v*. United States. 644
Marshall, Red Ball Transit Co. *v*. 632
Marsino *v*. United States and Higgins. 627
Marx, Executor, *v*. Reinecke. 664
Maryland *v*. Soper, Judge, No. 1. 9
Maryland *v*. Soper, Judge, No. 2. 36
Maryland *v*. Soper, Judge, No. 3. 44
Maryland Casualty Co. *v*. Community Building Co. . 652
Marysville, City of, Cities Service Oil Co. *v*. 665
Mason, Work, Secretary of Interior, *v*. 668
Mazukiewicz *v*. Hanover National Bank. 643
McCarl, Comptroller General, *v*. Cox. 652
McCarl, Comptroller General, United States *ex rel.* Skinner & Eddy Corp. *v*. 636
McCorkle, Warden, Barr *v*. 635
McCullough, Smith *v*. 456
McKee, Gratz *v*. 664
McLean, Ross *v*. 656
McMahon *v*. Montour R. R. Co. 628
Mellon, Agent, *v*. Weiss, Administrator. 565
Mellon, Director General, *v*. Gray, Administratrix. . 638
Mellon, Director General, *v*. Hussey. 659
Mellon, Director General, *v*. Oswald & Taube. 658

Page.
Mellon, Director General, *v.* Westinghouse, Church, Kerr & Co. 260
Merchants Bank & Trust Co. *v.* Thurman Motor Co. 661
Metal Products Co., United States *v.* 670
Michigan *v.* Illinois 631
Michigan *v.* Wisconsin 295
Michigan Central R. R. Co., Beauchamp, Administratrix, *v.* 643
Michigan Portland Cement Co., United States *v.* 521
Midland Land & Improvement Co. *v.* United States. 251
Miller, Commissioner, Evansville Oil & Grease Co. *v.* 633
Millers' Indemnity Underwriters *v.* Braud 59
Minneapolis & St. Louis R. R. Co. *v.* Peoria & Pekin Union Ry. Co. 580
Minnesota, Graves *v.* 669
Minnesota, United States *v.* 181
Missouri-Kansas-Texas Ry. Co. *v.* Tarter 659
Missouri Pacific R. R. Co. *v.* Baldwin 645
Missouri Pacific R. R. Co. *v.* Boone 466
Missouri Pacific R. R. Co. *v.* Hendrix 651
Monongahela Ry. Co., Pursglove *v.* 654
Montour R. R. Co., McMahon *v.* 628
Moore *v.* New York Cotton Exchange 593
Morris *v.* United States 640
Morse *v.* United States 151

National Contracting Co. *v.* United States 628
National Exchange Bank, United States *v.* 527
National Paper & Type Co. *v.* Bowers, Collector 630
Neuberger *v.* United States 568
New England S. S. Co., United States *v.* 320
Newman, United States *ex rel. v.* Hecht, Marshal ... 629
New York Central R. R. Co. *v.* Wheeling Can Co. 640, 645
New York Cotton Exchange, Moore *v.* 593
New York, New Haven & Hartford R. R. Co., United States *v.* 320

Page.
New York, State of, Defore *v*. 657
New York, State of, *v*. Wilson, Trustees. 651
Nime *v*. Fire Association of Philadelphia. 661
Noll *v*. United States. 649
Norborne Drainage District, Cole *v*. 45
North German Lloyd *v*. United States. 645
Northern Cedar Co. *v*. Gloyd, Director of Agriculture. 625
Northern Ohio Traction & Light Co. *v*. Erie R. R. Co. 650
Northern States Power Co., Risty, Commissioners, *v*. 378

Ohio, Harrison *v*. 632
Ohio, Madjorus *v*. 662
Oregon-Washington R. R. & Nav. Co. *v*. Washington. 87
O'Shaughnessy *v*. United States. 634
Oswald & Taube, Mellon, Director General, *v*. 658

Page, Receiver, Huff *v*. 670, 671
Palmer Brothers Co., Weaver *v*. 402
Pan American Petroleum & Transport Co. *v*. United States. 640
Patterson *v*. Virginia. 632
Patterson, Joines *v*. 639
Patterson, Administratrix, Pennsylvania R. R. Co. *v*. 649
Payne, Henry, Trustee, *v*. 636
Pennsylvania R. R. Co. *v*. Patterson, Administratrix 649
Peoples Natural Gas Co. *v*. Public Service Commission 550
Peoria & Pekin Union Ry. Co., Minneapolis & St. Louis R. R. Co. *v*. 580
Pere Marquette Ry. Co. *v*. United States. 320
Perry, Town of, Roberts and Collins *v*. 631
Pfizer & Co., Convoy S. S. Co. *v*. 641, 665
Phillips, Baltimore S. S. Co. *v*. 638
Phillips, Collector, *v*. International Salt Co. 639

Page.
Pickands, Mather & Co. *v.* Kuhn 654
Porter *v.* City of Lewiston 671
Portneuf Marsh Valley Canal Co. *v.* Brown and Chapin, Trustees 637
Powell, Trustee, *v.* Anderson 649
Prairie Oil & Gas Co., Harrell *v.* 648
Prairie Oil & Gas Co., Twist *v.* 639, 640
Public Service Commission, Peoples Natural Gas Co. *v.* 550
Pullman Co., Waters *v.* 651
Pursglove *v.* Monongahela Ry. Co. 654

Radio Corporation of America, Independent Wireless Telegraph Co. *v.* 84
Rasmussen *v.* United States 653
Rauch, United States *ex rel.*, *v.* Davis, Director General 653
Reading Co. *v.* United States 320
Reading Co., United States *v.* 320
Ready, Jones, Trustee, *v.* 652
Red Ball Transit Co. *v.* Marshall 632
Reed, Great Northern Ry. Co. *v.* 539
Reinecke, Marx, Executor, *v.* 664
Rhode Island Hospital Trust Co. *v.* Doughton, Commissioner 69
Risty, Commissioners, *v.* Chicago, Milwaukee & St. Paul Ry. Co. 378
Risty, Commissioners, *v.* Chicago, Rock Island & Pacific Ry. Co. 378
Risty, Commissioners, *v.* Chicago, St. Paul, Minneapolis & Omaha Ry. Co. 378
Risty, Commissioners, *v.* City of Sioux Falls 378
Risty, Commissioners, *v.* Great Northern Ry. Co. 378
Risty, Commissioners, *v.* Northern States Power Co. 378
Ritcey, United States *v.* 666, 667
Roberts *v.* Town of Perry 631
Rogers *v.* United States 154

Page.
Rooker *v.* Fidelity Trust Co..... 633, 657
Ross *v.* McLean..... 656
Royer, Liberato *v.*..... 535
Rullman *v.* Wheelock, Receivers..... 669

St. Louis, City of, American Manufacturing Co. *v.*.. 660
St. Louis, Brownsville & Mexico Ry. Co., United States *v.*..... 320
St. Louis, San Francisco & Texas Ry. Co., United States *v.*..... 1
St. Louis-San Francisco Ry. Co. *v.* Cauthen..... 656
Sanchez *v.* Deering..... 227
Sanitary District of Chicago, Illinois and, Wisconsin *v.*..... 634
Schaff, Receiver, *v.* Daugherty, Administratrix..... 642
Schendel, Administrator, Chicago, Rock Island & Pacific Ry. Co. *v.*..... 611
Schlesinger, Executors, *v.* Wisconsin..... 230
Scott, Chapman *v.*..... 657
Seaboard Rice Milling Co. *v.* Chicago, Rock Island & Pacific Ry. Co..... 363
Shaw *v.* Work, Secretary of Interior..... 642
Shelton, Woodmen of the World *v.*..... 628
Shire, Trustees, *v.* Hummel, Trustee..... 663
Sioux Falls, City of, Risty, Commissioners, *v.*..... 378
Skinner & Eddy Corp., United States *ex rel.*, *v.* McCarl, Comptroller General..... 636
Slayne, Cornell Steamboat Co. *v.*..... 647
Smith *v.* Illinois Bell Telephone Co..... 587
Smith *v.* McCullough..... 456
Smythe, Judge, Boyd *v.*..... 635
Soper, Judge, Maryland *v.*, No. 1..... 9
Soper, Judge, Maryland *v.*, No. 2..... 36
Soper, Judge, Maryland *v.*, No. 3..... 44
Southern Pacific Co. *v.* Trenholm, Administrator... 649
Southern Pacific Co. *v.* United States..... 103
Southern Ry. Co., United States *v.*..... 320, 667

Page.
Southern Surety Co. *v.* Crawford 655
South Fork Brewing Co. *v.* United States 631
Southwestern Bell Telephone Co., City of Fort Smith *v* 627
State Industrial Board *v.* Johnson Lighterage Co 655
Stein, Lakewood Engineering Co. *v* 661
Stovall, Administratrix, Ft. Worth & Denver City Ry. Co. *v* 660
Straesser-Arnold Co. *v.* Franklin Sugar Refining Co. 642
Sullivan *v.* United States 648
Swift & Co. *v.* United States 124
Swift & Co., United States *v* 124

Tafoya, Chairman, Fidelity & Deposit Co. *v* 426
Tarter, Missouri-Kansas-Texas Ry. Co. *v* 659
Texas & Pacific Ry. Co. *v.* Gulf, Colorado & Santa Fe Ry. Co 266
Thompson *v.* United States 654
Thompson Manufacturing Co., Chesapeake & Ohio Ry. Co. *v* 416
Thurman Motor Co., Merchants Bank & Trust Co. *v.* 661
Todd *v.* United States 644
Tom *v.* United States 645
Towar Cotton Mills *v.* United States 375
Toxaway Mills *v.* United States 637
Trenholm, Administrator, Southern Pacific Co. *v* 649
Trustee of the Rambler Cafeteria, Weil *v* 660
Tutun *v.* United States 568
Twist *v.* Prairie Oil & Gas Co 639, 640

United States *v.* Backman 666
United States *v.* Baltimore & Ohio R. R. Co 320
United States, Brown *v* 644, 646
United States *v.* Buckenmeyer 649
United States *v.* Central New England Ry. Co 320
United States *v.* Central R. R. Co. of New Jersey 644, 667, 668

Page.
United States, Chamberlain Machine Works *v*..... 347
United States, Cherokee Nation *v*..... 476
United States, Chicago, Indianapolis & Louisville Ry. Co. *v*..... 287
United States, Coghlan *v*..... 656
United States *v.* Cohn..... 339
United States, Collins *v*..... 647
United States, Consolidated Coal Co. *v*..... 664
United States, Crook Co. *v*..... 4
United States, Dillingham *v*..... 646
United States, Donner Steel Co. *v*..... 643
United States, Edenfield *v*..... 638
United States, Felder *v*..... 648
United States, First Moon *v*..... 243
United States, Forbes *v*..... 655
United States, Fry *v*..... 646
United States, Girard Trust Co. *v*..... 163
United States, Hackethal *v*..... 663
United States, Hadsell *v*..... 656
United States *v.* Holt State Bank..... 49
United States, Interocean Oil Co. *v*..... 65
United States, Iselin *v*..... 245
United States *v.* Koenig Coal Co..... 512
United States, Littlejohn & Co. *v*..... 215
United States *v.* Louisville & Nashville R. R. Co. 645, 669
United States, Luckenbach S. S. Co. *v*..... 662
United States, Maccieno *v*..... 629, 637, 668
United States, Mandelbaum *v*..... 7
United States, Mann *v*..... 648
United States, Marcusson *v*..... 648
United States, Marion & Rye Valley Ry. Co. *v*..... 280
United States, Marr *v*..... 644
United States, Marsino *v*..... 627
United States *v.* Metal Products Co..... 670
United States *v.* Michigan Portland Cement Co.... 521
United States, Midland Land & Improvement Co. *v*. 251
United States *v.* Minnesota..... 181

Page.
United States, Morris *v*..... 640
United States, Morse *v*..... 151
United States, National Contracting Co. *v*..... 628
United States *v*. National Exchange Bank..... 527
United States, Neuberger *v*..... 568
United States *v*. New England S. S. Co..... 320
United States *v*. New York, New Haven & Hartford R. R. Co..... 320
United States, Noll *v*..... 649
United States, North German Lloyd *v*..... 645
United States, O'Shaughnessy *v*..... 634
United States, Pan American Petroleum & Transport Co. *v*..... 640
United States, Pere Marquette Ry. Co. *v*..... 320
United States, Rasmussen *v*..... 653
United States *v*. Reading Co..... 320
United States, Reading Co. *v*..... 320
United States *v*. Ritcey..... 666, 667
United States, Rogers *v*..... 154
United States *v*. St. Louis, Brownsville & Mexico Ry. Co..... 320
United States *v*. St. Louis, San Francisco & Texas Ry. Co..... 1
United States, Southern Pacific Co. *v*..... 103
United States *v*. Southern Ry. Co..... 320, 667
United States, South Fork Brewing Co. *v*..... 631
United States, Sullivan *v*..... 648
United States *v*. Swift & Co..... 124
United States, Swift & Co. *v*..... 124
United States, Thompson *v*..... 654
United States, Todd *v*..... 644
United States, Tom *v*..... 645
United States, Towar Cotton Mills *v*..... 375
United States, Toxaway Mills *v*..... 637
United States, Tutun *v*..... 568
United States *v*. Van Zandt..... 630
United States *v*. Wabash Ry. Co..... 1

Page.
United States, White *v.* 175
United States, Winchester Repeating Arms Co. *v.*.. 661
United States, Wood, Trustee, *v.* 650
United States, Wuichet *v.* 651
United States, Yankton Sioux Indians *v.* 637
United States, Yip Wah *v.* 645
United States and Carbon County, Carbon County Land Co. *v.* 639
United States and Carbon County, Independent Coal & Coke Co. *v.* 639
United States *ex rel.* Abilene & Southern Ry. Co. *v.* Interstate Commerce Commission 650
United States *ex rel.* Fishlander *v.* Hecht, Marshal.. 629
United States *ex rel.* Jarman *v.* Work, Secretary of Interior 655
United States *ex rel.* Markin *v.* Curran, Commissioner 647
United States *ex rel.* Newman *v.* Hecht, Marshal.... 629
United States *ex rel.* Rauch *v.* Davis, Director General 653
United States *ex rel.* Skinner & Eddy Corp. *v.* McCarl, Comptroller General 636
United States *ex rel.* Valotta, Ashe, Warden, *v.* 424
United States Fidelity & Guaranty Co., Central State Bank *v.* 656
United States Fidelity & Guaranty Co., Whittaker, Administrator, *v.* 653
United States to the use of Forsberg, Fleischmann Construction Co. *v.* 349

Valotta, United States *ex rel.*, Ashe, Warden, *v.*... 424
Vanderbilt, Receivers, *v.* Atlantic Coast Line R. R. Co. 625
Van Zandt, United States *v.* 630
Virginia, Patterson *v.* 632

Wabash Ry. Co., American Refrigerator Transit Co. *v.* 643

Page.
Wabash Ry. Co., United States *v*..... 1
Walker, Marshal, Chapin *v*..... 659
Washington, Oregon-Washington R. R. & Nav. Co. *v*..... 87
Waters *v*. Pullman Co..... 651
Weaver *v*. Palmer Brothers Co..... 402
Weil *v*. Trustee of the Rambler Cafeteria..... 660
Weiss, Administrator, Mellon, Agent, *v*..... 565
Wells Fargo Nevada National Bank, Barnette *v*.... 438
Westinghouse, Church, Kerr & Co., Chesapeake & Ohio Ry. Co. *v*..... 260
Westinghouse, Church, Kerr & Co., Mellon, Director General, *v*..... 260
West Publishing Co., Jones & Co. *v*..... 665
Wheeling Can Co., New York Central R. R. Co. *v*..... 640, 645
Wheelock, Receivers, Rullman *v*..... 669
White, Green River Gas Co. *v*..... 660
White *v*. United States..... 175
White Tail, First Moon *v*..... 243
Whittaker, Administrator, *v*. United States Fidelity & Guaranty Co..... 653
Wilder, Tax Assessor, Bank of Hawaii *v*..... 652
Williams, Ft. Worth & Denver City Ry. Co. *v*..... 661
Williams Brothers Aircraft Corp., Gould-Mersereau Co. *v*..... 638
Wilson, Receivers, *v*. Atlantic Coast Line R. R. Co.. 625
Wilson, Trustees, State of New York *v*..... 651
Wimberley, Administrator, Atlantic Coast Line R. R. Co. *v*..... 637
Winchester Repeating Arms Co. *v*. United States... 661
Winter Garden Co., Globe & Rutgers Fire Ins. Co. *v*. 654
Wisconsin *v*. Illinois and Sanitary District of Chicago..... 634
Wisconsin, Michigan *v*..... 295
Wisconsin, Schlesinger, Executors, *v*..... 230
Wisconsin Lime & Cement Co. *v*. City of Chicago... 626

Page.
Wise, Trustee, *v.* Kettle 655
Wolfgang *v.* California 627
Wood, Trustee, *v.* United States 650
Woodmen of the World *v.* Shelton 628
Woodworth, Collector, *v.* Frey 669
Work, Secretary of Interior, *v.* Mason 668
Work, Secretary of Interior, Shaw *v.* 642
Work, Secretary of Interior, United States *ex rel.* Jarman *v* 655
Wuichet *v.* United States 651

Yakima County Horticultural Union *v.* Gloyd, Director of Agriculture 625
Yankton Sioux Indians *v.* United States 637
Yip Wah *v.* United States 645

TABLE OF CASES

CITED IN OPINIONS

	Page.
Abandonment of line of Missouri Pacific R. R., 76 I. C. C. 635	273
Ada, The, 250 Fed. 194	259
Adams *v.* Meyrose, 7 Fed. 208	504
Adams *v.* Tanner, 244 U. S. 590	415
Aktieselskabet Fido *v.* Lloyd Braziliero, 283 Fed. 62	259
Alabama *v.* Schmidt, 232 U. S. 168	214
Alabama Co. *v.* Director General, 78 I. C. C. 561	470
Albright *v.* Teas, 106 U. S. 613	502
Allen *v.* Smith, 173 U. S. 389	486
American Express Co. *v.* Caldwell, 244 U. S. 617	293
American Foundry Co. *v.* Pere Marquette R. R. Co., 263 Fed. 237	452
Amer. Graphophone Co. *v.* Victor Talking Mach. Co., 188 Fed. 431	504
American Lumber Asso. *v.* Director General, 66 I. C. C. 393	470
American Ry. Exp. Co. *v.* Levee, 263 U. S. 19	468
Amer. Steel Foundries *v.* Robertson, 262 U. S. 209	577
American Trust Co. *v.* Federal Reserve Bank, 256 U. S. 350	434
Amley *v.* Sando, 2 L. D. 142	546
Anaconda Copper Co. *v.* Director General, 57 I. C. C. 723	471
An Alien, *In re*, 7 Hill 137	578
Anderson *v.* United States, 171 U. S. 604	604
Anderson *v.* Watt, 138 U. S. 694	586
Anderson & Co. *v.* Susquehanna S. S. Co., 275 Fed. 989	259
Anderson, *Ex parte*, 3 Woods 124	450
Andrews *v.* Connolly, 145 Fed. 43	444
Andrews *v.* Virginian Ry., 248 U. S. 272	105, 154
Application of Atlanta & St. Andrews Bay Ry. Co., 71 I. C. C. 784	272
Ard *v.* Brandon, 156 U. S. 537	546
Arkadelphia Milling Co. *v.* St. Louis & S. W. Ry. Co., 249 U. S. 134	370
Armour Packing Co. *v.* United States, 209 U. S. 56	519
Asbell *v.* Kansas, 209 U. S. 251	95
Aspen Mining Co. *v.* Billings, 150 U. S. 31	154
Atchison &c. Ry. *v.* United States, 256 U. S. 205	336
Atherton Machine Co. *v.* Atwood-Morrison Co., 102 Fed. 949	504
Atlantic Coast Line Ry. Co. *v.* Railroad Comm., 281 Fed. 321	471
Atterbery's Case, 8 L. D. 173	546
Avent *v.* United States, 266 U. S. 127	517, 525
Babbit *v.* Read, 215 Fed. 395	564
Babbit *v.* Read, 236 Fed. 42	564

Page.
Bacon *v.* Rives, 106 U. S. 99 449
Badders *v.* United States, 240 U. S. 391 434
Baggs *v.* Martin, 179 U. S. 206 450
Baker *v.* Schofield, 243 U. S. 114 632
Ballard *v.* Searls, 130 U. S. 50 586
Baltimore & Ohio R. R. *v.* Parkersburg, 268 U. S. 35 447
Bank of Ky. *v.* Adams Exp. Co., 93 U. S. 174 422
Bank of U. S. *v.* Bank of Georgia, 10 Wheat. 333 534
Banton *v.* Belt Line Ry., 268 U. S. 413 592
Barber *v.* Pittsburgh &c. Ry., 166 U. S. 83 387
Barnett *v.* Kunkel, 264 U. S. 16 460
Barney *v.* Keokuk, 94 U. S. 324 55
Barrett *v.* Van Pelt, 268 U. S. 85 420, 421, 422
Barry *v.* Cavanaugh, 127 Mass. 394 149
Bauserman *v.* Blunt, 147 U. S. 647 358
Bausman *v.* Dixon, 173 U. S. 113 451
Beals *v.* Ill. &c. R. R. Co., 133 U. S. 290 619
Beazell *v.* State of Ohio, 269 U. S. 167 627
Bell, Estate of, 153 Cal. 331 621
Bement *v.* Nat. Harrow Co., 186 U. S. 70 607
Benedict *v.* Ratner, 268 U. S. 353 564
Bennett *v.* Fed. Coal Co., 70 W. Va. 456 169
Bessho *v.* United States, 178 Fed. 245 575
Bible Society *v.* Grove, 101 U. S. 610 450
Bilby *v.* Stewart, 246 U. S. 255 636
Binderup *v.* Pathe Exchange, 263 U. S. 291 554, 608
Blair *v.* United States *ex rel.* Birkenstock, 6 Fed. (2d) 679 169

Page.
Blanchard *v.* Dominion Nat. Bank, 130 Va. 633 490
Blank *v.* Aronson, 187 Fed. 241 444
Blanset *v.* Cardin, 256 U. S. 319 559
Blonde, The, L. R. (1922), 1 A. C. 313 225, 226, 227
Blossom *v.* Railroad Co., 1 Wall. 655 116
Bluefield Improvement Co. *v.* Pub. Ser. Comm., 263 U. S. 679 627
Blumenstock Bros. *v.* Curtis Pub. Co., 252 U. S. 436 582
Board of Commrs. *v.* Peirce, 90 Fed. 764 441, 442, 451
Board of Trade *v.* Christie Grain Co., 198 U. S. 236 606
Boardman *v.* Toffey, 117 U. S. 271 356
Boatmen's Bank *v.* Fritzlen, 135 Fed. 650 617
Bodek, *In re*, 63 Fed. 813 578
Bohler *v.* Calloway, 267 U. S. 479 387
Bond *v.* Dustin, 112 U. S. 604 357
Boston & Montana Mining Co. *v.* Montana Ore Purchasing Co., 188 U. S. 632 259
Bowen *v.* Minneapolis, 47 Minn. 115 169
Braden *v.* United States, 16 Ct. Cls. 389 486
Bradley *v.* Merrill, 91 Me. 340 490
Bradley, *Ex parte*, 7 Wall. 364 29
Bradshaw *v.* Bank, 81 Fed. 902 116
Bratton *v.* Cross, 22 Kan. 673 546
Brewster *v.* Walsh, 268 Fed. 207 173
Briggs *v.* United Shoe Mach. Co., 239 U. S. 48 503
British Mining Co. *v.* Baker Mining Co., 139 U. S. 222 355, 356
Brockett *v.* Brockett, 2 How. 238 154

Page.
Bronson's Estate, 150 N. Y. 1 83
Brothers *v.* United States, 250 U. S. 88 162
Brown *v.* Fletcher's Estate, 210 U. S. 82 622
Brown *v.* Keene, 8 Pet. 112 447
Brown *v.* Shannon, 20 How. 55 502
Brown *v.* United States, 8 Cr. 110 227
Bruce *v.* Tobin, 245 U. S. 18 626
Bryant Co. *v.* Steam Fitting Co., 235 U S. 327 360, 362
Burgess *v.* Seligman, 107 U. S. 20 565
Burns Baking Co. *v.* Bryan, 264 U. S. 504 415
Burt *v.* Smith, 203 U. S. 129 635
Bushwell *v.* Fuller, 89 Me. 600 423
Butler *v.* Goreley, 146 U. S. 303 469
Byers *v.* McAuley, 149 U. S. 608 451
Cairo Railroad *v.* United States, 267 U. S. 350 349
Calhoun's Lessee *v.* Dunning, 4 Dall. 120 620
California Canneries Co. *v.* Southern Pac. Co., 51 I. C. C. 738 470
California Powder Works *v.* Davis & Co., 151 U. S. 389 636
Campbell *v.* Boyreau, 21 How. 223 357
Campbell *v.* Gordon, 6 Cr. 176 577
Canal & Claiborne Sts. R. R. Co. *v.* Hart, 114 U. S. 654 449
Capital City Dairy Co. *v.* Ohio, 183 U. S. 238 242
Car Spotting Charges, 34 I. C. C. 609 266
Carib Prince, The, 170 U. S. 655 257
Castillo *v.* McConnico, 168 U. S. 674 635
Centi, *In re*, 217 Fed. 833 575
Central of Georgia Ry. *v.* Blount, 238 Fed. 292 524
Page.
Central R. R. Co. of N. J. *v.* United States, 257 U. S. 247 293
Central Stock Exch. *v.* Board of Trade, 196 Ill. 396 607
Central Trust Co. *v.* Tenn. V. & G. Ry. Co., 59 Fed. 523 451
Chainey's Case, 42 L. D. 510 546
Champion Spark Plug Co. *v.* Champion Ignition Co., 247 Fed. 200 610
Chandler *v.* Lumber Co., 131 Tenn. 47 621
Chapman *v.* Wintroath, 252 U. S. 126 402
Cherokee Nation *v.* United States, 202 U. S. 101 478, 487
Cherokee Nation *v.* United States, 40 Ct. Cls. 252 478
Ches. & Del. Canal Co. *v.* United States, 250 U. S. 123 196
Ches. & Ohio Ry. *v.* Cockrell, 232 U. S. 146 34
Ches. O. & S. W. R. R. Co. *v.* Smith, 101 Ky. 707 451
Chicago, etc., Ry. Co. *v.* Director General, 58 I. C. C. 647 291
Chicago, etc, Ry. Co. *v.* Lake Erie & West. R. R. Co., 88 I. C. C. 525 290
Chicago, etc. Ry. Co. *v.* Public Utilities Comm., 242 U. S. 333 469
Chicago, B. & Q. R. R. *v.* Osborne, 265 U. S. 14 388
Chicago, B. & Q. Ry. Co. *v.* Willard, 220 U. S. 413 447
Chicago, G. W. Ry. *v.* Basham, 249 U. S. 164 154
Chicago, G. W. Ry. *v.* Kendall, 266 U. S. 94 387
Chicago Junction Case, 264 U. S. 258 278, 295
Chicago, Mil. & St. P. Ry. Co. *v.* Minn. Civic Assn., 247 U. S. 490 277
Chicago, Mil. & St. P. Ry. Co. *v.* United States, 267 U. S. 403 331

Page.

C. R. I. & P. Ry. Co. *v.* Elevator Co., 226 U. S. 426 101
C. R. I. & P. Ry. Co. *v.* Martin, 178 U. S. 245 449
C. R. I. & P. Ry. Co. *v.* Maucher, 248 U. S. 359 266
Chile, The, 1 Br. & Col. Prize Cases 1 225
Choctaw, etc., R. R. *v.* Harrison, 235 U. S. 292 559
Chorpenning *v.* United States, 94 U. S. 397 577
Cincinnati, &c. Ry. Co. *v.* Ind. Union R. R. Co., 279 Fed. 356 114
Clark *v.* United States, 95 U. S. 539 143
Clarke *v.* Mathewson, 12 Pet. 164 258
Clarke's Lessee *v.* Courtney, 5 Pet. 319 313
Cleveland, &c. Ry. Co. *v.* Hirsch, 204 Fed. 849 524
Cleveland, etc., R. R. *v.* McClung, 119 U. S. 454 33
Cleveland Engr. Co. *v.* Galion Truck Co., 243 Fed. 405 609, 610
Clyde *v.* United States, 13 Wall. 38 577
Cochran *v.* Montgomery County, 199 U. S. 260 447
Coe *v.* Armour Fertilizer Works, 237 U. S. 413 625
Coffin *v.* Ogden, 18 Wall. 120 400
Cogdell *v.* Railroad, 132 N. C. 852 423
Cohens *v.* Virginia, 6 Wheat. 264 414
Coleman *v.* Bridge Co., 5 Blatchf. 56 584
Columbus Ry. Co. *v.* Wright, 151 U. S. 470 372
Compagnie Francaise, etc. *v.* Board of Health, 186 U. S. 380 95
Comptograph Co. *v.* Burroughs Adding Mach. Co., 175 Fed. 787 504
Consol. Turnpike Co. *v.* Norfolk R. R. Co., 228 U. S. 596 626, 636

Page.

Construction of line by Delaware, &c. R. R. 94 I. C. C. 541 273
Converse *v.* Hamilton, 224 U. S. 243 564
Cook, Appeal of, 242 Fed. 932 575
Cooke *v.* United States, 91 U. S. 389 534
Cooper *v.* Omohundro, 19 Wall. 65 356
Corcoran *v.* Ches., etc. Canal Co., 94 U. S. 741 621
Cornell *v.* Coyne, 192 U. S. 418 630
Cornplanter Patent, The 23 Wall. 181 400
Corry *v.* Baltimore, 196 U. S. 466 81
Courtney *v.* Croxton, 239 Fed. 247 564
Courtney *v.* Georger, 228 Fed. 859 564
Craig *v.* Hecht, 263 U. S. 255 579
Cramer *v.* United States, 261 U. S. 219 194, 196
Cramp & Sons Co. *v.* Int. Curtis Marine Turbine Co., 246 U. S. 28 284
Crane *v.* Craig, 230 N. Y. 452 169
Crocker *v.* United States, 240 U. S. 74 162
Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450 372
Cullen *v.* Whitham, 33 Wash. 366 490
Culver's Estate, *In re,* 145 Iowa 1 83
Cuyahoga Power Co. *v.* Akron, 240 U. S. 462 434
Cuyahoga Power Co. *v.* Nor. Realty Co., 244 U. S. 300 636
Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282 372
Dale Mfg. Co. *v.* Hyatt, 125 U. S. 46 502
Dale *v.* Smith, 182 Fed. 360 452
Davis *v.* Cohen & Co., 268 U. S. 638 567
Davis *v.* Cornwall, 264 U. S. 560 266

Page.
Davis *v.* Roper Lumber Co., 269 U. S. 158 421
Davis *v.* South Carolina, 107 U. S. 597 30
Dawson *v.* Kentucky Distilleries Co., 255 U. S. 288 389
Dean, Petitioner, 83 Me. 489 575
DeBearn *v.* Safe Deposit & Trust Co. 233 U. S. 24 635
Debs, *In re*, 158 U. S. 564 194
Dedham Nat. Bank *v.* Everett Nat Bank, 177 Mass. 392 534
Delaware R. R. *v.* Pennsylvania, 198 U. S. 341 80
Dennison *v.* Payne, 293 Fed. 333 617
Denver *v.* Home Savings Bank, 236 U. S. 101 358
Des Moines Natl. Bank *v.* Fairweather, 263 U. S. 103 82
Detroit & Mackinac Ry. Co. *v.* Michigan Railroad Commission, 240 U. S. 564 277
Dewey *v.* Des Moines, 173 U. S. 193 626
Dibble *v.* Bellingham Land Co., 163 U. S. 63 626
Dickinson *v.* Planters' Bank, 16 Wall. 250 355, 356
Dingley *v.* Oler, 117 U. S. 490 253
Dinsmore *v.* Abbott, 89 Me. 373 423
Direct Cable Co. *v.* Anglo-American Tel. Co., [1877] L. R. 2, A. C. 394 308
Doe *v.* Braden, 16 How. 635 201
Dow *v.* United States, 226 Fed. 145 575
Downey Shipbuilding Corp. *v.* Staten Island Ry. Co., 60 I. C. C. 543 266
Drainage Dist. *v.* Turney, 235 Mo. 80 47
Dry Dock Co. *v.* Dahl, 266 U. S. 449 65
Duncan Co. *v.* Lane, 245 U. S. 308 29
Dunkirk Colliery Co. *v.* Lever, 9 Ch. Div. 20 149
Dye *v.* United States, 262 Fed. 6 520, 525

Page.
Ebeling, Estate of, 169 Wis. 432 237
Eberstein *v.* Willetts, 134 Ill. 101 444
Eclipse, The, 135 U. S. 599 259
Economy Power *v.* United States, 256 U. S. 113 56, 59
Eddy, The, 5 Wall. 481 259
Edward Hines Trustees *v.* Martin, 268 U. S. 458 387
Eisner *v.* Macomber, 252 U. S. 189 82
Electron, The, 48 Fed. 689 259
Ellicott *v.* Pearl, 10 Pet. 412 313
Elliman *v.* Carrington [1901], 2 Ch. 275 607
Ellis *v.* Sullivan, 241 Mass. 60 490
Engel *v.* O'Malley, 219 U. S. 128 604
Engelhard, *In re*, 231 U. S. 646 592
Enright *v.* Hecksher, 240 Fed. 863 564
Erie Coal Corp. *v.* United States, 266 U. S. 518 143
Erie R. R. Co. *v.* New York, 233 U. S. 671 101
Erkel *v.* United States, 169 Fed. 623 357
Espy *v.* First National Bank, 18 Wall. 604 533
Esrom, The, 272 Fed. 266 257
Estate of Parks, *In re*, 166 Iowa 403 620, 621
Eureka Pipe Line Co. *v.* Hallanan, 257 U. S. 265 555
Excelsior Pipe Co. *v.* Pac. Bridge Co., 185 U. S. 282 504, 506, 509
Ex parte 74, Increased Rates, 1920, 58 I. C. C. 220 474
Fair, The, *v.* Kohler Die Co., 228 U. S. 22 504, 507, 508, 510
Fairbanks *v.* Snow, 145 Mass. 153 444
Faithorn *v.* Thompson, 242 Ill. 508 47
Fake *v.* Eddy, 15 Wend. 76 169
Farrington *v.* Tennessee, 95 U. S. 679 82
Farson & Co. *v.* Bird, 248 U. S. 268 636

Page.

Federal Trade Comm. *v.* Amer. Tobacco Co., 264 U. S. 298 472
Fellows *v.* Blacksmith, 19 How. 366 202
Finger *v.* McCaughey, 114 Cal. 64 490
First Moon *v.* White Tail, 270 U. S. 243 558
First Nat. Bank *v.* Prager, 91 Fed. 689 449
Fisher Mch. Co. *v.* Warner, 233 Fed. 527 149
Fogg *v.* Blair, 139 U. S. 118 349
Follansbee *v.* Walker, 74 Pa. St. 306 620
Fordiani, *In re,* 98 Conn. 435 575
Fowle *v.* Park, 131 U. S. 88 607
Frank *v.* Mangum, 237 U. S. 309 426
Freight Rates of Carriers, *Re,* P. U. R. 1921A 399 475
Frederick *v.* Amer. Sugar Ref. Co., 281 Fed. 305 149
French *v.* Fyan, 93 U. S. 169 203
French *v.* Weeks, 259 U. S. 326 160
Frick *v.* Pennsylvania, 268 U. S. 473 80, 434
Fuller *v.* Clibon, 15 L. D. 231 546
Fullerton *v.* Texas, 196 U. S. 192 626
Fullerton-Krueger Co. *v.* Nor. Pac. Ry. Co., 266 U. S. 435 3, 625
Gaar, Scott & Co. *v.* Shannon, 223 U. S. 468 636
Gableman *v.* Peoria Ry. Co, 179 U. S. 335 449, 451, 452
Galveston Elec. Co. *v.* Galveston, 258 U. S. 388 627
Garfield *v.* United States, *ex rel.* Spalding, 32 App. D. C. 153 123
Gas Co. *v.* United States, 260 U. S. 77 55, 56
Gasquet *v.* Lapeyre, 242 U. S. 367 635
Gates Iron Works *v.* Pepper & Co., 98 Fed. 449 449
Geneva Furniture Co. *v.* Karpen, 238 U. S. 254 504, 509

Page.

General Investment Co. *v.* Lake Shore Railway, 260 U. S. 261 366
Georgia, &c. Ry. Co. *v.* Blish Co., 241 U. S. 190 421
Georgia Power Co. *v.* Railroad Comm. 262 U. S. 625 627
Gibbons *v.* Ogden, 9 Wheat. 1 93, 96
Gilman *v.* United States, 294 Fed. 422 181
Gilmore *v.* Herrick, 93 Fed. 525 451
Gilseth *v.* Risty, 46 S. D. 374 387, 389
Glenn *v.* Liggett, 135 U. S. 533 564
Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418 584
Gonsalves *v.* Dry Dock Co., 266 U. S. 171 65
Goyaz, The, 281 Fed. 259 259
Gracie *v.* Palmer, 8 Wheat. 605 257
Granstein, *Ex parte,* 1 Hill (S. C.) 141 575
Grant *v.* Poillon, 20 How. 162 258
Grant *v.* Spokane Nat. Bank, 47 Fed. 673 451
Grant *v.* United States, 7 Wall. 331 282
Graves, *In re,* 270 Fed. 181 579
Gray's Logging Co. *v.* Coats Logging Co., 243 U. S. 251 625
Great Lakes Co. *v.* Kierejewski, 261 U. S. 479 65
Great Nor. Ry. Co. *v.* Hower, 236 U. S. 702 550
Great Nor. Ry. Co. *v.* Merch. Elevator Co., 259 U. S. 285 273
Great West. Tel. Co. *v.* Purdy, 162 U. S. 329 563
Greene *v.* Louisville R. R. Co., 244 U. S. 499 381, 387
Greene *v.* Star Package Co., 99 Fed. 656 451
Greenleaf *v.* Queen, 1 Pet. 138 584
Gulf &c. R. R. Co. *v.* Hewes, 183 U. S. 66 631

Page.
Gulf Ref. Co. *v.* United States, 269 U. S. 125 603
Gutenfels, The, 2 Br. & Col. Prize Cases 36 225
Haas *v.* Henkel, 216 U. S. 462 346
Haines *v.* Shapiro, 168 N. C. 34 423
Hall & Long *v.* Railroad Co., 13 Wall. 367 421
Hallanan *v.* Eureka Pipe Line Co., 261 U. S. 393 555
Hallanan *v.* United Gas Co., 261 U. S. 398 555
Hallowell *v.* Commons, 239 U. S. 506 244, 559
Hamilton-Brown Shoe Co. *v.* Wolf Bros. & Co., 240 U. S. 251 461
Hammerschmidt *v.* United States, 265 U. S. 182 346
Hanford *v.* Davies, 163 U. S. 273 34, 447
Hannibal, etc., R. R. Co. *v.* Husen, 95 U. S. 465 95
Hannis Distillery Co. *v.* Baltimore, 216 U. S. 285 81
Hanrick *v.* Hanrick, 153 U. S. 192 449
Hans *v.* Louisiana, 134 U. S. 1 193
Harding, *Ex parte*, 219 U. S. 363 28, 29
Harkness Estate, *In re*, 83 Okla. 107 83
Harmon *v.* United States, 223 Fed. 425 574
Harper *v.* Cunningham, 8 App. D. C. 430 358
Hartell *v.* Tilghman, 99 U. S. 547 502, 504, 508, 510, 511
Harvey *v.* United States, 113 U. S. 243 487
Hastings Ry. Co. *v.* Grinden, 27 L. D. 137 546
Hawaii *v.* Mankichi, 190 U. S. 197 360
Hawley *v.* Malden, 232 U. S. 1 81, 82
Hayburn's Case, 2 Dall. 409 576
Hays *v.* Seattle, 251 U. S. 233 370
Healy *v.* Sea Gull Co., 237 U. S. 479 504, 508, 510
Page.
Hebe Co. *v.* Shaw, 248 U. S. 297 242
Heckman *v.* United States, 224 U. S. 413 194, 618
Heffelfinger *v.* Choctaw R. R. Co., 140 Fed. 75 449
Hegler *v.* Faulkner, 127 U. S. 482 449
Helmholz *v.* United States, 294 Fed. 417 181
Henkel *v.* Cincinnati, 177 U. S. 170 626
Henry *v.* Dick Co., 224 U. S. 1 504, 506
Herrick *v.* Boquillas Co., 200 U. S. 96 4
Hetrick *v.* Lindsay, 265 U. S. 384 631
Hildebrand *v.* Carroll, 106 Wis. 324 423
Hoard, *Ex parte*, 105 U. S. 578 29
Hobbs *v.* United States, 19 Ct. Cls. 220 169
Hodges *v.* Snyder, 261 U. S. 600 365
Hoffman *v.* McClelland, 264 U. S. 552 117
Holy Trinity Church *v.* United States, 143 U. S. 457 360
Home for Incurables *v.* New York, 187 U. S. 155 626
Home Tel. & Tel. Co. *v.* Los Angeles, 227 U. S. 278 434
Hopkins *v.* United States, 171 U. S. 578 604
Hopkins *v.* Walker, 244 U. S. 486 460
Houck *v.* Drainage Dist., 239 U. S. 254 47
Houston Oil Co. *v.* Goodrich, 213 Fed. 136 313
Howden *v.* Piper, 3 L. D. 162 546
Hudson *v.* Parker, 156 U. S. 277 450
Hull *v.* Burr, 234 U. S. 712 635, 636
Humphreys *v.* Third National Bank, 75 Fed. 852 356
Hunnicutt *v.* Peyton, 102 U. S. 333 313

Page.

Hunter *v.* Pittsburgh, 207 U. S. 161 631
Illinois *v.* Fletcher, 22 Fed. 776 32
Illinois Central R. R. Co. *v.* Messina, 240 U. S. 395 521
Illinois Surety Co. *v.* Davis, 244 U. S. 376 360
Illinois Surety Co. *v.* Peeler, 240 U. S. 214 359, 362
Illinois Traffic Bureau *v.* Director General, 56 I. C. C. 426 470
Independent Wireless Co. *v.* Radio Corp., 269 U. S. 459 506
Indiana *v.* Kentucky, 136 U. S. 479 308, 318
Indiana Passenger Fares, etc., 69 I. C. C. 180 290
Ingersoll *v.* Coram, 211 U. S. 335 622
Insurance Co. *v.* Boon, 95 U. S. 117 357
Insurance Co. *v.* Folsom, 18 Wall. 237 356
Insurance Co. *v.* Harris, 97 U. S. 331 617
Insurance Co. *v.* Sea, 21 Wall. 158 356
Insurance Co. *v.* Tweed, 7 Wall. 44 355
Intermediate Switching Charges at Peoria, Ill., 77 I. C. C. 43 583
Int. Paper Co. *v.* Massachusetts, 246 U. S.. 135 80
Int. Text Book Co. *v.* Pigg, 217 U. S. 91 372
Intrastate Rates Within Illinois, 59 I. C. C. 350 475
Iowa C. R. Co. *v.* Iowa, 160 U. S. 389 635
James Everard's Breweries *v.* Day, 265 U. S. 545 242
Jassoy Co., *In re* 178 Fed. 515 564
Jefferson *v.* Fink, 247 U. S. 288 559
Jellenik *v.* Huron Copper Co., 177 U. S. 1 82
Jerome *v.* McCarter, 94 U. S. 734 442

Page.

Jett Bros. Dist. Co. *v.* Carrollton, 252 U. S. 1 626, 632
Jewett *v.* Whitcomb, 69 Fed. 417 451
Johannessen *v.* United States, 225 U. S. 227 578
Johnston *v.* Atchison &c. Ry. Co., 51 I. C. C. 356 470
Johnson *v.* Louisville Trust Co., 293 Fed. 857 564
Johnson, *Ex parte*, 79 Miss. 637 575
Jones *v.* Davis, 35 O. S. 474 83
Julian *v.* Trust Co., 193 U. S. 93 117
Kansas *v.* Colorado, 185 U. S. 125 634
Kansas City Ry. Co. *v.* Wolf, 261 U. S. 133 4
Kansas Indians, The, 5 Wall. 737 559
Kansas Pac. Ry. Co. *v.* Dunmeyer, 113 U. S. 629 549
Karasick, *In re*, 208 App. Div. 844 575
Keasbey & Mattison Co., Re, 160 U. S. 221 366
Keihl *v.* South Bend, 76 Fed. 921 451
Kelley *v.* Gill, 245 U. S. 116 564
Kentucky *v.* Powers, 201 U. S. 1 28, 29
Kerrison *v.* Stewart, 93 U. S. 155 619, 621
Kimball *v.* Williams, 36 App. D. C. 43 169
King *v.* Phillips, 95 N. C. 245 169
King County *v.* School Dist., 263 U. S. 361 214
Kingman *v.* Western Mfg. Co. 170 U. S. 675 154
Kinkead *v.* Lynch, 132 Fed. 692 149
Kline *v.* Burke Constr. Co,. 260 U. S. 226 616
Knights of Pythias *v.* Meyer, 265 U. S. 30 628
Knox County *v.* Harshman, 132 U. S. 14 585
Kuhn *v.* Fairmount Coal Co., 215 U. S. 349 387

Page.
Ladd Bank *v.* Hicks Co., 218 Fed. 310 357
Lamar *v.* United States, 240 U. S. 60 579
Lambert Run Coal Co. *v.* B. & O. R. R., 258 U. S. 377 259, 524
La Motte *v.* United States, 254 U. S. 570 194
Landers *v.* Felton, 73 Fed. 311 451
Lane *v.* Mickadiet, 241 U. S. 201 244, 559
LaRoque *v.* United States, 239 U. S. 62 196
Lau Ow Bew *v.* United States, 144 U. S. 47 360, 579
Law *v.* United States, 266 U. S. 494 356
Leavenworth &c R. R. Co. *v.* United States, 92 U. S. 733 206
Lee *v.* Chesapeake Ry., 260 U. S. 653 365, 366, 367
Lehigh Valley Coal Co. *v.* Director General, 69 I. C. C. 535 471
Lehnen *v.* Dickson, 148 U. S. 71 356, 357
Lemke *v.* Farmers Grain Co., 258 U. S. 50 554
Lemley *v.* Dobson-Evans Co., 243 Fed. 391 399
Lewin *v.* Folsom, 171 Mass. 188 490
Leyner Eng. Works *v.* Mohawk Leasing Co., 193 Fed. 745 149
Lias *v.* Henderson, 44 L. D. 542 546
Lion Bonding Co. *v.* Karatz, 262 U. S. 77 441
Littlefield *v.* Perry, 21 Wall. 205 506
Logan *v.* Davis, 233 U. S. 613 205
London Indemnity Co. *v.* Smoot, 287 Fed. 952 361
Loom Co. *v.* Higgins, 105 U. S. 580 401
Looney *v.* Crane Co., 245 U. S. 178 435

Page.
Louisiana *v.* Garfield, 211 U. S. 70 205, 206
Louisiana *v.* Mississippi, 202 U. S. 1 308
Louisiana *v.* Texas, 176 U. S. 1 95
Louisiana & P. B. Ry. Co. *v.* United States, 257 U. S. 114 295
Louisiana Nav. Co. *v.* Oyster Com., 226 U. S. 99 625
Louisville & Nashville R. R. Co. *v.* Mottley, 219 U. S. 467 519
Louisville & Nashville R. R. Co. *v.* United States, 238 U. S. 1 294
Louisville & Nashville R. R. *v.* United States, 267 U. S. 395 331, 338
Louisville Bedding Co. *v.* United States, 269 U. S. 533 628
Louisville Ferry Co. *v.* Kentucky, 188 U. S. 385 80
Los Angeles Switching Case, 234 U. S. 294 277
Lowry *v.* Hert, 290 Fed. 876 504
Lund *v.* Chicago &c. Ry. Co., 78 Fed. 385 451
Luria *v.* United States, 231 U. S. 9 578
Macon Grocery Co. *v.* Atlantic Coast Line, 215 U. S. 501 365, 366
Maddox *v.* Burnham, 156 U. S. 544 547
Manhattan Ry. Co. *v.* Gen. Elec. Co., 226 Fed. 173 149
Manning *v.* Amy, 140 U. S. 137 449
Manning *v.* French, 149 Mass. 391 122
Mansfield &c. Ry. Co. *v.* Swan, 111 U. S. 379 447
Manufacturers' Lumber Co., *In re*, 251 Fed. 957 564
Marrs *v.* Felton, 102 Fed. 775 449, 451
Marsh *v.* Nichols & Co., 140 U. S. 344 503
Martinton *v.* Fairbanks, 112 U. S. 670 356, 357

Page.

Marvin *v.* Trout, 199 U. S. 212 626
Marx *v.* United States, 276 Fed. 295 575
Maryland *v.* Soper, 270 U. S. 9 450
Maryland *v.* West Virginia, 217 U. S. 1 308
Maryland Rail Co. *v.* Taylor, 231 Fed. 119 564
Mason *v.* United States, 17 Wall. 67 377
Matarazzo *v.* Hustis, 256 Fed. 882 441, 450
Mayer *v.* Denver &c. R. R. Co., 41 Fed. 723 449
Mayor *v.* Ind. Steam-Boat Co., 115 U. S. 248 449
McCain *v.* Des Moines, 174 U. S. 168 635, 636
McClain *v.* Ortmayer, 141 U. S. 419 401
McCoach *v.* Minehill &c. R. R. Co., 228 U. S. 295 456
McCurdy *v.* United States, 264 U. S. 484 559
McDonald *v.* Oregon R. R. & Nav. Co., 233 U. S. 665 635
McLean *v.* Foster, 2 L. D. 175 546
Memphis *v.* Brown, 94 U. S. 715 154
Mercantile Trust Co. *v.* Kanawha &c. Ry. Co., 39 Fed. 337 451
Merritt *v.* American Barge Co., 79 Fed. 228 617
Met. Life Ins. Co. *v.* New Orleans, 205 U. S. 395 80
Meyer *v.* Nebraska, 262 U. S. 390 415
Meyer *v.* Northern Pac. Ry. Co., 31 L. D. 196 546
Meyer *v.* Pacific Mail S. S. Co., 58 Fed. 923 259
Miles *v.* Int. Hotel Co., 289 Ill. 320 423
Mille Lac Chippewas *v.* United States, 51 Ct. Cls. 400 199
Miller *v.* Bonding Co., 257 U. S. 304 361

Page.

Miller *v.* Davis, 52 Colo. 485 444
Miller *v.* Insurance Co., 12 Wall. 285 356
Miller *v.* Le Mars Nat. Bank, 116 Fed. 551 449
Miller *v.* Lumber Co., 98 Mich. 163 444
Miller *v.* Miloslowsky, 153 Ia. 135 423
Miller *v.* United States, 11 Wall. 268 227
Miller *v.* Wilson, 236 U. S. 373 416
Miller Electrical Co., *In re*, 111 Fed. 515 565
Minneapolis &c. R. R. Co. *v.* Peoria Ry. Co., 68 I. C. C. 412 582
Minnesota *v.* Hitchcock, 185 U. S. 373 58, 210
Minnesota Co. *v.* St. Paul Co., 2 Wall. 609 117
Minnesota Rate Cases, 230 U. S. 352 94, 96, 410
Missouri *v.* Iowa, 7 How. 660 308
Missouri *v.* Kansas Gas Co., 265 U. S. 298 554
Missouri *ex rel.* Tel. Co. *v.* Pub. Ser. Comm., 262 U. S. 276 627
Missouri, K. & T. Ry. Co. *v.* Haber, 169 U. S. 613 95
Missouri, K. & T. Ry. Co. *v.* Kan. Pac. Ry. Co., 97 U. S. 491 205
Missouri, K. & T. Ry. Co. *v.* Roberts, 152 U. S. 114 206
Missouri, K. & T. P. Ry. Co. *v.* Harriman, 227 U. S. 657 520
Missouri Pac. R. R. Co. *v.* Ault, 256 U. S. 554 282, 566
Missouri Pac. R. R. Co. *v.* Grocery Co., 268 U. S. 366 292
Missouri Pac. R. R. Co. *v.* Larabee Mills, 211 U. S. 612 102
Missouri Pac. R. R. Co. *v.* Stroud, 267 U. S. 404 101

Page.

Missouri Pac. R. R. Co. *v.* United States, 56 Ct. Cls. 341 323
Mitchell *v.* United States, 267 U. S. 341 285, 486
Mobile, etc. R. R. *v.* Turnipseed 219 U. S. 35 240
Mollan *v.* Torrance, 9 Wheat. 537 586
Montello, The, 20 Wall. 430 56
Montoya *v.* Gonzales, 232 U. S. 375 313
Moore *v.* Dempsey, 261 U. S. 86 426
Morewood *v.* Enequist, 23 How. 491 259
Morgan's etc., S. S. Co. *v.* Louisiana, 118 U. S. 455 95
Morse *v.* United States, 270 U. S. 151 105
Mosely *v.* Torrence, 71 Cal. 318 546
Motion Picture Co. *v.* Universal Film Co., 243 U. S. 502 507
Mudarri, *In re* 176 Fed. 465 577
Mudd *v.* Drainage Dist., 117 Ark. 30 47
Munger Vehicle Co., *In re*, 168 Fed. 910 563
Municipal Securities Corp. *v.* Kansas City, 246 U. S. 63 636
Muskrat *v.* United States, 219 U. S. 346 576
Naceskid Chain Co. *v.* Perdue, 1 Fed. (2d) 924 399
Nalle *v.* Oyster, 230 U. S. 165 358
Natches Chamber of Commerce *v.* La. & Ark. Ry. Co., 52 I. C. C. 105 470
Natl. Bank *v.* Mechanic's Bank, 94 U. S. 437 169
Natl. Lead Co. *v.* United States, 252 U. S. 140 251
Nebraska, *Ex parte*, 209 U. S. 436 29
Nelson *v.* Northern Pac. Ry. Co., 188 U. S. 108 546
New England Divisions Case, 261 U. S. 184 277
New Hampshire *v.* Louisiana, 108 U. S. 76 193

Page.

New Haven R. R. Co. *v.* Interstate Commerce Comm., 200 U. S. 361 519
New Marshall Co. *v.* Marshall Engine Co., 223 U. S. 473 504
New Mexico *v.* Colorado, 267 U. S. 30 308
New Orleans *v.* New Orleans Water Co., 142 U. S. 79 631
New Orleans *v.* Paine, 147 U. S. 261 577
Newton *v.* Consol. Gas Co., 258 U. S. 165 627
New York *v.* Bleecker St. R. R. Co., 178 Fed. 156 452
New York *v.* United States, 257 U. S. 591 469, 475
New York *v.* United States, 31 Ct. Cls. 276 169
New York, &c. R. R. Co. *v.* Pennsylvania, 153 U. S. 628 435
New York Trust Co. *v.* Detroit Ry. Co., 251 Fed. 514 169
Niles Pond Co. *v.* Iron Moulders' Union, 254 U. S. 77 451
Noble *v.* Massachusetts Ben. Assn., 48 Fed. 337 449
Nock *v.* United States, 2 Ct. Cls. 451 486
Nominsky *v.* New York, &c. R. R. Co., 239 Mass. 254 566
Norris *v.* Jackson, 9 Wall. 125 356, 357
North Dakota *v.* Minnesota, 263 U. S. 365 193
North Dakota *v.* Minnesota, 263 U. S. 583 319
Northern Central Ry. *v.* United States, 241 Fed. 25 524
Northern Pac. Ry. Co., *Re*, P. U. R. 1920F 33 475
Northern Pac. R. R. Co. *v.* Amacker, 175 U. S. 564 546, 547
Northern Pac. Ry. Co. *v.* Boyd, 228 U. S. 482 446
Northern Pac. R. R. Co. *v.* Grimes, 24 L D. 452 546

Page.

Northern Pac. Ry. Co. *v.* Houston, 231 U. S. 181 547
Northern Pac. Ry. Co. *v.* North Dakota, 250 U. S. 135 282
Northern Pac. Ry. Co. *v.* Solum, 247 U. S. 477 272
Northern Pac. Ry. Co. *v.* United States, 227 U. S. 355 196
Northern Pac. Ry. Co. *v.* Washington, 222 U. S. 370 101
Northern Pac. Ry. Co. *v.* Wass, 219 U. S. 426 547
Norton *v.* Larney, 266 U. S. 511 447, 459, 460
Norton *v.* Whiteside, 239 U. S. 144 635, 636
O'Brien *v.* Chamberlin, 29 L. D. 218 546
Ohio Railroad Comm. *v.* Worthington, 225 U. S. 101 554
Ohio Tax Cases, 232 U. S. 576 388
Oklahoma, *Ex parte,* 220 U. S. 191 29
Oklahoma *v.* Texas, 258 U. S. 574 56
Okla. Gas Co. *v.* Russell, 261 U. S. 290 592
Old Settlers *v.* United States, 148 U. S. 427 479
Old Settlers *v.* United States, 27 Ct. Cls. 1 479, 487
Operation of lines by Coal River & Eastern Ry. Co., 94 I. C. C. 389 272
Oregon & Cal. R. R. Co. *v.* United States, 189 U. S. 103 547
Oregon & P. R. R. Co. *v.* Forrest, 128 N. Y., 83 444
Oregon-Washington R. R. Co. *v.* United States, 255 U. S. 339 331
Ozawa *v.* United States, 260 U. S. 178 360, 574
Pace *v.* Burgess, 92 U. S. 372 630
Pacific Tel. Co. *v.* Kuykendall, 265 U. S. 196 589, 592
Palmetto Fire Ins. Co. *v.* Beha, 13 Fed (2d) 500 436

Page.

Paquete Habana, The, 175 U. S. 677 579
Park Square Auto Sta., *Ex parte,* 244 U. S. 412 29
Parker *v.* Ormsby, 141 U. S. 81 450
Pawhuska *v.* Pawhuska Oil Co., 250 U. S. 394 390
Payne *v.* New Mexico, 255 U. S. 367 542
Peck *v.* Lowe, 247 U. S. 165 630
Pederson *v.* United States, 253 Fed. 622 361
Pendleton *v.* Lutz, 78 Miss. 322 451
Pennsylvania *v.* West Virginia, 262 U. S. 553 554
Pennsylvania Co. *v.* United States, 236 U. S. 351 294
Penna. Coal Co. *v.* Mahon, 260 U. S. 393 410
Penna. Gas. Co. *v.* Pub. Ser. Comm., 252 U. S. 23 554
People *v.* Dennett, 276 Ill. 43 83
People *v.* Weiner, 271 Ill., 74 413
People *ex rel.* Goldsmith *v.* Travis, 219 N. Y. 589 120
People *ex rel.* Goldsmith *v.* Travis, 167 App. Div. 475 120
People's Bank *v.* Calhoun, 102 U. S. 256 449
People's Bank *v.* Goodwin, 162 Fed. 937 32
Peoria Ry. Co. *v.* United States, 263 U. S. 528 251, 527, 581, 584
Pepper *v.* Rogers, 128 Fed. 987 452
Perkins-Campbell Co. *v.* United States, 264 U. S. 213 349
Person *v.* Watts, 184 N. C. 499 83
Phillips *v.* Ballinger, 27 App. D. C. 46 123
Piedmont Coal Co. *v.* Seaboard Fisheries Co., 254 U. S. 1 632
Pierce Oil Co. *v.* Hope, 248 U. S. 498 242
Pintsch Compressing Co. *v.* Bergin, 84 Fed. 140 577

Page.
Pipe Line Oil Co., *In re*, 289 Fed. 698 564
Pitkin *v.* Cowen, 91 Fed. 599 451
Pollock, *In re*, 257 Fed. 350 576
Ponzi *v.* Fessenden, 258 U. S. 254 627
Potts *v.* Wallace, 146 U. S. 689 564
Powell *v.* Commonwealth, 114 Pa. St. 265 414
Powell *v.* Pennsylvania, 127 U. S. 678 413, 414
Prendergast *v.* N. Y. Tel. Co., 262 U. S. 43 592
Prigg *v.* Pennsylvania, 16 Pet. 539 345
Prinz Adalbert, The, Br. & Col. Prize Cases 70 225
Public Service Comm. *v.* Alabama &c. Ry. Co., 53 I. C. C. 1 470
Public Utilities Comm. *v.* Landon, 249 U. S. 236 554
Pullman Co. *v.* Pennsylvania, 141 U. S. 18 372
Purity Extract Co. *v.* Lynch, 226 U. S. 192 242, 415
Quong Wing *v.* Kirkendall, 223 U. S. 59 410, 414
Rahrer, *In re*, 140 U. S. 545 471
Railroad Comm. *v.* C. B. & Q. R. R. Co., 257 U. S. 563 277
Railroad Comm. *v.* Southern Pacific Co., 264 U. S. 331 278
Railroad Co. *v.* Bradleys, 7 Wall. 575 154
Railroad Co. *v.* Hughes, 94 Miss. 242 423
Railroad Co. *v.* Lockwood, 7 Wall. 357 422
Railroad Co. *v.* Reeves, 10 Wall. 176 422
Railroad Co. *v.* Schurmeir, 7 Wall. 272 59
Railroads, *Re*, P. U. R. 1920F 17 475
Railroads, *Re*, P. U. R. 1920F 33 475
Raimond *v.* Terrebonne Parish, 132 U. S. 192 355
Page.
Rasmussen *v.* Idaho, 181 U. S. 198 95
Rates, etc., of New York Cent. R. R. Co., 59 I. C. C. 290 475
Rates, etc., of Peoria Ry. Co. at Peoria, Ill., 93 I. C. C. 3 586
Rawlins *v.* Georgia, 201 U. S. 638 635
Raymond *v.* Chicago Traction Co., 207 U. S. 20 434
Realty Holding Co. *v.* Donaldson, 268 U. S. 398 447, 460
Red Cross Line *v.* Atlantic Fruit Co., 264 U. S. 109 259
Reed *v.* Insurance Co., 95 U. S. 23 328
Reichert Line *v.* Long Island Const. Co., 287 Fed. 269 259
Reid *v.* Colorado, 187 U. S. 137 95, 99, 100
Remington Auto. & Motor Co., *In re*, 153 Fed. 345 563
Renville, Matter of, 46 App. Div. 37 605
Rhode Island *v.* Massachusetts, 4 How. 591 308
Rice *v.* Minnesota &c. R. R. Co., 1 Black 358 208
Rice *v.* Sioux City &c. R. R. Co., 110 U. S. 695 203
Richard Winslow, The, 71 Fed. 426 259
Robbins *v.* Cheek, 32 Ind. 328 169
Robertson *v.* Cease, 97 U. S. 646 447
Robertson *v.* R. R. Labor Board, 268 U. S. 619 582
Roe, *Ex parte*, 234 U. S. 70 29
Rogers *v.* Peck, 199 U. S. 425 579
Rogers Loco. Works *v.* Emigrant Co., 164 U. S. 559 203
Rooker *v.* Fidelity Trust Co., 261 U. S. 114 633
Rooker *v.* Fidelity Trust Co., 263 U. S. 413 633
Rosenbaum *v.* Insurance Co., 37 Fed. 724 116
Ross *v.* Day, 232 U. S. 110 138
Rothschild *v.* Matthews, 22 Fed. 6 450

Page.

Rouse *v.* Hornsby, 161 U. S. 588 441
Royal Arcanum *v.* Green, 237 U. S. 531 628
Ruppert *v.* Caffey, 251 U. S. 264 242
Rutledge Timber Co. *v.* Farrell, 255 U. S. 268 542
Sage *v.* Hampe, 235 U. S. 99 465
St. Louis *v.* Telegraph Co., 166 U. S. 388 356, 357
St. Louis Compress Co. *v.* Arkansas, 260 U. S. 346 436
St. Louis Grain Co. *v.* United States, 191 U. S. 159 143
St. Louis, K. & S. R. R. Co. *v.* United States, 267 U. S. 346 282
St. Louis Railroad *v.* United States, 267 U. S. 346 349
St. Louis S. W. Ry Co. *v.* United States, 245 U. S. 136 293
St. Paul &c. Ry. Co. *v.* Donohue, 210 U. S. 21 547, 549, 550
St. Paul &c. Ry. Co. *v.* Phelps, 137 U. S. 528 541
St. Paul & Pac. R. R. Co. *v.* Northern Pacific R R., 139 U. S. 1 205
Salem Trust Co. *v.* Finance Co., 264 U. S. 182 449
Salinger *v.* Loisel, 265 U. S. 224 576
Savage *v.* United States, 92 U. S. 382 377
Schaff *v.* United States, 59 Ct. Cl. 318 3
Schell's Exrs. *v.* Fauche, 138 U. S. 562 205
Schlesinger *v.* Wisconsin, 270 U. S. 230 415, 416
Schollenberger *v.* Pennsylvania,, 171 U. S. 1 414
School Dist. *v.* Cross, 7 Fed. (2d) 491 449
Schulenberg *v.* Harriman, 21 Wall. 44 205
Schwab *v.* Berggren, 143 U. S. 442 627
Scott *v.* Carew, 196 U. S. 100 206

Page.

Scott *v.* Choctaw R. R. Co., 112 Fed. 180 449
Scott *v.* Lattig, 227 U. S. 229 55
Scovill *v.* Thayer, 105 U. S. 143 565
Seaboard Ry. Co. *v.* United States, 254 U. S. 57 294
Seacord *v.* Talbert, 2 L. D. 184 546
Seattle *v.* Ore. & Wash. R. R. Co., 255 U. S. 56 55
Selig *v.* Hamilton, 234 U. S. 652 564
Shafer *v.* Farmers Grain Co., 268 U. S. 189 554
Shaffer *v.* Carter, 252 U. S. 37 373, 388, 589
Shaw *v.* Railroad Co., 100 U. S. 605 619
Shearing *v.* Trumbull, 75 Fed. 33 451
Shepard, Estate of, 184 Wis. 88 83
Shinney *v.* North American Savings Co., 97 Fed. 9 451
Shively *v.* Bowlby, 152 U. S. 1 55
Shoshone Mining Co. *v.* Rutter, 177 U. S. 505 459
Shulthis *v.* McDougal, 225 U. S. 561 460, 635, 636
Simmons Coal Co. *v.* Doran, 142 U. S. 417 446
Sims *v.* Roy, 4 App. D. C. 496 423
Singer Sewing Machine Co. *v.* Benedict, 229 U. S. 481 388
Sioux Remedy Co. *v.* Cope, 235 U. S. 107 435
Slater, *Ex parte,* 246 U. S. 128 29
Small *v.* Rakestraw, 196 U. S. 403 546
Smith *v.* Adams, 130 U. S. 167 577
Smith, *Ex parte,* 8 Blackf. 395 575
Smith, *Ex parte,* 94 U. S. 455 449
Smith *v.* Gale, 144 U. S. 509 313
Smith-Porter Co. *v.* Rohde, 257 U. S. 469 63

Page.

Smoot's Case, 15 Wall. 36 253
Smyth *v.* Ames, 169 U. S. 466 388
Smyth *v.* Asphalt Belt Ry. Co., 267 U. S. 326 274
South Boston Iron Co. *v.* United States 118 U. S. 37 143
Southern Minn. Ry. Co. *v.* St. Paul &c. R. R. Co., 55 Fed. 690 619
Southern Pac. Co. *v.* Bogart, 250 U. S. 483 446
Southern Ry. Co. *v.* Puckett, 244 U. S. 571 632
Southern Ry. Co. *v.* Reid, 222 U. S. 424 101
Southern Ry. Co. *v.* United States, 222 U. S. 20 628
Southwestern Transp. Co. *v.* Pittsburg Coal Co., 42 Fed. 920 259
Spencer *v.* Duplan Silk Co., 191 U. S. 526 635, 636
Sperry Oil Co. *v.* Chisholm, 264 U. S. 488 559
Spokane Inland R. R. *v.* Whitley, 237 U. S. 487 621
Spratt *v.* Spratt, 4 Pet. 393 577
Standard Mfg. Co. *v.* Nat. Tooth Co., 95 Fed. 291 504
Standard Oil Co. *v.* Missouri, 224 U. S. 270 635
Stanton *v.* Embrey, 93 U. S. 548 358
State *v.* District Court, 107 Minn. 444 575
State *v.* District Court, 61 Mont. 427 575
State *v.* Dunlap, 28 Idaho 784 83
State *v.* Frost, 113 Wis. 623 452
State *v.* Inferior Court, 58 N. J. L. 97 575
State *v.* Superior Court, 75 Wash. 239 575
State *v.* Walker, 70 Mont. 484 83
State, *ex rel.* Drainage Dist. *v.* Hughes, 294 Mo. 1 48
State Railroad Tax Cases, 92 U. S. 575 373
State Tax on Foreign Held Bonds, 15 Wall. 300 80

Page.

Steam Railroads, *Re* P. U. R. 1920F 7 475
Stearns *v.* Minnesota, 179 U. S. 223 214
Stearns *v.* Page, 7 How. 818 349
Stebbins *v.* Riley, 268 U. S. 137 240
Stephenson, Estate of, 171 Wis. 452 237
Stewart *v.* Barnes, 153 U. S. 456 168
Stipp Const. Co., *In re*, 221 Fed. 372 563
Stone *v.* United States, 164 U. S. 380 162
Stuart, Petition of, 272 Fed. 938 564
Svor *v.* Morris, 227 U. S. 524 547
Swearingen *v.* Sewickley Dairy Co., 198 Pa. 68 563
Sweeney *v.* Irving, 228 U. S. 233 423
Tappan *v.* Bank, 19 Wall. 490 81
Tarpey *v.* Madsen, 178 U. S. 215 546
Taylor *v.* Parker, 235 U. S. 42 465
Teal *v.* Walker, 111 U. S. 242 358
Tempel *v.* United States, 248 U. S. 121 284
Tennessee *v.* Davis, 100 U. S. 257 32
Terral *v.* Burke Const. Co., 257 U. S. 529 434
Texas Co. *v.* Brown, 258 U. S. 466 633
Texas & Pac. Ry. Co. *v.* Amer. Timber Co., 234 U. S. 138 272
Texas & Pac. Ry. Co. *v.* Cox, 145 U. S. 593 441, 451
Texas & Pac. Ry. *v.* Murphy, 111 U. S. 488 154
Texas & Pac. Ry. Co. *v.* Rigsby, 241 U. S. 33 628
Texas Cement Co. *v.* McCord, 233 U. S. 157 351, 359, 361
Thompson Mfg. Co. *v.* Railroad, 93 W. Va. 3 419
Tiffany, *Ex parte*, 252 U. S. 32 29, 576

Page.
Tiger *v.* Western Investment Co., 221 U. S. 286 559
Tilson *v.* United States, 100 U. S. 43 487
Tisbury *v.* Vineyard Haven Water Co., 193 Mass. 196 490
Travellers' Ins. Co. *v.* Connecticut, 185 U. S. 364 373
Trenton *v.* New Jersey, 262 U. S. 182 390
Troxell *v.* Del., Lack. & West. R. R., 227 U. S. 434 617, 621
Tua *v.* Carriere, 117 U. S. 201 469
Turk *v.* Illinois Cent. R. R. Co., 218 Fed. 315 449
Turner *v.* United States, 248 U. S. 354 577
Turner *v.* Yates, 16 How. 14 357
Turpin *v.* Burgess, 117 U. S. 504 630
Twining *v.* New Jersey, 211 U. S. 78 632
Tyler *v.* Dane County, 289 Fed. 843 83
Uihlein's Will, *In re*, 187 Wis. 101 237
Underwood *v.* Gerber, 149 U. S. 224 401
Union Pac. Ry. Co. *v.* United States, 67 Fed. 975 619
Union Ref. Tr. Co. *v.* Kentucky, 199 U. S. 194 80
Union Tank Car Co. *v.* Day, 156 La. 1071 371, 373
Union Twist Drill Co. *v.* United States, 59 Ct. Cls. 909 144
United Gas. Co. *v.* Hallanan, 257 U. S. 277 554, 555
United States *v.* Abilene & Sou. Ry. Co., 265 U. S. 274 583
United States *v.* Adams, 7 Wall. 463 377
United States *v.* Amer. Ry. Exp. Co., 265 U. S. 425 294
United States *v.* Andrews & Co., 207 U. S. 228 143
United States *v.* Axman, 234 U. S. 36 253
United States *v.* Babcock, 250 U. S. 328 576

Page.
United States *v.* Balsara, 180 Fed. 694 575
United States *v.* Beatty, 232 U. S. 463 461
United States *v.* Beebe, 127 U. S. 338 194, 195
United States *v.* Bennett, 232 U. S. 299 80
United States *v.* Berdan Co., 156 U. S. 552 141
United States *v.* Bowling, 256 U. S. 484 244, 559
United States *v.* Breen, 135 App. Div. 824 575
United States *v.* Brelin, 166 Fed. 104 575
United States *v.* Brooks, 10 How. 442 201
United States *v.* Burlington &c. R. R. Co., 98 U. S. 334 205
United States *v.* Child & Co., 12 Wall. 232 377
United States *v.* Cohen, 179 Fed. 834 575
United States *v.* Cook, 257 U. S. 523 486
United States *v.* Cress, 243 U. S. 316 56
United States *v.* Daly, 32 App. D. C. 525 575
United States *v.* Del. & Hud. Co., 213 U. S. 366 472
United States *v.* Des Moines R. R. Co., 84 Fed. 40 619
United States *v.* Dolla, 177 Fed. 101 575
United States *v.* Doyle, 179 Fed. 687 575
United States *v.* Ellicott, 223 U. S. 524 154
United States *v.* Falk & Bro., 204 U. S. 143 251
United States *v.* Ferreira, 13 How. 40 576
United States *v.* Fokschauer, 184 Fed. 990 575
United States *v.* George, 164 Fed. 45 575
United States *v.* Gerstein, 284 Ill. 174 575
United States *v.* Ginsberg, 243 U. S. 472 578

Page.
United States *v.* Gleason, 25 Fed. Cas. 1335 43
United States *v.* Gleason, 1 Wool C. C. 128 41
United States *v.* Grant, 110 U. S. 225 486
United States *v.* Great Falls Mfg. Co., 112 U. S. 645 284
United States *v.* Great Falls Mfg. Co., 124 U. S. 581 284
United States *v.* Grimaud, 220 U. S. 506 525
United States *v.* Hammers, 221 U. S. 220 205
United States *v.* Hrasky, 240 Ill. 560 575
United States *v.* Illinois Cent. R. R. Co., 263 U. S. 515 293, 294, 583
United States *v.* Investment Co., 264 U. S. 206 381
United States *v.* Justice, 14 Wall. 535 377
United States *v.* Koenig Coal Co., 270 U. S. 512 522
United States *v.* Koenig Coal Co., 1 Fed. (2d) 738 515
United States *v.* Koopmans, 290 Fed. 545 575
United States *v.* Lenore, 207 Fed. 865 575
United States *v.* Louisiana, 127 U. S. 182 214
United States *v.* Martorana, 171 Fed. 397 575
United States *v.* Meyer, 241 Fed. 305 575
United States *v.* Mille Lac Chippewas, 229 U. S. 498 198, 215
United States *v.* Mills, 190 Fed. 513 546
United States *v.* Moser, 266 U. S. 236 617
United States *v.* Mulvey, 232 Fed. 513 575
United States *v.* Nashville etc., Ry. Co., 118 U. S. 120 194, 196
United States *v.* Nat. Exch. Bank, 214 U. S. 302 534
United States *v.* Ness, 245 U. S. 319 576, 580

Page.
United States *v.* Neugebauer, 221 Fed. 938 575
United States *v.* New Orleans Ry. Co., 248 U. S. 507 194
United States *v.* New River Co., 265 U. S. 533 294
United States *v.* New York S. S. Co., 239 U. S. 88 143
United States *v.* Noble, 237 U. S. 74 464
United States *v.* Nopoulos, 225 Fed. 656 575
United States *v.* O'Brien, 220 U. S. 321 252
United States *v.* Ojala, 182 Fed. 51 575
United States *v.* Omaha Indians, 253 U. S. 275 138
United States *v.* Osage County, 251 U. S. 128 194
United States *v.* Patten, 226 U. S. 525 343
United States *v.* Pennsylvania R. R. Co., 266 U. S. 191 293
United States *v.* Peterson, 182 Fed. 289 575
United States *v.* Poslusny, 179 Fed. 836 575
United States *v.* Reading Co., 226 U. S. 324 434
United States *v.* Realty Co., 163 U. S. 427 284, 486
United States *v.* Realty Co., 237 U. S. 28 456
United States *v.* Rodiek, 162 Fed. 469 575
United States *v.* Sanges, 144 U. S. 310 30
United States *v.* Shanahan, 232 Fed. 169 578
United States *v.* Sing Tuck, 194 U. S. 161 577
United States *v.* Smith, 94 U. S. 214 162
United States *v.* Stafoff, 260 U. S. 477 31
United States *v.* Stock Yards Co., 167 Fed. 126 355, 356
United States *v.* Texas, 143 U. S. 621 195
United States *v.* Thompson, 98 U. S. 486 196

Page.

United States *v.* Union Stock Yards, 226 U. S. 286 519
United States *v.* Village of Hubbard, 266 U. S. 474 295
United States *v.* Vogel, 262 Fed. 262 575
United States *v.* Weitzel, 246 U. S. 533 251
United States *v.* Wexler, 8 Fed. (2d) 880 575
United States *v.* Wilkins, 6 Wheat. 135 141
United States *ex rel.* Wedderburn *v.* Bliss, 12 App. D. C. 485 123
U. S. F. & G. Co. *v.* United States, 209 U. S. 306 3
United States Glue Co. *v.* Oak Creek, 247 U. S. 321 630
United Transp. Co. *v.* N. Y. & Balto. Transp. Co., 185 Fed. 386 259
Upton *v.* Tribilcock, 91 U. S. 45 444
Utilities Dev. Corp. *v.* Pittsburg &c. Ry. Co., 56 I. C. C. 694 470
Van Allen *v.* Assessors, 3 Wall. 573 81
Vandalia Ry. *v.* United States, 226 Fed. 713 524
Vicksburg Ry. *v.* Anderson-Tully Co., 256 U. S. 408 356, 357
Victor Talking Mach. Co. *v.* The Fair, 123 Fed. 424 504
Virginia *v.* Paul, 148 U. S. 107 28, 29, 30
Virginia *v.* Rives, 100 U. S. 313 28, 29, 34
Virginia *v.* Tennessee, 148 U. S. 503 308
Von Baumbach *v.* Land Co., 242 U. S. 503 456
Vura, *In re,* 5 Ohio App. 334 575
Wabash R. R. *v.* Adelbert College, 208 U. S. 38 117
Wabash Ry. Co. *v.* United States, 59 Ct. Cl. 322 3
Wallace *v.* Glaser, 82 Mich. 190 490

Page.

Wallace *v.* Weinstein, 257 Fed. 625 564
Walsh *v.* Brewster, 255 U. S. 536 173
Walton *v.* United States, 9 Wheat. 651 357
Ware & Leland *v.* Mobile County, 209 U. S. 405 604
Washington *v.* Dawson & Co., 264 U. S. 219 65
Washington Securities Co. *v.* United States, 234 U. S. 76 632
Webb *v.* Buckelew, 82 N. Y. 555 623
Weiss *v.* Director General, 250 Mass. 12 567
Welch *v.* Burrill, 223 Mass. 87 83
Wells Bros. *v.* United States, 254 U. S. 83 6
West *v.* Aurora City, 6 Wall. 139 449
West *v.* Louisiana, 194 U. S. 258 632
West *v.* Rutledge Timber Co., 244 U. S. 90 542
Western Maid, The, 257 U. S. 419 224
Western Pac. R. R. *v.* United States, 59 Ct. Cl. 67 4
Western Union Tel. Co. *v.* Ann Arbor R. R. Co., 178 U. S. 239 459, 635, 636
Western Union Tel. Co. *v.* Foster, 247 U. S. 105 435, 554
Western Union Tel. Co. *v.* Kansas, 216 U. S. 1 434
Westinghouse Mach. Co. *v.* General Elec. Co., 207 Fed. 75 400
Weyerhaeuser *v.* Hoyt, 219 U. S. 380 542, 547
Wheeler *v.* McNeil, 101 Fed. 685 444
Whitcomb *v.* Harris, 90 Me. 206 490
White *v.* Lee, 3 Fed. 222 504
White *v.* Rankin, 144 U. S. 628 504, 505, 508
Wilcox *v.* Jackson, 13 Pet. 498 206
Wilkie, *In re,* 58 Cal. App. 22 575

Page.
Willamette Lumbermen's Asso. *v.* Southern Pac. Co. 51 I. C. C. 250 470
Willard *v.* Dorr, 3 Mason 161 259
Williams *v.* Southern Pac. Co., 54 Cal. App. 571 617, 621
Wilson *v.* Oswego Township, 151 U. S. 56 449
Wilson *v.* Sandford, 10 How. 99 502, 503, 504, 505, 510, 511
Wilson Cypress Co. *v.* Marcos, 236 U. S. 635 229
Winters *v.* Drake, 102 Fed. 545 451
Wisconsin Passenger Fares, 59 I. C .C. 391 475
Wisconsin Railroad Comm. *v.* C. B. & Q. R. R. Co., 257 U. S. 563 469, 471, 475
Witter *v.* Rowe, 3 L. D. 499 546
Wood *v.* United States, 258 U. S. 120 7
Woodmen of America *v.* Mixer, 267 U. S. 544 628
Woolridge *v.* M'Kenna, 8 Fed. 650 449
Work *v.* Louisiana, 269 U. S. 250 203
Work *v.* United States *ex rel.* Rives, 267 U. S. 175 486
Wright *v.* Roseberry, 121 U. S. 488 203
Wrightsville Hardware Co. *v.* Woodenware Mfg. Co., 180 Fed. 586 452
Wyoming *v.* United States, 255 U. S. 489 542
Xenia Bank *v.* Lee, 7 Abb. Pr. 372 610
Yarnell *v.* Felton, 104 Fed. 161 449
Yazoo &c. R. R. Co. *v.* Brewer, 231 U. S. 245 636
York *v.* Washburn, 129 Fed. 564 355
Young *v.* Martin, 8 Wall. 354 358
Yunghauss *v.* United States, 218 Fed. 168 575

TABLE OF STATUTES.

Cited in Opinions.

(A) Statutes of the United States.

Page.

1790, Mar. 26, c. 3, 1 Stat. 103 576
1795, Jan. 29, c. 20, 1 Stat. 414 576
1823, Mar. 3, c. 29, 3 Stat. 754 228
1827, Feb. 8, c. 9, 4 Stat. 202 228
1833, Mar. 2, c. 57, 4 Stat. 633, § 3 32
1836, Apr. 20, c. 54, 5 Stat. 10 298
1836, June 15, c. 99, 5 Stat. 49 (Michigan Enabling Act) ..... 298, 301, 302, 303, 304, 307, 308, 309, 312, 314, 315.
1837, Jan. 26, c. 6, 5 Stat. 144 298
1837, July 29, 7 Stat. 536 (Chippewa Treaty) 196
1838, June 12, c. 101, 5 Stat. 244 302
1840, July 20, c. 54, 5 Stat. 404 302
1841, Sept. 11, c. 25, 5 Stat. 465, § 2 492
1846, Aug. 6, c. 89, 9 Stat. 56 (Wisconsin Enabling Act). 299, 304, 305, 307, 308, 309, 310, 312, 313, 314.
1846, Aug. 10, c. 175, 9 Stat. 85, § 4 304
1848, May 29, c. 50, 9 Stat. 233 ..... 299, 305
1850, Sept. 28, c. 84, 9 Stat. 519 ..... 202, 203, 206, 211, 212, 213, 214
§ 2 ..... 210, 211
1851, Feb. 27, c. 12, 9 Stat. 573 479

Page.

1857, Feb. 26, c. 60, 11 Stat. 166 59
1858, May 11, c. 31, 11 Stat. 285 55
1860, Mar. 12, c. 5, 12 Stat. 3 ..... 203, 205, 206, 211
§ 2 ..... 204, 211, 212, 213
1862, May 20, c. 75, 12 Stat. 392, §§ 1, 2 545
1864, June 13, c. 173, 13 Stat. 241, § 50 32
1865, Mar. 3, c. 86, 13 Stat. 500 355
1866, July 13, c. 184, 14 Stat. 171, § 37 32
1880, May 14, c. 89, 21 Stat. 140, § 3 545
1884, July 4, c. 181, 23 Stat. 98, § 5 122
1884, July 7, c. 334, 23 Stat. 236 122
1887, Feb. 4, c. 104, 24 Stat. 379 (Interstate Commerce Act) 420
1887, Feb. 8, c. 119, 24 Stat. 388 (General Allotment Act) 243
1887, Mar. 3, c. 373, 24 Stat. 552 452
1887, Mar. 3, c. 376, 24 Stat. 556 619
1888, Aug. 13, c. 866, 25 Stat. 433 (Judiciary Act) 365
1889, Jan. 14, c. 24, 25 Stat. 642 ..... 52, 54, 198, 199, 206, 210, 214, 215
1890, July 2, c. 647, 26 Stat. 209, Sherman Anti-Trust Act, §§ 1, 2 ..... 604, 607, 608
1890, Sept. 30, c. 1126, 26 Stat. 504 493

Page.
1891, Feb. 28, c. 383, 26 Stat. 794 243
1891, Mar. 3, c. 517, 26 Stat. 826, § 6 576
1891, Mar. 3, c. 559, 26 Stat. 1093 196
1891, Mar. 3, c. 561, 26 Stat. 1098 545
§ 8 195
1892, Aug. 8, c. 382, 27 Stat. 390 (Homestead Law) ... 542, 547, 548, 549
1893, Mar. 3, c. 209, 27 Stat. 612, § 10 ..... 481, 482
1894, Aug. 13, c. 280, 28 Stat. 278 (Materialmen's Act) .. 351, 358, 359, 360, 361
1894, Aug. 15, c. 290, 28 Stat. 305 245
1895, Mar. 2, c. 177, 28 Stat. 795 484
1895, Mar. 2, c. 188, 28 Stat. 876 ..... 461, 463, 464
§ 1 558
1897, Mar. 2. c. 360, 29 Stat. 607 634
1897, Mar. 3, c. 391, 29 Stat. 692,
§ 1 399
§ 2 400
1897, June 7, c. 3, 30 Stat. 72 ..... 461, 463, 464
1901, Feb. 6, c. 217, 31 Stat. 760 245
1902, July 1, c. 1375, 32 Stat. 716, § 68 484
1903, Feb. 19, c. 708, 32 Stat. 847 (Elkins Act), § 1. 515, 516, 518, 519, 520, 523, 524, 525
1903, Mar. 3, c. 994, 32 Stat. 982 484
1905, Feb. 24, c. 778, 33 Stat. 811 351
1906, June 21, c. 3504, 34 Stat. 325 ..... 53, 461, 462
1906, June 29, c. 3591, 34 Stat. 584 (Hepburn Act),
§ 2 515
§ 7 420
Page.
1906, June 29, c. 3592, 34 Stat. 596, § 3 ..... 575, 580
1906, June 30, c. 3912, 34 Stat. 634 ..... 493, 494
1907, Mar. 1, c. 2285, 34 Stat. 1033 53
1907, Mar. 2, c. 2564, 34 Stat. 1246 (Criminal Appeals Act) 343
1908, May 20, c. 181, 35 Stat. 169 53
1909, Feb. 15, c. 126, 35 Stat. 619 199
1909, Mar. 4, c. 298, 35 Stat. 907 494
1910, June 18, c. 309, 36 Stat. 539, § 12 470
1910, June 25, c. 431, 36 Stat. 855 244
§ 1 558
1911, Mar. 3, c. 231, 36 Stat. 1087 8
1911, Dec. 21, c. 5, 37 Stat. 46 244
1912, Aug. 20, c. 308, 37 Stat. 315 96
1913, Oct. 3, c. 16, 38 Stat. 114, § III, B (Tariff Act of 1913) 344
1913, Oct. 22, c. 32, 38 Stat. 208 ..... 290, 582
1914, Oct. 15, c. 323, 38 Stat. 730, § 16 (Clayton Act) .. 604
1915, Mar. 4, c. 143, 38 Stat. 1062 (War Appropriation Act) 142, 144
1915, Mar. 4, c. 176, 38 Stat. 1196 (Cummins Amendment) 420, 421, 422, 423
1916, Aug. 23, c. 390, 39 Stat. 532 ..... 441, 450
1916, Aug. 23, c. 399, 39 Stat. 532 ..... 21, 26
1916, Aug. 29, c. 418, 39 Stat. 619 282
1916, Sept. 6, c. 448, 39 Stat. 726 106
§ 2 ..... 625, 626, 632
§ 6 630
1916, Sept. 8, c. 463, 39 Stat. 756, § 407 453
1916, Sept. 8, c. 464, 39 Stat. 801 199

Page.
1917, Mar. 4, c. 179, 39 Stat. 1165 ..... 96, 103
§ 2 96
§ 7 97
§ 8 97
§ 10 99
1917, May 12, c. 13, 40 Stat. 75 224
1917, Sept. 24, c. 56, 40 Stat. 288, § 6 8
1917, Oct. 3, c. 63, 40 Stat. 300, § 1009 (Revenue Act) 168, 173
1917, Oct. 6, c. 105, 40 Stat. 398 (War Risk Insurance Act.)
Art. I, § 1 180
Art. IV, § 400 179
§ 401 179
§ 402 180
§ 405 179
1917, Dec. 26, 40 Stat. 1733. 282
1918, Mar. 21, c. 25, 40 Stat. 451 (Federal Control Act.) 284, 286, 322, 328
§ 1 ..... 283, 285
§ 3 ..... 281, 284, 285
§ 10 ..... 467, 470, 472
1918, May 20, c. 77, 40 Stat. 555 179
1918, Sept. 24, c. 176, 40 Stat. 965, § 2 8
1918, Oct. 23, c. 194, 40 Stat. 1015 341
1919, Feb. 24, c. 18, 40 Stat. 1057 (Revenue Act of 1918.) 246
§ 800(a), par. 1.... 248, 249
§ 800(a), par. 2.... 249, 250
§ 800(a), par. 3 ..... 246, 247, 248, 249, 250
§ 800(a), par. 4. 246, 247, 249
§ 800(a), par. 5..... 249
§ 800(a), par. 6.... 249, 250
§ 1000, (a)(1) and (c).. 453
1919, Mar. 2, c. 94, 40 Stat. 1272 (Dent Act)..... 126
1919, Mar. 3, c. 113, 40 Stat. 1316 ..... 478, 485, 486
1919, June 30, c. 4, 41 Stat. 3 § 18..... 494, 496
Page.
1919, Oct. 28, c. 85, 41 Stat. 305 (National Prohibition Act.)..... 31
Tit. II, § 23..... 26
§ 28..... 27, 31
1919, Dec. 24, c. 16, 41 Stat. 371, § 13..... 179
1920, Feb. 28, c. 91, 41 Stat. 456 (Transportation Act.) 2, 3, 4
§ 1 (21)..... 292
§ 3 (4)..... 292
§ 15 (3) (4)..... 292
§ 202 328
§ 204 ..... 281, 286
§ 206 (a)..... 566
§ 206 (d)..... 567
§ 208 (a)..... 468, 470, 472, 473, 475
§ 402 (15)..... 515, 525, 526, 527
§ 402 (18)..... 270, 272, 273, 276, 277, 278
§ 402 (19)..... 272, 273, 277, 278
§ 402 (20)..... 270, 272, 273, 277, 278, 279
§ 402 (22)..... 270, 276, 277, 278
§ 415 474
§ 416 474
§ 418 295
§ 421 295
§ 422 474
1920, Mar. 9, c. 95, 41 Stat. 525 (Suits in Admiralty Act)..... 223
1920, June 4, c. 227, 41 Stat. 759, § 24b (Army Reorganization Act)..... 156
1921, Mar. 3, c. 119, 41 Stat. 1225, § 26..... 559
1921, June 10, c. 18, 42 Stat. 25, § 311..... 122
1921, Nov. 23, c. 134, 42 Stat. 223, § 5 (Willis-Campbell Act.) 31
1921, Nov. 23, c. 136, 42 Stat. 227,
§ 250 (b) 166
§ 252 166
§ 800 (a) 251

Page.
1921, Nov. 23, c. 136, 42 Stat. 227—Continued.
§ 1324 .... 167, 169, 171, 172
§ 1324 (a) 167
1924, June 2, c. 234, 43 Stat. 253,
§ 500 (a) 251
§ 900 119
1924, June 7, c. 235, 43 Stat. 633, § (3) (h)..... 3
1925, Feb. 13, c. 229, 43 Stat. 936..... 105, 106, 153, 376, 381, 440, 458, 514, 582
§ 1 (a)..... 633, 634
§ 6 (a)..... 635
§ 13 ..... 5, 635
§ 14 ..... 105, 499
§ 128 (a)..... 576
1925, Mar. 3, c. 428, 43 Stat. 1112 223
1925, Mar. 4, c. 553, 43 Stat. 1302 179
Constitution. See Index at end of volume.
Compiled Statutes.
§ 1015 26
Revised Statutes.
§ 643 32
§ 649 ..... 353, 355
§ 688 29
§ 700 355
§ 954 460
§ 1088 153
§ 2289 ..... 545, 578
§ 2290 545
§ 3282 31
§ 3659 492
§ 3744 ..... 68, 133, 142, 143, 144
§ 4883 578
§ 4886 399
§ 4920 400
§ 4923 400
Judicial Code.
§ 24..... 244
§ 24, par. 7..... 499
§ 24, par. 20..... 8
§ 28 ..... 366, 367, 441
§ 33 ..... 21, 22, 26, 27, 28, 29, 30, 31, 32, 34, 36, 39, 42, 43, 44, 441, 450.

Page.
Judicial Code—Continued.
§ 48 499
§ 51 ..... 365, 366, 367, 499
§ 66 ..... 442, 452
§ 128 ..... 381, 458, 576
§ 142 376
§ 145 ..... 4, 283
§ 175 153
§ 177 487
§ 237 . 419, 625, 626, 632, 633
§ 238..... 110, 271, 364, 370, 410, 499
§ 238, par. 2..... 514
§ 238, par. 4..... 582
§ 240 633
§ 241 ..... 271, 381, 440, 458
§ 242. 3, 5, 164, 247, 253, 282
§ 243 ..... 3, 153
§ 250 120
§ 256 499
§ 266 410
Penal Code.
§ 35 ..... 341, 346, 347
§ 37 346
Court of Appeals Act..... 576, 578, 579
Criminal Appeals Act... 343, 514
Dent Act..... 348
Elkins Act.. 516, 519, 520, 524, 525
Federal Employers' Liability Act 614, 622
Hepburn Act..... 420, 515
Interstate Commerce Act... 265, 266, 292
§ 6 470
§ 6 (3) 470
§ 6 (7) 266
§ 13 (2) 584
§ 15 (2) 584
§ 15 (7) 470
§ 16a 584
§ 16, par. 3..... 2, 3
§ 16, par. 6..... 585
§ 17, par. (4)..... 583
Naturalization Act 578, 579
§ 3 579
§ 9 577
§ 11 577
§ 15 ..... 576, 579, 580
Transportation Act ..... 270, 273, 277, 278, 469, 473, 474, 475, 525.

(B) STATUTES OF THE STATES AND TERRITORIES.

Illinois. Page.
Laws 1915, p. 375..... 413
Iowa.
Code, 1924, § 1361 (Workmen's Compensation Law).. 613, 614, 623
Louisiana.
Constitution.
Art. X, § 1..... 371
Art. X, § 16... 370, 371
Art. XIV, § 12..... 374
§§ 7, 8... 374
Laws of 1921, Act 109, § 5 ..... 370, 372, 373
§ 1..... 370
Maryland.
Code of Public Gen. Laws, Art. 13, § 81... 533
Michigan.
Constitution, 1850..... 310
Constitution, 1908..... 308
1915 Comp. Laws, 133.. 305
1915 Comp. Laws, 209.. 306
Minnesota.
Gen. Stat. 1913, §§ 5523, 5525, 5531, 5553..... 54
Laws 1905, c. 230..... 54
Missouri.
Revised Statutes, 1855, c. 39, § 45..... 467
Revised Statutes, 1919, § 9941 ..... 467, 468
Drainage Laws of 1913, § 40 46
New Mexico.
Code of 1915, § 2814... 436
§ 2820.... 433, 436, 437
Laws of 1921, c. 195.... 433
New York.
Laws 1871, c. 365, p. 724 601
North Carolina.
Consolidated Statutes, § 1181 79
Public Laws, c. 90, § 6, sub § 7..... 77

Pennsylvania. Page.
Workmen's Compensation Act,
§ 310 ..... 537, 538, 539
§ 502 539
Act, June 14, 1923..... 410, 411, 412, 414
§ 1 408
§ 2 409
South Dakota.
Revised Code of 1919, §§ 8458, 8476..... 383
§§ 8459, 8460, 8461, 8462, 8463 384
§§ 8464, 8467, 8470, 8477. 385
§§ 8463, 8464, 8467, 8470, 8489 386
§§ 6826, 8464, 8469..... 388
Texas.
Gen. Laws 1917, p. 269. 62
Part I, § 3..... 63
(Workmen's Compensation Law of Texas.)
Washington.
Laws of 1921, c. 105, p. 308..... 92, 93
Wisconsin.
Laws of 1855, c. 210.... 316
Revised Statutes of 1921, c. 72,
§ 72.01..... 237
§ 72.02..... 237
§ 72.05..... 237
§ 72.01, cl. (3).... 238
Revised Statutes of 1925, c. 72,
§ 72.01..... 237
§ 72.02..... 237
§ 72.05..... 237
Statutes 1919, c. 64ff,
§ 1087–1 .. 236, 237, 238
§ 1087–2 ..... 236, 237
§ 1087–5 237
Laws of 1903, c. 44, § 1.. 236
Laws of 1913, c. 643, subdiv. 3..... 236

(C) TREATIES

Page.

1846, Aug. 6, 9 Stat. 871 (Treaty with the Cherokees) 479, 485, 488
1866, June 19, 14 Stat. 799 (Treaty with Cherokees) .. 491
1889, Mar. 2, c. 413, 25 Stat. 1006, § 14..... 480
Art. 4..... 480
Art. 6..... 481
(Treaty with Cherokees.)
1854, Sept. 30, 10 Stat. 1109 (Chippewa Treaty) 58
1855, Feb. 22, 10 Stat. 1165 (Chippewa Treaty) ... 58, 196

Page.

1863, Mar. 11, 12 Stat. 1249 (Chippewa Treaty) .. 197, 208
1863, Oct. 2, 13 Stat. 667 (Chippewa Treaty)..... 58
1864, May 7, 13 Stat. 693 (Chippewa Treaty) .. 197, 208
1867, Mar. 19, 16 Stat. 719 (Chippewa Treaty)... 197, 208
1913, Feb. 25, 38 Stat. 1669 ..... 537, 538
Art. 3..... 537
(Treaty with Italy.)

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1925.

UNITED STATES *v.* ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY.

UNITED STATES *v.* WABASH RAILWAY COMPANY.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 91 and 92. Argued November 16, 1925.—Decided January 18, 1926.

1. Transportation Act, 1920, amending par. 3, § 16, of the Interstate Commerce Act, provides: "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." *Held* not applicable retroactively to causes of action existing at the date of the Transportation Act. P. 3.
2. The Act of June 7, 1924, which further amended par. 3, § 16, of the Interstate Commerce Act, among other things by adding that its provisions "shall extend to and embrace cases in which the cause of action has heretofore accrued as well as cases in which the cause of action may hereafter accrue," was not intended to defeat claims on which suits duly brought were then pending, or in which judgment had already been entered. *Id.*

59 Ct. Cls. 322, affirmed.

APPEALS from judgments recovered in the Court of Claims by two railroads for transportation service rendered to the Government.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Solicitor General Mitchell* was on the briefs, for the United States.

Mr. Lawrence H. Cake, with whom *Mr. Alex. Britton* was on the brief, for appellee in No. 91.

Mr. F. Carter Pope, for appellee in No. 92.

Messrs. William R. Harr and *Charles H. Bates* filed a brief as *amici curiæ,* by special leave of Court.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These cases, which were argued together, present on similar facts the same question of law. In each the railroad had, prior to federal control, rendered to the War Department transportation service, payment for which was disallowed by the Auditor. Each company commenced suit therefor in the Court of Claims more than three years but within six years from the time when the cause of action accrued, and after the lapse of three years from the enactment of Transportation Act, 1920, February 28, 1920, c. 91, 41 Stat. 456. That Act, amending paragraph 3 of § 16 of the Interstate Commerce Act, provides:

"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."

The Government defended these suits solely on the ground that the right to sue had been lost by lapse of time. It contended that the three-year limitation ap-

plies to claims against the Government prosecuted in the Court of Claims, as well as to actions brought against other shippers in other courts; that it applies to claims which arose prior to the passage of the 1920 Act; that the three-year period began at the date when the cause of action accrued, provided there remained, at the passage of the Act, a reasonable time before the expiration of the three years within which suit could have been brought; and that, in any event, suit on such claims is barred where, as in the cases at bar, the suit is commenced more than three years after the passage of the 1920 Act. In each of these cases judgment was entered for the plaintiff. *Wabash Ry. Co.* v. *United States,* 59 Ct. Cl. 322; see also *Schaff, Receiver,* v. *United States,* 59 Ct. Cl. 318. An appeal to this Court, under §§ 242 and 243 of the Judicial Code, was taken in each case before June 7, 1924.

That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this Court to statutes governing procedure, *United States Fidelity and Guaranty Co.* v. *United States,* 209 U. S. 306; and specifically to the limitation of actions under another section of Transportation Act, 1920. *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.,* 266 U. S. 435. There is nothing in the language of paragraph 3 of § 16, or in any other provision of the Act, or in its history, which requires us to hold that the three-year limitation applies, under any circumstances, to causes of action existing at the date of the Act.

The Government contends that, even if the suits were not barred by Transportation Act, 1920, they were barred by the Act of June 7, 1924, c. 235, 43 Stat. 633, which amended paragraph 3, among other things, by making the following addition thereto:

"(h) The provisions of this paragraph (3) shall extend to and embrace cases in which the cause of action has heretofore accrued as well as cases in which the cause of action may hereafter accrue. . . ."

The Senate and House Reports accompanying the bill (S. 2704) state that the purpose of the amendment was to revive claims barred under the existing law as interpreted in *Kansas City Ry. Co.* v. *Wolf*, 261 U. S. 133. It is not to be assumed that Congress intended by that amendment to defeat claims on which suits duly brought were then pending, or on which, as in the cases at bar, judgment had already been entered below. Compare *Herrick* v. *Boquillas Land & Cattle Co.*, 200 U. S. 96.

As we hold that paragraph 3 does not apply to any cause of action existing at the date of the passage of Transportation Act, 1920, we have no occasion to consider whether, under any circumstances, it is applicable to claims against the Government brought in the Court of Claims pursuant to § 145, Judicial Code. See *Western Pacific R. R. Co.* v. *United States*, 59 Ct. Cl. 67, 81.

Affirmed.

H. E. CROOK COMPANY, INC. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 122. Argued January 12, 1926.—Decided January 25, 1926.

Where a contract for furnishing and installing heating plants in buildings to be erected for the Government by other contractors showed on its face that progress under it would be dependent on the progress of the buildings, and, though strictly limiting the time for the contractor's performance, made no reference to delays by the Government save as grounds for time extensions to the contractor; and the contractor therein agreed to accept the contract price in full satisfaction for all work done under the contract, reduced by damages deducted for its delays and increased or reduced by the price of any changes ordered by the Government, and stipulated that the contract price should cover all expenses of any

nature connected with the work to be done; *held,* that the Government was not bound to make good losses suffered by the contractor in performing the contract, due to delays in completing the buildings.

59 Ct. Cls. 593, affirmed.

APPEAL from a judgment of the Court of Claims denying a claim for damages due to delay in enabling the claimant to perform its contract.

Messrs. G. M. Brady and *Bynum E. Hinton,* with whom *Mr. Julian C. Hammack* was on the brief, for appellant.

Assistant Attorney General Galloway, with whom *Solicitor General Mitchell* and *Mr. Joseph Henry Cohen,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims, taken under § 242 of the Judicial Code before that section was repealed by the Act of February 13, 1925, c. 229, § 13; 43 Stat. 936, 941. The claim is for damages due to delay in enabling the plaintiff to perform a contract. The Court of Claims held that the plaintiff waived any claim that it might have had by going on with the work without protest and without taking any steps to protect itself. 59 Ct. Cl. 593. The Government contends that by the terms of the contract it was not bound to pay damages for delay.

The contract was that the plaintiff should furnish and install heating systems 'one in the Foundry Building, and one in the Machine Shop at the Navy Yard, Norfolk, Virginia.' It allowed two hundred days from the date of delivering a copy to the plaintiff for the work to be completed. A copy was delivered on August 31, 1917,

making March 19, 1918, the day for completion. But it was obvious on the face of the contract that this date was provisional. The Government reserved the right to make changes and to interrupt the stipulated continuity of the work. *Wells Brothers Co.* v. *United States,* 254 U. S. 83, 86. The contract showed that the specific buildings referred to were in process of construction by contractors who might not keep up to time. 'The approximate contract date of completion for the foundry' is stated to be March 17, 1918, and that for the machine shop, February 15, 1918. The same dates were fixed for completing the heating systems, but the heating apparatus had to conform to the structure, of course, so that if the general contractors were behindhand the heating also would be delayed. They were behindhand nearly a year. When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied.

The Government did fix the time very strictly for the contractor. It is contemplated that the contractor may be unknown, and he must satisfy the Government of his having the capital, experience, and ability to do the work. Much care is taken therefore to keep him up to the mark. Liquidated damages are fixed for his delays. But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do. Delays by the building contractors were unavoidable from the point of view of both parties to the contract in suit. The plaintiff agreed to accept in full satisfaction for all work done under the

contract the contract price, reduced by damages deducted for his delays and increased or reduced by the price of changes, as fixed by the Chief of the Bureau of Yards and Works. Nothing more is allowed for changes, as to which the Government is master. It would be strange if it were bound for more in respect of matters presumably beyond its control. The contract price, it is said in another clause, shall cover all expenses of every nature connected with the work to be done. Liability was excluded expressly for utilities that the Government promised to supply. We are of opinion that the failure to exclude the present claim was due to the fact that the whole frame of the contract was understood to shut it out, although in some cases the Government's lawyers have been more careful. *Wood* v. *United States,* 258 U. S. 120. The plaintiff's time was extended and it was paid the full contract price. In our opinion it is entitled to nothing more.

Judgment affirmed.

MANDELBAUM *v.* UNITED STATES.

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

No. 139. Argued January 15, 1926.—Decided January 25, 1926.

Unregistered War Savings Certificates, issued under the Acts of September 24, 1917, and September 24, 1918, are not payable if lost, even though an indemnity bond be tendered. P. 9.

298 Fed. 295, affirmed.

APPEAL from a judgment of the Circuit Court of Appeals affirming the District Court in dismissing the bill in a suit to recover on lost war savings certificates with stamps attached.

Mr. Howard L. Bump, with whom *Mr. James C. Hume* was on the brief, for appellant.

Assistant Attorney General Letts, with whom *Solicitor General Mitchell* and *Mr. Harvey B. Cox,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought in the District Court under its jurisdiction concurrent with the Court of Claims (Judicial Code, § 24, Twentieth; Act of March 3, 1911, c. 231; 36 Stat. 1087,) to recover on War Saving Certificates with stamps attached, issued under the Acts of September 24, 1917, c. 56, § 6; 40 Stat. 288, 291; and of September 24, 1918, c. 176, § 2, 40 Stat. 965, 966. The certificates fell due on January 1, 1923, but were stolen in the preceding year. They bore the name of the plaintiff or of different members of his family who had transferred their claim to him, but they were not registered. The plaintiff offers to give a sufficient bond of indemnity. The bill was dismissed by the District Court and the decree was affirmed by the Circuit Court of Appeals on the ground that the right to recover was excluded by the certificates on their face. 298 Fed. Rep. 295.

The certificates were sheets with blanks for the affixing of stamps issued by the Government for the purpose, face value five dollars each. They were not valid without one stamp affixed, and there were blanks for twenty in all, which could be added from time to time if and when desired. The certificate declared that, subject to the conditions thereon, the owner named on the back would be entitled on January 1, 1923, to receive the amount indicated by the stamps. Among the conditions are provisions for registration and notice that unless registered the United States will not be liable for payment to one not the owner; that upon payment the certificate must be surrendered and a receipt signed by the

owner; and that upon satisfactory evidence of the loss of a registered certificate the owner shall be entitled to payment of the registered amount. We agree with the Circuit Court of Appeals that these conditions very plainly imported what on January 21, 1918, was embodied by the Secretary of the Treasury in an authorized regulation, that unregistered certificates would not be paid if lost. There was good reason for the condition. The stamps are undistinguishable one from another. Therefore they could be detached and put upon another certificate, and it would be impossible for the Government to know whether the stolen stamps that gave the value to the certificate had been paid or not. The offer of indemnity was illusory, and the case is not like that of a lost bond. The condition limited the obligation of the Government to pay and until it is complied with the plaintiff must put up with his loss.

Decree affirmed.

MARYLAND *v.* SOPER, JUDGE. (No. 1)

PETITION FOR A WRIT OF MANDAMUS.

No. 23, Original. Argued December 7, 1925.—Decided February 1, 1926.

1. The remedy of mandamus is grantable by this Court, in its sound discretion, on petition of a State to determine the legality of a removal of a criminal case from a state to a federal court, under Jud. Code § 33. P. 28.
2. The propriety of the writ in such cases results from the exceptional character of the proceeding sought to be reviewed and the absence of any other provision for reviewing it; it does not depend on lack of jurisdiction or abuse of discretion in the District Court. *Id.*
3. Section 33 of the Judicial Code, which authorizes removal to the District Court of any criminal prosecution commenced in any court of a State against "any officer appointed under or acting under or by authority of any revenue law of the United States,

or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, . . . ", applies to prohibition agents (and their chauffeur) engaged in a quest for an illicit still, under commissions from the Commissioner of Internal Revenue empowering them to enforce the prohibition acts and internal revenue acts relating to manufacture, sale, taxation, etc., of intoxicating liquors. So *held* in view of § 5 of the Act of November 23, 1921, (amending the Prohibition Act,) which kept in force earlier laws and penalties regarding manufacture, etc., of intoxicating liquors; of Rev. Stats. § 3282, forbidding and punishing unauthorized distilling, etc.; and of § 28, Title II, of the Prohibition Act, extending to officers enforcing that Act the "protection" conferred by law for the enforcement of then existing laws relating to the manufacture, etc., of intoxicating liquors. P. 30.

4. In authorizing removal of a prosecution commenced "on account of" any act done by the defendant, under color of his office, etc., § 33 of the Judicial Code, *supra,* does not mean that the very act charged, e. g., a homicide, must have been done by him; it is enough if the prosecution is based on, or arises out of, acts which he did, or his presence at the place, under authority of federal law, in the discharge of his official duty. P. 32.
5. In his petition to remove a prosecution, under § 33, *supra,* the defendant must set forth all the circumstances known to him out of which the prosecution arose, candidly, specifically and positively explaining his relation to the matter and showing that it was confined to his acts as such officer. P. 34.
6. The petition must aptly plead the case upon which the defendant relies so that the court may be fully advised and the State may take issue by a motion to remand. *Id.*
7. A removal petition setting forth acts done by the petitioners in performance of their duty as prohibition officers and alleging that their indictment in a state court is a criminal prosecution on account of acts alleged to have been done by them at a time when they were engaged in the performance of their duties as such officers as so set forth, is insufficient. P. 35.

Mandamus awarded.

PETITION by the State of Maryland for a writ of mandamus directing the United States District Judge of the District of Maryland to remand to the proper state court an indictment for murder, which had been removed

to the District Court under the provisions of § 33 of the Judicial Code. See also the next two cases.

Messrs. Thos. H. Robinson, Attorney General of Maryland, and *Herbert Levy,* Assistant Attorney General of Maryland, for petitioner.

Mandamus lies from this Court to compel a federal district court to remand a criminal prosecution to the state court where it is apparent from the record that the federal court has no jurisdiction whatever of the case.

It has been broadly asserted that the inferior federal tribunals have the power to decide whether or not they have jurisdiction to try a civil cause properly brought before them, and that such decisions are not open to collateral attack. *Ex parte Hoard,* 105 U. S. 578; *Re Pollitz,* 206 U. S. 323; *Ex parte Nebraska,* 209 U. S. 436; *Ex parte Gruetter,* 217 U. S. 586; *Re Harding,* 219 U. S. 363; *Ex parte Roe,* 234 U. S. 70; *Ex parte Park Square Automobile Station,* 244 U. S. 412; *Ex parte Riddle,* 255 U. S. 450. In the *Harding Case,* all of the cases upon the subject were discussed, and the Court announced this general rule, for civil cases. In doing so, it disapproved and qualified the following: *Ex parte Wisner,* 203 U. S. 449; *Re Moore,* 209 U. S. 490; *Re Winn,* 213 U. S. 458.

In the *Harding Case* an exception to the general rule was recognized as to the power of this Court to utilize the writ of mandamus to remand a criminal prosecution "which, if wrong was committed, no power otherwise to redress than by mandamus existed." This exception has been recognized also in *Virginia* v. *Rives,* 100 U. S. 313; *Virginia* v. *Paul,* 148 U. S. 107; *Kentucky* v. *Powers,* 201 U. S. 1.

Petitioner has no remedy by appeal from the order of the District Court of the United States refusing to remand the case to the state court, for it is well established that such a review can be had only after final judgment.

McLish v. *Roff,* 141 U. S. 661. Should the final judgment be an acquittal, in whole or in part, the State could not have a writ of error to review it. *United States* v. *Sanges,* 144 U. S. 310. Unless this Court entertains the petition for mandamus, the State is without any redress.

Removal acts are strictly construed. *Blake* v. *McKim,* 103 U. S. 336; *Sewing Mach. Co's. Case,* 18 Wall. 553. No case is subject to removal, which is not by its facts brought completely within the defined class.

Section 33 of the Judicial Code was passed in consequence of an attempt by one of the States to make penal the collection by United States officers of duties under the tariff laws. *Tennessee* v. *Davis,* 100 U. S. 257; *People's United States Bank* v. *Goodwin,* 162 Fed. 937. Its purpose is to protect the federal officers in the discharge of their official duties, and those who are employed to act under them; but, further than providing this necessary protection to the administration of its revenues, the federal Government is not interested. The statute must be interpreted with reference to its manifest spirit and general purpose, and a word or phrase should not be extended beyond its proper relation to give jurisdiction. *Johnson* v. *Wells Fargo & Co.,* 98 Fed. 3; *Virginia* v. *DeHart,* 119 Fed. 626.

The jurisdiction of the federal court under removal acts depends upon the statements made in the petition for removal, verified by the oath of the petitioner. *Virginia* v. *Paul,* 148 U. S. 107; *Salem & L. R. Co.* v. *Boston & L. R. Co.,* 21 Fed. 228.

Federal prohibition agents acting under the National Prohibition Law are not revenue officers and that law is not a revenue law. *Lipke* v. *Lederer,* 259 U. S. 557. Whether officers enforcing the prohibition law are entitled to remove prosecutions against them in state courts, under § 33 of the Judicial Code, has never been passed upon by this Court. The decisions of the lower federal

courts are not in accord. *Oregon* v. *Wood,* 268 Fed. 975; *Morse* v. *Higgins,* 273 Fed. 830; *Smith* v. *Gillian,* 282 Fed. 628; *Commonwealth* v. *Bogan,* 285 Fed. 668; *United States* v. *Commonwealth of Pennsylvania,* 293 Fed. 931; *Wolkin* v. *Gibney,* 3 Fed. (2d) 960. Section 28, Title II, of the National Prohibition Act, does not enlarge the scope of § 33 of the Judicial Code, so as to confer the right of removal upon federal prohibition agents. *Smith* v. *Gillian, supra.*

The facts, as set out in the amended petition, make it abundantly clear that the duties which these petitioners were alleged to have been performing at the time of the happenings which form the basis of the indictment were being performed in their capacity as federal prohibition officers and not as general revenue officers enforcing "other revenue statutes."

The following facts are pertinent: The petitioners deny they brought about the death of Wenger, or had any knowledge of who was responsible therefor, or how he, Wenger, came to his death. It is nowhere alleged that the deceased was engaged in the violation of the National Prohibition Law or any other revenue law at the time of his decease; or that the agents suspected Wenger of any such violation; or that Wenger was connected in any way with any investigation in which the agents allege they were engaged; or that the homicide was the result of any act upon the part of the agents to protect themselves or each other in the discharge of any duty they were performing. The facts alleged do not show what act done by them under color of their office or any revenue law can be said to have resulted in the prosecution—not the investigation they were conducting; nor any act of self-protection or for the protection of each other; nor any act in attempting to apprehend the supposed violators of the National Prohibition Law; nor any act in returning to Baltimore to report their investigation; nor any act in

attempting to obtain medical attention for the deceased. If the prosecution was not on account of any act done under color of their office or under color of any revenue law, then it should not have been removed, because it obviously did not arise on account of any right, title or authority claimed by them under any revenue law, and was not commenced against any person holding property or estate by title derived from any revenue officer, and did not affect the validity of any revenue law—the other two classes of prosecutions to which the statute is applicable.

To permit of removal, the prosecution must have arisen out of an act done under the color of their office or under the color of a revenue law, unless the statute is construed to mean that the right of removal is accorded to every officer of the kind merely by virtue of his office, irrespective of the nature of his act or of the circumstances under which it was committed. Certainly a mere denial of guilt does not create a presumption that the acts charged were done under color of his office.

It may be asserted that the construction contended for by the State would require revenue officers to admit their guilt or to establish their legal justification for the act done as a condition precedent to the exercise of their right of removal. That this argument is fallacious is apparent from a comparison of § 33 of the Judicial Code with Revised Statutes, § 753. The latter provides that the federal courts shall have the power to release by *habeas corpus,* persons "in custody for an act done or omitted in pursuance of a law of the United States." To warrant the exercise of this jurisdiction, this Court has held that it must be established: (1) That, under the circumstances disclosed, the petitioner for *habeas corpus* was acting in pursuance of the law of the United States and within the scope of his authority as a federal officer; (2) that his confinement will injure and seriously affect the authority and operations of the National Govern-

ment; and (3) that the case was one of extreme urgency where the federal court having heard the facts believes that a proper exercise of the discretion vested in it demands the discharge of the prisoner. *Drury* v. *Lewis,* 200 U. S. 1. See also: *Pales* v. *Paoli,* 5 Fed. (2d) 280; *United States* v. *Weeden,* 24 Fed. Cas. 738; *In re Marsh,* 51 Fed. 277; *Castle* v. *Lewis,* 254 Fed. 917; *Cunningham* v. *Neagle,* 135 U. S. 1. It follows that under Rev. Stats. § 753, petitioner must establish, *inter alia,* his innocence of the crime charged as a condition of his release. The distinction between the two provisions of the law lies in the words "*under color* of his office or of any such law." The phrase, "under color" implies that, for removal, the officer must establish *prima facie,* that is to say, he must set up in his petition, such facts as show affirmatively that the act upon which the prosecution is grounded was done in the probable pursuance of his duties or was within the apparent scope of his authority. When he seeks his release by *habeas corpus* he must go further; he must show that the act was actually within the scope of his authority. A review of the cases arising under § 33 of the Judicial Code shows that, in every instance where the removal was granted, some specific act under color of his office or under color of a revenue law, was set forth, either expressly or impliedly, in the petition for removal. There was a statement of the act done by the officer, resulting in his prosecution, which showed *prima facie* that the act was done under color of his office. *Tennessee* v. *Davis,* 100 U. S. 257; *Davis* v. *South Carolina,* 107 U. S. 597; *Illinois* v. *Fletcher,* 22 Fed. 776; *Salem & L. R. Co.* v. *Boston & L. R. Co.,* 21 Fed. Cas. 228.

A just interpretation does not authorize a writ of certiorari upon a statement of the mere opinion of the petitioner and his counsel that the act was done under color of the office of an agent under the revenue laws of the United States. Facts, not mere opinions or conclusions of

law, should be set forth, so that it may appear whether in judgment of law such a case exists as enables the petitioner to call for removal. *Virginia* v. *Dehart,* 119 Fed. 626; *Virginia* v. *Felts,* 133 Fed. 85; *People's U. S. Bank* v. *Goodwin,* 162 Fed. 937. *Alabama* v. *Peak,* 252 Fed. 306 is unsound. *Oregon* v. *Wood,* 268 Fed. 975; *Smith* v. *Gillian,* 282 Fed. 628; *Commonwealth of Massachusetts* v. *Bogan,* 285 Fed. 668.

The removal statute applies only where the act which is the basis of the action or prosecution has some rational connection with official duties under a "revenue law," and in some way affects the revenue of the Government. In this case, the amended petition, which sets forth in detail the facts upon which the petitioners rely, does not meet the jurisdictional requirements for the removal of the prosecution, even though this Court may be of the opinion that in a proper case the removal acts are applicable to officers such as those described in the petition.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* was on the brief, for respondent.

The five defendants stand on an equal footing, so far as removal is concerned. *Davis* v. *South Carolina,* 107 U. S. 597. They are within the statutory terms: "officers acting by authority of any revenue law of the United States," or "persons acting under or by authority of any such officer." Their commissions empowered them to enforce not merely the National Prohibition Act but also the internal revenue laws which dealt with intoxicating liquor. Sections of the Revised Statutes which deal with the subject of illicit distilling are still presumably in force, having been revived by § 5 of the Act of November 23, 1921, c. 134, 42 Stat. 222. *United States* v. *Stafoff,* 260 U. S. 477. And their provisions were clearly applicable to the circumstances disclosed by this case. The defendants searching for an illicit still were not acting to enforce the

National Prohibition Act alone, but equally to enforce the provisions of the older revenue laws. *United States* v. *Page,* 277 Fed. 459. Their power to make searches and seizures was derived not only from the National Prohibition Act but also from Rev. Stats. 3166, 3276, 3278, and 3332. Cf. *Steele* v. *United States (No. 2),* 267 U. S. 505.

The National Prohibition Act may or may not itself be a "revenue law" (*Lipke* v. *Lederer,* 259, U. S. 557); and government officers relying on its provisions alone may or may not be "revenue officers" in the strictest technical sense. There are provisions in the Prohibition Act clearly designed for the raising of revenue. The older provisions of the Revised Statutes, at any rate, are revenue measures under which taxes may still be imposed. Congress may tax liquors, even though their production is forbidden. *United States* v. *Yuginovich,* 256 U. S. 450. By the amendatory Act of 1921, (Nov. 23, 1921, c. 134, 42 Stat. 222) Congress has clearly manifested its intention to do so. *United States* v. *Stafoff,* 260 U. S. 477. A commission as a "revenue officer" is not a necessary requirement for removal of a prosecution. *Davis* v. *South Carolina,* 107 U. S. 597; *United States* v. *Page,* 277 Fed. 459. Even if they are not themselves "revenue officers," the Commissioner of Internal Revenue is such an officer; and the defendants were clearly "persons acting under or by authority of" the Commissioner. Prosecutions against prohibition agents are properly removable, as well as prosecutions against "revenue officers".

The "protection" extended to prohibition agents by § 28 includes the right to seek removal of prosecutions from the state courts. *United States* v. *Pennsylvania,* 293 Fed. 931; *Massachusetts* v. *Bogan,* 285 Fed. 668; *Morse* v. *Higgins,* 273 Fed. 830; *Oregon* v. *Wood,* 268 Fed. 975. *Smith* v. *Gillian,* 282 Fed. 628, and *Wolkin* v. *Gibney,* 3 Fed. (2d) 960, *contra.* Protection implies the

right to conduct one's defense in a court where that defense can most properly be made. *Massachusetts* v. *Bogan,* 285 Fed. 668.

The removal provisions of § 33 of the Judicial Code are the lineal descendants of § 3 of the Force Act of 1833, directed against Nullification in South Carolina. Act of March 2, 1883, c. 57, 4 Stat. 632. See the President's message on that occasion. Richardson's Messages and Papers of the Presidents, vol. II, p. 610; Debates in Congress, vol. 9, part 1, p. 329. The removal provisions were designed as a measure of protection to the agents of the United States. *Davis* v. *South Carolina,* 107 U. S. 597; *Tennessee* v. *Davis,* 100 U. S. 257; *The Mayor* v. *Cooper,* 6 Wall. 247; *Massachusetts* v. *Bogan,* 285 Fed. 668; *In re Duane,* 261 Fed. 242; *Peyton* v. *Bliss,* Fed. Cas. No. 11055; *Findley* v. *Satterfield,* Fed. Cas. No. 4792; *State* v. *Hoskins,* 77 N. Car. 530.

The prosecution was removable nothwithstanding the fact that the defendants did not admit that they had any part in the killing. In so far as *Illinois* v. *Fletcher,* 22 Fed. 776, holds otherwise, it has twice been disapproved in subsequent decisions. *Alabama* v. *Peak,* 252 Fed. 306; *Oregon* v. *Wood,* 268 Fed. 975. The petition need only set forth that at the time of the alleged crime the officer was acting under color of his office or under authority of the law; and it must allege that the prosecution is for acts alleged to have been done in the performance of his duty. It is not necessary for him to disclose before trial his complete defense to the indictment, nor to adduce full evidence showing justification of his official acts. It is enough, in the words of the statute, to show that the prosecution arises on account of any act done under color of his office or of any such law. The phrase "color of office" covers a claim which may later turn out to be groundless, as well as a claim which full investigation shows to have been well founded. Indeed, the former

meaning is probably the more usual one. Bouvier, L. D., s. v. " Color of Office "; *Virginia v. De Hart,* 119 Fed. 626; *Griffiths* v. *Hardenbergh,* 41 N. Y. 464; *Wilson* v. *Fowler,* 88 Md. 601; *McCain* v. *Des Moines,* 174 U. S. 168. The statute requires only a fair showing that the officer was acting at the time in the probable course of his duty. *Tennessee* v. *Davis,* 100 U. S. 257.

The decision of the District Court granting the petition for removal, and denying the motion to remand, was an exercise of lawful judicial discretion, and can not be controlled by mandamus. *United States* v. *Lawrence, Judge,* 3 Dall. 42; *Ex parte Bradstreet,* 8 Pet. 588. Cf. *Ex parte Taylor,* 14 How. 2; *Ex parte Secombe,* 19 How. 9; *Ex parte Newman,* 14 Wall. 152; *Ex parte Cutting,* 94 U. S. 14; High, Extraordinary Legal Remedies (3d. ed.), § 149; *In re Rice,* 155 U. S. 396; *Ex parte Roe,* 234 U. S. 70; *Ex parte Slater,* 246 U. S. 128; *Ex parte Chicago, Rock Island and Pacific Railway,* 255 U. S. 273; *Ex parte Hoard,* 105 U. S. 578; *Ex parte Harding,* 219 U. S. 363.

An exception may perhaps be recognized with respect to the removal of criminal causes. And in three cases this Court has granted mandamus to compel the remand of criminal cases wrongfully removed from the state courts. *Virginia* v. *Rives,* 100 U. S. 313; *Virginia* v. *Paul,* 148 U. S. 107; *Kentucky* v. *Powers,* 201 U. S. 1. In each of these cases the petition for removal upon its face clearly showed that no grounds for removal existed. The record in each case demonstrated the lack of jurisdiction of the federal court. On the other hand, where the jurisdiction of the lower court is doubtful, the remedy by mandamus will be refused. *Ex parte Muir,* 254 U. S. 522.

In *Virginia* v. *Rives,* 100 U. S. 313, this Court held that the protection afforded by Rev. Stats. § 641 extended only to cases where there had been a denial of equal rights by the law of the State. Denial of equal rights by the wrongful practice of state officials, (unauthorized by law,)

furnished no ground for removal. The petition of the accused negroes, therefore, on its face failed to disclose any possible ground for removal, and the Circuit Court had no possible ground for assuming jurisdiction. *Kentucky* v. *Powers,* 139 Fed. 452 was very similar.

In *Virginia* v. *Paul,* 148 U. S. 107, is the only case where this Court has granted mandamus to remand a prosecution against a federal officer. It went upon the ground that no prosecution had been " commenced " at the time removal was sought. A prosecution for murder in Virginia was held to be " commenced," only by the finding of an indictment, and not by the issuance of a warrant of arrest. Until the indictment is found, there is no " prosecution " to remove. The Circuit Court was therefore without any jurisdiction to order removal upon the petition filed in that case. Not one of those decisions turned upon the sufficiency of allegations as to the official capacity of the accused, or as to the fact that the indictment was for a crime committed in the course of his duty.

In the case at bar it is submitted that the District Court had ample facts before it upon which to base its assumption of jurisdiction. Upon the amended petition for removal and the motion by the State to quash and remand, the court was called upon to decide mixed questions of law and fact. It is submitted that the decision of the District Court was final. *Tennessee* v. *Davis,* 100 U. S. 257; *Virginia* v. *Felts,* 133 Fed. 85; *Virginia* v. *De Hart,* 119 Fed. 626. If jurisdiction is clear, or even if jurisdiction is doubtful, mandamus will not lie. *In re Cooper,* 143 U. S. 472; *Ex parte Muir,* 254 U. S. 522.

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

This is a petition by the State of Maryland for a writ of mandamus against Morris A. Soper, the United States District Judge for Maryland, directing him to remand an indictment for murder, found in the Circuit Court for

Harford County, Maryland, against four prohibition agents and their chauffeur, which was removed to the United States District Court under § 33 of the Judicial Code, as amended August 23, 1916, 39 Stat. 532, c. 399. The text of the amended section in so far as it is material here is set out in the margin.*

The indictment, found February 10, 1925, charged as follows:

" The jurors of the State of Maryland, for the body of Harford County, do on their oath present that Wilton L. Stevens, John M. Barton, Robert D. Ford, E. Franklin Ely, and William Trabing, late of Harford County aforesaid, on the nineteenth day of November, in the year of our Lord nineteen hundred and twenty-four, at the County aforesaid, feloniously, wilfully, and of their deliberately premeditated malice aforethought did kill and murder Lawrence Wenger; contrary to the form of the Act of Assembly in such case made and provided; and against the peace, government, and dignity of the State."

---

* " Sec. 33. That when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner."

The defendants were arrested, and on February 11, 1925, filed a petition in the United States District Court for the District of Maryland, in which they averred that they were Federal prohibition agents, except Trabing, who was their chauffeur, and was assisting them and was acting under the authority of the Prohibition Director, and that the act or acts done by Trabing, as chauffeur and helper, as well as by the other defendants, at the time when they were alleged to have been guilty of the murder of Lawrence Wenger, which charge they all denied, were done in the discharge of their official duties as prohibition agents, and as officers of the internal revenue in the discharge of their duty. Thereupon an order of removal, together with a writ of certiorari, and *habeas corpus cum causa,* pursuant to § 33, was made by Judge Soper of the District Court. On March 12th, the State of Maryland, by its Attorney General and the State's Attorney for Harford County, appeared specially and made a motion to quash the writ and rescind the order. On the 17th of May, the cause came on for hearing on the motion to quash, and the defendants having applied for leave of court to amend the petition, it was granted, and an amended petition was filed. After setting out the indictment, the third, fourth, and fifth paragraphs of the amended petition were as follows:

"3. That the acts alleged to have been done by the petitioner William Trabing are alleged to have been done at a time when he was engaged in the discharge of his duties while acting under and by authority of Federal Prohibition Director Edmund Budnitz and Federal Prohibition Officers Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Franklin Ely, as aforesaid, while the said officers were engaged in the discharge of their official duties as prohibition officers in making and attempting to make an investigation concerning a violation

of the National Prohibition Act and other Internal Revenue Laws and while reporting and preparing to report the results of said investigation and in protecting himself and the said officers of the Internal Revenue in the discharge of his and their duty as set out in Paragraph 4 below.

"4. That the acts alleged to have been done by the petitioners Robert D. Ford, John M. Barton, Wilton L. Stevens, and E. Franklin Ely, are alleged to have been done at a time when they were engaged in the discharge of their official duties as Federal Prohibition Officers, and in making and attempting to make an investigation concerning a violation of the National Prohibition Act and other Internal Revenue Laws, and in reporting the results of said investigation, and in protecting themselves in the discharge of their duty as follows:

"That on November nineteenth, nineteen hundred and twenty-four, your petitioners were directed by Maryland Federal Prohibition Director Edmund Budnitz to investigate the alleged unlawful distillation of intoxicating liquor on a farm known as the Harry Carver farm situated approximately three miles from the village of Madonna, about twelve miles northwest from Bel Air, Maryland, which said property was then unoccupied. Your petitioners reached the said farm premises shortly after midday on November nineteenth, nineteen hundred and twenty-four, and discovered there in a secluded wooded valley and swamp materials for an illicit distilling operation, to wit, nine empty mash boxes, three fifty-gallon metal drums, a fifty-gallon condenser, about one thousand pounds of rye meal in bags, a lighted fire, and men's working clothes. Your petitioners thereupon concealed themselves in woods and shrubbery nearby the still site and shortly thereafter became aware of the approach of a number of men bringing with them a still. Your petitioners thereupon made their presence known to the men who were approaching, and the men immediately dropped

the still and fled; and though your petitioners pursued them across the fields, no one of the fleeing men was overtaken or arrested. Thereupon your petitioners returned to the still site, destroyed the materials before mentioned which constituted the unlawful distilling plant, and started to return to their car which had been left some distance from the still site, for the purpose of returning to Baltimore to report to the office of the Maryland Federal Prohibition Director concerning the results of their investigation, when they discovered a man, whom they afterwards learned to be one Lawrence Wenger, mortally wounded and lying beside the path along which they were walking, some 400 or 500 yards from the still site and in a direction opposite to that from which the unknown men had approached and towards which they fled. Whereupon your petitioners carried the wounded man to their car and took him to Jarrettsville, Maryland, for medical treatment, but finding none there available, proceeded with all speed to Bel Air, where they sought out in turn Doctors Richardson, Sappington and Archer, without success, and finally placed the said Lawrence Wenger in charge of Doctor Van Bibber, who pronounced him dead. Your petitioners then, acting under the advice of the said Doctor Van Bibber, removed the body of the said Lawrence Wenger to the undertaking establishment of Dean and Foster in Bel Air. Your petitioners then proceeded to the State's Attorney's office in Bel Air and related the facts aforesaid to the State's Attorney; whereupon, on being informed by them that your petitioners Robert D. Ford, John M. Barton, Wilton L. Stevens, and E. Franklin Ely were prohibition officers and that your petitioner William Trabing was employed by the Federal Prohibition Director as their chauffeur, they were placed under arrest by the sheriff of Harford County at the instance of the State's Attorney and were confined in the Harford County jail until the following morning, Novem-

ber twentieth, nineteen hundred and twenty-four. On the morning of November twentieth, nineteen hundred and twenty-four, your petitioners were taken by the Sheriff and State's Attorney, in company with a number of men who that afternoon served upon the coroner's jury mentioned in the indictment, and in company with two Baltimore city police headquarters detectives, to the scene of their investigation of the previous day. They related the facts concerning their investigation of the unlawful distilling operation and their finding of the said Lawrence Wenger on November nineteenth, and then and there went over the scene of the said occurrences, relating freely and without reservation the events which took place November nineteenth, in accordance with their duty as investigating and reporting officers of the Federal Government and in compliance with their duties as Federal Prohibition Officers. Likewise on the afternoon of November twentieth your petitioners were called before the coroner's inquest heretofore described in the indictment, and freely and without reservation in accordance with their duty as investigating and reporting officers of the Federal Government and acting under the direction of the Maryland Federal Prohibition Director, related the facts aforementioned. And thereupon they were again placed in the Harford County jail and held for action of the Harford County Grand Jury until their release on bail upon the evening of November twentieth, nineteen hundred and twenty-four, at the instance of the United States Attorney for the District of Maryland acting on their behalf.

" 5. That the said criminal prosecution was commenced in the manner following:

"A presentment against your petitioners was returned in the Circuit Court for Harford County, February ninth, nineteen hundred and twenty-five, following which presentment the State of Maryland, by the State's Attorney

for Harford County, prosecuted and sued forth out of the Circuit Court for Harford County a writ of the State of Maryland of *Capias Ad Respondendum* against your petitioners, to which there was no return by the Sheriff of Harford County, whereupon the indictment heretofore set forth was returned.

"The said indictment is now pending in the Circuit Court for Harford County and is a criminal prosecution on account of acts alleged to have been done by your petitioners at a time when they were engaged in the performance of their duties as Federal Prohibition Officers and chauffeur for Federal Prohibition Officers as set forth in the aforegoing paragraphs.

"*Wherefore,* your petitioners pray that the said suit may be removed from the Circuit Court for Harford County, aforesaid, to this Honorable Court, and that writs of certiorari and habeas corpus *cum causa* may issue for that purpose pursuant to the statute of the United States in such case made and provided. (U. S. Compiled Statutes, Sec. 1015, being Judicial Code, Sec. 33, as amended Act August 23, 1916, c. 399; Prohibition Act, Title II, Section 23.)"

A motion to quash the amended petition, April 11, 1925, was based on the ground, among others, that the allegations of the amended petition did not disclose a state of facts entitling the defendants to have the writ issue, or to have the charge against them removed. On May 5, 1925, Judge Soper denied the motion to quash, and directed that the order of court removing the indictment be ratified and confirmed. On the same day, the following stipulation was entered into by the parties:

"It is stipulated by and between the parties hereto that Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Franklin Ely, during the month of November, in the year 1924, and prior to said time, and at the time of the matters and facts charged in the indictment in the

Circuit Court for Harford County, were Federal Prohibition Officers, holding a commission under the Commissioner of Internal Revenue, and countersigned by the Federal Prohibition Commissioner, in the form following, that is to say:

'This certifies that.....is hereby, employed as a Federal Prohibition Officer to act under the authority of and to enforce the National Prohibition Act and Acts supplemental thereto and all Internal Revenue Laws, relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors, and he is hereby authorized to execute and perform all the duties delegated to such officers by law.'

"And that William Trabing was, at the time of the acts alleged in the indictment in the Circuit Court for Harford County, a chauffeur of the Reliable Transfer Company, engaged and employed by Edmund Budnitz, Federal Prohibition Director of the State of Maryland, in the capacity of chauffeur for the Prohibition Agents above named."

The State of Maryland applied to this Court for leave to file its petition for mandamus, in which it set forth fully the facts as above stated, including, as exhibits, the petition for removal, the amended petition for removal, its motion to quash, the stipulation, and the orders of the District Court. This Court, granting leave, issued a rule against Judge Soper to show cause why the writ of mandamus should not issue in accordance with the prayer of the State.

Judge Soper, in his answer to the rule, recited the facts of the record as already given, said that the District Court was of opinion that the petitioners were entitled to removal under § 33 of the Code as revenue officers, or, if not as revenue officers, as agents of the Commissioner by virtue of § 28 of the National Prohibition Act; that a prosecution had been commenced against the

petitioners on account of acts done under color of their office and of the revenue and prohibition laws of the United States, notwithstanding that the petitioners did not admit having caused the death of Wenger, and that it had adjudged that it possessed ample jurisdiction to order the removal and to try the case; and he therefore asked that the rule be discharged and that the petition of the State be dismissed.

It is objected on behalf of the respondent that this is not a proper case for mandamus; that whether the facts averred in the amended petition come within the requirement of § 33 of the Judicial Code is a question within the regular judicial function of the District Court to decide, and that this Court should not interfere thus prematurely with its exercise.

Virginia v. *Rives,* 100 U. S. 313, *Virginia* v. *Paul,* 148 U. S. 107, and *Kentucky* v. *Powers,* 201 U. S. 1, were cases in which criminal prosecutions by a State, removed to a federal court under asserted compliance with federal statutes, were ordered remanded by writ of mandamus. The Attorney General of Maryland relies on them to show that the writ may issue to test the legality of the removal in all criminal cases. On behalf of the United States, it is pointed out that these cases differ from the one before us, in that in the former the State prosecution had not reached a stage for removal, or was not of a character in which, under the language of the statute, removal could be had at all, and so the federal court was wholly without jurisdiction. The writ in those cases was justified by the Court because of the gross abuse of discretion of the lower court, its clear lack of jurisdiction, and the absence of any other remedy. *Ex parte Harding,* 219 U. S. 363, at p. 373. In this case, the facts averred show the prosecution to be of the class and character in which removal is permitted by § 33, and there is no lack of jurisdiction or abuse of discretion; and the only issue made is on the interpreta-

tion of the facts and the application of the section, an issue clearly within the judicial jurisdiction of a district court.

Mandamus is an extraordinary remedy which is issued by this Court under Rev. Stats., § 688 to courts of the United States in the exercise of its appellate jurisdiction, and in civil cases does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or appeal. *Ex parte Roe,* 234 U. S. 70, 73; *Ex parte Tiffany,* 252 U. S. 32, 37; *Ex parte Park Square Automobile Station,* 244 U. S. 412; *Ex parte Slater,* 246 U. S. 128, 134; *Ex parte Oklahoma,* 220 U. S. 191, 209; *Ex parte Harding,* 219 U. S. 363; *Ex parte Nebraska,* 209 U. S. 436; *Ex parte Hoard,* 105 U. S. 578.

It may be conceded that there are substantial differences between *Virginia* v. *Paul, Virginia* v. *Rives,* and *Kentucky* v. *Powers,* and this case. But we do not think that those differences should prevent the issue of the mandamus here. In respect of the removal of state prosecutions, there should be a more liberal use of mandamus than in removal of civil cases. We exercise a sound judicial discretion in granting or withholding the writ. It may be " in cases warranted by the principles and usages of law." Rev. Stats., § 688; *Ex parte Bradley,* 7 Wall. 364, 376; *Virginia* v. *Rives, supra,* at p. 323, separate opinion of Mr. Justice Field, *ibid.* at p. 329. It is granted in analogy to the intervention of equity to secure justice in the absence of any other adequate remedy. *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 312. In the case before us and in all state prosecutions removed under § 33, the jurisdiction of the courts of a State to try offenses against its own laws and in violation of its own peace and dignity is wrested from it by the order of an inferior federal court. The State by its petition for man-

damus becomes a suitor at the bar of this Court to challenge the legality of the inferior court's action. Conceding the validity of the exceptional use of the national supremacy in a proper case, it seeks by this writ to test its propriety here. Except by the issue of mandamus, it is without an opportunity to invoke the decision of this Court upon the issue it would raise. The order of the United States District Judge refusing to remand is not open to review on a writ of error, and a judgment of acquittal in that court is final. *United States* v. *Sanges,* 144 U. S. 310; *Virginia* v. *Paul, supra,* at p. 122. The fact that the United States District Court may be proceeding in the exercise of a lawful jurisdiction should not, under such exceptional circumstances, prevent this Court from extending to the State the extraordinary remedy.

We come then to the sufficiency of the amended petition for removal under § 33 of the Judicial Code to justify the District Court in denying the motion to remand.

The first objection made by the State to the removal is that prohibition agents can not have the benefit of § 33, because they are not officers "appointed under or acting by authority of any revenue law of the United States," as provided in the section. Four of the defendants are admitted to have been acting under commissions issued by the Commissioner of Internal Revenue, "empowering them to enforce the National Prohibition Acts and Acts supplemental thereto, and all Internal Revenue Laws, relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors." The fifth defendant, Trabing, it is admitted, was acting as a chauffeur and helper to the four officers under their orders and by direction of the Prohibition Director for the State. It is not denied on behalf of the State that he has the same right to the benefit of § 33 as they. *Davis* v. *South Carolina,* 107 U. S. 597.

The Act of November 23, 1921, 42 Stat. 223, c. 134, § 5, known as the Willis-Campbell law, amending the National Prohibition Act, 41 Stat. 307, c. 85, provides that,

"All laws in regard to the manufacture and taxation of a traffic in intoxicating liquor and all penalties for violations of such law, that were in force when the National Prohibition Act was enacted, shall be and continue in force as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act."

Rev. Stats., § 3282, forbidding fermenting of mash or wort, or the making of spirits therefrom on premises other than a distillery authorized by law, and by a duly authorized distiller, and punishing its violation by fine and imprisonment, is not in conflict with anything in the Prohibition Act. The Willis-Campbell Act thus makes clear the criminality of such an act under the revenue laws. *United States* v. *Stafoff,* 260 U. S. 477. In searching for the still for the purpose of preventing the violation of law, the prohibition agents in this case were therefore acting under the authority of the revenue laws.

More than this, they were brought within the application of § 33 by the provision of § 28, Title II, of the National Prohibition Act, providing that the commissioner, his assistants, agents, and inspectors, and all other officers of the United States whose duty it is to enforce criminal laws, shall have all the power and *protection* in the enforcement of the Act, or any provisions thereof, which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquor under the law of the United States. We have no doubt that the word "protection" was inserted for the purpose of giving to officers and persons acting under authority of the National Prohibition Act in enforcement of its provisions, the same protection of a trial in a federal

court of state prosecutions as is accorded to revenue officers under § 33.

Section 33 was derived from § 643 of the Revised Statutes, which in turn was derived from the Act of July 13, 1866, 14 Stat. 171, c. 184, § 37, and the Act of June 13, 1864, 13 Stat. 241, c. 173, § 50. These acts extend the Act of March 2, 1833, 4 Stat. 633, c. 57, § 3, applying to officers engaged in collection of customs duties, to those engaged in the collection of internal revenue. *People's United States Bank* v. *Goodwin,* 162 Fed. 937, 939; *Tennessee* v. *Davis,* 100 U. S. 257, 267. The Act of 1833 was enacted in the days of attempted nullification of national customs revenue laws in South Carolina and was during the Civil War extended to those charged with collecting the internal revenue. Congress not without reason assumed that the enforcement of the National Prohibition Act was likely to encounter in some quarters a lack of sympathy and even obstruction, and sought by making § 33 applicable to defeat the use of local courts to embarrass those who must execute it. The constitutional validity of the section rests on the right and power of the United States to secure the efficient execution of its laws and to prevent interference therewith, due to possible local prejudice, by state prosecutions instituted against federal officers in enforcing such laws, by removal of the prosecutions to a federal court to avoid the effect of such prejudice. *Tennessee* v. *Davis, supra.*

Do the facts disclosed by the amended petition for removal bring the defendants within § 33? The State insists that they are insufficient because they do not show that the defendants committed the act of homicide upon which the indictment is founded. The case of *Illinois* v. *Fletcher,* 22 Fed. 776, seems to hold that a revenue officer can take advantage of the statute and secure a trial in a federal court only by admitting that he did the act for which he is prosecuted. We think this too

narrow a construction of the section. *Cleveland, Columbus, etc., Railroad* v. *McClung,* 119 U. S. 454, 461.

The prosecution to be removed under the section must have been instituted "on account of" acts done by the defendant as a federal officer under color of his office or of the revenue or prohibition law. There must be a causal connection between what the officer has done under asserted official authority and the state prosecution. It must appear that the prosecution of him, for whatever offense, has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty. But the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution.

Suppose that the prosecution of the officer for murder was commenced merely on account of the presence of the officer, in discharge of his duties in enforcing the law, at or near the place of the killing, under circumstances casting suspicion of guilt on him. He may not even know who did the killing, and yet his being there and his official activities may have led to the indictment. He may certainly claim the protection of the statute on the ground that the prosecution was commenced against him "on account of" his doing his duty as an officer under color of such a law, without being able to allege that he committed the very act for which he is indicted. It is enough if the prosecution for murder is based on or arises out of the acts he did under authority of federal law in the discharge of his duty and only by reason thereof.

In invoking the protection of a trial of a state offense in a federal court under § 33, a federal officer abandons his right to refuse to testify because accused of crime, at least to the extent of disclosing in his application for removal all the circumstances known to him out of which the prosecution arose. The defense he is to make is that of his immunity from punishment by the State, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based. He must establish fully and fairly this defense by the allegations of his petition for removal before the federal court can properly grant it. It is incumbent on him, conformably to the rules of good pleading, to make the case on which he relies, so that the court may be fully advised and the State may take issue by a motion to remand. *Chesapeake & Ohio Railway Company* v. *Cockrell,* 232 U. S. 146, 151, 152, and cases cited. See also concurring opinion of Mr. Justice Field in *Virginia* v. *Rives, supra,* at p. 332, and *Hanford* v. *Davies,* 163 U. S. 273, 279.

We think that the averments of the amended petition in this case are not sufficiently informing and specific to make a case for removal under § 33. We have set forth the account the defendants gave in their amended petition of what they saw and did, but the only averments important in directly connecting the prosecution with their acts are at the opening and close of their petition. They refer to the death of Wenger only by incorporating the indictment in the petition, and then say that " the acts [i. e. the killing of Wenger] alleged to have been done by petitioners Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Franklin Ely, are alleged to have been at a time when they were engaged in the discharge of their official duties as Federal Prohibition Officers, and in making and attempting to make an investigation concerning a violation of the National Prohibition Act and other Internal

Revenue Laws and in reporting the results of said investigation, and in protecting themselves in the discharge of their duty." The amended petition closes with the statement that the indictment "is a criminal prosecution on account of acts alleged to have been done by your petitioners at a time when they were engaged in the performance of their duties as Federal Prohibition Officers and chauffeur for Federal Prohibition Officers as set forth in the foregoing paragraphs."

These averments amount to hardly more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duties. They do not negative the possibility that they were doing other acts than official acts at the time and on this occasion, or make it clear and specific that whatever was done by them leading to the prosecution was done under color of their federal official duty. They do not allege what was the nature of Wenger's fatal wound, whether gunshot or otherwise, whether they had seen him among those who brought the still and fled, or whether they heard, or took part in any shooting. They do not say what they did, if anything, in pursuit of the fugitives. It is true that, in their narration of the facts, their nearness to the place of Wenger's killing and their effort to arrest the persons about to engage in alleged distilling are circumstances possibly suggesting the reason and occasion for the criminal charge and the prosecution against them. But they should do more than this in order to satisfy the statute. In order to justify so exceptional a procedure, the person seeking the benefit of it should be candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer. As the defendants in their statement have not clearly fulfilled this requirement, we must grant the writ of mandamus,

directing the District Judge to remand the indictment and prosecution. Should the District Judge deem it proper to allow another amendment to the petition for removal, by which the averments necessary to bring the case within § 33 are supplied, he will be at liberty to do so. Otherwise the prosecution is to be remanded as upon a peremptory writ.

MARYLAND *v.* SOPER, JUDGE. (No. 2)

PETITION FOR A WRIT OF MANDAMUS.

No. 24 Original. Argued December 7 1925.—Decided February 1, 1926.

An indictment in a state court charging federal prohibition agents with a conspiracy to obstruct justice by giving false testimony at a coroner's inquest concerning a homicide for which they were then under arrest and subsequently were indicted for murder, is not removable to the federal court under § 33 of the Judicial Code, even though the murder charge would be removable as one commenced "on account" of their official acts. P. 42.

Mandamus made absolute.

PETITION by the State of Maryland for a writ of mandamus directing the United States District Judge of the District of Maryland to remand to the proper state court an indictment for conspiracy to obstruct justice by false testimony, which had been removed to the District Court under the provisions of § 33 of the Judicial Code. See also the case next preceding.

Messrs. Thos. H. Robinson, Attorney General of Maryland, and *Herbert Levy,* Assistant Attorney General of Maryland, for petitioner.

If any reports were required of these federal officers, it was their duty to make them to their superior. Unless the words "act done under color of his office or any such law" in § 33 of the Judicial Code are to be deprived of all meaning and effect, they clearly render the provisions of that statute inapplicable to the case at bar. If it can

be claimed that a report made to a coroner's inquest is a report made under color of office or of a revenue law, then an action arising out of any slanderous statement made by a revenue officer in the course of his private and personal transactions can also be removed. If the prosecution in this case can be removed, then any action or prosecution, no matter how personal its nature or how unconnected with the official capacity of the revenue officer, can be removed. The essence of the offense charged against the officers was a conspiracy to commit perjury before the coroner's inquest. See *Thomas* v. *Loney,* 134 U. S. 372, holding: "the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had."

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* was on the brief, for respondent.

The prosecution for conspiracy to obstruct justice was properly removable, notwithstanding that the defendants expressly denied having conspired. This Court has declared that "even the most unquestionable and most universally applicable of state laws, such as those concerning murder," will not be allowed to control the conduct of federal officers in certain cases. *Johnson* v. *Maryland,* 254 U. S. 51. And in numberless instances federal officers, accused in the state courts of murder, have been removed for trial to the federal courts, or have even been released on *habeas corpus* without having to stand any trial at all.

Where a federal officer held in state custody claims the protection of the federal court, either by petition for *habeas corpus,* or by petition for removal, the court may look behind the actual indictment to ascertain whether the act was really done under color of federal authority. *In re Neagle,* 135 U. S. 1; *Virginia* v. *Felts,* 133 Fed. 85; *Virginia* v. *De Hart,* 119 Fed. 626; *Ex parte Jenkins,* Fed. Cas. No. 7259. Removal has been granted in many cases

and upon an almost endless variety of charges. The following will serve as illustrations: *Findley* v. *Satterfield,* Fed. Cas. No. 4792; *Virginia* v. *Felts,* 133 Fed. 85; *Virginia* v. *De Hart,* 119 Fed. 626; *Delaware* v. *Emerson,* 8 Fed. 411; *Virginia* v. *Bingham,* 8 Fed. 561; *Buttner* v. *Miller,* Fed. Cas. No. 2254; *Warner* v. *Fowler,* Fed. Cas. No. 17182.

The purpose of the removal statute, as recognized in *Tennessee* v. *Davis,* is twofold: First, to protect the functions of the Federal Government from being hindered by the possible unfriendly action of States and to prevent its officers from being withdrawn from their duty and held in confinement by state authorities; and, second, to protect the officers themselves. Both of these purposes can be defeated as well by indictments for acts which the officers deny altogether as by indictments for acts which they admit having done, but for which they claim justification under federal law.

It is argued that the indictment for conspiracy has no reasonable connection with their acts done under federal authority. But it must be remembered that the charge of conspiracy is bound up with the charge of murder, and that the same train of circumstances led up to both. It is submitted that the case can not be disposed of upon the simple theory that federal officers can never be called upon to commit "conspiracy" in the abstract. The name given to the charge is immaterial. The court must look behind the name to the actual circumstances under which it arose. Judged by this test, the present charge of conspiracy bears a direct relation to the acts done by the accused "under color of their office" and "under color of the revenue laws of the United States." And if that is true, then the prosecution was properly removable to the federal court. It is "color of office" and "color of the law" which the statute makes ground for removal of the cause. "Color of office" covers something which may prove in-

sufficient as a defense, as well as that which may prove sufficient. The removal statute on this point differs sharply from the statute which confers upon federal officers the right to be discharged upon *habeas corpus*.

The decision of the District Court granting the petition for removal, and denying the motion to remand, was an exercise of lawful judicial discretion, and can not be controlled by mandamus.

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

This is a petition for mandamus by the State of Maryland to require the District Court of the United States for that State to remand to the state Circuit Court for Harford County an indictment by the grand jury of that county for obstructing justice of the State by false testimony. The indictment had been removed from the circuit court to the federal court in asserted compliance with § 33 of the Judicial Code. The amended petition of removal, upon the sufficiency of which the application of § 33 turns, discloses the same state of facts as that shown in the mandamus case between the same parties, just decided. The indictment charges that the same defendants as were there charged with murder conspired in a hearing before a justice of the peace of Harford County, acting as the coroner with a jury and engaged in the official duty of inquiring into the manner of the death of Lawrence Wenger on November 20, 1924, to deceive the coroner and jury by withholding the facts concerning Wenger's death, and falsely asserting ignorance thereof, in order to induce them to return a false and erroneous verdict, and thus to obstruct justice in violation of a criminal statute of Maryland. This testimony was given the day after Wenger's death while the defendants were under arrest on the charge of murder, and the indictment in this case was returned at the same time as the indictment for murder.

The amended petition of defendants for removal avers that " on the afternoon of November twentieth your petitioners were called before the Coroner's Inquest heretofore described in the indictment, and freely and without reservation in accordance with their duty as investigating and reporting officers of the Federal Government and acting under the direction of the Maryland Federal Prohibition Director, related the facts before mentioned. And thereupon they were again placed in the Harford County jail and held for the action of the Harford County Grand Jury." The amended petition concludes with the statement that "The said indictment is now pending in the Circuit Court for Harford County and is a criminal prosecution on account of acts alleged to have been done by your petitioners at a time when they were engaged in the performance of their duties as Federal Prohibition Officers and chauffeur for Federal Prohibition Officers as set forth in the aforegoing paragraphs."

The record in this case is in all respects like that in the case just decided, except that the prosecution is for obstruction of justice. The orders of the federal District Court, the other proceedings, the stipulation as to evidence, the petition for mandamus, and the return of Judge Soper to the rule issued on the petition of the State for mandamus, are all similar.

Counsel for the State of Maryland argue that the accused officers were in no sense acting in their official capacity when engaged in the alleged conspiracy to deceive the coroner, that their duty had been discharged when they destroyed the still, that their subsequent reports of what had happened to their federal superiors are not the subject of this prosecution, that the indictments for conspiracy and perjury were based not on acts which the defendants had done in pursuance of federal law and in discharge of their duty to the federal Government, but on testimony given by them under their obligations to

the State as individuals and for which they were detained in jail. To this it is answered, on behalf of the United States, as follows:

"But how did the officers come to be in jail? If they had not been engaged in the performance of their duties as federal officers they would never have been there. When they found Wenger's body, they had just come from performing their duty and were on their way back to report officially to their superior. At that time they were still acting in their official capacity. *United States* v. *Gleason,* 1 Wool. C. C. 128. In immediately seeking for a physician and in reporting Wenger's death at once to the State's Attorney, they were doing the only reasonable act which could be expected of them, both as public officers and as private citizens. But, as their petition alleges, the State's Attorney, on being informed by them that 'your petitioners . . . were prohibition officers,' ordered them to be at once placed under arrest.

"If they had not discovered Wenger and reported his murder, there would have been no need for them to testify before the Coroner's jury, and there would have been no occasion for any charge of conspiracy. The two charges, it is submitted, are so closely inter-related that they can not properly be separated. The charge of murder gave rise to the charge of conspiracy. If the former charge is removable to the Federal court, it is submitted that the latter should be removable also.

"Considerable danger would be involved in a contrary holding. If charges of murder alleged to have been committed by Federal officers are removable, and charges of conspiracy and similar offenses are not removable, an obvious expedient would suggest itself. In localities where the administration of particular Federal laws is unpopular, Federal officers need no longer be dragged before hostile state tribunals on charges such as murder, on which they may successfully claim removal and plead self-defense.

The charge can readily be altered to 'conspiracy' or to some other crime, which the accused officers deny having committed at all, but on which it will be clear that removal can not be obtained. The actual charge will serve merely as a cloak to obtain the desired end, namely, incarceration of an unpopular officer. In this way the functions of the Federal Government may be harassed or impeded and its officers withdrawn from their duty as effectively as by prosecutions for homicide actually committed in self-defense. This method may easily become as effective as out-and-out nullification of Federal laws."

We may concede that the reports of the officers to their federal superiors were within their official duty, but it does not follow that whatever happened between the events at the place of the still and the return to Baltimore to make report was within the protection of their official immunity. It depends upon the nature of that which they did in the interval. The right of the State to inquire into suspected crime in its territory justifies the use of investigation by its officers and the questioning of suspected persons under oath. The response of the federal officer under suspicion to such questioning is not an act of his under federal authority.

Of course one can state a case in which acts not expressly authorized by the federal statutes are such an inevitable outgrowth of the officer's discharge of his federal duty and so closely interrelated with it as necessarily to be within the protection of § 33.

Thus removals of prosecutions on account of acts done in enforcement of the revenue or prohibition laws or under color of them properly include those for acts committed by a federal officer in defense of his life, threatened while enforcing or attempting to enforce the law. Such acts of defense are really part of the exercise of his official authority. They are necessary to make the enforcement effective.

This is as far as the case of *United States* v. *Gleason, supra,* 25 Fed. Cases 1335, No. 15,216, cited by government counsel, would by analogy carry us. That was a charge to the jury by Mr. Justice Miller in the trial of a federal criminal indictment under a statute punishing the obstruction of a federal officer in arresting an army deserter which caused the death of the officer. The Justice said to the jury that if the officer, having been obstructed, was retreating with a view of making other arrangements to perform his duty of arresting, he was still employed in arresting deserters. It was not necessary, to render his killing an offense against the United States, that he should be engaged in the immediate duty of arrest. "The purpose of the law is to protect the life of the person so employed, and this protection continues so long as he is engaged in a service necessary and proper to that employment." But the indictment which is here removed is for acts not thus closely connected with, and included in, the attempted enforcement of the federal law.

The defendants, when called upon to testify before the coroner, were not obliged by federal law to do so. Indeed, even under state law, they might have stood mute, because the proceeding was one in which they were accused of crime. They themselves show that they voluntarily made the statements upon which these indictments were founded. While of course it was natural that if not guilty they should have responded fully and freely to all questions as to their knowledge of the transaction, with a view of showing their innocence, nevertheless their evidence was not in performance of their duty as officers of the United States.

In answer to the suggestion that our construction of § 33 and our failure to sustain the right of removal in the case before us will permit evilly minded persons to evade the useful operations of § 33, we can only say that, if prosecutions of this kind come to be used to obstruct

seriously the enforcement of federal laws, it will be for Congress in its discretion to amend § 33 so that the words "on account of" shall be enlarged to mean that any prosecution of a federal officer for any state offense which can be shown by evidence to have had its motive in a wish to hinder him in the enforcement of federal law, may be removed for trial to the proper federal court. We are not now considering or intimating whether such an enlargement would be valid; but what we wish to be understood as deciding is that the present language of § 33 can not be broadened by fair construction to give it such a meaning. These were not prosecutions, therefore, commenced on account of acts done by these defendants solely in pursuance of their federal authority. With the statute as it is, they can not have the protection of a trial in the federal court, however natural their denials under oath of inculpating circumstances. As the indictment in this case was not removable under § 33, the mandamus to the Judge of the District Court to remand it to the Circuit Court for Harford County, Maryland, must be made absolute. The writ need not issue, however, as Judge Soper's return indicates that he will act upon an expression of our views.

MARYLAND *v.* SOPER, JUDGE. (No. 3)

PETITION FOR A WRIT OF MANDAMUS

No. 25, Original. Argued December 7, 1925.—Decided February 1, 1926.

Decided upon the authority of *Maryland* v. *Soper* (*No. 2*), *ante*, p. 36.

Messrs. Thos. H. Robinson, Attorney General of Maryland, and *Herbert Levy,* Assistant Attorney General of Maryland, for petitioner.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* was on the brief, for respondent.

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

This case is quite like that in No. 24, Original, just decided. It differs, in that here the indictment which was removed from the Circuit Court of Harford County, Maryland, to the District Court of the United States for Maryland was an indictment against E. Franklin Ely for perjury, in the inquiry made by the coroner into the circumstances of the death of Wenger, it being charged that when it was material whether he had seen Lawrence Wenger at the time he (Ely), as a government officer, lay concealed and hidden and watched the bringing of the still, he falsely stated he had not seen Wenger. In all other respects the proceedings were quite like those in the case just decided, and on the principles laid down in that case we must hold that there was no ground for removing the prosecution of Ely for perjury, and that the mandamus to require the remanding of the removal should be made absolute.

CHARLES D. COLE, MARY COLE, HERMAN NOELKER ET AL. *v.* NORBORNE LAND DRAINAGE DISTRICT OF CARROLL COUNTY, MISSOURI, H. H. FRANKLIN, L. WILLIAMS ET AL.

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

No. 152. Argued January 20, 1926.—Decided February 1, 1926.

A state law (Ls. Mo. 1913) providing that establishment of a drainage district, with consequent liability for assessments, shall depend on the vote of the owners of the majority of the acreage included,

but permitting an established district to be extended by court proceedings to adjoining lands that will be benefited by the proposed reclamation, does not violate the equal protection clause of the Fourteenth Amendment in not allowing the owners of such adjoining lands the right to vote on the inclusion of their property.

Affirmed.

APPEAL from a decree of the District Court dismissing a bill brought to restrain the collection of drainage assessments and entry upon the plaintiffs' land in pursuance of a drainage plan.

Messrs. Cyrus Crane and *M. J. Henderson,* for appellants.

Messrs. William A. Franken and *S. J. Jones,* with whom *Messrs. Grover C. Jones, Sam Withers* and *Scott R. Timmons* were on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill to restrain the collection of a tax and entry upon the plaintiffs' lands in pursuance of a plan of drainage established in the mode provided by the laws of Missouri. The grounds on which relief is sought are that § 40 of the Drainage Laws of 1913, under which the plaintiffs' lands were brought into the drainage district, is contrary to the Fourteenth Amendment, and that the inclusion of their lands was an arbitrary exercise of power for the purpose of making the plaintiffs pay for benefits that they did not share. The District Court found that there was no arbitrary exercise of power, but only a decision upon disputable questions of benefit with regard to land all of which was Missouri bottom land, similar in condition in everything but degree. It upheld the inclusion of the plaintiffs' land. In view of the constitutional question raised the plaintiffs appealed directly to this Court.

Under the laws of the State a drainage district was incorporated which originally contained, it is said, 14,400 acres. In a later year, upon petition of the supervisors of the district, the boundaries were enlarged in due statutory form so as to take in nearly 24,000 acres more of adjoining land, including that now concerned. It is not disputed that the original district was lawful in all respects. In general there can be no doubt that a State has power to add more land, that shares the benefit of a scheme, to the lawfully constituted district that has to pay for it, and to do so against the will of the owner. *Houck* v. *Little River Drainage District,* 239 U. S. 254, 262. *Squaw Creek Drainage District* v. *Turney,* 235 Mo. 80. *Mudd* v. *St. Francis Drainage District,* 117 Ark. 30. *Faithorn* v. *Thompson,* 242 Ill. 508. But it is objected that as in this case the original district was formed on the petition of the 'owners of a majority of the acreage' in contiguous lands, and as, under the statute, the concurrence of the owners of a majority of the acreage was necessary, there is an unconstitutional discrimination in not leaving it to a similar majority to determine whether the new land shall come in. It seems strange if the power of the legislature to add to a lawfully existing district depends on how that district was formed many years before. But it is enough to repeat the answer of the appellees. The original incorporators take the risk of a plan and agree to pay for it while as yet they do not know exactly what the plan will be or what the benefits. If after the plan is made and started it becomes obvious that other contiguous land will be benefited, it is just that such land should help to pay the bills. But only an Eighteenth Century faith in human nature could expect that the owners would vote to come in and pay their shares when they would get the same benefit if they stayed out. The discrimination is justified by the change in position at the later time.

As to the supposed sinister purpose of those who brought the plaintiffs in, no evidence was given to prove it. That the plantiffs' land would be benefited has been found by the Circuit Court of Carroll County, Missouri, which made the order, and by the District Court below. We see no reason in the evidence for not accepting their findings. There is another objection to inquiring further. By the law of Missouri the decree of the Circuit Court is final with regard to the territorial extent of the district. The bill further states that the plantiffs have sought redress in the courts of the State without avail. The defendants plead that the plaintiffs sued in a State court to cancel the assessments upon them and to annul the judgment of the Circuit Court; that thereupon the defendants applied to the Supreme Court for a writ of prohibition, and that the court made the prohibition absolute, upholding the constitutionality of the law. *State, ex rel. Norborne Land Drainage District* v. *Hughes,* 294 Mo. 1. The defendants urge these facts to show that the plaintiffs had an adequate remedy at law by bringing either the judgment of the Circuit Court or that of the Supreme Court here. It is hard to see why these decisions do not make the question sought to be opened here *res judicata,* although not so pleaded. But in any event we see no ground for disturbing the decree below. The District Court rightly held that the plaintiffs Hellwig and Summers must fail for the additional reason that the assessments against them were less than the jurisdictional amount, but this is not very important as on the merits the bill must be dismissed.

Decree affirmed.

Syllabus.

UNITED STATES *v.* HOLT STATE BANK ET AL.

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

No. 47. Argued April 24, 27, 1925.—Decided February 1, 1926.

1. In general, lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in interstate and foreign commerce. P. 54.
2. Where the United States, after acquiring the territory and before the creation of the State, has granted rights in such lands, in carrying out public purposes appropriate to the objects for which the territory was held, such rights are not impaired by the subsequent creation of the State, and the rights which otherwise would then pass to the State in virtue of its admission into the Union are restricted and qualified accordingly. *Id.*
3. But disposals by the United States, during the territorial period, of lands under navigable water should not be regarded as intended unless the intention was made very plain by definite declaration or otherwise. P. 55.
4. Navigability, when asserted as the basis of a right arising under the Constitution, is a question of federal law, to be determined by the rule applied in the federal courts, and not by a local standard. *Id.*
5. By the federal rule, streams or lakes which are navigable in fact are navigable in law; they are navigable in fact when used, or susceptible of use, in their natural and ordinary condition, as highways of commerce over which trade and travel are or may be conducted in the customary modes on water; and navigability does not depend on the particular mode of such actual or possible use—whether by steamboats, sailing vessels or flatboats—nor on the absence of occasional difficulties in navigation, but upon whether the stream, in its natural and ordinary condition, affords a channel for useful commerce. P. 56.
6. The evidence requires a finding that Mud Lake, in Minnesota, now drained, was navigable when Minnesota was created a State in 1858. *Id.*
7. At the time of Minnesota's admission as a State, Mud Lake and other and much larger navigable waters within her limits were

included in the Red Lake Indian Reservation, which had resulted from a succession of treaties by which the Chippewas ceded to the United States their right of occupancy of the surrounding lands, leaving this remainder of the aboriginal territory, recognized as a reservation but never formally set apart as such. There had been no affirmative declaration of the Indians' rights in the reservation, nor any attempted exclusion of others from the use of the navigable waters therein. *Held* that the land under Mud Lake passed to the State, since there was nothing to evince a purpose of the General Government to depart from the established policy of holding such land for the benefit of the future State. P. 57.

294 Fed. 161, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing on the merits, after final hearing, a bill brought by the United States to quiet title to the bed of a drained lake and to enjoin the defendants from asserting any claim to the land.

Mr. W. W. Dyar, Special Assistant to the Attorney General, with whom *Solicitor General Beck, Assistant Attorney General Wells* and *Mr. S. W. Williams,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mud Lake was never a navigable body of water in fact, therefore the title to its bed did not vest in the State. *The Daniel Ball,* 10 Wall. 557; *The Montello,* 20 Wall. 430; *Leovy* v. *United States,* 177 U. S. 621; *Harrison* v. *Fite,* 148 Fed. 781; *Oklahoma* v. *Texas,* 258 U. S. 574; *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77.

Tested by the rules laid down in the cases cited, it will be readily seen that Mud Lake falls far short of being a navigable body of water. It may have had sufficient depth at times of floods for the use of boats of light draft, but there were seasons when the lake was practically dry land, and often in times of water the boats that were used upon the lake had to be poled or pulled across the shallow

places. Moreover, there was no commerce to be conducted on the lake, as the country was sparsely settled and there was little or no occasion for it.

To admit a multiplicity of rules defining navigability would be to violate the principle of equality among the States under pretense of observing it; and to permit the various States to define the rule for themselves would be in effect to make them the arbiters of their respective prerogatives under the Constitution and submit the property rights of the United States to State determination. 29 Op. A. G. 455.

The Government clearly had the right to limit its patents to lands above the meander line. *Oklahoma* v. *Texas,* 258 U. S. 574; 29 Op. A. G. 455; *Mitchell* v. *Smale,* 140 U. S. 406; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District,* 232 U. S. 186. The United States owned the lake bed in trust for the Indians and was under obligations to them to dispose of it for their benefit. *Minnesota* v. *Hitchcock,* 185 U. S. 373; *Shively* v. *Bowlby,* 152 U. S. 1; *United States* v. *Winans,* 198 U. S. 371. The United States was not bound by the proceedings had in the state court. *Stanley* v. *Schwalby,* 162 U. S. 255.

Mr. A. N. Eckstrom, with whom *Messrs. W. E. Rowe* and *Ole J. Vaule* were on the brief, for appellees.

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

This is a bill in equity by the United States to quiet in it the title to the bed of Mud Lake—now drained and uncovered—in Marshall County, Minnesota, and to enjoin the defendants from asserting any claim thereto. After answer and a hearing the District Court entered a decree dismissing the bill on the merits. The United States appealed to the Circuit Court of Appeals, where the decree was affirmed, 294 Fed. 161, and then by a further appeal brought the case here.

Mud Lake is within what formerly was known as the Red Lake Indian Reservation, which had an area exceeding 3,000,000 acres and was occupied by certain bands of the Chippewas of Minnesota. Most of the reservation, including the part in the vicinity of Mud Lake, was relinquished and ceded by the Chippewas conformably to the Act of January 14, 1889, c. 24, 25 Stat. 642, for the purposes and on the terms stated in that Act. It provided that the lands when ceded should be surveyed, classified as "pine lands" and "agricultural lands," and disposed of in designated modes; that such as were classified as agricultural should be disposed of under the homestead law at a price of $1.25 an acre; and that the net proceeds of all, whether classified as pine or agricultural, should be put into an interest-bearing trust fund for the Chippewas and ultimately disbursed for their benefit or distributed among them.

The cession became effective through the President's approval March 4, 1890. Thereafter the lands in the vicinity of Mud Lake were surveyed and platted in the usual way, the lake being meandered and represented on the plat as a lake. The tracts bordering on the lake were classified as agricultural, opened to homestead entry and disposed of to homestead settlers, patents being issued in due course. The defendants now own and hold these tracts under the patents. After the homestead entries were allowed, and after most of them were carried to patent, the lake was drained and its bed made bare by a public ditch constructed under the drainage laws of the State. The United States then surveyed the bed with the purpose of disposing of it for the benefit of the Indians under the Act of 1889, and later brought this suit to clear the way for such a disposal.

The lake in its natural condition covered an area of almost 5,000 acres and was traversed by Mud River, a tributary of Thief River, which was both navigable in

itself and directly connected with other navigable streams leading to the western boundary of the State and thence along that boundary to the British possessions on the north.

The ditch which drained the lake was established as a means of fitting for cultivation a large body of swamp lands in that general vicinity. It is as much as 30 miles long, and, like Mud River, passes through the lake and discharges into Thief River. Its depth exceeds that of the lake and its width and fall are such that it has drawn the water out of the lake. Its construction was begun in 1910 and was so far completed in 1912 that the lake was then effectively drained.

The swamp lands which the ditch was intended to reclaim were within the ceded portion of the Red Lake Reservation. Some had been disposed of under the Act of 1889 and thus had passed into private ownership; but the absence of necessary drainage was preventing or retarding the disposal of the others. Congress caused an examination to be made to determine whether drainage was physically and economically feasible, Acts of June 21, 1906, c. 3504, 34 Stat. 352, and March 1, 1907, c. 2285, 34 Stat. 1033; and a report of the examination was made, H. R. Doc. No. 607, 59th Cong. 2d Sess. Shortly thereafter Congress gave its assent to the drainage of the lands under the laws of the State by declaring that all lands not entered and all entered lands for which a final certificate had not issued should "be subject to all the provisions of the laws of said State relating to the drainage of swamp or overflowed lands for agricultural purposes to the same extent and in the same manner in which lands of a like character held in private ownership are or may be subject to said laws." Act May 20, 1908, c. 181, 35 Stat. 169.

The laws of the State, to the application of which assent was thus given, authorized the establishment of public drainage ditches by judicial proceedings and provided that

such ditches might be so established as to widen, deepen, change or drain any river or lake, even if navigable and whether meandered or not. Laws 1905, c. 230; Gen. Stat. 1913, §§ 5523, 5525, 5531, 5553, *et seq.* The ditch which drained Mud Lake was established by judicial proceedings begun under these laws after the congressional consent was given; and it is not questioned that those proceedings made it entirely lawful to construct the ditch through the lake and to drain it as an incident of the reclamation project in hand.

The defendants insist that the lake in its natural condition was navigable, that the State on being admitted into the Union became the owner of its bed, and that under the laws of the State the defendants as owners of the surrounding tracts have succeeded to the right of the State. On the other hand, the United States insists that the lake never was more than a mere marsh, that the State never acquired any right to it, that the surveyor should have extended the survey over it when he surveyed the adjacent lands, and that the United States is entitled and in duty bound to dispose of it under the Act of 1889 for the benefit of the Chippewas.

Both courts below resolved these contentions in favor of the defendants; and whether they erred in this is the matter for decision here.

It is settled law in this country that lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the State, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce

among the States and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the State, but remain unimpaired, and the rights which otherwise would pass to the State in virtue of its admission into the Union are restricted or qualified accordingly. *Barney* v. *Keokuk,* 94 U. S. 324, 338; *Shively* v. *Bowlby,* 152 U. S. 1, 47–48, 57–58; *Scott* v. *Lattig,* 227 U. S. 229, 242; *Port of Seattle* v. *Oregon & Washington R. R. Co.,* 255 U. S. 56, 63; *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77, 83–85. But, as was pointed out in *Shively* v. *Bowlby,* pp. 49, 57–58, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

The State of Minnesota was admitted into the Union in 1858, c. 31, 11 Stat. 285, and under the constitutional principle of equality among the several States the title to the bed of Mud Lake then passed to the State, if the lake was navigable, and if the bed had not already been disposed of by the United States.

Both courts below found that the lake was navigable. But they treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota. We think they applied a wrong standard. Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to

the general rule recognized and applied in the federal courts. *Brewer-Elliott Oil & Gas Co.* v. *United States, supra,* p. 87. To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended. But notwithstanding the error below in accepting a wrong standard of navigability, the findings must stand if the record shows that according to the right standard the lake was navigable.

The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce. *The Montello,* 20 Wall. 430, 439; *United States* v. *Cress,* 243 U. S. 316, 323; *Economy Light & Power Co.* v. *United States,* 256 U. S. 113, 121; *Oklahoma* v. *Texas,* 258 U. S. 574, 586; *Brewer-Elliott Oil & Gas Co.* v. *United States, supra,* p. 86.

The evidence set forth in the record is voluminous and in some respects conflicting. When the conflicts are resolved according to familiar rules we think the facts shown are as follows: In its natural and ordinary condition the lake was from three to six feet deep. When meandered in 1892 and when first known by some of the witnesses it was an open body of clear water. Mud River traversed it in such way that it might well be characterized as an

enlarged section of that stream. Early visitors and settlers in that vicinity used the river and lake as a route of travel, employing the small boats of the period for the purpose. The country about had been part of the bed of the glacial Lake Agassiz and was still swampy, so that waterways were the only dependable routes for trade and travel. Mud River after passing through the lake connected at Thief River with a navigable route extending westward to the Red River of the North and thence northward into the British possessions. Merchants in the settlements at Liner and Grygla, which were several miles up Mud River from the lake, used the river and lake in sending for and bringing in their supplies. True, the navigation was limited, but this was because trade and travel in that vicinity were limited. In seasons of great drought there was difficulty in getting boats up the river and through the lake, but this was exceptional, the usual conditions being as just stated. Sand bars in some parts of the lake prevented boats from moving readily all over it, but the bars could be avoided by keeping the boats in the deeper parts or channels. Some years after the lake was meandered, vegetation such as grows in water got a footing in the lake and gradually came to impede the movement of boats at the end of each growing season, but offered little interference at other times. Gasoline motor boats were used in surveying and marking the line of the intended ditch through the lake and the ditch was excavated with floating dredges.

Our conclusion is that the evidence requires a finding that the lake was navigable within the approved rule before stated. From this it follows that no prejudice resulted from the recognition below of the local rule respecting navigability.

We come then to the question whether the lands under the lake were disposed of by the United States before Minnesota became a State. An affirmative disposal is

not asserted, but only that the lake, and therefore the lands under it, was within the limits of the Red Lake Reservation when the State was admitted. The existence of the reservation is conceded, but that it operated as a disposal of lands underlying navigable waters within its limits is disputed. We are of opinion that the reservation was not intended to effect such a disposal and that there was none. If the reservation operated as a disposal of the lands under a part of the navigable waters within its limits it equally worked a disposal of the lands under all. Besides Mud Lake, the reservation limits included Red Lake, having an area of 400 square miles, the greater part of the Lake of the Woods, having approximately the same area, and several navigable streams. The reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands. The last treaties preceding the admission of the State were concluded September 30, 1854, 10 Stat. 1109, and February 22, 1855, 10 Stat. 1165. There was no formal setting apart of what was not ceded,* nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 389. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the

* Other reservations for particular bands were specially set apart, but those reservations and bands are not to be confused with the Red Lake Reservation and the bands occupying it. See Treaty concluded October 2, 1863, 13 Stat. 667.

benefit of the future State. Without doubt the Indians were to have access to the navigable waters and to be entitled to use them in accustomed ways; but these were common rights vouchsafed to all, whether white or Indian, by the early legislation reviewed in *Railroad Company* v. *Schurmeir,* 7 Wall. 272, 287–289, and *Economy Light & Power Co.* v. *United States, supra,* pp. 118–120, and emphasized in the Enabling Act under which Minnesota was admitted as a State, c. 60, 11 Stat. 166, which declared that the rivers and waters bounding the State "and the navigable waters leading into the same shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States."

We conclude that the State on its admission into the Union became the owner of the bed of the lake. It is conceded that, if the bed thus passed to the State, the defendants have succeeded to the State's right therein; and the decisions and statutes of the State brought to our attention show that the concession is rightly made.

Decree affirmed.

MILLERS' INDEMNITY UNDERWRITERS *v.* NELLIE BOUDREAUX BRAUD AND ED. J. BRAUD.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 124. Argued January 13, 1926.—Decided February 1, 1926.

Plaintiff's intestate, while employed as a diver by a ship-building company, submerged himself from a floating barge anchored in a navigable river in Texas thirty-five feet from the bank, for the purpose of sawing off timbers of an abandoned set of ways, once used for launching ships, which had become an obstruction to navigation. While thus submerged he died of suffocation due to failure of the air supply. Damages for the death were recovered from the employer's insurer under the workmen's compensation law of Texas. *Held,*

1. That the facts disclosed a maritime tort to which the general admiralty jurisdiction would extend save for the state compensation law; but the matter was of mere local concern and its regulation by the State would work no material prejudice to any characteristic feature of the general maritime law. P. 64.
2. The state compensation law prescribed the only remedy, and its exclusive features abrogated the right to resort to the admiralty court which otherwise would exist. *Id.*

Affirmed.

ERROR to a judgment of the Supreme Court of Texas affirming a judgment of the Court of Civil Appeals, which affirmed a recovery in a suit under the workmen's compensation law of Texas. See 245 S. W. Rep. 1025; 261 *Id.* 127.

Mr. J. B. Morris, with whom *Messrs. G. Bowdoin Craighill, Hannis Taylor, Jr.,* and *J. Austin Barnes* were on the brief, for plaintiff in error.

The Supreme Court of Texas bases its decision upon an erroneous construction of *Grant-Smith Porter Ship Co.* v. *Rohde,* 257 U. S. 469. While conceding that the cause if considered as a tort action, partakes of an admiralty nature, the court concludes from the above opinion that it may assume jurisdiction of an admiralty cause of action and apply to it local statutes as long as such statutes do not work material prejudice to the general characteristics of the maritime law. But see *Washington* v. *Dawson & Co.,* 264 U. S. 219, and *Gonsalves* v. *Morse Dry Dock Co.,* 266 U. S. 171. The Supreme Court of the United States had never held that a state court may assume jurisdiction over causes of an admiralty nature and apply to such causes a state compensation law. What it has held is that a court of admiralty, under certain circumstances, may apply to an admiralty cause of action local regulations.

If this case could be disposed of upon the theory that the cause of action grows out of the contract of employ-

ment, there would be no basis for *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205. The primary cause, which is, after all, the basis of the cause of action, is the death occasioned by a tort committed upon navigable water while the deceased was engaged in work of a maritime nature. The reason the compensation law cannot apply to a cause of an admiralty nature is that the admiralty law is an exclusive branch of federal jurisprudence which covers maritime torts. The compensation law cannot substitute its measure of damages, if you can call it such, for the right of maintenance and cure given by the rules of admiralty. No matter whether you consider the cause of action as predicated upon the contract of employment or upon tort, if the tort occurred upon navigable waters the locality of the tort fixes the jurisdiction.

The courts of Texas have held the Texas compensation law invalid as applied to causes of an admiralty nature. *Home Life & Accident Co.* v. *Wade,* 236 S. W. 778. This cause of action is a maritime tort. *Atlantic Transport* v. *Imbrovek,* 234 U. S. 52; *DeGaetno* v. *Merrett & Chapman Co.,* 196 N. Y. Sup. 195; *Ellis* v. *United States,* 206 U. S. 246; *In re Eastern Dredging Co.,* 138 Fed. 942; *The Sunbeam,* 195 Fed. 468.

Mr. M. G. Adams, with whom *Messrs. C. W. Howth* and *D. E. O'Fiel* were on the brief, for defendants in error.

Under the provisions of the Texas Compensation Law, which determined the rights of the parties to this cause, the element of tort or locality is wholly eliminated and constitutes no part of the cause of action, which rests entirely in contract among employer, employee and insurer. The employer and the insurer enter into a contract for the protection of the employer and the employees, having reference to the provisions of the statute which are read into and become a part of the contract of insurance. *Grant-Porter Ship Co.* v. *Rohde,* 257 U. S.

469. This remedy is exclusive of all other remedies, and the tort element, together with full indemnity for negligence, is completely eliminated and expressly excluded. The test to be applied in this case to determine jurisdiction, is the contract and its nature. The fact that Boudreaux was working in navigable water does not determine exclusive jurisdiction in admiralty, for the simple reason that this cause of action does not in any manner sound in tort but is based wholly on the contract.

If the Texas Compensation Law were eliminated and the cause of action regarded as being founded on tort, this would not bring this cause within the exclusive admiralty jurisdiction but would merely have the effect of bringing it within that large class of causes of concurrent jurisdiction of the admiralty and common law courts. Cognizance by the state court can not possibly touch or work material prejudice to the general maritime law; it can not interfere with the proper harmony and uniformity of that law in its international and interstate relations; and, therefore, it cannot impinge upon the admiralty jurisdiction of the federal courts; and the full purpose of the constitutional grant to the federal courts and the limitation upon the state courts as to admiralty and maritime causes would not be in anywise impaired. *Western Fuel Co.* v. *Garcia,* 259 U. S. 233; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Peters* v. *Veasey,* 251 U. S. 121.

Mr. Justice McReynolds delivered the opinion of the Court.

The court below affirmed a judgment of the Orange County District Court in favor of defendant in error for compensation under the Workmen's Compensation Law of Texas (Gen. Laws 1917, p. 269) on account of the death of her brother, O. O. Boudreaux. April 17, 1920, while employed as a diver by the National Ship Building Company, he submerged himself from a floating barge anchored

in the navigable Sabine River thirty-five feet from the bank, for the purpose of sawing off the timbers of an abandoned set of ways, once used for launching ships, which had become an obstruction to navigation. While thus submerged the air supply failed and he died of suffocation.

The employing company carried a policy of insurance with plaintiff in error conditioned to pay the compensation prescribed by the statute and accordingly was " regarded as a subscriber " to the Texas Employers' Insurance Association therein provided for. Part I, § 3, of the statutes declares—

" The employes of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employes shall have no right of action against such subscribing employer for damages for injuries resulting in death, but such employes and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for . . ."

It also prescribes a schedule of weekly payments for injured employes or their beneficiaries, and provides for a Board to pass upon claims and an ultimate right to proceed in court. Subscribers' employes do not contribute to the necessary costs of such protection. They are presumed to accept the plan and to waive all right to recover damages for injuries at common law or under any statute unless they give definite written notice to the contrary. No such notice was given by the deceased.

Plaintiff in error insists that the claim arose out of a maritime tort; that the rights and obligations of the parties were fixed by the maritime law; and that the State had no power to change these by statute or otherwise.

This subject was much considered in *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469, 477—here on certificate—which arose out of injuries suffered by a carpenter

while at work upon an uncompleted vessel lying in navigable waters within the State of Oregon. The words of the local statute applied to the employment and prescribed an exclusive remedy. We said the cause was controlled by the principle that, as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter may be modified or supplemented by state statutes. And we held that under the circumstances disclosed "regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations." Stressing the point that the parties were clearly and consciously within the terms of the statute and did not in fact suppose they were contracting with reference to the general system of maritime law, we alluded to the circumstance, not otherwise of special importance, that each of them had contributed to the industrial accident fund.

And answering the certified questions we affirmed that "the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a State." Also, that "in the circumstances stated the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist."

In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; but the matter is of mere local concern and its regulation by the State will work no material prejudice to any characteristic

feature of the general maritime law. The Act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.

We had occasion to consider matters which were not of mere local concern because of their special relation to commerce and navigation, and held them beyond the regulatory power of the State, in *Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U. S. 479; *Washington* v. *Dawson & Co.,* 264 U. S. 219; *Gonsalves* v. *Morse Dry Dock Co.,* 266 U. S. 171; and *Robins Dry Dock Co.* v. *Dahl,* 266 U. S. 449, 457.

The conclusion reached by the court below is correct and its judgment must be

Affirmed.

THE INTEROCEAN OIL COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 115. Argued January 12, 1926.—Decided March 1, 1926.

Where a company, which supplied oil to the Government during the war, moved its storage tanks from the place where they were established to a distant locality, at the demand of an army officer, relying on his promise that all expenses and losses to be thereby sustained would be paid by the Government and believing that he was acting within the scope of his authority, but knowing his action was subject to written confirmation by a superior, which was never given, *held,* that there was no express contract of the Government to pay the expenses, and damages to the company's business, resulting from the removal; and that no contract could be implied.

59 Ct. Cls. 980, affirmed.

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

Mr. Charles E. Kern, with whom *Mr. John Paul Earnest* was on the brief, for appellant.

Solicitor General Mitchell, Mr. Alfred A. Wheat, Special Assistant to the Attorney General, and *Mr. Randolph S. Collins,* Attorney in the Department of Justice, for the United States, submitted.

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

This is an appeal from a judgment of the Court of Claims, entered May 26, 1924, sustaining a demurrer filed by the United States, and dismissing the petition upon the ground that it does not state a cause of action. The facts stated in the petition are as follows:

The appellant, the Interocean Oil Company, was, in 1918 and before, engaged in refining, transporting and dealing in petroleum and petroleum products, chiefly fuel oil, at Carteret, New Jersey, where it owned and operated a refinery and storage tanks. It also had a refinery at Baltimore, Maryland. During the War, the corporation was represented in Baltimore by Harold F. Brown in the sale of oil to the Shipping Board and the United States Navy. Brown made arrangements with Major Ross of the Quartermaster's Department of the United States Army, acting under the direction of Colonel Kimball, in charge, for the purchase by that department of fuel oil for army transports. After experiments made under the direction of Major Ross, a satisfactory grade of fuel oil was obtained by mixing the heavy gravity oil of this oil company with the light gravity oil of the Standard Oil Company. Major Ross then directed Brown to be prepared to furnish the full quantity of fuel oil required by the Quartermaster's Department. Ross complained that there was not enough storage for fuel oil at Baltimore. Brown advised him that the steel plates with which to erect the tanks could not be obtained on account of the War. Ross, finding that the company owned storage facilities at Carteret, demanded that they be removed to

Baltimore. In a conversation, in April, 1918, Ross advised the officers of the company that the Quartermaster's Department was short of fuel oil and that there must be additional tankage, and that unless the tankage at Carteret was removed to Baltimore, the Department would seize it and remove it itself as an exigency of war; but that if the claimant was willing itself to transfer the tanks, it would be satisfactory to the Department, and that all expense incurred and all losses sustained would be paid by the Government. The company's officers advised Ross that the removal of the tanks would mean the destruction of its business at New York, but Ross said it would be compensated for all its loss and damage and that failure to remove the tanks would result in the Department itself doing the work. The officers of the company were convinced that Ross was acting within the scope of his authority, because theretofore when he had given verbal orders to Brown for fuel oil, they had always been followed in due time by confirmatory written orders, and thereafter prompt payment had been made for the oil purchased. Indeed, so accustomed was Brown to this that he had complied without question with every order, depending upon the future confirmation of it. In respect of the movement of the tanks, Ross said that he was authorized to act for the War Department, and that written official confirmation thereof would be forthcoming from that Department. When Ross's attention was called to the fact that these confirmatory orders had not come, he said it was an oversight and promised they would be forthcoming at once from Colonel Kimball. Later he said he had made out the orders and delivered them to Colonel Kimball, who would sign them as evidence that proper official authority was being exercised. They were never signed or delivered, however, and Colonel Kimball left the service and went abroad because of ill health, and later died. The removal of the tanks was begun by the com-

pany with all dispatch, and it was far advanced when the Armistice was signed November 11, 1918. This made their use unnecessary for the purpose of the War Department. They were not re-erected and in condition for use at Baltimore until February, 1919.

The petition averred that the removal of the tanks from Carteret resulted in the claimant's losing its right to re-erect them at Carteret because of action of the legislature of New Jersey and the local authorities. The items of damage included the actual expense incurred in taking down the plant at Carteret and its freight to Baltimore, and its re-erection there, which amounted to about $54,000. The claim made also included an item for the depreciation in the plant at Carteret of $220,000 and one for the loss of franchise to conduct business at Carteret and the profit on the probable sales of oil at Carteret for five years from April, 1918, to October, 1923, which was put at $2,300,000.

It is contended on behalf of the claimant that the Government got the benefit of the contract made between Ross and it, that it had the right to rely on Ross's authority, and that performance of the contract saved the necessity of a written agreement as required by Rev. Stats. § 3744. The petition set forth no facts upon which the United States can be said to have made any contract, whether oral or written, with the claimant company. There is no averment that Major Ross was authorized to make the contract upon which suit is brought. The averments are only that Ross told the officers of the company that he had the authority to make the contract, and that there would be a written confirmation by his chief, Colonel Kimball. It is expressly admitted that no such written confirmation by Colonel Kimball was ever signed or delivered to the company. The necessary effect of the lengthy averments of the petition is that Ross did not have authority to make a contract for the Government such as that

sued on, but that the authority was vested in Colonel Kimball, and that until Colonel Kimball signed the contract, it did not bind the Government. All the statements of the petition united together are no more than to say that the company relied on the promise of Major Ross that Colonel Kimball would confirm the contract which Ross proposed to make and said that he had authority subject to Kimball's confirmation to make. But Kimball never confirmed it.

Nor is there any implied contract binding upon the Government. The Oil Company was dealing with its own property in moving it from Carteret to Baltimore, and when the tanks were removed to Baltimore, they still belonged to the company for use by it not only in storing oil for the Government but for anyone else. There was no enrichment of the Government to its knowledge, no benefit in the form of property given to it or of service rendered to it from which the contract by it to pay could be implied. The Court of Claims was right in sustaining the demurrer, and the judgment is

Affirmed.

RHODE ISLAND HOSPITAL TRUST COMPANY, EXECUTOR OF GEORGE BRIGGS, DECEASED, *v.* RUFUS A. DOUGHTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

No. 106. Argued January 11, 1926.—Decided March 1, 1926.

1. Under the principle that the subject to be taxed must be within the jurisdiction of the State, applicable to a transfer tax as well as to a property tax, a State may not tax the devolution of property from a non-resident to a non-resident, unless it has jurisdiction of the property. P. 80.
2. Inasmuch as the property of a corporation is not owned by the shareholder, presence of such property in a State does not give that State jurisdiction over his shares for tax purposes. P. 81.

3. A North Carolina law purporting to tax the inheritance of shares owned by a non-resident in any corporation of another State having fifty per cent. or more of its property in North Carolina, the assessment of the shares as compared to their full value being in the same ratio as the value of the corporate property in the State to all the corporate property,—*held* void as applied to shares owned by a resident and citizen of Rhode Island, and passing to his executor there, in a New Jersey corporation, where two-thirds in value of the corporation's property was located in North Carolina, but where the corporation was not "domesticated" by reincorporation in North Carolina, and where there was nothing in the statutory conditions on which it began and continued business there suggesting that the shareholders thereby subjected their stock to the taxing jurisdiction of that State. P. 80.

187 N. C. 263, reversed.

ERROR to a judgment of the Supreme Court of North Carolina sustaining a tax on the inheritance of shares of stock.

Mr. John M. Robinson, with whom *Messrs. William R. Tillinghast, James C. Collins* and *Colin MacR. Makepeace* were on the brief, for plaintiff in error.

The distinction between the ownership of the shares of a corporation and ownership of its property is fundamental, and has heretofore been fully recognized by the law of North Carolina. *Pullen* v. *Corporation Commission,* 152 N. C. 553. See 38 Harv. L. Rev. 813. The decision in the present case seems to stand alone. *Tyler* v. *Dane County,* 289 Fed. 843; *State* v. *Dunlap,* 28 Idaho 784; *People* v. *Dennett,* 276 Ill. 43; *Welch* v. *Burrell,* 223 Mass. 87; *State* v. *Walker,* 70 Mont. 484; *In re McMullen's Estate,* 192 N. Y. S. 49; *Shephard* v. *State,* 184 Wis. 88. See *Eisner* v. *Macomber,* 252 U. S. 189; *Hawley* v. *Maldin,* 232 U. S. 1.

We submit that the stock in question could not, in any sense, be properly regarded as property in North Carolina. The owner was not a resident. The corporation was a New Jersey one. The certificates themselves were physi-

cally out of the State. Any transfer of the certificates must have been effected out of the State. There is no contention, we assume, that the State could have exercised any control over the transfer of the stock from one owner to the other. Nor have we heard it contended that the stock, prior to the decedent's death, was subject to an *ad valorem* tax in North Carolina. In other words, that State had no jurisdiction over the property itself or the transition thereof. Even if North Carolina, through its legislature and courts, could thus sweep aside the corporate entity in dealing with the relationship of stockholders to the property of a domestic corporation, it could not do so when dealing with the relationship of stockholders in a foreign corporation.

The tobacco company is a corporation of New Jersey. Hence the relation of the stockholders to the corporate property is determined by the law of that State and can not be changed by the State of North Carolina. *Supreme Council* v. *Green,* 237 U. S. 531; *Canada, etc. R. R.* v. *Gebhard,* 109 U. S. 529. In the absence of evidence to the contrary, it is presumed that the relation of a stockholder to the corporate property is fixed by the State of New Jersey in accordance with the rules of the common law, unaffected by statute. *Miller* v. *Railroad,* 154 N. C. 441; *Roberts* v. *Pratt,* 152 N. C. 731.

From the admitted facts it is seen that the taxing State had no jurisdiction over the owner, or the property, or the transfer of the property. *Frick* v. *Commonwealth of Pennsylvania,* 268 U. S. 473. It is elementary that the power of a State to tax is limited to persons, property and business within its domain. *State Tax on Foreign-Held Bonds,* 15 Wall. 300; *Coe* v. *Errol,* 116 U. S. 517; *Dewey* v. *Des Moines,* 173 U. S. 192; *Bristol* v. *Washington County,* 177 U. S. 133; *Tyler* v. *Dane County,* 289 Fed. 843; *Shepard* v. *State,* 184 Wis. 88; *Welch* v. *Burrell,* 223 Mass. 87.

The fact that the tobacco company complied with the state statutes in order to do business therein conferred no authority on the State to impose the tax in question. Section 1181 of the Consolidated Statutes so complied with, contains no provision to the effect that a corporation, upon complying with its requirements, becomes, in any respect, a North Carolina corporation. On the contrary the section expressly provides that a corporation which has complied with its provisions may thereafter "withdraw" from the State in a prescribed manner. Formerly there were two sorts of statutes in the case of admission of foreign corporations to do business in a State—one making it a domestic corporation, and the other merely giving the foreign corporation, as such, permission to do business in the State. Chapter 62 of the Public Laws of the North Carolina Assembly of 1899 was an example of the first kind of statute mentioned. This statute was considered in the case of *Southern Railway Co.* v. *Allison,* 190 U. S. 326, wherein it was decided that a foreign corporation, which had complied with the statute, did not thereby lose its right to remove to the federal court an action brought against it by a resident of North Carolina.

In *Pennsylvania Railroad Co.* v. *Railroad,* 118 U. S. 290, the Court said: "It does not seem to admit of question that a corporation of one State, owning property and doing business in another State by permission of the latter, does not thereby become a citizen of this State also." It will be noted that the North Carolina statute (C. S. 1181) does not purport to deal with the stockholders or their liabilities, nor to change the common law relation of a stockholder to the corporate property. Its provisions operate directly upon the corporation itself, without attempting to reach beyond it. It is true that a State may impose valid conditions upon a foreign corporation seeking to enter its borders to transact business. But we submit that, even if it attempted to do so, it could not impose the

condition that stock in such corporation, held outside the State by a non-resident, should be subject to its inheritance tax. *Shephard* v. *State,* 184 Wis. 88; *Tyler* v. *Dane County,* 249 Fed. 843.

It is true that, in exceptional cases, the court will disregard the corporate entity. This, however, is resorted to in order to prevent injustice or to circumvent manifest fraud. But our research has failed to disclose a single case wherein the corporate entity has been disregarded in order to support a tax for which the corporation admittedly is not liable. If a State may utterly disregard the entity of a foreign corporation, owning property within its borders, solely for the purpose of collecting taxes out of non-resident stockholders of the corporation, it may disregard that entity for any and all purposes. The fact that North Carolina has the power to punish the tobacco company for transferring the stock before payment of the tax, by taking property of the company located in the State, does not confer jurisdiction. The vital fact in the case is that Briggs owned no property there.

The economic policy pursued by North Carolina cannot deprive the plaintiff in error of its federal rights. Neither Briggs nor the plaintiff ever took any benefit under the North Carolina way of levying *ad valorem* taxes. In *Person* v. *Watts,* 184 N. C. 499, no rights under the federal Constitution were involved.

Mr. Dennis G. Brummitt, Attorney General of North Carolina, with whom *Mr. Frank Nash,* Assistant Attorney General of North Carolina, was on the brief, for defendant in error.

An inheritance tax is in no sense a tax upon property but is a levy upon the exercise of a state-granted privilege to dispose of property at one's death or to receive such property by reason of the death of the former holder. The authority to tax this privilege is not restricted by

the Fourteenth Amendment unless the statute plainly offends against due process or equal protection. *Orr* v. *Gilman,* 183 U. S. 278; *Billings* v. *Illinois,* 188 U. S. 97; *Campbell* v. *California,* 200 U. S. 87.

The idea of a corporation as a legal entity apart from its members is a mere fiction of law. When this fiction is urged to an extent not within its reason and purpose it should be disregarded and the corporation considered as an aggregation of persons both in equity and law. *Baltimore & P. R. Co.* v. *Fifth Baptist Church,* 108 U. S. 317; *United States* v. *Trinidad Coal & C. Co.,* 137 U. S. 160. See also *Hale* v. *Henkel,* 201 U. S. 43; *J. J. McCaskill Co.* v. *United States,* 216 U. S. 504. *Linn Timber Co.* v. *United States,* 236 U. S. 574; *Northern Securities Co.* v. *United States,* 193 U. S. 332; *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106.

The legislature has authority to modify or abolish fictions, though they may have been judicially created. The State of North Carolina adopted this rule years ago and has adhered to it consistently since in raising revenue by the taxing of corporations and their shareholders. The act of 1919 but extended this salutary principle to inheritance taxes. [Citing numerous statutes.] See *Railroad Co.* v. *Commissioners,* 87 N. C. 414; *Worth* v. *Railroad,* 89 N. C. 301; *Railroad Co.* v. *Commissioners,* 91 N. C. 454; *Person* v. *Watts,* 184 N. C. 499; *Person* v. *Doughton,* 186 N. C. 723.

The Act does not offend against the Fourteenth Amendment, as the shares of stock held by the decedent in another State are not themselves property, but only evidence of decedent's ownership of an interest in property actually located in North Carolina, the statute being careful to fit the taxable value of the transfer of such shares to the proportion of the property owned and operated by the corporation in the State. While title to cor-

porate property is in the corporation, the substantial beneficial ownership is, in equity at least, in the stockholders. *Gadsden First Nat. Bank* v. *Winchester,* 119 Ala. 168; *Swift* v. *Smith,* 65 Md. 428; *Bundy* v. *Ophir Iron Co.,* 38 Oh. St. 30; *United States* v. *Wolters,* 46 Fed. 509; *Warren* v. *Davenport Fire Ins. Co.,* 31 Iowa 464; *State* v. *Brinkhop,* 238 Mo. 298; *Seaman* v. *Enterprise F. & M. Ins. Co.,* 21 Fed. 778; *Aetna Fire Ins. Co.* v. *Kennedy,* 161 Ala. 600; *Riggs* v. *Commercial Mut. Ins. Co.,* 125 N. Y. 7. Many of the cases in this Court which recognize a distinct property in the shareholder in his shares of stock, do so in determining the constitutionality of a statute, which was enacted in recognition of this principle. *Hawley* v. *Malden,* 232 U. S. 1; *Blackstone* v. *Miller,* 188 U. S. 189; *Wheeler* v. *Sohmer,* 233 U. S. 434. See *Tappan* v. *Merchants National Bank,* 19 Wall. 490; *Farrington* v. *Tenn.,* 95 U. S. 679; *Corry* v. *Baltimore,* 196 U. S. 466; *Rogers* v. *Hennipen County,* 240 U. S. 184; *Van Allen* v. *The Assessors,* 3 Wall. 598, dissenting opinion. I Morawetz on Corporations, 2d Ed. §§ 227, 232; 3 Cook on Corporations, 8th Ed. §§ 663, 664.

The State has constitutional authority to disregard this fiction, particularly when this is done with no ulterior purpose but with the intent to conform its inheritance tax laws to its consistent policy of disregarding the fiction in all of its revenue acts in relation to the taxation of the property of corporations and of their shareholders. *Blackstone* v. *Miller,* 188 U. S. 189. See *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S. 185; *New Orleans* v. *Stemple,* 175 U. S. 309. There is nothing in the recent case of *Frick* v. *Pennsylvania,* 268 U. S. 473, which conflicts with this view.

The State has constitutional authority to levy an inheritance tax upon the transfer of only that part of the stock which is represented by the value of the property located in the State. This is fair and just, because the

tobacco company is conducting its very profitable business under the fostering care of the laws of North Carolina and practically all the profits that accrued to the decedent from his ownership of the shares accrued in North Carolina. See *Young* v. *South Tredegar Iron Co.*, 85 Tenn. 189; *In re Bronson's Estate,* 150 N. Y. 44; *In re Culver's Estate,* 145 Iowa 1; *Parks Cramer Co.* v. *Southern Express Co.*, 185 N. C. 428. If this position is not sound, then it is easy to conceive a corporation incorporated in another State and doing business in this State with all of its property in the State, whose shares of stock would not be subject to the inheritance tax.

As this is in reality taxation of the transfer of an interest in property located in the State, the General Assembly may impose the obligation to pay such tax upon the custodian of the property within the State. Much more may it, then, impose this liability upon the tobacco company in the present case if it should transfer the stock upon its books without the waiver of the Commissioner of Revenue required to give such transfer validity. *Kirkland* v. *Hotchkiss,* 100 U. S. 498; *Bristol* v. *Washington Co.,* 166 U. S. 141; *Carstairs* v. *Cochran,* 193 U. S. 10; *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60.

Plaintiff in error relies upon certain cases falling into two classes: (*a*) Those where the court, in interpreting a general statute not specifically imposing a tax, holds that the tax cannot be assessed under the general words of the act because the property in the share of stock is distinct from the property of the corporation, and the share being located without the taxing State, it has no authority to impose the tax. *People* v. *Bennett,* 276 Ill. 43; *People* v. *Blair,* 276 Ill. 623; *State* v. *Dunlop,* 28 Idaho 784; *Welch* v. *Burrell, State Treas.,* 223 Mass. 87; *In re Harkness Estate,* 83 Okla. 107; (*b*) Those which hold an act somewhat similar to the North Carolina act attacked herein, unconstitutional. *Tyler* v. *Dane County,* 289 Fed. 843;

Shepard v. *The State,* 184 Wis. 88. Both of the two decisions last cited were founded upon the fundamental difference in Wisconsin between the capital of a corporation and its capital stock. *State ex rel. Trust Co.* v. *Walker,* 70 Mont. 484, also distinguished.

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

This is a writ of error to the Supreme Court of North Carolina in a consolidation of two causes, the first being an appeal to a Superior Court of the State by the plaintiff in error, the Rhode Island Hospital Trust Company, executor of George Briggs, from an inheritance tax assessment on the decedent's estate made by the Commissioner of Revenue of North Carolina, and the second being an action at law by the executor to recover the taxes paid by it on the assessment under protest. The Superior Court held that the inheritance taxes imposed by the Commissioner of Revenue of the State were lawful and that the executor was not entitled to recover them back as illegally collected. The Supreme Court of North Carolina affirmed this judgment. 187 N. C. 263.

The assignment of error of the executor is based on the invalidity under the Fourteenth Amendment of that part of the Revenue Act of 1919 of North Carolina, Public Laws, c. 90, § 6 and sub § 7, which provides:

"SEC. 6. From and after the passage of this act all real and personal property of whatever kind and nature which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, whether the person or persons dying seized thereof be domiciled within or out of the State (or if the decedent was not a resident of this State at the time of his death, such property or any part thereof within this State,) or any interest therein or income therefrom which shall be transferred by deed, grant,

sale or gift, made in contemplation of the death of the grantor, bargainor, donor or assignor, or intended to take effect in possession or enjoyment after such death, to any person or persons or to bodies corporate or politic, in trust or otherwise, or by reason whereof any person or body corporate or politic shall become beneficially entitled in possession or expectancy to any property or the income thereof, shall be and hereby is made subject to a tax for the benefit of the State. . . .

"Seventh. The words 'such property or any part thereof or interest therein within this State' shall include in its meaning bonds and shares of stock in any incorporated company, incorporated in any other State or country, when such incorporated company is the owner of property in this State, and if 50 per cent or more of its property is located in this State, and when bonds or shares of stock in any such company not incorporated in this State, and owning property in this State, are transferred by inheritance, the valuation upon which the tax shall be computed shall be the proportion of the total value of such bonds or shares which the property owned by such company in this State bears to the total property owned by such company, and the exemptions allowed shall be the proportion of exemption allowed by this act, as related to the total value of the property of the decedent."

The seventh sub-section further provides:

"Any incorporated company not incorporated in this State and owning property in this State, which shall transfer on its books the bonds or shares of stock of any decedent holder of shares of stock in such company exceeding in par value $500, before the inheritance tax, if any, has been paid, shall become liable for the payment of the said tax, and any property held by such company in this State shall be subject to execution to satisfy the same. A receipt or waiver signed by the State Tax Commissioner of North Carolina shall be full protection for any such company in the transfer of any such stocks or bonds."

George Briggs was a resident of the State of Rhode Island, and domiciled therein at the time of his death. He never resided in North Carolina. He died testate October 29, 1919, leaving a large estate. The plaintiff, Rhode Island Hospital Trust Company, was appointed executor of Briggs' will, and qualified as such before the municipal court of the city of Providence, Rhode Island. Among other personal property passing to the executor under the will were shares of stock in the R. J. Reynolds Tobacco Company which with declared dividends unpaid were valued at $115,634.50. The R. J. Reynolds Tobacco Company, hereinafter for brevity called the Tobacco Company, is a corporation created under the laws of the State of New Jersey. Section 1181 of the Consolidated Statutes of North Carolina provides that every foreign corporation, before being permitted to do business in North Carolina, shall file in the office of the Secretary of State a copy of its charter, a statement of the amount of its capital stock, the amount actually issued, the principal office in North Carolina, the name of the agent in charge of the office, the character of the business which it transacts, and the names and post office addresses of its officers and directors. It is required to pay, for the use of the State, twenty cents for every one thousand dollars of its authorized capital stock, but in no case less than $25, nor more than $250. It may withdraw from the State upon paying a fee of five dollars, and filing in the office of the Secretary of State a statement of its wish to do so. In August, 1906, the Tobacco Company filed its application under the statute and complied with the requirements, and a certificate granting authority to it to do business in the State was issued. Two-thirds in value of its entire property is in North Carolina. Since 1906, it has regularly paid the license and franchise tax required, and is still doing business in the State.

Briggs' certificates of stock in the Tobacco Company, passing under his will to his executor, were, none of them,

in the State of North Carolina at the time of his death, and never had been while they were owned by him. The Commissioner of Revenue of the State assessed an inheritance tax upon $77,089.67, (66⅔ per cent. of the total value of Briggs' stock), amounting to $2,658.85. The plaintiff as executor applied to the office of the company in New Jersey to have this stock transferred to it as executor, in compliance with the will of Briggs. The company refused to do so, on the ground that under the law of North Carolina, already set forth, it would by such transfer before the executor paid the transfer tax subject itself to a penalty which could be exacted out of its property in that State. Thereupon the executor paid the tax under protest, and brought suit to recover it back.

The question here presented is whether North Carolina can validly impose a transfer or inheritance tax upon shares of stock owned by a non-resident in a business corporation of New Jersey, because the corporation does business and has two-thirds of its property within the limits of North Carolina. We think that the law of North Carolina by which this is attempted, is invalid. It goes without saying that a State may not tax property which is not within its territorial jurisdiction. *State Tax on Foreign Held Bonds,* 15 Wall. 300; *Louisville Ferry Company* v. *Kentucky,* 188 U. S. 385; *Delaware Railroad* v. *Pennsylvania,* 198 U. S. 341; *Union Ref. Transit Company* v. *Kentucky,* 199 U. S. 194; *Metropolitan Life Insurance Company* v. *New Orleans,* 205 U. S. 395, 399; *United States* v. *Bennett,* 232 U. S. 299, 306; *International Paper Company* v. *Massachusetts,* 246 U. S. 135, 142; *Frick* v. *Pennsylvania,* 268 U. S. 473, 488.

The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the State applies as well in the case of a transfer tax as in that of a property tax. A State has no power to tax the devo-

lution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred. In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, a transfer tax of course may be properly levied by the State in which he resides. So, too, it is well established that the State in which a corporation is organized may provide in creating it for the taxation in that State of all its shares, whether owned by residents or non-residents. *Hawley* v. *Malden,* 232 U. S. 1, 12; *Hannis Distillery Co.* v. *Baltimore,* 216 U. S. 285, 293, 294; *Corry* v. *Baltimore,* 196 U. S. 466; *Tappan* v. *Bank,* 19 Wall 490, 503.

In this case the jurisdiction of North Carolina rests on the claim that, because the New Jersey corporation has two-thirds of its property in North Carolina, the State may treat shares of its stock as having a situs in North Carolina to the extent of the ratio in value of its property in North Carolina to all of its property. This is on the theory that the stockholder is the owner of the property of the corporation, and the State which has jurisdiction of any of the corporate property has *pro tanto* jurisdiction of his shares of stock. We can not concur in this view. The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property.

In *Van Allen* v. *Assessors,* 3 Wall. 573, 583, the question was whether shares of stock in a national bank could be subjected to state taxation if part or all of the capital of the bank was invested in securities of the National

Government declared by the statute authorizing them to be exempt from taxation by state authority. It was held that they could be so taxed. Mr. Justice Nelson, speaking for this Court, said, at pp. 583, 584:

"But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. . . .

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him."

The same principle is declared in *Jellenik* v. *Huron Copper Company,* 177 U. S. 1, in which it was held that shares of stock in a corporation had a situs in the State creating the corporation so that they were there subject to mesne process. It is approved in *Farrington* v. *Tennessee,* 95 U. S. 679, 686; in *Hawley* v. *Malden, supra,* at p. 19; in *Eisner* v. *Macomber,* 252 U. S. 189, 208, 213, 214, and in *Des Moines Natl. Bank* v. *Fairweather,* 263 U. S. 103, 112.

In North Carolina and in some other States, the state constitution requires all property, real and personal, to be taxed equally. Laws have been passed exempting shares of stock in North Carolina corporations from taxation, on the ground that the property of the corporation is taxed, which is held to be equivalent to taxing the shares.

Person v. *Watts,* 184 N. C. 499; *Jones* v. *Davis,* 35 O. S. 474. But such cases grow out of state constitutional difficulties and are hardly applicable to questions of state jurisdiction of shares of foreign corporation stock. The cases of *Bronson's Estate,* 150 N. Y. 1, 8, and *In re Culver's Estate,* 145 Iowa 1, said to hold that a stockholder owns the property of the corporation, are really authorities to the point that shares of stock in a corporation of a State have their situs for purposes of taxation in that State, as well as in the residence of the owner of the shares. But whatever the view of the other courts, that of this Court is clear: the stockholder does not own the corporate property. Jurisdiction for tax purposes over his shares can not, therefore, be made to rest on the situs of part of the corporate property within the taxing State. North Carolina can not control the devolution of New Jersey shares. That is determined by the laws of Rhode Island where the decedent owner lived or by those of New Jersey, because the shares have a situs in the State of incorporation. There is nothing in the statutory conditions on which the Tobacco Company began or continued business in North Carolina which suggests that its shareholders subjected their stock to the taxing jurisdiction of that State by the company's doing business there.

Our conclusion is in accord with the great majority of cases in the state courts where this exact question has arisen. *Welch* v. *Burrill,* 223 Mass. 87; *People* v. *Dennett,* 276 Ill. 43; *State* v. *Dunlap,* 28 Idaho 784; *State* v. *Walker,* 70 Montana 484; *In re Harkness Estate,* 83 Okla. 107. *Tyler* v. *Dane County,* 289 Fed. 843, contains a full and satisfactory discussion of the subject in a Wisconsin case which has been followed by the Supreme Court of Wisconsin in *Estate of Shepard,* 184 Wis. 88. See article by Professor Beale, 38 Harvard Law Review 291.

In an addendum to its opinion in this case, the Supreme Court of North Carolina suggests that the jurisdiction of the State to tax the shares of the New Jersey corporation

may be based on the view that the corporation has been domesticated in North Carolina. So far as the statutes of the State show, it has been authorized to do and does business in the State and owns property therein and pays a fee for the permission to do so. It has not been re-incorporated in the State. It is still a foreign corporation and the rights of its stockholders are to be determined accordingly.

We conclude that the statute of North Carolina, above set out, in so far as it attempts to subject the shares of stock in the New Jersey corporation, held by a resident of Rhode Island, to a transfer tax, deprives the executor of Briggs of his property without due process of law and is invalid.

Judgment reversed.

INDEPENDENT WIRELESS TELEGRAPH COMPANY *v.* RADIO CORPORATION OF AMERICA.

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

No. 87. Petition for rehearing; denied March 1, 1926.

This Court will not examine a point raised for the first time in a petition for rehearing, after failure to raise it in the petition for certiorari, briefs, or argument of counsel.

On petition to rehear, after the decision reported in 269 U. S. 459.

Mr. William H. Davis, for petitioner.

Mr. John W. Davis, with whom *Mr. James J. Cosgrove* was on the brief, for respondent.

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

This is a petition for rehearing of a case in which the opinion was handed down January 11th last. The case

was a bill in equity in the District Court for the Southern District of New York, filed by the Radio Corporation to enjoin the Independent Wireless Company from infringing the rights of the Radio Company, which were averred in its bill to be those of an exclusive sub-licensee of the patentee, the De Forest Radio Telegraph & Telephone Company, in respect of the use of certain radio apparatus for commercial communication between ships and shore for pay. The Radio Company made the De Forest Company co-complainant in the bill, reciting that it had asked the De Forest Company to become a co-complainant, and that it had refused, that the De Forest Company was a resident of Delaware, was beyond the jurisdiction of the District Court for the Southern District of New York, and could not be served with process, and that under such circumstances it had the right to use the name of the De Forest Company as co-complainant without its consent. A motion to dismiss the bill was granted by the District Court for lack of the presence of the patentee as a party, and an appeal was taken from the decree of dismissal to the Circuit Court of Appeals. The latter court reversed the decree of dismissal and remanded the case for further proceedings. Thereupon an application was made to this Court for certiorari, and the certiorari was issued. In the opinion already rendered, January 11th last, this Court held that the Radio Corporation properly made the De Forest Company a co-complainant with it in the bill without its consent, and therefore that the action of the Circuit Court of Appeals in reversing the decree of the District Court dismissing the bill was right. The petition for rehearing on behalf of the Independent Wireless Company now filed, raises the question whether the Radio Corporation is an exclusive sub-licensee of the patentee, the De Forest Company, under the contracts, from which the Radio Company derives its rights, and which are exhibits to the bill. It is the first time that this question has been made in this Court. The bill which was dis-

missed makes the specific averment that the Radio Corporation did have the rights of an exclusive licensee. Both the District Court and the Circuit Court of Appeals found from the contracts as exhibited that the Radio Company had the exclusive rights as sub-licensee which it claimed. The briefs for the Independent Wireless Company did not raise any question on this point in this Court, nor was it mentioned in that Company's petition for certiorari. Its whole argument therein was devoted to the issue whether, assuming that the Radio Company was an exclusive licensee, it could make the patentee company, the De Forest Company, a co-complainant. As the District Judge remarked in his opinion, the contracts out of which the Radio Company's alleged exclusive license arises are complicated, and this Court, in view of the decision of both the lower courts, holding such exclusive rights in the Radio Company as a licensee to exist, decided the case on the basis of those rights. In view of the course of the Independent Wireless Company in not making this point in its petition for certiorari, briefs or argument, we do not purpose to examine this question now raised for the first time. Our writ of certiorari was granted solely because of the importance of the question of patent practice decided in our opinion already announced. However, as the case must now be remanded to the District Court for further proceedings, we have no wish by action of ours to preclude the defendant below from making the point unless it is prevented by his course in the courts below. We therefore direct the mandate to include a provision that the further proceedings to be taken shall be without prejudice, by reason of anything in the opinion or decree of this Court, to the right of the Independent Wireless Company to raise the issue, by answer or otherwise, whether the Radio Corporation has the rights as an exclusive sub-licensee, which it avers in its bill. With this reservation, the petition for rehearing is denied.

Petition denied.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY *v.* STATE OF WASHINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 187. Argued January 28, 1926.—Decided March 1, 1926.

1. The power of the States to quarantine against importation of farm produce likely to convey injurious insects from infested localities, was suspended, in so far as concerns interstate commerce, by the Act of August 20, 1912, as amended March 4, 1917, investing the Secretary of Agriculture with full authority over the subject. P. 96.
2. This Act of Congress can not be construed as leaving the States at liberty to establish such quarantines in the absence of action by the Secretary of Agriculture. P. 102.
3. A quarantine proclaimed by the State of Washington under Ls. 1921, c. 105, against importation of alfalfa hay and alfalfa meal, except in sealed containers, coming from designated regions in other States found to harbor the alfalfa weevil, is therefore inoperative. Pp. 93, 102.

128 Wash. 365, reversed.

ERROR to a judgment of the Supreme Court of Washington affirming a decree, in a suit instituted by the State, permanently enjoining the Railroad Company from transporting through the State consignments of alfalfa hay and meal from other designated States or parts thereof, in disregard of a quarantine.

Mr. Arthur C. Spencer, with whom *Messrs. Henry W. Clark* and *F. T. Merritt* were on the brief, for plaintiff in error.

Mr. R. G. Sharpe, with whom *Mr. John H. Dunbar* was on the brief, for defendant in error.

The reasonableness of a quarantine regulation must in all cases be determined by the exigencies of the particular problem confronting the commonwealth, and the quarantine order here involved is no more drastic than the evi-

dence shows the situation demanded. *Railroad Company* v. *Husen*, 95 U. S. 465, distinguished. See *Rasmussen* v. *Idaho*, 181 U. S. 198; *State* v. *Rasmussen*, 7 Idaho 1; *Smith* v. *Railroad Co.*, 181 U. S. 248; *Compagnie Française De Navigation à Vapeur* v. *Board of Health*, 186 U. S. 380; *Schollenberger* v. *Commonwealth of Pennsylvania*, 171 U. S. 1.

The federal act does not conflict with the state law and, in any event, the former merely delegates to the Secretary of Agriculture the right to quarantine any district which he finds, after a public hearing, to be infected by a dangerous plant disease or insect infestation, and until the Secretary of Agriculture has actually caused such a public hearing to be had and has fixed, or refused to fix, quarantine lines as contemplated by § 8 of the Act, it cannot be said that Congress has occupied the field covered by the state quarantine law.

Clearly the fact that Congress has merely delegated to an executive officer the power which it itself has to enact police regulations affecting the welfare of the several States does not mean that it has deprived the several States of the right to protect their own agricultural industries by proper police regulations of their own, at least until the delegated power has been actively exercised by the executive officer. *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612; *Railway Co.* v. *Harris*, 234 U. S. 412; *Atlantic Coast Line R. R.* v. *Commonwealth, etc.*, 136 Va. 134.

It is argued by the Railroad that the Act of Congress makes it obligatory upon the Secretary of Agriculture to establish a quarantine "when he shall determine that such a quarantine is necessary." But he is merely authorized and not required to have a public or other hearing for the purpose of determining whether a particular district should or should not be quarantined. Even were the duty expressly imposed upon the Secretary to cause such

hearings to be had and adopt the necessary quarantine measures, there could be no other or greater duty imposed upon this officer to ascertain the facts and adopt the proper regulations than was already imposed upon Congress itself before the law was enacted. We respectfully insist that no more imperative duty to pass needed legislation can be delegated to any officer, board or tribunal than already exists in the delegating legislative body itself, and failure on the part of Congress to act has never been held to imply a congressional finding that legislation of the several States was unnecessary. The Secretary would not be required to fix quarantine lines if he deemed the state regulations sufficiently effective.

But the federal law does not, and was not intended to, cover the entire field of quarantining districts infested with injurious plant diseases and insect pests. It authorizes the Secretary of Agriculture to establish quarantine when he finds that any particular plant disease or insect infestation is "new to or *not theretofore widely prevalent or distributed within and throughout the United States.*" It might well be urged that in the present case, for instance, the alfalfa weevil was widely prevalent in the United States, since it exists in Utah, Colorado, Idaho, Oregon and Nevada, and for that reason the Secretary of Agriculture would be powerless to establish the quarantine provided for by the Act; and were the federal Act adjudged to be exclusive, the State of Washington, which is now free from the pest, would be powerless to prevent infestation of its 300,000 acres of alfalfa land by appropriate quarantine measures. Under the federal law it is apparent that, if all States save one were infected, the one free from infection would be powerless to protect itself. This could not have been the purpose of Congress in enacting this legislation. *Savage* v. *Jones,* 225 U. S. 501; *Carey* v. *South Dakota,* 250 U. S. 118; *Reid* v. *Colorado,* 187 U. S. 137; *Asbell* v. *Kansas,* 209 U. S. 251; *State* v.

R. Co., 200 Mo. App. 109; *Missouri Pacific Ry.* v. *Larabee Mills*, 211 U. S. 612.

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

This was a bill of complaint filed by the State of Washington in the Superior Court of Thurston County of that State against the defendant, the Oregon-Washington Railway & Navigation Company, an interstate common carrier in the States of Idaho, Oregon and Washington. The bill averred that there existed in the areas of the States of Utah, Idaho, Wyoming, Oregon and Nevada, an injurious insect popularly called the alfalfa weevil, and scientifically known as the *Phytonomus posticus*, which fed upon the leaves and foliage of the alfalfa plant, to the great damage of the crop; that the insect multiplied rapidly and was propagated by means of eggs deposited by the female insect upon the leaves and stalks of the plant; that when the hay was cured, the eggs clung to and remained dormant upon the hay and even in the meal made from it; that the eggs and live weevils were likely to be carried to points where hay was transported, infecting the growing crop there; that when the hay was carried in common box cars the eggs and live weevils were likely to be shaken out and distributed along the route and communicated to the agricultural lands adjacent to the route; that a proper inspection to ascertain the presence of the eggs or weevils would require the tearing open of every bale of hay and sack of meal, involving a prohibitive cost of inspection, and that the only practical method of preventing the spread into uninfested districts was to prohibit the transportation of hay or meal from the district in which the weevil existed; that the pest is new to, and not generally distributed within, the State of Washington; that there is no known methed of ridding an infested district of the pest; that subsequent to June 8, 1921, and

prior to September 17, 1921, information was received by the Washington Director of Agriculture that there was a probability of the introduction of the weevil into the State across its boundaries; that he thereupon investigated thoroughly the insect and the areas where such pests existed and ascertained it to be in the whole of the State of Utah, all portions of the State of Idaho lying south of Idaho County, the counties of Uinta and Lincoln in the State of Wyoming, the county of Delta in the State of Colorado, the counties of Malheur and Baker in the State of Oregon, and the county of Washoe in the State of Nevada; that he, with the approval of the Governor of the State, thereupon, on or about September 17, 1921, made and promulgated a quarantine regulation and order under the terms of which he declared a quarantine against all of the above described areas and forbade the importation into Washington of alfalfa hay and alfalfa meal, except in sealed containers, and fixed the boundaries of the quarantine. The bill further averred that the defendant, knowing of the proclamation, and in violation thereof, had caused to be shipped into Washington, in common box cars, and not in sealed containers, approximately 100 cars of alfalfa hay, consigned from various points in the State of Idaho lying south of Idaho County and through the State of Oregon and into the State of Washington, in direct violation of the quarantine order; and that, unless enjoined, the defendant would continue to make these shipments from such quarantined area in the State of Idaho into and through the State of Washington; that large quantities of alfalfa were grown in the eastern and central portions of Washington and adjacent to the railroad lines of the defendant and other railroads over which such shipments of alfalfa hay were shipped, and were likely to be shipped in the future unless an injunction was granted, to the great and irreparable damage of the citizens of Washington growing alfalfa therein. A tempo-

rary injunction was issued, and then a demurrer was filed by the defendants. The demurrer was overruled. An answer was filed and in each of the pleadings was set out the claim by the defendant that the action and proclamation of the Director of Agriculture and the Governor, and chapter 105 of the Laws of Washington of 1921, under which they acted, were in contravention of the interstate commerce clause of the Federal Constitution, and in conflict with an act of Congress.

At the hearing there was evidence on behalf of the State that the Oregon-Washington and Northern Pacific Railroads ran through the parts of the State where the alfalfa was raised; that the weevil had first appeared in Utah in 1904 in Salt Lake City, and that it had spread about 10 miles a year; that it came from Russia and Southern Europe; that it would be impossible to adopt any method of inspection of alfalfa hay to keep out the weevil not prohibitory in cost; that in Europe the weevil is not a serious pest, because its natural enemies exist there and they keep it down; that the United States Government had attempted to introduce parasites, but that it takes a long time to secure a natural check from such a method; that methods by using poison sprays, by burning and in other ways had been used to attack the pest, but that no one method has been entirely successful; that there is no practical way of eliminating the beetles completely if the field once becomes infected, and the continuance of the pest will be indefinite; that the great danger of spreading the infection is through the transfer of hay from one section to another. In behalf of the defendant it was testified that the prevalent opinion in regard to the spread of the alfalfa weevil and the damage it was doing was vastly exaggerated; that the spread of the weevil from hay shipped in the cars, through the State of Washington, was decidedly improbable. The Superior Court made the temporary injunction permanent and the

Supreme Court of Washington affirmed the decree. This is a writ of error under section 237 of the Judicial Code to that decree.

By chapter 105 of the Washington Session Laws of 1921, p. 308, the Director is given the power and duty, with the approval of the Governor, to establish and maintain quarantine needed to keep out of the State contagion or infestation by disease of trees and plants and injurious insects or other pests, to institute an inspection to prevent any infected articles from coming in except upon a certificate of investigation by such Director, or in his name by an inspector. Upon information received by the Director, of the existence of any infectious plant disease, insect or weed pest, new to or not generally distributed within the State, dangerous to the plant industry of the State, he is required to proceed to investigate the same, and then enforce necessary quarantine. There is a provision for punishment by a fine of not less than $100, or more than $1,000, or by both such fine and imprisonment, for violation of the Act.

In the absence of any action taken by Congress on the subject matter, it is well settled that a State in the exercise of its police power may establish quarantines against human beings or animals or plants, the coming in of which may expose the inhabitants or the stock or the trees, plants or growing crops to disease, injury or destruction thereby, and this in spite of the fact that such quarantines necessarily affect interstate commerce.

Chief Justice Marshall, in *Gibbons* v. *Ogden,* 9 Wheat. 1, speaking of inspection laws, says at p. 203:

" They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government: all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the in-

ternal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

Again, he says at p. 205:

"The acts of congress, passed in 1796 and 1799 (1 Stat. 474, 619), empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a state, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true, that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a state may rightfully regulate commerce with foreign nations, or among the states; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of congress, and are considered as flowing from the acknowledged power of a state, to provide for the health of its citizens. But, as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by the laws of the United States, made for the regulation of commerce, congress, in that spirit of harmony and conciliation, which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states. But, in making these provisions, the opinion is unequivocally manifested, that Congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce."

This Court in the *Minnesota Rate Cases,* 230 U. S. 352, 406, said:

"Quarantine regulations are essential measures of protection which the States are free to adopt when they do

not come into conflict with Federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the States and has repeatedly acquiesced in the enforcement of State laws. . . . Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health (*Hannibal & St. Joseph Railroad Co.* v. *Husen,* 95 U. S. 465, 472, 473); but the power of the State to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question. *Morgan's &c. S. S. Co.* v. *Louisiana,* 118 U. S. 455; *Missouri, Kansas & Texas Ry. Co.* v. *Haber,* 169 U. S. 613; *Louisiana* v. *Texas,* 176 U. S. 1; *Rasmussen* v. *Idaho,* 181 U. S. 198; *Compagnie Francaise, etc.* v. *Board of Health,* 186 U. S. 380; *Reid* v. *Colorado,* 187 U. S. 137, 138; *Asbell* v. *Kansas,* 209 U. S. 251."

Counsel for the company argues that the case of *Railroad Co.* v. *Husen,* 95 U. S. 465, is an authority to show that this law as carried out by the proclamation goes too far, in that it forbids importations from certain parts of Idaho, of Utah, of Nevada, of alfalfa hay, without qualification and without any limit of time. The *Husen Case* is to be distinguished from the other cases cited, in that the Missouri statute there held invalid was found by the Court not to be a quarantine provision at all. It forbade the importation into Missouri for eight months of the year of any Texas, Mexican or Indian cattle without regard to whether the cattle were diseased or not, and without regard to the question whether they came from a part of the country where they had been exposed to contagion.

We think that here the investigation required by the Washington law and the investigation actually made into the existence of this pest and its geographical location makes the law a real quarantine law, and not a mere inhibition against importation of alfalfa from a large part of the country without regard to the conditions which might make its importation dangerous.

The second objection to the validity of this Washington law and the action of the State officers, however, is more formidable. Under the language used in *Gibbons* v. *Ogden, supra,* and the *Minnesota Rate Cases, supra,* the exercise of the police power of quarantine, in spite of its interfering with interstate commerce, is permissible under the Interstate Commerce clause of the Federal Constitution "subject to the paramount authority of Congress if it decides to assume control."

By the Act of Congress of August 20, 1912, 37 Stat. 315, c. 308, as amended by the Act of March 4, 1917, 39 Stat. 1165, c. 179, it is made unlawful to import or offer for entry into the United States, any nursery stock unless permit had been issued by the Secretary of Agriculture under regulations prescribed by him.

Section 2 makes it the duty of the Secretary of the Treasury to notify the Secretary of Agriculture of the arrival of any nursery stock and forbids the shipment from one State or Territory or District of the United States into another of any nursery stock imported into the United States without notifying the Secretary of Agriculture, or at his direction, the proper State, Territorial or District official to which the nursery stock was destined. Whenever the Secretary of Agriculture shall determine that such nursery stock may result in the entry of plant diseases or insect pests, he shall promulgate his determination of this, but shall give due notice and a public hearing at which any interested party may appear before the promulgation.

Section 7 provides that whenever, in order to prevent the introduction into the United States of any tree, plant or fruit disease, or any injurious insect, not theretofore widely prevalent or distributed within and through the United States, the Secretary shall determine that it is necessary to forbid the importation into the United States, he shall promulgate such determination, and such importations are thereafter prohibited.

Section 8 of the Act was amended by the Agricultural Appropriation Act of March 4, 1917, and reads as follows:

"Sec. 8. That the Secretary of Agriculture is authorized and directed to quarantine any State, Territory, or District of the United States, or any portion thereof, when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and throughout the United States; and the Secretary of Agriculture is directed to give notice of the establishment of such quarantine to common carriers doing business in or through such quarantined area, and shall publish in such newspapers in the quarantined area as he shall select notice of the establishment of quarantine. That no person shall ship or offer for shipment to any common carrier, nor shall any common carrier receive for transportation or transport, nor shall any person carry or transport from any quarantined State or Territory or District of the United States, or from any quarantined portion thereof, into or through any other State or Territory or District, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine except as hereinafter provided. That it shall be unlawful to

move, or allow to be moved, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from any quarantined State or Territory or District of the United States or quarantined portion thereof, into or through any other State or Territory or District, in manner or method or under conditions other than those prescribed by the Secretary of Agriculture. That it shall be the duty of the Secretary of Agriculture, when the public interests will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, and method and manner of delivery and shipment of the class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from a quarantined State or Territory or District of the United States, or quarantined portion thereof, into or through any other State or Territory or District; and the Secretary of Agriculture shall give notice of such rules and regulations as hereinbefore provided in this section for the notice of the establishment of quarantine: *Provided,* That before the Secretary of Agriculture shall promulgate his determination that it is necessary to quarantine any State, Territory, or District of the United States, or portion thereof, under the authority given in this section, he shall, after due notice to interested parties, give a public hearing under such rules and regulations

as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney."

Section 10 of the Act provides that any person who shall violate any provisions of the Act, or who shall forge, counterfeit or destroy any certificate provided for in the Act or in the regulations of the Secretary of Agriculture, shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both such fine and imprisonment, in the discretion of the court. It is made the duty of the United States attorneys diligently to prosecute any violations of this Act which are brought to their attention by the Secretary of Agriculture, or which come to their notice by other means; and for the purpose of carrying out the provisions of the Act, the Secretary of Agriculture shall appoint from existing bureaus in his office, a commission of five members employed therein.

It is impossible to read this statute and consider its scope without attributing to Congress the intention to take over to the Agricultural Department of the Federal Government the care of the horticulture and agriculture of the States, so far as these may be affected injuriously by the transportation in foreign and interstate commerce of anything which by reason of its character can convey disease to and injure trees, plants or crops. All the sections look to a complete provision for quarantine against importation into the country and quarantine as between the States under the direction and supervision of the Secretary of Agriculture.

The courts of Washington and the counsel for the State rely on the decision of this Court in *Reid* v. *Colorado,* 187 U. S. 137, as an authority to sustain the validity of the Washington law before us. The *Reid Case* involved the constitutionality of a conviction of Reid for violation of

an Act of Colorado to prevent the introduction of infectious or contagious diseases among the cattle and horses of that State. The law made it unlawful for any person, association or corporation to bring or drive any cattle or horses, suffering from such disease, or which had within ninety days prior thereto been herded or brought into contact with any other cattle or horses, suffering from such disease, into the State, unless a certificate or bill of health could be produced from the state veterinary sanitary board that the cattle and horses were free from all infectious or contagious diseases. It was urged that it was inconsistent with the Federal Animal Industry Act. This directed a study of contagious and communicable diseases of animals and the best method of treating them, by the Federal Commissioner of Agriculture, to be certified to the executive authority of each State, and the coöperation of such authority was invited. If the authorities of the State adopted the plans and methods advised by the Department, or if such authorities adopted measures of their own which the Department approved, then the money appropriated by Congress was to be used in conducting investigations and in aiding such disinfection and quarantine measures as might be necessary to prevent the spread of the diseases in question from one State or Territory into another. This Court held that Congress did not intend by the Act to override the power of the States to care for the safety of the property of their people, because it did not undertake to invest any officer or agent of the Department with authority to go into a State and without its assent take charge of the work of suppressing or extirpating contagious, infectious or communicable diseases there prevailing, or to inspect cattle or give a certificate of freedom from disease for cattle, of superior authority to state certificates.

It is evident that the federal statute under consideration in the *Reid Case* was an effort to induce the States to

coöperate with the general Government in measures to suppress the spread of disease without at all interfering with the action of the State in quarantining or taking any other measures to extirpate it or prevent its spread. Indeed the Commissioner of Agriculture in that case was to aid the state authorities in their quarantine and other measures from federal appropriation. The act we are considering is very different. It makes no reference whatever to coöperation with state authorities. It proposes the independent exercise of federal authority with reference to quarantine in interstate commerce. It covers the whole field so far as the spread of the plant disease by interstate transportation can be affected and restrained. With such authority vested in the Secretary of Agriculture, and with such duty imposed upon him, the state laws of quarantine that affect interstate commerce and this federal law can not stand together. The relief sought to protect the different States, in so far as it depends on the regulation of interstate commerce, must be obtained through application to the Secretary of Agriculture.

In the relation of the States to the regulation of interstate commerce by Congress there are two fields. There is one in which the State can not interfere at all, even in the silence of Congress. In the other, (and this is the one in which the legitimate exercise of the State's police power brings it into contact with interstate commerce so as to affect that commerce,) the State may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action.

Cases of the latter type are the *Southern Railway Co.* v. *Reid,* 222 U. S. 424; *Northern Pacific Railway Co.* v. *Washington,* 222 U. S. 370, 378; *C. R. I. & P. Ry. Co.* v. *Elevator Company,* 226 U. S. 426, 435; *Erie Railroad Co.* v. *New York,* 233 U. S. 671, 681; and *Missouri Pacific Railroad Co.* v. *Stroud,* 267 U. S. 404.

Some stress is laid by the counsel of the State on the case of *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills*, 211 U. S. 612. There the question was whether a state court might by mandamus compel a railroad company, under its common law obligation as a common carrier, to afford equal local switching service to its shippers, notwithstanding the fact that the cars in regard to which the service was claimed were two-thirds of them in interstate commerce and one-third in intrastate commerce. The contention was that the enactment of the Interstate Commerce Law put such switching wholly in control of the Interstate Commerce Commission. The case was one on the border line, three judges dissenting. The number of cases decided since that case and above cited have made it clear that the rule, as it always had been, was not intended in that case to be departed from. That rule is that there is a field in which the local interests of States touch so closely upon interstate commerce that, in the silence of Congress on the subject, the States may exercise their police powers; and local switchings, as in that case, and quarantine, as in the case before us, are in that field. But when Congress has acted and occupied the field, as it has here, the power of the States to act is prevented or suspended.

It follows that, pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject can not be given application. It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that can not be given to the federal statute. The obligation to act without respect to the States is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not

act, it must be presumed that it is not necessary. With the federal law in force, state action is illegal and unwarranted.

The decree of the Supreme Court of Washington is

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE SUTHERLAND, dissenting.

We cannot think Congress intended that the Act of March 4, 1917, without more should deprive the States of power to protect themselves against threatened disaster like the one disclosed by this record.

If the Secretary of Agriculture had taken some affirmative action the problem would be a very different one. Congress could have exerted all the power which this statute delegated to him by positive and direct enactment. If it had said nothing whatever, certainly the State could have resorted to the quarantine; and this same right, we think, should be recognized when its agent has done nothing.

It is a serious thing to paralyze the efforts of a State to protect her people against impending calamity and leave them to the slow charity of a far-off and perhaps supine federal bureau. No such purpose should be attributed to Congress unless indicated beyond reasonable doubt.

SOUTHERN PACIFIC COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 805. Motion to dismiss appeal submitted February 1, 1926.—Decided March 1, 1926.

1. This Court has no jurisdiction to consider an appeal from a judgment of the Court of Claims acquiring finality subsequently to

the going into effect of the Act of February 13, 1925, c. 229, 43 Stat. 936, which limited the method of review by this Court of final judgments in the Court of Claims to writs of certiorari. P. 106.

2. A judgment of the Court of Claims, entered before May 13, 1925, the effective date of the above Act, but suspended by a motion for new trial which was denied after that date, was not appealable. *Id.*

Appeal from 60 Ct. Cls. 662, dismissed; certiorari granted.

MOTION to dismiss an appeal from the Court of Claims in an action brought by the Railroad Company to recover compensation for transportation of impedimenta carried with troop trains of the United States. A writ of certiorari had been applied for in due time and is granted.

Solicitor General Mitchell, for the United States, in support of the motion.

Messrs. William R. Harr and *Charles H. Bates* for the appellant, in opposition thereto.

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

The Southern Pacific Company filed a petition in the Court of Claims seeking to recover compensation for the transportation of impedimenta carried with troop trains of the United States. It asked for a judgment of $42,734.97. After a hearing on the evidence, the Court of Claims gave judgment for the Company in the sum of $498.38. This judgment was entered May 11, 1925. On July 10, 1925, the plaintiff filed a motion for a new trial, which, on October 26, 1925, the court denied. On October 28, 1925, the Company filed a petition for an appeal, which was allowed by the Court of Claims on November 2, 1925.

A motion is now made by the United States to dismiss the appeal on the ground that this Court was deprived of jurisdiction to entertain appeals from the Court of

Claims by the Act entitled "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court and for other purposes," approved February 13, 1925, c. 229, 43 Stat. 936. Section 14 of that Act provides: "This Act shall take effect three months after its approval, but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review or the mode or time for exercising the same as respects any judgment or decree entered prior to the date when it takes effect." The Act took effect May 13, 1925. The judgment from which an appeal is sought was entered May 11, 1925, but the effect of that judgment as a final judgment was suspended by the motion for a new trial duly filed, within the rules of the Court, on July 10, 1925. This motion was not finally denied until October 26, 1925, and not until then did the judgment become subject to review in this Court. The general principle is well established by many decisions of this Court, some of which are cited in *Morse* v. *United States, post,* p. 151. That the operation of the Act of February 13, 1925, does not change the application of the principle appears clearly from the case of *Andrews* v. *Virginian Railway,* 248 U. S. 272. In that case, a suit for damages for wrongful death was heard in a state Circuit Court of Virginia, and a judgment rendered in favor of the defendant, June 16, 1916. A petition for writ of error to review the judgment was presented to the Court of Appeals and finally denied on November 13, 1916. On November 27, 1916, a petition was presented to the Presiding Judge of the state Circuit Court for the allowance of a writ of error from this Court to review the judgment of that court of June 16, 1916, which was allowed, and the case was brought here. Between the time of the rendition of the judgment in the state Circuit Court and the denial of the petition for writ of error by the Court of Appeals of Virginia, November 13, 1916, the Act of Congress of

September 6, 1916, ch. 448, 39 Stat. 726, had been approved and became operative October 6, 1916. In form the judgment to which the writ of error was addressed was rendered on June 16, 1916, before the operation of the Act of Congress, and it was argued that the judgment was outside its provisions. The question considered by the court was thus whether the judgment was a final judgment at the date named, or became so only by the state Court of Appeals declining in the exercise of its discretion to take jurisdiction on November 13, 1916, after the passage of the new Act of Congress. It was held that, though the action of the Court of Appeals was the mere exercise of gracious or discretionary power, neither imperative nor obligatory, the judgment of the Circuit Court could not be regarded as final for the purpose of review in this Court until after the exercise by the Court of Appeals of this discretion. It was therefore held that the judgment of the state Circuit Court, though rendered before the approval of the Act of September 6, 1916, which took effect October 6, 1916, must be regarded as not final with reference to the review by this Court until the refusal of the Court of Appeals of Virginia to consider the case on November 13, 1916. And so in this case. While the judgment to which the appeal was allowed was actually entered two days before the Act of Congress of February 13, 1925, went into effect, the subsequent motion for a new trial of July 10, 1925, seasonably filed, suspended the judgment of the Court of Claims as a final judgment for purposes of review until the denial of the motion for new trial in October, 1925. This Court, therefore, has no jurisdiction to consider an appeal from a judgment acquiring finality only in October after the going into effect of the Act of February 13, 1925, which limited the method of review by this Court of final judgments in the Court of Claims to writs of certiorari after May 13, 1925. The motion to dismiss the appeal must be granted. In the

meantime, and in due time, a petition for certiorari was filed, which the Court has considered, and does now grant, and the cause is set for hearing on the summary docket for the 4th day of October next.

CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY *v.* INDIANAPOLIS UNION RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, AND THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 328, 329. Argued November 25, 1925.—Decided March 1, 1926.

1. Upon an appeal to this Court from a decree of the District Court dismissing a petition for want of ancillary jurisdiction, the equity of the petition, and questions whether it should be denied because of acquiescence or laches, are not open. P. 115.
2. As ancillary to a decree of railway foreclosure, by which the purchaser of the property was allowed a fixed time in which to elect not to assume outstanding leases and contracts, and which reserved for future adjudication all questions not disposed of, and permitted all parties, including the purchaser, to apply to the court for further relief at the foot of the decree, the District Court had jurisdiction, irrespective of citizenship, over a petition of the purchaser seeking to be relieved of agreements made by its predecessors with a terminal company, upon the ground that the purchaser's failure to relieve itself of them by a valid election was due to a mistake. P. 115.
3. A delay of two years in filing such petition is not a reason for dismissing it for want of jurisdiction. P. 114.

Reversed.

JURISDICTIONAL appeals from decrees of the District Court dismissing ancillary petitions. See 279 Fed. 356.

Mr. Murray Seasongood, with whom *Messrs. George W. Wickersham, F. J. Goebel* and *Lester A. Jaffe* were on the brief, for appellant.

The jurisdiction of this Court is sustained by *Hoffman* v. *McClelland,* 264 U. S. 552; *Central Union Trust Co.* v. *Anderson County,* 268 U. S. 93; *Smith* v. *Apple,* 264 U. S. 274.

The District Court had jurisdiction to entertain appellant's petition because it is ancillary to the foreclosure action. *Central Union Trust Co.* v. *Anderson County, supra; Cincinnati, Indianapolis & Western R. R.* v. *Indianapolis Union Railway Co.,* 279 Fed. 356; *Lang* v. *Choctaw, Oklahoma & G. R. R.,* 160 Fed. 355; see also *Hoffman* v. *McClelland,* 264 U. S. 552; *Wabash R. R.* v. *Adelbert College,* 208 U. S. 38; *Julian* v. *Central Trust Co.,* 193 U. S. 111; *Fulton Nat. Bank* v. *Hozier,* 267 U. S. 276. That a bill to reform or rescind or otherwise grant equitable relief is ancillary, see *Rosenbaum* v. *Council Bluffs Ins. Co.,* 37 Fed. 724; *Bradshaw* v. *Miners Bank,* 81 Fed. 902. Diversity of citizenship is not necessary in an ancillary bill. *Kripendorf* v. *Hyde,* 110 U. S. 276.

If a petition seeking relief from an election made by mistake is ancillary to the suit the decree in which created the right of election, then, surely, mere delay, explained or unexplained, does not deprive the petition of its ancillary character. Delay, accompanied by elements of estoppel, may sometimes be a ground for refusing relief on the merits. It does not, however, oust the jurisdiction of the court, any more than was the case in *Oliver Am. Trading Co.* v. *Mexico,* 264 U. S. 440, where the trial court mistakenly thought the immunity of a sovereign State from suit prevented the court from taking jurisdiction as a federal court, or than was the case in *Smith* v. *Apple,* 264 U. S. 274, where the trial court incorrectly thought that the federal statute, forbidding enjoining prosecution of suits in state courts, prevented the federal court, as a federal court, from entertaining jurisdiction.

Since the decree dismissed the petition on the sole ground of want of jurisdiction and a sufficient certificate was filed, the case was properly appealed to this Court. *Sov. Camp Woodmen* v. *O'Neill,* 266 U. S. 292. The allegations of the original petition show there was neither waiver nor acquiescence, since there was no estoppel or prejudice suffered by appellees, nor any other feature involved making it inequitable to grant relief. The allegations of the amendment to the petition specifically deny waiver or acquiescence on the part of appellant and, on a motion to dismiss, must be taken as true. There was no " instant duty " on appellant, as a " condition precedent " to obtaining relief, to bring suit immediately after learning of its legal rights, in May, 1922.

Messrs. Joseph S. Graydon and *Joseph J. Daniels,* with whom *Mr. Albert Baker* was on the brief, for appellees.

There was error in the decree if, and only if, the relief sought by appellant was not relief from an accepted and binding contract. That such was the relief sought by appellant is conclusively demonstrated by an analysis of the facts in the record. Such contract became in all respects valid and binding on appellant either (a) on December 30, 1915, the day on or before which the purchaser at the foreclosure sale was required by the foreclosure decree to file a written election not to adopt the contract, or (b) on May 31, 1922, being thirty days after this Court terminated the prior litigation by refusing certiorari, or (c) within a reasonable time after May 1, 1922, the day that this Court denied the writ of certiorari in the prior litigation. For the purposes of the case at bar, it is immaterial which of these three views is taken as to the time when such contract became binding on appellant.

The obligation of the appellant is, under the authorities, as complete and binding an obligation as any obligation arising out of a contract executed between two private

parties. It has been repeatedly held that a sale or contract made by an order of court creates, when confirmed by the court, precisely the same situation as is created by a sale or contract between private persons. *Files* v. *Brown,* 124 Fed. 133; *Morrison* v. *Burnette,* 154 Fed. 617; *In re Burr Mfg. & Supply Co.,* 217 Fed. 16; *Earle* v. *McCartney,* 112 Fed. 372; *Cropper* v. *Brown,* 76 N. J. Eq. 406; *Hayward* v. *Wemple,* 136 N. Y. Supp. 625; *Koegel* v. *Koegel,* 83 N. J. Eq. 179; *Pewabic Mining Co.* v. *Mason,* 145 U. S. 356.

Appellant's petition is simply a suit seeking rescission of appellant's accepted contract with the Indianapolis Railway Company. Of such a suit the District Court has no jurisdiction. Appellant's petition seeks rescission of an accepted contract, not modification of the District Court's decree of foreclosure, nor rescission of appellant's election. The accepted contract which appellant seeks to rescind has been binding on appellant since December 31, 1915, or at the very latest since May 31, 1922.

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

These are appeals under § 238 of the Judicial Code, allowed February 18, 1925, in two cases between the same parties from identical decrees of the District Court for the Southern District of Ohio. By agreement they are to be treated in every respect as one. The certificate of the District Court is that the petition as amended "does not show the existence of the requisite diversity of citizenship, nor the existence of a Federal question, and that this Court, not having found the said petition to be ancillary to any prior suit, but having found the said petition to be original, did thereupon dismiss the same upon the sole ground of want of jurisdiction." The question of jurisdiction is whether a petition by the purchasing company at a railway foreclosure sale, in seeking to

reform, because of mistake, its contract of purchase in imposing upon it liability for rentals under a terminal facilities contract, is a suit ancillary to the original foreclosure suit so that jurisdiction exists in the Federal District Court to hear it, without regard to the citizenship of the necessary parties to the petition.

The two original foreclosure suits were brought, one by the Equitable Trust Company of New York and Elias J. Jacoby, as trustees, against the Cincinnati, Indianapolis & Western Railway Company, and the other by the Central Trust Company of New York and Mason, trustees, against the same railway company. There was the necessary diversity of citizenship in each case, and the appellant in this present suit, the Cincinnati, Indianapolis & Western Railroad Company, is a newly organized company, the assignee of the purchaser at the foreclosure sales of the whole railroad property covered by all the mortgages foreclosed. It became a party to each cause as such assignee, as permitted in the decree of foreclosure in each case, and it will be hereafter called the purchasing company.

The Indiana, Decatur & Western Railway Company owned the part of the railway from Indianapolis to Springfield, Illinois. The Cincinnati, Hamilton & Indianapolis Railroad Company owned the part from Indianapolis to the East. In 1902 they were merged into a corporation called the Cincinnati, Indianapolis & Western Railway Company, which gave a first refunding mortgage upon the two properties. It was expected that the bonds secured by this mortgage would be used in refunding two underlying mortgages on the eastern part, and a single underlying mortgage on the western part. The refunding was not completed and the two foreclosure suits, already referred to, were filed at the same time in the same court, so that by an identical decree in each case the purchaser was enabled to acquire title to the con-

solidated railway free from the liens of the four mortgages. The decree of foreclosure in each case contained a provision giving the purchaser under the foreclosure sale, and his successors or assigns, the right for a period of thirty days after the delivery of the master's deed, to elect "whether or not to assume or adopt any lease or contract made by the defendant consolidated company, or its predecessors in title, and such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the Clerk of this Court within the said period of thirty days."

Within the thirty days, the purchasing company filed in the two foreclosure cases what it called an election "not to assume or adopt the contract dated September 20, 1883, and the amendment of August 20, 1906, under which the tracks of the Union Railway Company are occupied in Indianapolis, in so far as such rights are conferred by the signature of the Indianapolis, Decatur & Springfield Railway Company to said contract. This assignee hereby expressly accepts such contract as made with the Cincinnati, Hamilton & Indianapolis Railroad Company, and desires to accept the benefits of the contract with said company, and the right to occupy the tracks of the Union Railway Company and the Indianapolis Belt Railway Company therein conferred."

The Indianapolis Union Railway Company is a company engaged in operating a union railway depot and union railway tracks for the use of several railroads entering that city, its properties having been owned by five so-called proprietary companies and conveyed by them to it. It had acquired a perpetual lease of a belt line. September 20, 1883, an agreement was made between the Union Railway Company and five proprietary companies, by which each of the companies in the use of the terminals

became liable for a fixed rental which was to be paid by each company, whether the terminal was used or not. Then there were admitted seven non-proprietary companies to the joint use of the Belt Railway and Union Railway Company property under the same agreement as to a fixed rental, in addition to which there was to be a payment in proportion to the use on the basis of wheelage. At this time the Indianapolis, Decatur & Springfield Railway Company owned the part of the railroad here in question west of Indianapolis, and it bound itself for one-thirteenth of the rental, and the Cincinnati, Hamilton & Indianapolis Railroad Company owning the other part of the railroad here in question east of Indianapolis became bound for another one-thirteenth of the rental. In 1902, the two companies were united under the name of the Cincinnati, Indianapolis & Western Railway Company, and, from that time until the foreclosure in 1915, the united company paid two-thirteenths of the rentals. When, however, the decrees were made in the foreclosure of the two parts of the railway, the purchasing company, the appellant here, sought to reduce its rental from two-thirteenths to one-thirteenth by electing to take the contract for rental of its predecessor in title of the eastern part of the united railway, and to refuse to elect to take the contract of rental of its predecessor in title for the western part of the railway, and, having filed such an election, it declined to pay more than one-thirteenth of the rental.

There then intervened in the original foreclosure suits the Indianapolis Union Railway Company and the then proprietary parties to the terminal agreement, by petitions asking that the purchasing company show cause why it should not be ordered to make payment to the Indianapolis Union Company of the full amount that would have been payable to that company by the Cincin-

nati, Indianapolis & Western Railway Company, the defendant in the foreclosure in both suits. Jurisdiction was taken of this petition, and the District Court held that the so-called election was unauthorized and improper, and that the purchasing company, for failure to elect to reject the contracts entirely, was responsible for two-thirteenths of the total rentals. This controversy was carried to the Circuit Court of Appeals for the Sixth Circuit, which affirmed the District Court. *Cincinnati, I. & W. R. Co.* v. *Indianapolis Union Railroad Company,* 279 Fed. 356.

The order of the Circuit Court of Appeals was made in 1922. In 1924, the present intervening petition was filed by appellant as purchaser against the Indianapolis Union Railway Company and the proprietary companies, which had been parties to the preceding controversy. In this, the petitioner, the present appellant, sought to have the court relieve it from the effect of its so-called ineffective election by which it made itself responsible, according to the decree of the Circuit Court of Appeals, for two-thirteenths, on the ground of its mistake in not electing to reject the whole contract for use of the terminals. On the hearing of the petition, to which the Indianapolis Union Railway Company and the other defendants filed answers, the District Court held that the delay of two years between the coming down of the decree from the Circuit Court of Appeals, in 1922, until 1924, when the petition was filed, was a delay constituting acquiescence which would prevent the consideration of the petition. The petitioner then filed an amendment to its petition, in which it set out reasons thought by it to justify the delay, including a statement that attempts had been made to secure relief by a personal negotiation with the interested parties, to whom it had indicated from the first that it did not intend to acquiesce in an obligation to pay the rentals. The District Court, conceiving that by reason of the delay of two years such relief as the petitioners

sought must be obtained by an independent suit, and not by an ancillary proceeding, held that, there being no diversity of citizenship or federal question to justify jurisdiction, the petition must be dismissed.

The sufficiency of the petition in equity is not for us to consider. We have here only the question of jurisdiction. On that issue, we think the District Court was in error. The present proceeding deals with the effect of the decree upon which the petitioner became the owner of the property. The previous litigation between the parties to this petition as to the effect of the attempted election in which the petitioner was defeated involved a construction of the decree of sale and the purchaser's action under it in the foreclosure proceedings. That decree provided that "all questions not hereby disposed of are reserved for future adjudication. Any party to this cause may at any time apply to this Court for further relief at the foot of this decree" It also provided "that the purchaser shall have the right to enter his appearance in this Court and to become a party to this cause," and it made itself a party under that order. The Circuit Court of Appeals in its opinion in the case already cited said:

"Notwithstanding the property had passed from the possession of the court, appellant, [that is, petitioner], as the purchaser, would have an undoubted right to apply to the court for relief respecting the controversy over its right of election under the sale."

At the instance of the defendants here, the purchaser was held by its so-called election to be bound to the two contracts, and, having been thus defeated, it seeks the equitable intervention of the court, on the ground of mistake, to secure relief from this adjudicated effect of its unsuccessful attempt at election. Assuming that it has a right to seek such a remedy, (and we must do so in this hearing), we do not see why it may not obtain that relief in the same forum by ancillary proceeding in the original suit in foreclosure in which it was held to have bound

itself by its purchase and ineffective election. It may be that equity will not give it relief from mistake under the circumstances. It may be that it has acquiesced and may be denied relief on that account. It may be that it has been guilty of laches. But these are questions on the merits. We can not see that they affect the jurisdiction of the court to consider the issue thus raised.

The present proceeding is only another phase of the same litigation, carried on as ancillary to the foreclosure suit, in which the purchasing company was found to be bound by its purchase to pay two-thirteenths of the rentals to the Indianapolis Union Railway. The purchaser seeks to recur to the circumstances under which it attempted to accept liability to pay one-thirteenth of the rental and to reject the other one-thirteenth. It says that, as the Circuit Court of Appeals has held that its attempted election was invalid and ineffective for the purpose, it should have equitable relief from the oppressive obligation to pay two-thirteenths on the ground of its mistake and be permitted to make an election which will relieve it from the contract to pay any rental at all, as it might have done when it became the purchaser. Such a proceeding is certainly ancillary to the enforcement of the decree of sale and the contract of purchase. *Rosenbaum* v. *Council Bluffs Insurance Company,* 37 Fed. 724; *Bradshaw* v. *Miners' Bank of Joplin,* 81 Fed. 902. Clearly it is a natural and closely proximate sequence of the sale by the court and requires the interpretation of its decree and the attempted election of the purchaser under it and the consideration of its effort to correct the alleged inequitable result. "A purchaser or bidder at a master's sale in chancery subjects himself *quoad hoc* to the jurisdiction of the court and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim, at the hands of the court, such relief as the rules of equity proceedings entitle him to." *Blossom* v. *Railroad Company,*

1 Wall. 655, 656. It is well settled that where a bill in equity is necessary to have a construction of an order or decree of a federal court, or to explain, enforce or correct it, a bill of this kind may be entertained by the court entering the decree, even though the parties interested for want of diverse citizenship could not be entitled by original bill in the federal court to have the matter there litigated. *Julian* v. *Central Trust Company,* 193 U. S. 93, 113; *Minnesota Company* v. *St. Paul Company,* 2 Wall. 609, 633; *Wabash Railroad* v. *Adelbert College,* 208 U. S. 38, 54; *Hoffman* v. *McClelland,* 264 U. S. 552, 558.

The District Court had jurisdiction, and the decree dismissing the petition should be

Reversed.

H. ELY GOLDSMITH, CERTIFIED PUBLIC ACCOUNTANT, *v.* UNITED STATES BOARD OF TAX APPEALS.

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

No. 320. Argued November 30, 1925.—Decided March 1, 1926.

1. Power of the United States Board of Tax Appeals to prescribe rules for admission of attorneys and certified public accountants to practice before it under the Revenue Act of 1924, § 900, 43 Stat. 253, is implied in the other powers conferred by the Act. P. 120.
2. Where the application of a certified public accountant for admission to practice before the Board of Tax Appeals was denied after an *ex parte* investigation, *held* that he was entitled to notice and a hearing before the Board upon the charges on which the denial was based. P. 123.
3. Mandamus will not lie summarily to compel the Board to enroll an applicant who has not applied to the Board for a hearing on the charges which caused its denial of his application. P. 123.

55 App. D. C. 229, 4 Fed. (2d) 422, affirmed.

ERROR to a judgment of the Court of Appeals of the District of Columbia refusing a mandamus to compel the

United States Board of Tax Appeals to admit to practice before it a certified public accountant.

Mr. H. Ely Goldsmith, pro se.

The board has no express authority to make and enforce rules for the admission of attorneys, and there is no authority in the courts to supply omissions of the statutes. *Cotheal* v. *Cotheal,* 40 N. Y. 405; *Benton* v. *Wickwire,* 54 N. Y. 226; *Daly* v. *Haight,* 170 App. Div. 469; *F. A. Bank* v. *Colgate,* 120 N. Y. 381. *Shoemaker* v. *Hoyt,* 148 N. Y. 425; *Morrill* v. *Jones,* 106 U. S. 466.

There is no implied authority of executive departments to prescribe and enforce rules for admission of attorneys. If Congress had intended to give this board such power as is claimed by it, it would have said so specifically. If the respondents had the power to make rules for admission of attorneys they failed to exercise in a proper manner their prerogative of passing upon applications in the case of petitioner. The due process clause in the Constitution entitled petitioner to be heard before an opportunity to make a living in his profession was taken away from him. A substantial right has been invaded by the respondents, and this Court may well determine that they acted arbitrarily, tyrannically and capriciously in refusing the enrollment. *Ex parte Garland,* 4 Wall. 333; *Ex parte Secombe,* 19 How. 9; *Ex parte Robinson,* 19 Wall. 513. Notwithstanding their powers of subpoena, the defendants form an administrative board, and not a judicial tribunal.

Solicitor General Mitchell and *Messrs. Alfred A. Wheat,* Special Assistant to the Attorney General, and *Randolph S. Collins,* Attorney in the Department of Justice, were on the brief, for respondents.

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

H. Ely Goldsmith, a citizen of New York and qualified to practice as a Certified Public Accountant by certificate

issued under the laws of that State, filed a petition in the Supreme Court of the District of Columbia asking for a writ of mandamus against the United States Board of Tax Appeals created by the Revenue Act of 1924, 43 Stat. 253, 336, Title IX, § 900, to compel the Board to enroll him as an attorney with the right to practice before it, and to enjoin the Board from interfering with his appearance before it in behalf of tax-payers whose interests are there being dealt with.

The petition avers that the Board has published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the States, and the District of Columbia, as well as certified public accountants duly qualified under the law of any State or the District, are made eligible. The applicant is required to make a statement under oath giving his name, residence and the time and place of his admission to the bar or of his qualification as a public accountant, and disclosing whether he has ever been disbarred or his right to practice as a certified accountant has ever been revoked. The rules further provide that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission.

The petitioner says that pursuant to these rules he made application, showing that he was a public accountant of New York duly certified and that his certificate was unrevoked, that he thereupon filed petitions for tax-payers before the Board, but that he was then advised, September 5, 1924, by the Board that the question of his admission to practice had been referred to a committee for investigation, that in due course he would be notified whether the committee desired him to appear before it and of its action in the premises; and that on September 27 he received notice that his application had been received, considered and denied. So far as appears, he made no further application to the Board to be heard

upon the question of his admission, but filed his petition for mandamus at once. In his petition, he denies the power of the Board to make rules for admission of persons to practice before it.

Upon the filing of the petition, a judge of the Supreme Court of the District ordered a rule against the Board to show cause. The members of the Board answered the rule as if they were individual defendants and set out at considerable length the discharge of the petitioner for improper conduct as examiner of municipal accounts in the office of State Comptroller of New York (*People ex rel. Goldsmith* v. *Travis,* 167 App. Div. 475; 219 N. Y. 589) and the rejection of the petitioner as an applicant for admission to practice in the Department of the Treasury because of improper advice to clients, as grounds upon which the committee and the Board had denied his application to practice before it.

To this answer the petitioner replied, consenting to the appearance of individual members of the Board as defendants, denying some of the charges made but averring that they were none of them competent evidence on the issue presented and were merely hearsay, and that the action in New York and in the Treasury Department was due to prejudice against him for doing his duty. To this reply the defendants demurred. Upon the issue thus presented, the Supreme Court dismissed the petition for mandamus.

The Court of Appeals of the District affirmed the judgment of the Supreme Court (4 Fed. (2nd) 422), and the case has been brought here on error under § 250 of the Judicial Code, as a case in which the construction of a law of the United States is drawn in question.

The chief issue made between the parties is whether the Board of Tax Appeals has power to adopt rules of practice before it by which it may limit those who appear before it to represent the interest of tax-payers to persons

whom the Board deem qualified to perform such service and to be of proper character.

The Board is composed of members appointed by the President by and with the advice and consent of the Senate, with a chairman appointed by the Board. It is charged with the duty of hearing and determining appeals from the Commissioner of Internal Revenue on questions of tax assessments for deficiencies in returns of tax-payers. Notice and opportunity to be heard is to be given to the tax-payer. Hearings before the Board are to be open to the public. The Board may subpoena witnesses, compel the production of papers and documents and administer oaths. The duty of the Board and of each of the divisions into which it may be divided is to make a report in writing of its findings of fact and decision in each case. In any subsequent suit in court by the tax-payer to recover amounts paid under its decision, its findings of fact shall be *prima facie* evidence. It is further provided by the Act that " the proceedings of the Board and its divisions shall be conducted in accordance with such rules of evidence and procedure as the Board may prescribe." The last sentence in the Title providing for the Board is, " The Board shall be an independent agency in the executive branch of the Government."

We think that the character of the work to be done by the Board, the quasi judicial nature of its duties, the magnitude of the interests to be affected by its decisions, all require that those who represent the tax-payers in the hearings should be persons whose qualities as lawyers or accountants will secure proper service to their clients and to help the Board in the discharge of its important duties. In most of the Executive departments in which interests of individuals as claimants or tax-payers are to be passed on by executive officers or boards, authority is exercised to limit those who act for them as attorneys to persons of proper character and qualification to do so. Not in-

frequently, statutory provision is made for requiring a list of enrolled attorneys to which a practitioner must be admitted by the executive officer or tribunal. Act July 7, 1884, 23 St. 236, 258, c. 334; Act of July 4, 1884, 23 Stat. 98, 101, c. 181, § 5; Act of June 10, 1921, 42 Stat. 25, c. 18, § 311. In view of these express provisions, it is urged that the absence of such authority in case of the Board of Tax Appeals should indicate that it was not intended by Congress to give it the power. Our view, on the contrary, is that so necessary is the power and so usual is it that the general words by which the Board is vested with the authority to prescribe the procedure in accordance with which its business shall be conducted include as part of the procedure rules of practice for the admission of attorneys. It would be a very curious situation if such power did not exist in the Board of Tax Appeals when in the Treasury Department and the office of the Commissioner of Internal Revenue there is a list of attorneys enrolled for practice in the very cases which are to be appealed to the Board.

Our conclusion in this case is sustained by the decision of the Supreme Judicial Court of Massachusetts in *Manning* v. *French,* 149 Mass. 391. That was a suit for tort against members of the Court of Commissioners of Alabama Claims for unjustly depriving an attorney of the privilege of practicing before it. The court was given by statute power to make rules for regulating the forms and mode of procedure for the court, and this was held to include the power to make rules for the admission of persons to prosecute claims before the court as agents or attorneys for the claimants. It was pointed out in support of the construction that claimants were not compelled to appear in person to present their claims, as the tax-payers are not before the Board of Tax Appeals. The fact that in the *Manning Case* the body was called a Court and that here the Board is an executive tribunal does not make the decision inapplicable. The Court of Alabama Claims was

certainly not a United States Court under the third Article of the Constitution. It was rather a commission to aid the fulfilment of an international award with judicial powers.

It is next objected that no opportunity was given to the petitioner to be heard in reference to the charges upon which the committee acted in denying him admission to practice. We think that the petitioner having shown by his application that, being a citizen of the United States and a certified public accountant under the laws of a State, he was within the class of those entitled to be admitted to practice under the Board's rules, he should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer. The rules adopted by the Board provide that " the Board may in its discretion deny admission, suspend or disbar any person." But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process. *Garfield* v. *United States, ex rel. Spalding,* 32 App. D. C. 153, 158; *United States ex rel. Wedderburn* v. *Bliss,* 12 App. D. C. 485; *Phillips* v. *Ballinger,* 27 App. D. C. 46, 51.

The petitioner as an applicant for admission to practice was, therefore, entitled to demand from the Board the right to be heard on the charges against him upon which the Board has denied him admission. But he made no demand of this kind. Instead of doing so, he filed this petition in mandamus in which he asked for a writ to compel the Board summarily to enroll him in the list of practitioners, and to enjoin it from interfering with his representing clients before it. He was not entitled to this on his petition. Until he had sought a hearing from the Board, and been denied it, he could not appeal to the courts for any remedy and certaintly not for mandamus to compel enrollment. Nor was there anything in the

answer, reply or demurrer which placed him in any more favorable attitude for asking the writ.

This conclusion leads us to affirm the judgment of the Court of Appeals.

Affirmed.

UNITED STATES *v.* SWIFT & COMPANY.

SWIFT & COMPANY *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS

Nos. 288 and 289. Submitted November 24, 1925.—Decided March 1, 1926.

1. A finding by the Court of Claims that a general who signed a contract for army supplies was the representative of the Quartermaster's Department in that regard, *held* conclusive on this Court as a finding of fact, or of mixed law and fact, where the result involved consideration of apparent conflicts of jurisdiction of many food supply agencies during the war, and of orders from the War Department and Quartermaster's Department, the effect of which was limited in practice, all of which were before the Court of Claims. P. 137.
2. Orders for the purchase of bacon for the Army, accepted by the seller and signed by the proper representatives of the Quartermaster's Department and the Food Administration, *held* authorized in writing on behalf of the Government. P. 138.
3. The authority of the representative of the Packing House Products Branch of the Subsistence Division of the Quartermaster General's Office, at Chicago, to purchase meat products for the Army, which was repeatedly exercised and recognized, was not affected by the assignment of another officer as the purchasing and contracting officer for the Packing House Products and Produce Division of the office of the Depot Quartermaster at Chicago or his subsequent transfer to Director of Purchase and Storage. P. 138.
4. Acceptance of an offer in part becomes a contract when the offerer accepts the modification. P. 139.
5. It is not essential to a contract of sale that it fix a price. P. 139.
6. An agreement reached by correspondence between a meat packer and representatives of the Quartermaster's Department and the Food Administration for the delivery of bacon in three successive

months, a specified quantity in each, *held* a contract of the Government to take the total quantity, and not preliminary negotiations, although the amounts for the first two months were subsequently covered by more formal contracts fixing the price, which could not be done in advance. P. 141.

7. Under the Act of March 4, 1915, providing that a contract not to be performed within sixty days and exceeding $500 in amount, where made by the Quartermaster General or by officers of the Quartermaster Corps, shall be reduced to writing and signed by the contracting parties, a contract with the Quartermaster's Department may be made by an exchange of correspondence, properly signed, and need not be in one instrument signed by both parties at the end thereof. Rev. Stats. § 3744, if to be construed otherwise, is modified by the later enactment. P. 142.
8. The fact that a government contract was signed in the name of the contracting officer by a subordinate does not render it invalid, where such execution accorded with the practice of the office and was authorized, and the binding effect of the contract recognized, by the contracting officer. P. 144.
9. In the absence of a market value standard, a vendor of goods which the Government declines to accept under its contract, is entitled to the difference between the contract price and the amount realized by the vendor through resale made in good faith with diligent effort. P. 148.
10. The fact that the vendor shipped part of the goods to Europe and resold them there, *held* no reason for denying recovery according to this rule, good faith being evident, with nothing to show that a better price could have been realized elsewhere. P. 149.

59 Ct. Cls. 364, affirmed with modification.

Cross appeals from a judgment of the Court of Claims allowing recovery of damages resulting from the Government's refusal to take goods under its contract, but limiting this to the part resold by the claimant in this country, and refusing relief as to the part which it resold abroad.

Solicitor General Mitchell, Assistant to the Attorney General Donovan, and *Messrs. Abram F. Myers* and *Rush H. Williamson,* Special Assistants to the Attorney General, were on the brief, for the United States.

Mr. G. Carroll Todd submitted for Swift & Co. *Messrs. Albert H. Veeder, Henry Veeder, R. C. McManus, Connor B. Shaw* and *P. L. Holden* were also on the brief.

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

This is a suit to recover damages for the loss caused to Swift & Company by the refusal of the United States to accept a quantity of finished and unfinished army bacon ordered by competent authority for delivery in March, 1919. The only ground for not accepting it was that the need had been removed by the unexpected rapidity of demobilization. The claim was first presented to the War Department under the Act of March 2, 1919, 40 Stat. 1272, known as the Dent Act. It was denied by the Board of Contract Adjustment of the War Department, on the ground that the agreement under which the bacon was produced was not concluded until after November 12, 1918, the Dent Act applying only to agreements entered into prior to that date. The Secretary of War affirmed this decision. The petition in the Court of Claims alleged that the liability of the Government was lawfully established by a written contract properly signed and executed, binding the United States.

The Court of Claims found that the contract was entered into in due and regular form, and could be enforced under the general jurisdiction of the Court of Claims, and that, even if there were defects in the contract, as the contract had been fully performed in accord with the terms of the contract as subsequently modified by the parties, the alleged defects were immaterial. It accordingly gave judgment for $1,077,386.30, being the difference between the contract price for the bacon ready for delivery in accordance with the contract and the proceeds of its sale. In addition to this amount, Swift & Company sought damages in the amount of $212,216.69 for more

than one million pounds of salted bellies which had been cured but had not been smoked and made into bacon, and which were on hand at the time the contract was cancelled. A large part of these were sold in France at a very large reduction. The Court of Claims held that by attempting to sell this material abroad, Swift & Company had taken a speculative course and could not hold the Government for the difference between the contract price and the proceeds of sale. Swift & Company filed a cross appeal on this issue, and that is before us.

The Government in the Court of Claims set up a counter-claim against Swift & Company for $1,571,882, made up of alleged improper and illegal charges presented by the plaintiff to the defendant on account of army bacon delivered from September, 1918, to February, 1919, which were paid by the Government by mistake to Swift & Company in the settlement of bills and accounts so presented. The Court of Claims found that it was not shown to the satisfaction of the court that any improper or illegal charges had been made or paid by mistake, or that any misrepresentation or concealment was practiced by Swift & Company, to the detriment of the Government in the settlement. The Government appealed from this rejection of the counter-claim, but does not press its appeal.

The correspondence upon which Swift & Company asserts the existence of a valid contract in writing between the parties is contained in the sixteenth finding of the Court of Claims:

"XVI.

"On November 9, 1918, a conference was held on the call of General Kniskern at which he and Major Skiles, for the Government, were present and representatives of the seven large packers, including Swift & Co., for the purpose of providing allotments of bacon and other meat products for the months of January, February, and March, 1919. The quantity of bacon asked for for the

three months stated was 60,000,000 pounds, 30,000,000 pounds each of Serials 8 and 10.

"On November 12, 1918, Swift & Co. sent to the general depot of the Quartermaster Corps at Chicago the following communication:

"'Swift & Company,
Union Stock Yards,
Chicago, November 12, 1918.

"'War Department,
General Depot of the Quartermaster Corps,
1819 West 39th Street, Chicago, Illinois.

"'Gentlemen: (Attention Maj. Skiles).

"'Referring meeting in your office Saturday, November 9th, please be advised we offer for delivery during January, February, and March, 1919:

17,500,000 lbs. serial 10 bacon and
4,000,000 lbs. serial 8 bacon.

21,500,000 lbs.

"'We offer for delivery each month as shown under:

	Serial # 10	Serial # 8
January,	6,000,000	1,400,000
February,	5,500,000	1,200,000
March,	6,000,000	1,400,000
Total,	17,500,000	4,000,000

"'You will note we are offering a larger proportion of serial #10 than of serial #8 bacon. This because we have gone to great expense in equipping canning rooms at Chicago, Kansas City, and Boston on the understanding that you very much preferred serial #10 bacon to serial #8. The amount serial 10 given above is the minimum amount required to enable us to operate our canning rooms at fair capacity. If necessary we are willing to have our offers Serial 8 bacon increased and serial 10 decreased proportionately to the extent you find necessary

bearing in mind that we will appreciate as liberal a proportion of serial #10 bacon as possible.

"'Will you kindly advise if we shall figure to put down above amounts for delivery as shown. After receipt of such advice we will furnish you with statement of amounts we will put in cure at each plant.

"'Yours respectfully,

"'Swift & Company,

"'Per GES, Jr.

"'Prov. Dept. JH-JL.

"'United States Food Administration License No. G-09753.'

"On November 26, 1918, the following communication was sent to the Chicago office of the Food Administration for the attention of Major Roy:

"'(War Department, office of the Quartermaster General, Packing House Products Branch, Subsistence Division, 1819 West 39th Street, Chicago, Ill.)

"'Subsistence.

"'431 P & S-PC.

"'November 26, 1918.

"'From: Officer in charge, Packing House Products Branch, Subsistence Division, office Director of Purchase and Storage.

"'To: United States Food Administration 757 Conway Bldg., Chicago, Ill. Attention Major E. L. Roy.

"'Subject: Allotments—Bacon and canned meats.

"'1. In connection with the requirements of this office—canned meats and bacon—for the months of January, February, and March, 1919, you are requested, please, to make allotments to the various packers of the items in the quantities and for delivery as is indicated below:

"'Swift & Company, serial 10 bacon, January, 6,000,000 lbs.

"'Swift & Company, serial 10 bacon, February, 5,500,000 lbs.

"'Swift & Company, serial 10 bacon, March, 6,000,000 lbs.'

(There follows names of 17 other packers followed by stated amounts of different products for each of the three months.)

"'2. It is requested that packers be informed at the earliest practical date allotments made to them, in order, (*sic*), that they can make necessary arrangements for the procurement of tins, boxes, and other equipment, as well as to know the quantities of green product it will be necessary for them to put in cure during December to apply on later deliveries.

"'3. Please send copy of the official allotments to this office for our records.

"' By authority of the Director of Purchase and Storage:

"'A. D. Kniskern,

"Brigadier General, Q. M. Corps, in Charge.

"' By O. W. Menge,

"' *2nd Lieut., Q. M. Corps.'*"

"'OWM: JDW.'

"On December 3, 1918, the Food Administration, by Major Roy, with the approval of the chief of the Meat Division, whose assistant he was, issued the following:

"'Dec. 3.

"'D. C. P. #8. 2187.

"'From: U. S. Food Administration, Meat Division, Swift & Company.

"'To: U. S. Yards, Chicago, Ill.

"'Subject:

"'1. On requisition of the Packing House Products Branch, Subsistence Division, office of Quartermaster General, 1819 W. 39th Street, Chicago, Ill., you have been allotted for delivery during the month of—

Product	Quantity	Price
January, 1919, bacon serial #10;	6,000,000 lbs.	To be determined later
February, 1919, bacon serial #10;	5,500,000 lbs.	
March, 1919, bacon serial #10;	6,000,000 lbs.	

"'2. The above to be in accordance with Q. M. C. Form 120 and amendments thereto.

"'3. For any further information regarding this allotment apply to the Packing House Products Branch, Subsistence Division, office of the Quartermaster General, 1819 W. 39th St., Chicago, Ill.

"'United States Food Administration,

"'Meat Division,

"'By E. L. Roy.'

"Major E. L. Roy, Quartermaster Corps, National Army, then a captain, was by orders of the Chief of Staff, dated July 22, 1918, directed to proceed to Chicago and report to the depot quartermaster for assignment to temporary duty with the Food Administration. He became assistant to the chief of the Meat Division of the Food Administration in charge of the Chicago office of that division and remained with the Food Administration in that capacity until his resignation on December 10, 1918, following his discharge from the Army.

"Two copies of this notice were sent to Swift & Co. on one of which was stamped the words 'Accepted,' followed by this instruction: 'To be signed and returned to Meat Division, 11 W. Washington St., Chicago.'

"Swift & Co. indicated its acceptance by writing below the word 'Accepted' the following: 'Swift & Company, By G. E. S. Jr., 12/11/18', and returned this copy to the Food Administration. The price was left for later determination because of the possible fluctuation in the basic price, that is the price of hogs.

"A copy of this notice was sent to the packing-house products branch of the subsistence division, office of Director of Purchase and Storage, at Chicago, and on December 10, 1918, the following communication was sent to Swift & Co.:

"'(War Department, office of the Quartermaster General, Packing House Products Branch, Subsistence Division, 1819 West 39th Street, Chicago, Ill.)

"'December 10, 1918.

"'Address reply to Depot Quartermaster. Marked for attention Div. 1-1-b, and refer to File No. 431.5 P & S—PC.

"'From: Officer in charge Packing House Products Br., Subsistence Div., office Director of Purchase and Storage.

"'To: Swift & Co., Union Stock Yards, Chicago, Ill.

"'Subject: Bacon Serial 10, January, February, and March.

"'1. In connection with the offers you made to this office on bacon, serial 10, for delivery during the months of January, February and March, you will please find indicated below the schedules of deliveries this office requests you to make:

January,	6,000,000 lbs.
February,	5,500,000 lbs.
March,	6,000,000 lbs.

"'2. In order that proper arrangements can be made and all concerned informed accordingly, you are further requested to advise this office by return mail where you contemplate putting up these allotments.

"'By authority of the Director of Purchase and Storage.

"'A. D. Kniskern,

"'*Brigadier General, Q. M. Corps,*

Officer in Charge.

"'By O. W. Menge,

2nd Lieut., Q. M. Corps.'

"'OWM: MJB.'"

"Serial No. 10 bacon was prepared according to Army specification which was packed in cans, the cans being then packed in boxes. Serial No. 8 differed in that it was packed in boxes but not canned."

Upon receiving these orders, Swift & Company directed its buyers to buy hogs. From that time on purchases were conducted daily so that suitable bellies were pre-

pared for January and February deliveries, and on January 13, 1919, the first bellies were put in cure for March, 1919, delivery.

The objections by the Government to the documents submitted on behalf of Swift & Company as written evidence of a contract, are, first, that Government officers conducting the correspondence had no authority to make it; second, that the documents do not contain the necessary terms to constitute a contract, in that they do not show the place for the performance of the contract, and do not fix the price of the bacon to be delivered; third, they do not show a real agreement between the parties, but were merely preliminary negotiations and were never merged in a written contract; and, fourth, that they do not comply with Revised Statutes, § 3744, in the form of contract required in such cases.

First. The officers whose names are attached to the papers on behalf of the Government are Brigadier General A. D. Kniskern, Quartermaster Corps, and Major E. L. Roy, Quartermaster Corps, assigned to temporary duty with the Food Administration.

The finding of the Court of Claims in respect of General Kniskern's authority is as follows:

" The furnishing of adequate meat supplies for the Army was within the authority and duty of the Acting Quartermaster General and afterwards within his authority and duty as Director of Purchase and Storage. General Kniskern, as depot quartermaster at Chicago, was the authorized representative of the Acting Quartermaster General in the purchase of meat supplies and, while subject to any specific instructions which the Acting Quartermaster General might see fit to give him, his duty was to supply the needs, and specific authority as to each purchase was not required. There was in the office of the Quartermaster General a subsistence division, but the chief duty it exercised in the matter of the purchase of meats was to

supply General Kniskern with such information as might be available as to future needs, leaving it to him to supply them. The authority of General Kniskern in connection with the establishing in Chicago of a packing house products branch of the subsistence division of the Quartermaster General's Office and in connection with his later appointment as zone supply officer appears in Findings V and VI.

"V.

"On July 3, 1918, by Office Order No. 419, Quartermaster General's Office, there was established in Chicago a packing-house products branch of the subsistence division of the Quartermaster General's Office to be located in the general supply depot of the Quartermaster Corps at Chicago, to be under the immediate direction and control of the depot quartermaster, and to be responsible for all matters pertaining to the procurement, production, and inspection of packing-house products, subject to the control of the Quartermaster General.

"The interpretation of this order by the then Acting Quartermaster General was, 'that whereas the purchasing of supplies was concentrated in Washington, that Chicago being the food market, we delegated to General Kniskern the purchase of meat products and articles of that kind.'

"VI.

"On October 28, 1918, by Purchase and Storage Notice No. 21, issued by Brig. Gen. R. E. Wood, as Director of Purchase and Storage, supply zones were created and by said order the Director of Purchase and Storage appointed 'as his representative in each general procurement zone the present depot quartermaster to act and be known as the zone supply officer,' who was 'charged with authority over and responsibility for supply activities within the zone under his jurisdiction.'

" This form of organization in effect transferred the field organization of the Quartermaster Corps to the office of the Director of Purchase and Storage. The procurement divisions which had theretofore existed in the Quartermaster Corps were transferred to the supply zones created in the purchase and storage organization, these zones being practically the same as those formerly existing in the Quartermaster Corps, over each of which the proper depot quartermaster exercised jurisdiction, and the depot quartermasters of the Quartermaster Corps became zone supply officers and representatives, as such, of the Director of Purchase and Storage.

" Existing orders and regulations of the several supply corps with respect to supply activities transferred to the Director of Purchase and Storage were continued in effect, ' providing that the zone supply officers constituted by the notice shall have final authority in their respective zones over all matters referred to in existing orders and regulations.' "

The Food Administration under the President, early in 1918, found that the demand for food commodities was greater than their supply, and it was necessary to suspend the law of supply and demand in respect of their prices, and that large purchases of certain commodities should be made by allocations at fair prices. A Food Purchase Board was formally organized by the President, which, on July 16, 1918, required that canned meats and bacon should be placed on an allotment basis. General Kniskern, as depot quartermaster at Chicago, was notified by the Quartermaster General that thereafter tin bacon and smoked bacon would be allocated by the Food Administration and he was requested to cancel orders which had been placed with the packers and ask allotments of the same from the Food Administration. He accordingly in August 1918 cancelled the orders for the next four months, but wrote the Food Administration requesting that they

confirm the allotments made in accordance with his orders. Thereupon Major Roy of the Quartermaster's Department, in the name of the Food Administration, made the allotments. This arrangement continued until the Food Administration gave up its activities, after the Armistice.

On December 16, 1918, General Kniskern was instructed by telegraph as follows:

"December 16, 1918.

"Effective with January requirements, the Army will purchase packing-house products independently of Food Administration.

"This office is notifying Food Administration accordingly. You are authorized to proceed on this basis. Please wire acknowledgment.

"Wood, *Subsistence*, Baker."

Thereafter prices for January and February deliveries were determined as they had been during the early months of 1918 before that function came to be exercised by the Food Administration. The course of procedure with reference to giving the orders for bacon and the fixing of the price therefor is shown in the following Finding:

"IX.

"In supplying the needs of the Army for bacon and other packing house products during the early stages of the war, the regular method of advertising for and receiving bids and letting contracts to lowest bidders, if otherwise satisfactory, was adhered to, but later on, in 1917 and during 1918, the needs had so grown and were so rapidly approaching the capacity of the packing plants that this method became impracticable, and the necessity for a constant and ever-increasing flow of supplies of this character made necessary the resort to other purchase and procurement methods.

"The office of the depot quartermaster, afterward the zone supply officer, at Chicago was informed from time to time by the proper authorities at Washington as to the number of men which would be in the service within stated times, and the duty devolved on the depot quartermaster of procuring supplies of the kind in question sufficient for the indicated number of men without the issuance of specific authorization to him in each instance to purchase or specific instructions as to quantities to be purchased. And because of the time required to cure, smoke and can Army bacon, it was necessary to anticipate needs therefor.

"The plan was adopted by the depot quartermaster at Chicago of calling into conference with him or his authorized assistant, from time to time, representatives of this plaintiff and the six other large packing houses, at which conferences the packers' representatives were informed as to the needs of the Government for a stated period, usually three months, sufficiently in the future to give time for manufacture, and asked to indicate what portion of the stated needs each would furnish. Upon receipt of the statements from the packers as to what quantities they would furnish, which were submitted in writing and usually within a few days after the conference, the depot quartermaster made an allotment to each packer and notified each as to the quantities it would be expected to furnish during each month of the period involved."

It is quite evident from the findings that in the organization and reorganization of the many agencies needed to furnish the supplies of food in Chicago, there were apparent conflicts of jurisdiction and there were orders issued having on their face general application which in fact by the course of business were limited, and all these orders from the War Department and from the Quartermaster's Department were before the Court of Claims for its consideration. In such a situation the finding of the

Court of Claims that General Kniskern was the representative of the Quartermaster's Department in making these contracts for bacon is either a question of fact or a mixed question of law and fact, and is conclusive on this Court. *United States* v. *Omaha Tribe of Indians,* 253 U. S. 275, 281; *Ross* v. *Day,* 232 U. S. 110, 116, 117, and cases cited. There is nothing whatever in the other findings which is inconsistent with this. At the time this order was given and accepted by Swift & Company in November, 1918, the Food Administration, by direction of the President, had the authority and duty to act upon the needs of the Quartermaster General's Department for bacon and other food supplies and to approve those orders and allot them to the packing companies who were to deliver the supplies. When, therefore, the accepted orders had been signed both by General Kniskern and by Major Roy for the Food Administration, they were certainly authorized in writing on behalf of the Government.

General Kniskern's authority to act in these purchases is questioned on the ground that a Captain Shugert was the only officer authorized to make such contracts. The objection can not be sustained. On September 17, 1918, Capt. Jay C. Shugert, Quartermaster Corps, was, by authority of the Acting Quartermaster General, designated as purchasing and contracting officer for the packing house products and produce division of the office of the depot quartermaster at Chicago. This order to Shugert did not vest him with any authority to make contracts for the packing products branch of the subsistence division of the Quartermaster General's office. Before this latter branch was established, there was a packing house products and produce division of the depot quartermaster's office at Chicago to which Shugert was attached. These two offices were distinct. The former was a unit of the Quartermaster General's office located at Chicago under the immediate direction and control of

the depot quartermaster, with general authority to purchase packing house products for the whole army of the United States wherever situated, as shown by the findings. The latter was a unit in the depot quartermaster's office at Chicago, and by an order of January 9, 1919, its functions were transferred to a newly organized office of Director of Purchase and Storage, and Captain Shugert was transferred with it and thereafter signed the so-called formal contracts of January and February. More than this, even if Captain Shugert had been a purchasing and contracting officer with authority to sign this main contract of November, 1918, it would not have deprived General Kniskern of such power when his authority had been recognized and exercised in the purchase of many millions of pounds of bacon for the Government for many months.

Second. The next objection is that the alleged contract is not complete in its terms, first, in that the offers made by Swift & Company included No. 8 bacon, while the order of the Food Administration and of General Kniskern included nothing but No. 10 bacon. We find no weight in this suggestion. The offer was made by Swift & Company, and it was only accepted by the allotment of the Food Administration to the extent of No. 10 bacon and that allotment was accepted in writing by Swift & Company, which, of course, eliminated bacon No. 8 from the contract.

Then it is said that in the letter of December 10th an inquiry was made by General Kniskern for information as to where the allotments were to be put up. This was not a term of the contract. It was evidently left to the discretion of Swift & Company to distribute the allotments as might be convenient to it, and the inquiry was only for information as to the various plants of Swift & Company at which inspections and deliveries were to be made.

Then it is said that there was no complete contract because the price was not fixed. Upon this point Finding

No. 10 of the Court of Claims is important. It is as follows:

"Since there were many elements entering into cost of production as to which there were frequent fluctuations, it was not practicable to undertake to determine prices so far in advance, and accordingly, instead of fixing prices at the time the proposals were submitted, or notices of allotments issued, it was agreed that prices would be determined at or near the first of each month for the product to be furnished during that month. This was at a time when of necessity the preparation of the product, in this instance bacon, was well under way, approaching completion as to a large part thereof and when the cost of the green bellies, the basic element of final cost, and other fluctuating elements of cost were ascertainable.

"At about this time the usual form of circular proposals were sent to the packers, not for use in submitting bids as under the peacetime competitive system, but as a convenient method for formal submission by the packers of their proposals as to price for the product which they had theretofore been directed to furnish during the month in question and which already, by direction of the depot quartermaster, was in process of preparation.

"Upon submission of these proposals as to price, if the same were satisfactory to the depot quartermaster or, otherwise, upon adjustment to a satisfactory basis, purchase orders were issued, which furnished the basis of payment, although the purchase orders frequently were not issued until a part and sometimes all of the product covered thereby had been delivered."

It was evidently impossible to make a contract fixing the price of the bacon in advance of the partial performance of it, and the price was therefore left to subsequent adjustment. The Food Administration, by its regulations, had already determined that the profit of the seller should not exceed 9 per cent. of the investment, or 2½ per cent.

of the gross sales. Under ordinary conditions, a valid agreement can be made for purchase and sale without the fixing of a specific price. In such a case a reasonable price is presumed to have been intended. In the case of *United States* v. *Wilkins*, 6 Wheat. 135, it was held, under a proviso of the contract which left the price to be adjusted by the Government and the contractor, that it was to be the joint act of both parties and not the exclusive act of either, that if they could not agree, then a reasonable compensation was to be allowed, that that reasonable compensation was to be proved by competent evidence and settled by a jury and that the contractor at such a trial was at liberty to show that the sum allowed him by the Secretary of War was not a reasonable compensation. In *United States* v. *Berdan Fire Arms Company*, 156 U. S. 552, 569, a suit in the Court of Claims, it was objected that there was no price agreed upon and that the officers of the Government were not authorized to agree upon a price. It was held that this was not material. The question was whether there was a contract for the use of the patent in that case, and not whether all the conditions of the use were provided for in such contract, that this was the ordinary rule in respect of the purchase of property or labor. 1 Williston, Contracts, § 41. We find, therefore, that, by the writings and documents, all the necessary details making a valid contract were set forth in writing.

Third. Were they more than mere preliminary data upon which a subsequent formal contract was to be framed and signed? Taking the writings together, it is quite evident that as between individuals such writings would constitute a single contract for the delivery of 17,000,000 pounds of No. 10 bacon in monthly installments. As the Court of Claims points out: "From the inception of the contract here involved bacon for January, February, and March deliveries was the matter to which the parties addressed themselves. At the conference of November 9,

the total needs for the three months were made known. The plaintiff's proposal, the Food Administration's allotment, in so far as that is material, and General Kniskern's award all covered the three months. Any separation of the month of March and its treatment as a matter of independent negotiation is, therefore, unauthorized."

The fact that in January and February there were separate formal contracts of purchase of the bacon deliveries for those months signed by Captain Shugert and Swift & Company does not change our view that the original contract was made in November for the three months. These later contracts were not made until much of the bacon had been delivered and the remainder was nearly ready for delivery and after the price could be determined from the actual cost of purchase of the hogs and the preparation of the bacon. The real function of these so-called formal contracts was to fix the price for the monthly settlements which had been postponed in accordance with the provision of the original contract until it could be fairly determined from the actual cost.

Fourth. We reach the question whether the contract was evidenced in writing as required by the statutes of the United States? Rev. Stats., § 3744, provides that "it shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof." This has been qualified by a provision of a War Appropriation Act of March 4, 1915, 38 Stat. 1062, 1078, c. 143, reading as follows:

"That hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Quartermaster General, or by officers of the Quartermaster Corps authorized to make

them, and are in excess of $500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Quartermaster General."

It is first contended on behalf of the Government that under § 3744, Revised Statutes, the contract must be in one instrument and signed by both parties at the end thereof—that that is the effect of the words "to be signed at the end thereof." This section has been before this Court a number of times, and it has never been clearly declared by this Court to require the contract to be reduced to one instrument. In the case of *South Boston Iron Company* v. *United States,* 118 U. S. 37, the Court of Claims had held that the words "with their names at the end thereof" required that the signatures should be appended to one instrument, but it was not necessary to the decision of the case. On review in this Court, however, the papers relied on were held to be nothing more than preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law, which was never done. It was said that the whole matter was abandoned by the Department after the memoranda had been made and that the Iron Company had never performed any of the work which was referred to and had never been called upon to do so.

The section has been under consideration before this Court also in *Clark* v. *United States,* 95 U. S. 539; *St. Louis Hay & Grain Co.* v. *United States,* 191 U. S. 159; *United States* v. *Andrews & Co.,* 207 U. S. 228; *United States* v. *New York & Porto Rico S. S. Co.,* 239 U. S. 88, 92; *Erie Coal & Coke Corporation* v. *United States,* 266 U. S. 518. In no one of these has it been expressly decided that the requirements of § 3744 may not be met by an exchange of correspondence properly signed. But whether the contention by the Government be true or not

as to § 3744, the change in the Appropriation Act of 1915, in which the words "signed by the parties at the end thereof" are omitted, clearly makes unnecessary the evidencing of such contracts with the Quartermaster's Department by reduction to writing and signatures in one instrument. This was a contract made by the Quartermaster's Department and comes exactly within the amendment of 1915, and we see no reason why it does not constitute a binding contract upon the Government under the general jurisdiction of the Court of Claims.

Some suggestion is made that the signature of General Kniskern to the letter of December 10 was by another. The signature was

" By authority of the Director of Purchase and Storage,

A. D. Kniskern,
Brigadier General, Q. M. Corps,
Officer in Charge,
By O. W. Menge,
2d Lieut., Q. M. Corps."

It is evident from subsequent correspondence that General Kniskern recognized this as his signature and as a binding contract. There seems no doubt about the authority of Lieut. Menge to attach his signature or that it was the regular practice in the office. In a similar case the Court of Claims, *Union Twist Drill Co.* v. *United States,* 59 Ct. Cls. 909, held that the affixing of the signature of a contracting officer by another duly authorized created no infirmity in the execution of the contract. A similar conclusion was reached by Attorney General Gregory, 31 A. G. 349, and by Attorney General Wirt, 1 A. G. 670. The conclusion we have come to in respect to the regularity and legality of the contract under the Act of 1915 makes it unnecessary for us to consider the other ground upon which the Court of Claims sustained this recovery, to-wit, full performance.

This brings us to the question of damages. The Government contends that the Court of Claims did not adopt the proper rule in respect to damages. By the letter of January 24, General Kniskern, Zone Supply Officer, notified Swift & Company that the only bacon the Government would take during the month of March, 1919, would be such bacon as was then in process of cure over and above the quantity necessary to take care of the February awards and which had been passed by the inspectors. Swift & Company received this on January 27th, and at once stopped the putting of bacon in cure, but proceeded with the curing, smoking and canning of bacon already in cure. March 5, 1919, General Kniskern notified Swift & Company that it would be necessary to discontinue production on all commodities which were not intended to apply against the February contract. Should Swift & Company have any issue bacon which was now in smoke and which was in excess of the amount required, for the February delivery, it would be accepted. Swift & Company received this notice on March 6th, and completed the smoking and canning of bacon which was already in smoke. When the notice of March 5th was received by Swift & Company, it had already in smoke for March delivery, 4,197,672 pounds. This bacon was put up under government inspection. When the order was received, there also remained in process of cure, not needed for February deliveries, and intended for March delivery, 1,068,538 pounds of bellies. These had been prepared under government inspection. On March 22, Swift & Company notified General Kniskern that at that time it had the bacon practically all packed and ready for delivery. It said, "We are very short of storage room at each of these plants and will appreciate your giving us purchase order and shipping instructions in the very near future." April 24, General Kniskern wrote Swift & Company that his office was tak-

ing preliminary steps toward an adjustment for materials on hand to be applied against the March deliveries, which had been cancelled, and requested that a representative of Swift & Company should be present at a conference to be held at his office on April 29, 1919, "in order that you may be fully informed as to what methods should be followed by your firm in submitting your claim." On April 29, he wrote to Swift & Company, enclosing papers "necessary to prepare in order to file a claim for any amount you may consider due from the various packing house commodities allotted you for delivery during March, 1919, and on which you will suffer a loss by reason of cancellation of those orders." And in a note of August 29, 1919, General Kniskern, Zone Supply Officer, wrote as follows to Swift & Company:

"1. Regarding your claim for the value of bacon prepared by you under allotment given by this office of November 9, 1918, and in view of the fact that this claim is still awaiting action of the Board of Contracts Adjustments in Washington, I desire to state the following:

" . . . it will be impossible for this office to give you positive and definite instructions as to the disposal of any of this product which may at this time be in your possession. It is, however, realized by this office that the product in question is of a perishable nature. Further, it is an important food product. In view of these two facts, it is believed that these products should be disposed of at the earliest possible moment. It will not be possible for the Government to dispose of them until the negotiations are completed and the actual ownership determined by the Government, taking them at the agreed price or turning them over to you on a basis similar to the salvage basis of unfinished material.

"3. In the judgment of this office, if you are able to dispose of this product by a sale within the limits of the United States, it would be a perfectly proper procedure,

bearing in mind, of course, that having made such sale it will be necessary for you, when the later negotiations are in progress, to be able to convince a negotiating officer that the price you may have received for such part of this product as has been sold was justified by the conditions.

"4. In order that you may have some basis on which to proceed, in case you decide to attempt a sale of these products, you are informed that this office, under authority from Washington, is now selling, through the parcel post and to individuals, bacon, serial 10, at $4.15 per can, or about 34 7/12 cents per pound.

"5. Any sales that you may make at the price which is now being charged through the parcels post and to individuals would, in the judgment of this office, be entirely in the interests of the Government."

Thereupon Swift & Company began selling the number 10 bacon it had prepared for March deliveries. It directed its branch houses and agents to sell this at $4.02 a can at wholesale, a price designed to permit the retailer to sell at the Government's price and realize a profit for the handling of approximately one cent per pound. It sent out instructions to its representatives that the Government was selling at $4.15 a can and added that it was desirable, therefore, that no dealer should sell for less than that. Subsequently, and from time to time, the Government reduced its price on army bacon, and the plaintiff followed the Government's price in its sales except that in a few localities it was able to procure a better price by reason of its ability to make prompt delivery which the Government could not do. The lowest price realized was $2.65 per can, or 22 1/12 cents per pound, which was at or near the end of the period covered by these sales. The sale of the bulk of this product, approximately 98½ per cent. thereof, was completed in January, 1920, although there were sales of about 700 cases in February and a few small

sales thereafter, until October, 1920, during which month the last was sold. For this bacon sold at varying prices the plaintiff received $1,062,847.54, and its expenses of sale were $160,982.23.

The Court of Claims found that a fair contract price for the bacon on the basis upon which prices had theretofore been fixed, and the basis upon which it was contemplated by the parties that the price for this bacon would be fixed, was $1,640,146.18; that the cost of the bacon put up by Squire & Company, a subsidiary of Swift & Company, for the account of Swift & Company, was $430,410.48, and the fair contract price therefor as between the plaintiff and the United States, on the basis above stated as within the contemplation of the parties, was $432,573,34; that the reasonable profit, if it had been permitted to complete and deliver this, would have been $5,021.90, and that the reasonable additional profit accruing to Swift & Company, if it had been permitted to manufacture and deliver serial number 10 bacon up to 6,000,000 pounds for March delivery, would have been $8,818.30, leaving a balance, after deducting the net proceeds of sale, and certain other small items to be added, of $1,077,386.30.

We think the necessary effect of the Court of Claims findings is that Swift & Company was diligent in disposing of this bacon at the best prices it was possible to secure. There was a very large amount of this particular bacon on the market, and the finding was that it was not particularly salable because specially prepared under army orders to avoid spoiling; that it was not commercial bacon like number 8; that it required more time for preparation and was not adapted to popular consumption because of its more salty flavor.

The Government complains that this army bacon might have been sold at an earlier time during the summer when pork was at a higher figure, and would have brought more money, but there is nothing in the findings to make a

basis for this claim. The uncertainties as to the best method of disposition of such surplus supplies, not needed by reason of demobilization, justified care and deliberation. Swift & Company seemed to be properly anxious not to embarrass the Government by throwing what it had on the market. The large amount of bacon of this peculiar kind which had to be disposed of made its sale a matter of considerable delay. Swift & Company were evidently anxious to conform as nearly as possible to the desires of the Government, and did so. The bacon of this kind had no market price and had to be worked off slowly. Under these conditions, there was no standard by which the usual rule of damages, namely, the difference between the contract price and the market price, could be the measure of Swift & Company's loss through the failure of the Government to receive the bacon. This was a case where the only standard could be the contract price and the amount realized at actual sale by diligent effort. The rule is that where there is no general market or the merchandise is of a peculiar character and not staple, it is necessary that some other criterion be taken than the difference between the agreed price and the general market value. *Fisher Hydraulic Stone & Machinery Company* v. *Warner,* 233 Fed. 527; *Kinkead* v. *Lynch,* 132 Fed. 692; *Leyner Engineering Works* v. *Mohawk Consolidated Leasing Company,* 193 Fed. 745; *Manhattan City, etc. Ry. Co.* v. *General Electric Company,* 226 Fed. 173; *Frederick* v. *American Sugar Refining Company,* 281 Fed. 305; *Barry* v. *Cavanaugh,* 127 Mass. 394; *Dunkirk Colliery Co.* v. *Lever* (C. A.), 9 Ch. Div. 20, 25.

For these reasons, the measure of damages adopted by the Court of Claims for the bacon which had been prepared under the contract and which the Government did not take, was justified.

We come now to the question of the cross appeal of Swift & Company with reference to the bellies which were

sent abroad for sale in April, after the Government had indicated its desire to cancel the orders for March. These bellies had not been made into bacon. Of these, 65,225 pounds was sold in the United States at an average price of $33\frac{1}{16}$ cents per pound. All of the remainder of them were shipped abroad. Those that went to Belgium were sold at 31 cents; to Norway, at 31 cents; to Germany, at 40 cents, and to France, at 16.56 cents. Swift & Company had theretofore, in ordinary course of business, exported similar products in large quantities, and believed that at this time it would find a good market because of the widely reported shortage of food products in Europe. With these exportations Swift & Company had shipped largely of other products on its own account on which it sustained heavy losses. The Court of Claims in its opinion states that it is quite clear that, in seeking a foreign market for this product, plaintiff was acting in perfect good faith, and in accordance with its best judgment, based on former experiences in exporting and information then at hand as to markets to be anticipated abroad. But the court said that it did not think it could relieve itself from the consequences of its error in seeking a foreign market. "It is true that it does not appear that it could have made other sales on the basis of those made in New York; on the contrary, it is rather to be implied that other purchasers were not then available and that the one found would not buy further, but it seems to us that it was the duty of the plaintiff to have relied upon the home market and to have taken such steps that it might show that it had exhausted that market before resort to a foreign one, and that in the absence of such a showing, it assumed the risk of procuring such results as would demonstrate that the course taken had resulted beneficially to the other party."

We do not agree with this conclusion. We do not think seeking a market in France was so different from

attempting a sale in the United States as to indicate a disposition to speculate at the expense of the Government. In view of the complete good faith manifested by Swift & Company in this whole transaction, and the willingness on its part to give up its claim for larger damages for failure of the Government to take the full March delivery, and in the absence of proof that the bellies might have been disposed of anywhere else at a better price, we think the same result should be reached in case of the bellies as in that of the bacon. We think the Government should pay the difference between the fair contract price, as found by the Court of Claims, and the actual sales of the material remaining. In that view there should be added to the recovery on the cross appeal $212,216.69, the excess of the contract price over the net amount realized. The judgment of the Court of Claims is accordingly affirmed for the amount already allowed by it, with directions to allow the additional amount now awarded on the cross appeal.

Affirmed with modification.

MORSE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 201. Motion to dismiss submitted February 1, 1926.—Decided March 1, 1926.

1. Under Rule 90 of the Court of Claims, after a motion for new trial has been overruled another can not be made without leave of court. P. 153.
2. The ninety days allowed by Jud. Code § 243 for appeal to this Court from a judgment of the Court of Claims, began to run from the day when that court denied a duly and seasonably filed motion for a new trial, and was not postponed by the subsequent presentation of a motion (which the court likewise denied) for leave to file a further motion for a new trial. P. 153.

Appeal from 59 Ct. Cls. 139, dismissed.

APPEAL from a judgment of the Court of Claims denying a salary claim.

Solicitor General Mitchell and *Assistant Attorney General Galloway* for the United States, in support of the motion.

Mr. John H. Morse, pro se, in opposition thereto.

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

John H. Morse, claiming that he had been illegally separated from the Civil Service of the United States, filed his petition in the Court of Claims for $4,000 for his salary. Upon a general traverse the case was heard and the Court made findings of fact and entered judgment that the petition of the plaintiff should be dismissed on the merits. The judgment was entered on the 21st of January, 1924. On March 19, 1924, Morse filed a motion for a new trial. This motion was overruled by the Court on May 4, 1924. On May 28, 1924, Morse presented a motion for leave to file a motion to amend the findings of fact. This motion for leave to file was overruled by the Court of Claims on June 2, 1924. On June 9, 1924, Morse presented a motion for leave to file a motion to reconsider and grant a new trial, and on the same day the Court of Claims overruled the motion for leave to file. On September 5, 1924, Morse made application for an appeal to this Court. The Court of Claims allowed the appeal on October 13, 1924. At the time of allowing the appeal, the Court of Claims filed a memorandum, calling attention to the dates upon which the steps referred to above had occurred and to the rule of the Court of Claims on the subject, and added: "In this state of the record the Court is in doubt whether an appeal is allowable, but grants the appeal to give plaintiff the benefit of any doubt upon the question."

Rule 90 of the Court of Claims provides as follows:

"Whenever it is desired to question the correctness or the sufficiency of the court's findings of fact or its conclusions or to amend the same, the complaining party shall file a motion which shall be known and may be considered as a motion for a new trial. All grounds relied upon for any or all of said objects shall be included in one motion. After the court has announced its decision upon such motion no other motion by the same party shall be filed unless by leave of court. Motions for new trial, except as provided by Section 1088 of the Revised Statutes (Sec. 175 of the Judicial Code) shall be filed within sixty days from the time the judgment of the court is announced."

Section 243 of the Judicial Code, which was in force at the time the appeal herein was taken, but which was later repealed by the Act of February 13, 1925, c. 229, 43 Stat. 936, provided as follows:

"All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct."

It is clear from the sequence of dates above given that more than ninety days elapsed between the overruling of the motion for a new trial and application for appeal by the appellant. The appellant contends that the motion for leave to file a motion for a new trial, on June 9, 1924, prevented the beginning of the period of limitation within which application for an appeal could be made from the judgment of the Court of Claims, and therefore that the appeal taken on the 5th of September was within the statutory ninety days.

There is no doubt under the decisions and practice in this Court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be

initiated begins from the date of the denial of either the motion or petition. *Brockett* v. *Brockett,* 2 How. 238, 241; *Railroad Company* v. *Bradleys,* 7 Wall. 575, 578; *Memphis* v. *Brown,* 94 U. S. 715, 718; *Texas & Pacific Railway* v. *Murphy,* 111 U. S. 488, 489; *Aspen Mining and Smelting Co.* v. *Billings,* 150 U. S. 31, 36; *Kingman* v. *Western Manufacturing Co.* 170 U. S. 675, 678; *United States* v. *Ellicott,* 223 U. S. 524, 539; *Andrews* v. *Virginian Railway,* 248 U. S. 272; *Chicago, Great Western Railway* v. *Basham,* 249 U. S. 164, 167. The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, depends upon the due and seasonable filing of the motion for a new trial or the petition for rehearing. In this case after the first motion for a new trial had been overruled, on May 4, 1924, no motion for a new trial could be duly and seasonably filed under Rule 90 of the Court of Claims, except upon leave of the Court of Claims. This leave, though applied for twice, was not granted. Applications for leave did not suspend the running of the ninety days after the denial of the motion for a new trial within which the application for appeal must have been made. For that reason, the motion of the Government to dismiss the appeal as not in time, and so for lack of jurisdiction, must be granted.

Appeal dismissed.

ROGERS *v.* UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

No. 153. Argued January 20, 21, 1926.—Decided March 1, 1926.

1. The Army Reorganization Act of June 4, 1920, should be liberally construed to avoid unnecessary technical limitation upon the military agencies which are to carry it into effect. *French* v. *Weeks,* 259 U. S. 326. P. 160.
2. The requirement of the Act that an officer before a court of inquiry shall be furnished with a full copy of the official records upon

which his proposed classification as an officer who should not be retained in the service is based, was sufficiently complied with to avoid invalidating the proceedings where the officer was furnished, for his own keeping and use, a copy of everything adverse to him in his record, and was given full opportunity in the court of inquiry to consult his entire record. P. 160.

3. A court of inquiry, under this statute, reported in favor of an officer, but the final classification board, having before it the record from the court of inquiry, decided otherwise, finally classifying him as one who should not be retained in the service. *Held* that the fact that the court of inquiry discouraged the officer from adducing cumulative testimony in disproof of charges which that court declined to consider because they had never been presented to him, did not invalidate the final classification, since it was not to be presumed that the final board would consider those charges under the circumstances, and since the officer's counsel, if he deemed the evidence material and important, would have insisted on its production before the court of inquiry. Pp. 161, 162.
4. On an appeal from a judgment of the Court of Claims upholding proceedings of military tribunals leading to claimant's retirement from the Army, as to which it is objected that the record sent from the court of inquiry to the final classification board was defective, this Court derives its knowledge of the contents of such record from the findings of the Court of Claims. P. 162.

59 Ct. Cls. 464, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for additional pay, made by a retired army officer upon the ground that the order for his retirement was illegal and void.

Mr. Nathan William MacChesney, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

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

Wilbur Rogers was a Major of Field Artillery in the Regular Army of the United States until January 26,

1921, when by an order of that date, issued by the Secretary of War, he was placed on the retired list, under section 24b of the Act of June 4, 1920. On the ground that the order was illegal and void, he brought this action in the Court of Claims to recover the difference between the pay and allowances of a Major of Field Artillery on the active list, from January 26, 1921 to January 26, 1922, and the retired pay for the same period which he actually received, this difference amounting to about $4,300. A general traverse was entered and the issues were heard and findings of fact made by the court.

The Act of June 4, 1920, 41 Stat. 759, 773, c. 227, commonly called the Reorganization Act, provides:

"Sec. 24b. Classification of Officers.—Immediately upon the passage of this Act, and in September of 1921 and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service, and Class B, of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to Class A, and shall be promoted according to the provisions of this act to fill any vacancies which may occur prior to such final classification. No officer shall be finally classified in class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in Class B, a board of not less than three

officers shall be convened to determine whether such classification is due to his neglect, misconduct or avoidable habits. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay," etc.

The Court of Claims found that the law had been complied with and dismissed the petition.

The grounds relied on by the petitioner for the appeal, as stated in his brief, are,

First, that plaintiff was prevented by military law from going forward before the court of inquiry with testimony which he desired to give, which was necessary to meet the adverse charges in his record which were before the court of inquiry and the *prima facie* case made out against him by the provisional classification board.

Second, that the record of the court of inquiry was not a complete record as required by law, in that there is no mention of the peremptory closing of the court, and nothing to show that the new evidence which Major Rogers desired to give was excluded.

Third, that the court of inquiry made an error of law when it assumed that it could arbitrarily exclude the testimony of Major Rogers and other witnesses, once it had determined to recommend that Major Rogers be retained on the active list, inasmuch as its decision was not final, as shown by the case and provided by the statute.

Fourth, that the Court of Claims made an error of law when it made a finding of fact that Major Rogers was excused as a witness and did not complete the testimony which he desired to give, although he was not prevented from doing so by the court.

After the preliminary board of classification had classified the plaintiff in class B, he applied for opportunity to appear before a court of inquiry, which was duly appointed and convened at Chicago, November 20, 1920. He was assisted by counsel, Lieutenant Colonel Horace F.

Sykes of the Infantry. The plaintiff was furnished with copies from the official records of his service, which copies contained only the unfavorable portions of his record upon which the action of the board was based. The plaintiff thereupon applied to the War Department for the complete record of his service, but his request was not granted. He was however permitted to read the complete record of his service prior to the meeting of the court of inquiry and during its proceedings. It was a complete record of plaintiff's services as an officer of the Army from the date of his first commission therein to the date of the convening of said court of inquiry.

The plaintiff called to the attention of the court of inquiry certain charges preferred against him by Colonel Harry C. Williams, of the Field Artillery, as shown in the record. The court heard the plaintiff upon these charges, but discouraged any further evidence relative thereto, upon the grounds stated by the president of said court in his evidence before the Court of Claims that the court had received instructions to disregard any charges against any officer who had not been brought to trial on any charges, or to whom the charges had not been read. The plaintiff had testified that he had never been acquainted with these charges until he was notified that he had been put in class B.

While the plaintiff was on the witness stand testifying in reference to adverse reports in his record, the court through its president stated " That will be all," whereupon he was excused as a witness and did not complete the testimony which he desired to give, although, as the Court of Claims finds, he was not prevented from doing so by the court.

During the course of the hearing before the court of inquiry the presiding officer addressed plaintiff's counsel as follows:

" It is the suggestion of the court, merely a suggestion, you understand, that counsel rest his case."

Counsel for the plaintiff thereupon stated to the court that he had more evidence that he desired to submit, whereupon the presiding officer stated:

"I wish to repeat that it is the suggestion of the court that counsel rest his case."

Thereupon the counsel for the plaintiff again stated to the court that he had other evidence, and that there were six witnesses in the building whom he desired to call, and a seventh witness who was in the city and waiting to be called by telephone. The presiding officer thereupon stated emphatically, striking his hand forcibly on his desk:

"I wish to reiterate that it is the suggestion of the court that counsel rest his case."

The plaintiff thereupon closed his case. At the time, plaintiff had, in the same building wherein the court was sitting, six witnesses, and a seventh witness, an army officer, waiting to be notified by telephone to appear. These witnesses would have testified as to the charges which the court had decided to ignore, but were not called by the plaintiff. The Court of Claims finds that the plaintiff made no protest to the court because they were not called.

A copy of the official records was incorporated in the record of the court of inquiry. The court ruled as a matter of law that a favorable efficiency report could be discussed but should not be incorporated in the record of the court, because these reports were on file in the War Department and would be considered, as they were, by the final board of classification.

At the conclusion of the hearing the court of inquiry made the following determination:

"The court is of the opinion that Major Wilbur Rogers should not be continued in class B."

It appears that the plaintiff, by mail, having received the record of the court of inquiry, complained to the

recorder of the court that the record contained errors, but that the recorder refused to rectify them.

The final classification board, after considering the record received from the court of inquiry as additional evidence, finally classified the plaintiff in class B.

It does not appear to us that there is anything in the findings of the Court of Claims to show that the proceedings by which the plaintiff was classified in class B were rendered invalid. This Court has had occasion to consider the Reorganization Act under which this retirement was ordered. In the case of *French* v. *Weeks*, 259 U. S. 326, 327, 328, we said:

"The Army Reorganization Act is intended to provide for a reduction of the Army of the United States to a peace basis while maintaining a standard of high efficiency. To contribute to this purpose, Congress made elaborate provision in the act for retaining in the service officers who had proved their capacity and fitness for command, and for retiring or discharging those who, for any reason, were found to be unfit. Every step of this process is committed to military tribunals, made up of officers, who by experience and training, should be the best qualified men in the country for such a duty, but with their action all subject, as we shall see, to the supervisory control of the President of the United States.

"Not being in any sense a penal statute, the act should be liberally construed to promote its purpose, and it is of first importance that that purpose shall not be frustrated by unnecessarily placing technical limitations upon the agencies which are to carry it into effect."

It is conceded on behalf of the plaintiff that the procedure required by the statute was followed in the organization of the boards and the court of inquiry. It was objected in the court below and in the assignments of error here that the plaintiff was not furnished with a copy of the official records in the court of inquiry upon

which the proposed classification was based. As a matter of fact, he was furnished with a written copy for his own keeping and use of everything that was adverse to him in his record, and he was given in the court of inquiry a full opportunity to consult a copy of his entire record. We do not think that the difference between what was required by the statute and what was actually afforded him in the matter was of sufficient substance to invalidate the proceedings.

The chief complaint of plaintiff, when the briefs in his behalf are analyzed, is that he was prevented by the court from introducing additional evidence of cumulative character to disprove charges which the court of inquiry, upon the statement in the plaintiff's own evidence that he had never been presented with the charges and never been called upon to answer them, completely ignored. The court did so, as explained by the president of the court of inquiry, in accordance with instructions received by the court to disregard any charges against any officer who had not been brought to trial on them or to whom they had not been read. The recommendation of the court of inquiry was that the plaintiff be retained in class A. This was doubtless the reason why the court of inquiry did not think it necessary to call additional witnesses, especially in reference to a subject matter that could not affect the standing of the officer. In the absence of any other circumstances, and in the face of the presumption of regularity that must obtain in proceedings of this sort, we can not assume that the final board of classification considered as a basis for putting the plaintiff in class B, charges which had never been presented to him, charges which he denied, and charges which the court of inquiry ignored.

It is claimed that the plaintiff was injured by the failure of the recorder of the court to include in the record of the court of inquiry the colloquy between the plaintiff and his

counsel, on the one hand, and the court of inquiry on the other, with reference to discontinuing the hearings. We do not think that, if the colloquy had been put in the record, it would have made any substantial difference in its effect. We have no means of knowing exactly what the record of the court of inquiry as forwarded to the board of final classification contained except from the findings of the Court of Claims, which shows that it contained all that the plaintiff put in in the way of records and documents and his evidence. In view of this we can not assume that the complaint by the plaintiff that the record was defective was well founded.

The Court of Claims found that the plaintiff was not prevented from putting in the additional evidence on the charges which were subsequently ignored. It is argued to us that the attitude of the court was in effect and as a matter of military law a military order preventing the submission of further evidence and making it a military offence for the plaintiff to have insisted on introducing his witnesses. Were the matter important, we should have difficulty in yielding to such a view. The Court of Claims finds in effect that the action of plaintiff in not producing further evidence was voluntary acquiescence by him in the suggestion of the court. He had counsel who presumably knew his rights under the statute, and if such evidence was deemed material and important, we must assume that the counsel would have asserted his right and insisted on the production of the evidence.

Much of the briefs of counsel for the plaintiff in error is made up of statements based on, and quotations from, the evidence before the Court of Claims. We can not consider this. We are limited to the findings of the Court of Claims. *United States* v. *Smith,* 94 U. S. 214; *Stone* v. *United States,* 164 U. S. 380; *Crocker* v. *United States,* 240 U. S. 74, 78; *Brothers* v. *United States,* 250 U. S. 88, 93.

There is nothing in the record before us which would justify us in holding the proceedings invalid. The judgment is

Affirmed.

GIRARD TRUST COMPANY, GEORGE STEVENSON, WILLIAM R. VERNER ET AL. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 137. Argued January 14, 15, 1926.—Decided March 1, 1926.

1. Where interest on tax refunds is allowed by statute, a suit for the interest after refund of a tax is maintainable in the Court of Claims. *Stewart* v. *Barnes,* 153 U. S. 456, distinguished. P. 168.
2. Under § 1324 (a) of the Revenue Act of November 23, 1921, which provides that, upon the allowance of a claim for the refund of internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund " to the date of such allowance," the date to which the interest runs is neither the date of actual repayment nor the date on which the Commissioner of Internal Revenue first decides that there has been an overassessment and refers the matter to the Collector for examination and report of the amounts to be refunded, but the date on which the Commissioner approves the amount thus ascertained, for payment. P. 169.
3. The above section dates the interest (a) from the time when the tax was paid, if it was paid " under a specific protest setting forth in detail the basis of and reasons for such protest," but (b) from six months after the date of filing claim for refund, if there was no protest or payment pursuant to additional assessment. *Held,* that, in order to date the interest from time of payment of tax, the protest under which it was paid must set forth a specific and valid reason for a refund. P. 171.
4. Where a tax payment was less than the amount illegally assessed, due to deduction of the discount allowed on anticipatory payments by § 1009 of the Revenue Act of October 3, 1917, the amount refundable, with interest, was the amount actually paid, not including the discount. P. 173.

59 Ct. Cls. 727, reversed.

APPEAL from a judgment of the Court of Claims allowing, in part, claims for recovery of interest on the amounts of refunded tax payments.

Mr. James Craig Peacock, with whom *Mr. John W. Townsend* was on the brief, for appellants.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Mr. Randolph S. Collins,* Attorney in the Department of Justice, were on the brief, for the United States.

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

This is an appeal from a judgment of the Court of Claims under § 242 of the Judicial Code. The judgment was entered May 19, 1924, and the appeal was allowed July 3, 1924. The judgment dismissed the petition of the plaintiffs upon findings of fact. The Girard Trust Company and the other appellants are trustees of the estate of Alfred F. Moore, deceased.

Their claims are for interest not paid on refunds of taxes paid them. The proposed income tax upon the Moore estate for 1920, as originally returned early in 1921, was $196,202.61. On March 15, 1921, and on June 15, 1921, quarterly payments of the tax, which amounted to $49,050.66 each, were paid to the collector. On August 2, 1921, the trustees for the estate filed a claim for the refund of the two installments aggregating $98,101.32, already paid, and claim for abatement of the two remaining quarterly installments not yet paid, aggregating the same amount. The claim for abatement was allowed in its entirety, and the claim for the refund in large part. The action of the Department began December 9, 1922, in a schedule form, signed by the Commissioner of Internal Revenue, including an item of overassessments, and marked, "Approved by the Commissioner of Internal

Revenue, for transmission to the proper accounting officers for credit and refund." This was transmitted to the Collector of Internal Revenue for the First District of Pennsylvania to examine the account of the taxpayer, to report back the amount to be refunded and the amount to be credited on taxes due and unpaid. The collector made the report. The Assistant Commissioner of Internal Revenue confirmed the report and the Commissioner directed the refund January 16, 1923. On February 20, 1923, the trustees received by mail a certificate of overassessment dated February 10, 1923, stating that since $196,202.61 was assessed, whereas $13,663.89 was the correct tax, there had been an overassessment of $182,583.72, and that the amount of this overassessment had been applied as follows:

Amount abated	$98,101.29
Amount credited	21.41
Amount refunded	84,416.02

With this certificate was a check for $84,416.02, the amount of the refund without interest. Since filing the petition in this case the trustees received, under date of October 5, 1923, a check for $4,318.97, interest on the refund and the credit of $21.41, from six months after the filing of the claim for refund to December 9, 1922.

Moore's estate made return to the Collector of Internal Revenue for excess profits tax for the year 1917 of $108,140.15, and on March 21, 1918, paid to the Collector of Internal Revenue $107,372.36, the amount of the tax less the credit of $767.79 allowed for payment in advance of the time fixed by law, June 15, 1918. Ascertaining that the trustees of a trust estate were not subject to excess profits tax, on August 2, 1921, they filed a claim for refund of the entire tax of $108,140.15. This claim was approved by the Commissioner of Internal Revenue for $107,372.36, on December 9, 1922, under the prescribed schedule form in which this item was marked

"Approved by the Commissioner of Internal Revenue, for transmission to the proper accounting officer for credit and refund." It was sent to the proper Collector of Internal Revenue who reported it back to the Bureau. It was approved by the Assistant Commissioner and the refund was finally approved by the Commissioner, January 16, 1923. On February 7, 1923, the plaintiffs received by mail a certificate of overassessment dated February 6, 1923, for $107,372.36, together with a check for $112,864.53, the difference $5,492.17 being interest on the amount refunded from the date six months after the filing of the claim to December 9, 1922.

The contentions of the trustees are that the allowances of interest on the refunds are not sufficient under the statute. Section 250(b) of the Revenue Act of November 23, 1921, 42 Stat. 227, 264, c. 136, provides:

"As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252."

Section 252 of the above Act, 42 Stat. 268, provides:

"That if, upon examination of any return . . , it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer. . . ."

Section 1324 (a) of the same statute, 42 Stat. 316, contains the provision as to interest as follows:

"That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) If such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

The claims made by the trustees, appellants here, are, first, that the Government erred in its construction of § 1324, by which it allowed interest, not to the dates of payments of the refunds February 20 and February 7, 1923, but only to the date when the Commissioner approved the schedule finding the amount of the overassessments and transmitted the schedule to the accounting officers December 9, 1922. The interest between December 9, 1922, down to the dates of payment amounts to $2,028.11. The question is whether the words "to the date of the allowance" mean to the date of the decision of the Commissioner that an overassessment has been made, i. e., to December 9, 1922, to the final approval of the refund by the Commissioner January 16, 1923, or to the date of payment.

The next claim of the trustees is for $3,889.67, and this turns on the question whether under § 1324 the interest on the refund for the 1920 taxes should be calculated

under clause (1) in that section as for a payment made under a specific protest or whether as upon a payment under clause (3) for which no protest was made. The Commissioner held that no sufficient protest had been made and therefore allowed interest, not from the time of payment as provided under clause (1), but from six months after the filing of the claim for refund under clause (3), which made a difference of $3,889.67.

The third claim of the trustees is for $767.79. This is based on the fact that under the Revenue Act of October 3, 1917, 40 Stat. 300, 326, c. 63, § 1009, a credit on taxes to be paid in advance, calculated at the rate of 3 per cent. per annum upon the amount so paid from the date of payment to the date fixed by law for payment, was allowed and the amount paid was $767.79 less than the amount assessed. The claim for refund was allowed for the amount actually paid, but not for the discount. The trustees now seek to recover the discount.

The Court of Claims dismissed the petition for all these claims on the authority of *Stewart* v. *Barnes,* 153 U. S. 456. The taxpayer in that case had already received and accepted the principal of the amount improperly collected by a collector of internal revenue, and this was an action for the interest. This Court held that the taxpayer could not maintain an independent action for interest, for the reason that in such cases interest is considered as damages, does not form the basis of the action, and is only an incident to the recovery of the principal debt. We do not think that it controls this case. The payment of interest in the *Stewart Case* was not expressly provided for in the Act. In this case there is statutory provision for it, and it is analogous to a suit in debt or covenant in which the contract specifically provides for payment of interest on the principal debt. In such cases the authorities all hold that the acceptance of the payment of the principal debt does not preclude a further suit for the interest unpaid.

Fake v. *Eddy,* 15 Wend. (N. Y.) 76; *Kimball* v. *Williams,* 36 App. D. C. 43; *New York Trust Company* v. *Detroit Railway Company,* 251 Fed. 514; *King* v. *Phillips,* 95 N. C. 245; *Bennett* v. *Federal Coal & Coke Company,* 70 W. Va. 456; *Robbins* v. *Cheek,* 32 Ind. 328. And the same rule obtains where the obligation is one that by statute bears interest. *National Bank* v. *Mechanic's Bank,* 94 U. S. 437; *Hobbs* v. *United States,* 19 Ct. Cls. 220; *New York* v. *United States,* 31 Ct. Cls. 276; *Crane* v. *Craig,* 230 N. Y. 452; *Bowen* v. *Minneapolis,* 47 Minn. 115; *Blair* v. *United States ex rel. Birkenstock,* 6 Fed. (2d) 679.

We are therefore brought to the merits of the case. First, what is the meaning in § 1324 of the words "to the date of such allowance" to which interest is to be paid on refunds. The Treasury Department by its regulations of 1922 construed this provision as follows:

"A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part, for transmission to the proper accounting officer, for credit or refund."

And this is the holding of the Comptroller General, 1 Decisions Compt. Gen. 411, 412. He says:

"To compute interest to the date of actual payment would be wholly impracticable from an administrative standpoint, and I have no doubt that this phase of the matter was considered by the Congress in providing that the interest should be allowed to the date of allowance rather than to the date of payment of the claim."

If Congress had intended that interest should be allowed to the date of the payment, it seems to us it would have said so. Allowance in its ordinary sense does not mean payment, and in the practical administration of the Treasury Department the two things are quite different. The one is a decision by the competent authority that the payment should be made. The other is the actual pay-

ment. The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision finally, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section.

It is said that this is a remedial statute and was intended to require the Government to recoup the taxpayer unjustly dealt with by paying interest during the whole time the money was detained. That was doubtless its general purpose. But the statute is to be construed in the light of the difficulties of the Government bookkeeping and accounting. To have made the interest calculable to the date of actual payment would have led to uncertainty and confusion, as the Comptroller General indicates, and it was doubtless for that reason that Congress qualified its desire to pay interest for the exact time during which the money was detained to a date which was practical from an administrative standpoint. Nor does the fact that, pending the carrying out of the direction of the Commissioner of Internal Revenue to make the refund, he might reverse himself, change the finality of his decision allowing the refund. If he does so, the date fixed as the date of the allowance under the section is changed of course, but the mere fact that he can reverse a final allowance does not prevent its being a final allowance, any more than when a court renders a judgment, its ability within the term to set it aside or change it affects its finality, if it is not changed. We think, therefore, that the words "to the date of such allowance" do not carry interest to be paid on refunds down to the time of payment.

We can not concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an over-

assessment and sends upon a proper form his decision to the Collector of Internal Revenue, who made the collection and keeps the account with the taxpayer. The findings and the exhibits show that the course of business is that the Collector on receiving from the Commissioner the schedule as to the overassessment, examines his books and reports back to the Bureau the amount which should be credited on taxes due and the amount to be refunded, that this is examined by the Assistant Commissioner and then is delivered to the Commissioner, who makes it effective by his approval. Until it reaches him and is approved by him, the refund can not be paid. This we think is the real date of allowance. Until that time, the exact amount of the refund is not fixed finally by competent authority. This date would seem to be just as certain and convenient from an administrative standpoint as that of the original decision of the Commissioner, and it is certainly more in conformity to the general purpose of Congress to relieve the overassessed taxpayer by paying compensatory interest on money unjustly taken and kept by the Government. We think, therefore, that the trustees are entitled to recover from the Government, interest on both the refund for the taxes of 1917 and that for those of 1920 from December 9, 1922 to January 16, 1923.

Second. This second claim turns on the provisos of § 1324 with reference to protests. The trustees attached to their original return of income tax for 1920 the following protest:

"Note.—Profit was made during the year 1920 upon sales of capital assets as set forth in block C above. This amount of $349,200.85 is included in the total net income and under regulations is returned for tax on Form 1040. As the taxpayer is advised that such sum is not taxable income, under the decision of Brewster *v.* Walsh—District Court for District of Connecticut made December 16, 1920—the report of the amount of such profit is made and

tax paid thereon. only under protest, and only in compliance with the requirement of the foregoing form and the instructions thereon."

Both the installments of the income tax paid March 15 and June 15 were paid under this protest. On the 15th of June, however, there was added to the protest the following memorandum:

"In view of the joint investigation by accountants of both Government and trustees now in progress, with the agreed object of correcting certain figures, especially those relating to depreciation, believed to have been erroneously increased, as to the most important item and ignored as to another item, in the 1920 return of said trustees covering the sale of the three capital assets in that return set forth, estimating the total of said profits and the tax payable thereon out of the trust estate.

"Inasmuch as the second quarterly installment of $49,050.60 based upon said estimate, is now due, you are hereby notified that the accompanying payment thereof is made without prejudice to the right of said trust estate to be hereafter relieved from or reimbursed for the payment of any tax upon the profits so returned in excess of the total tax, resulting from such final adjustment thereof as may be determined, either by agreement, or by the courts. . . ."

The Government's contention is that the distinction made in § 1324, by which the interest to be paid on refunded taxes is to date from the payment of the taxes in cases where there is a specific protest setting forth in detail the basis and reasons for such protest, and by which the interest is to be dated only from six months after the date of filing the claim for refund or credit when there is no protest, was intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.

We agree with this view. To hold otherwise would be to invite a protest on any pretended ground by tax-

payers in every case of payment and would make the protest of no value to the Treasury or the collecting officers. A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once. But if protests are based on reasons of no validity, they do not accomplish the public purpose for which they are devised.

In the present case, the protest was based on a decision of the District Court of Connecticut made December 16, 1920. *Brewster* v. *Walsh,* 268 Fed. 207. That case was reversed in *Walsh* v. *Brewster,* 255 U. S. 536, March 28, 1921, or more than two months before the payment of the June 15 installment by the trustees. The statement added under the June 15 installment was merely a recital that an investigation was going on between the Government and the trustees, and that if that turned out to be in excess of the right amount, the payment was without prejudice to the recovery of the excess. This was certainly not a protest for specific reasons in accordance with the requirement of the statute. For these reasons, we think that no recovery can be had for failure to allow interest for the period of the six months after the date of payment.

Third. The third item of the recovery here sought is for the $767 of discount allowed by the Government upon the amount returned for taxation on the income for 1917 by the trustees on the excess profits tax. The tax assessed was $108,140.15. It was not due until June 15, 1918. Under § 1009 of the Revenue Act of October 3, 1917, 40 Stat. 300, c. 63, it was provided that the Secretary of the Treasury, under rules and regulations prescribed by him, should permit taxpayers liable to income and excess-profits taxes to make payments in advance in installments or in whole of an amount not in excess of the estimated taxes which would be due from them, provided that the Secretary of the Treasury, under rules and regulations prescribed by him, might allow credit against such taxes so

paid in advance of an amount not exceeding three per centum per annum calculated upon the amount so paid from the date of such payment to the date fixed by law for such payment; but that no such credit should be allowed on payments in excess of taxes determined to be due.

We do not see the basis upon which such recovery can be had. The taxpayer can not obtain a refund under the other sections quoted except for taxes paid. By reason of his payment earlier than required, he has been permitted to reduce the amount which he actually paid. But there is no provision in the statute for a recovery of anything but what he did pay, or for interest on anything but on what he did pay. We think that if Congress intended him to recover interest for his accommodation of the Government by a premature payment of his taxes illegally collected, it would have made a specific provision for it and have given the Commissioner special authority.

This disposes of the three claims. The conclusion of the Court of Claims is therefore affirmed in all respects except as to the interest on the refunds on the taxes illegally collected for the year 1917, and for the year 1920 for the period from the 9th of December, 1922, to January 16, 1923, which the trustees should recover.

The judgment is therefore reversed and the cause is remanded to the Court of Claims with directions to enter a judgment in accordance with this opinion.

Reversed.

WHITE *v.* UNITED STATES ET AL.

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

No. 177. Argued January 26, 1926.—Decided March 1, 1926.

1. The Act of March 5, 1925, giving appellate jurisdiction to the Circuit Courts of Appeals in suits for war risk insurance, including suits pending, did not apply to a case pending in this Court on appeal on the date of the Act. P. 179.
2. A form of certificate of war risk insurance providing that it should be subject not only to the War Risk Insurance Act but to any future amendments thereof, could be validly adopted under the Act by the Director with the approval of the Secretary of the Treasury. P. 180.
3. Where a certificate was thus subject to future legislation, the beneficiary named had not such a vested right in the instalments payable as will prevent letting in another beneficiary not eligible under the statute originally, but named in the soldier's will and made eligible by an amendment of the statute passed after his death. P. 180.

299 Fed. 855, affirmed.

APPEAL from a judgment of the District Court in a suit to enforce rights claimed under a certificate of war risk insurance.

Mr. A. T. Gordon, with whom *Mr. R. L. Gordon, Jr.,* was on the brief, for appellant.

The judgment of the court below, founded upon the amended Act, violates the Fifth Amendment by taking the property of the appellant without compensation. *Forbes Pioneer Boat Line Co.* v. *Commrs. Everglades Drainage Dist.,* 258 U. S. 336; *Pennie* v. *Reis,* 132 U. S. 464; *Steger* v. *Building & Loan Assn.,* 208 Ill. 236; *Barrett* v. *Barrett,* 120 N. C. 127; *Welch Water Co.* v. *Town of Welsh,* 62 S. E. 497; *Ettor* v. *City of Tacoma,* 228 U. S. 146. The interest of the appellant became vested upon the death of the insured. *Supreme Council* v. *Behrend,* 247 U. S. 394. The designation of Lucy

Reeves as one of the beneficiaries of the contract is not voidable, but void. The Act of Congress expressly forbade the insured to name her as a participant in the fund. The power of Congress to extend the permitted class of beneficiaries ceases when the title of the permitted beneficiary becomes complete.

The policy is not a gratuity, but a contract, founded upon a valuable consideration, to wit, seven dollars per month deducted from the soldier's pay. It has been fully performed by the payment of the sums stipulated for and by the performance of the services which it was intended to stimulate. The fact that the insured only paid the normal premiums incident to times of peace and the Government paid the additional premium incident to the hazards of war, cannot affect the obligation to pay the sum contracted for or justify an interpretation of the Act which robs the contract of its character as a property right.

The contract is entire, founded upon an indivisible consideration. The fact that the payments are in future installments is immaterial. The contract insured the life of the soldier in the sum of ten thousand dollars. This sum is divided into 240 installments, based on a life expectancy of twenty years. In the event of the soldier's death within this period, the promise is to pay his beneficiary the same installments for twenty years or, in the event of her death, for such proportion of it as she actually continues in life. Hence death is a condition subsequent, operating to defeat the previously vested interest in the fund. An estate is "vested" where there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. *Armstrong* v. *Barber,* 239 Ill. 389; *United States* v. *Fidelty Trust Co.,* 222 U. S. 155.

Congress can make no contract with the insured except by statute. The Act in question did not, and could not constitutionally, authorize the Department to incorporate

conditions in the contract reserving to Congress the power to alter or change its terms. *Williamson* v. *United States,* 207 U. S. 425.

The power of Congress to reserve the right to alter or amend the grant is exclusive.

But, aside from this, had the general language found in the application of the insured been incorporated in the Act of 1917, it would not change the result. A general reservation of this character gives no power to destroy the obligation of the contract. The reservations have relation to the executory stages of performance during the life of the contract, and then only to reasonable changes that do not materially affect its obligation. *County of Stanislaus* v. *San Joaquin Canal Co.,* 192 U. S. 201; *Holyoke Water Co.* v. *Lyman,* 15 Wall. 500; *Miller* v. *New York,* 15 Wall. 478; *Vinton* v. *Welsh,* 9 Pick. 92; *Close* v. *Glenwood,* 107 U. S. 466; *Sinking Fund Cases,* 99 U. S. 710; *Curran* v. *State,* 15 How. 402; 19 R. C. L. 1207, §§ 23–24; 7 C. J. 1080; *Bornstein* v. *Grand Lodge &c.,* 81 Pac. 271.

Solicitor General Mitchell, with whom *Assistant Attorney General Letts,* and *Messrs. Alfred A. Wheat* and *William M. Offley,* Special Assistants to the Attorney General, were on the brief, for appellees.

The jurisdiction of this Court on direct appeal must be rested on § 238 of the Judicial Code, as it stood in 1924, allowing direct appeals in cases involving the construction of the Constitution of the United States. As this appeal was taken in August, 1924, the Act of February 13, 1925, does not apply. Although Congress may withdraw the right of appeal even after the appeal has been taken, *Crane* v. *Hahlo,* 258 U. S. 142, the Act of March 4, 1925, is prospective in the sense that it was not intended to affect cases in which appeals had been taken prior to its passage, especially as the earlier Act of February 13, 1925, had expressly saved pending appeals.

The jurisdiction of this Court depends therefore on whether a substantial constitutional question is presented. *Goodrich* v. *Ferris,* 214 U. S. 71; *Sugarman* v. *United States,* 249 U. S. 182.

The Act of December 24, 1919, did not deprive the appellant of property without due process of law, and its retroactive provisions must be sustained because the War Risk Insurance Act, as amended October 6, 1917, gave to the Director, under the direction of the Secretary of the Treasury, power to administer, execute, and enforce the provisions of the Act and authority to make rules and regulations for that purpose and to determine the full and exact terms and conditions of the contract. The Director exercised this power by prescribing a condition, which was inserted in the contract in express terms, that the contract should be subject in all respects to the provisions of the Act of October 6, 1917, and of any amendments thereto and of all regulations thereunder "now in force or hereafter adopted." The power given him by the Act was sufficiently broad to authorize the Director to reserve in the contract a power to the United States to enact laws amending the contract subsequent to its issuance, at least for the purposes of carrying out the objects of the Act, and the wishes of the insured. These provisions should be construed to render the law subject to modification by Congress after the issuance of the contract and after the death of the insured so as to meet the expressed wish of the soldier as to which of those dependent upon him should receive the benefits of the insurance.

The Act of December 24, 1919, is a legislative recognition that the Director was acting within his powers, or is a ratification of his act in reserving to Congress a right to alter the contract. The Act of December 24, 1919, validating an ineffective attempt of the insured to designate his aunt as a beneficiary, may be sustained on principles applied to sustain curative Acts.

MR. JUSTICE HOLMES delivered the opinion of the Court.

George White, a soldier in the American army during the late war, on July 1, 1918, took out insurance upon his life for $10,000 under the War Risk Insurance Act of October 6, 1917, c. 105, Article IV, § 400; 40 Stat. 398, 409. He designated his mother, the appellant, as beneficiary, but by a letter of the same date, since established as his will, he provided that one-half of the sums paid should go to his aunt, Lucy Reeves, who at that time was not among those to whom the statute allowed the policy to be made payable. § 401. He died on October 4, 1918, and thereafter monthly installments of $57.50 were paid to the mother through January, 1921. The award of the whole to her then was suspended on the ground that by the will the aunt was entitled to one-half. The Act of December 24, 1919, c. 16, § 13; 41 Stat. 371, 375, had enlarged the permitted class of beneficiaries to include aunts among others and had provided that the section should be deemed to be in effect as of October 6, 1917, and, with proper safeguards, that awards of insurance should be revised in accordance with the amended act. On October 9, 1923, the mother filed a petition under § 405 of the Act of 1917 and the Act of May 20, 1918, c. 77; 40 Stat. 555, to establish her claim to the whole, and set up that to give effect to the Act of 1919 would be to deprive her of her property without due process of law contrary to the Constitution of the United States. The District Court decided in favor of the aunt. 299 Fed. 855. Mrs. White appealed to this Court in August, 1924, and it fairly may be assumed that the Act of March 4, 1925, c. 553; 43 Stat. 1302, 1303, giving the appellate jurisdiction to the Circuit Court of Appeals does not apply.

Mrs. White's argument, of course, is that, although the statute allowed a beneficiary to be named by will, it did

not extend the benefit to aunts, so that her son's will was ineffective at the time when it was established; that therefore the mother's interest vested as absolute at the son's death, and could not be defeated by later legislation. But this argument fails when the precise position of the parties is understood.

The certificate of insurance provided in terms that it should be "subject in all respects to the provisions of such Act [of 1917], of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the Act, shall constitute the contract." These words must be taken to embrace changes in the law no less than changes in the regulations. The form was established by the Director with the approval of the Secretary of the Treasury and on the authority of Article I, § 1, and Article IV, § 402, of the Act, which, we have no doubt, authorized it. The language is very broad and does not need precise discussion when the nature of the plan is remembered. The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the Government to them if not paternal was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the Government's hands to that extent no one else could complain. The only relations of contract were between the Government and him. White's mother's interest at his death was vested only so far as he and the Government had made it so, and was subject to any conditions upon which they might agree. They

did agree to terms that cut her rights down to one-half. She is a volunteer and she cannot claim more. See *Helmholz* v. *United States,* 294 Fed. 417, affirming 283 Fed. 600. *Gilman* v. *United States,* 294 Fed. 422, affirming 290 Fed. 614.

Judgment affirmed.

UNITED STATES *v.* MINNESOTA.

No. 17, Original. Argued January 4, 5, 1926.—Decided March 1, 1926.

1. A suit against a State brought by the United States as guardian of tribal Indians to recover the title, or money proceeds, of lands alleged to have been patented to the State by the United States in breach of its trust obligations to the Indians,—is not a suit in which the Indians are the real parties in interest, but one in which the United States is really and directly interested; and is within the original jurisdiction of this Court. P. 193.
2. The six year limitation (Act of March 3, 1891,) is inapplicable where the United States sues to annul patents issued in alleged violation of rights of its Indian wards and of its obligations to them. P. 195.
3. State statutes of limitations do not apply to such suits. *Id.*
4. The United States, as guardian of Indians, is without right to recover from a State lands which, in a suit between the Indians and the United States in the Court of Claims, were adjudged to have been rightly patented to the State. P. 199.
5. The courts can not go behind a treaty with Indian tribes for the purpose of annulling it upon the ground that in its negotiation the representatives of the Indians were prevented from exercising their free judgment. P. 201.
6. The Swamp Land Act of 1850 operated as a grant *in praesenti.* P. 202.
7. The Act of March 12, 1860, extending the provisions of the Swamp Land Act of 1850 to Minnesota and Oregon, with a proviso "that the grant hereby made shall not include any lands which the government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act," granted those States an immediate inchoate title to the public swamp land in their confines, to become perfect as of the date

of the Act when the lands were identified and patented, excluding from the grant all lands which might be reserved, sold or disposed of in pursuance of any law theretofore enacted, prior to the issuance of patent. P. 203.

8. Long continued and uniform practice of officers charged with the duty of administering a land law is persuasive in its construction. P. 205.
9. Lands which have been appropriated or reserved for a lawful purpose are not public, and are impliedly excepted from subsequent laws, grants, and disposals which do not specially disclose a purpose to include them. P. 206.
10. Lands within the Leech Lake, Winnibigoshish, and Cass Lake Indian reservations when the swamp land grant was extended to Minnesota, were excepted from that grant. P. 206.
11. Patenting of such lands to the State as swamp land was contrary to law and in derogation of the rights of the Chippewas under the Act of January 14, 1889. P. 206.
12. The proviso of the Act of March 12, 1860, *supra*, is not to be construed as authorizing appropriation by treaty with the Indians of swamp lands which were public when the Act took effect and the inchoate title to which had therefore passed to the State. P. 207.
13. Assuming that the treaty-making power might divest rights of property which could not constitutionally be divested by an Act of Congress, no treaty should be construed as so intending unless a purpose to do so be shown in the treaty beyond reasonable doubt. P. 207.
14. Treaties making general reservation of very extensive areas "as future homes" of Chippewa Indians, are to be construed as excepting swamp lands which had theretofore been granted to Minnesota. P. 209.
15. The provision of the Act of March 12, 1860, *supra*, for selection of lands thereafter to be surveyed, within two years from the adjournment of the State legislature, "at the next session, after notice by the Secretary of the Interior to the Governor of the State that the surveys have been completed and confirmed," is to be construed, in accordance with the practice under the Swamp Land Act of 1850, as permitting the State, through a legislative act (like that passed by Minnesota in 1862,) to elect to abide by the field notes of the government survey, and as treating such legislative election, approved by the Governor, as a continuing selection of all lands shown by such field notes to be swamp. P. 211.

16. The amendment of the Minnesota constitution adopted in 1881, declaring that the lands acquired by the State under the Swamp Land Act should be sold and the proceeds devoted to education, did not disable the State from reclaiming the lands or evince a purpose not to reclaim them. P. 213.
17. The direction of the Swamp Land Act of 1850 that the lands granted, or their proceeds, "be applied exclusively, or as far as necessary," to effecting their reclamation, leaves the application to the judgment of the grantee State, and is not enforceable by the courts. P. 213.
18. The Act of January 14, 1889, and the cession of lands thereunder by the Chippewa Indians, related only to lands in which the Indians had an interest, and the resulting rights and obligations of the Indians and the United States were limited accordingly. P. 214.
19. The damages recoverable from the State of Minnesota on account of lands ceded to the United States by the Chippewas pursuant to the Act of January 14, 1889, which were erroneously patented to the State and by her sold, should be determined on the basis of the prices that would have controlled had the particular lands been dealt with under that statute. P. 215.

Bill dismissed in part; decree on the remainder for the United States.

SUIT brought in this Court by the United States against Minnesota to cancel patents issued to the State for lands under the Swamp Land Grant, or to recover the value of such of the lands as the State had sold.

Mr. W. W. Dyar, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Assistant Attorney General Parmenter,* were on the brief, for complainant.

The treaty of 1855 was negotiated under circumstances of haste and pressure, with chiefs not adequately representing their bands; the small scattered reservations constituted by it were inadequate to the Indian needs; and the whole arrangement was so disastrous to them as to impose upon the Government a moral obligation to restore some of the lands then ceded. This moral obligation was recognized and acted upon by the Government in the treaty of 1863–4, by creating the enlarged Leech

Lake Reservation. The lands thus restored were unfit for agriculture, insufficient and inadequate in other respects, and this was expressly acknowledged by the United States in the treaty of 1867, establishing the White Earth Reservation on lands ceded in 1855. The treaties constituting the new and enlarged reservations out of lands ceded in 1855 were without exceptions or qualifications, and constituted solemn engagements that all the lands included in those reservations should be Indian lands. The Nelson Act contained an equally solemn engagement that all the lands (save only those embraced in pending entries) should be sold for the benefit of the Indians, either as "pine lands" or "agricultural lands."

The statutes of limitations apply only to public lands subject to disposition under the land laws, and not to Indian lands. *Northern Pacific Ry.* v. *United States,* 227 U. S. 355; *La Roque* v. *United States,* 239 U. S. 62. The defenses of stale claim and laches can not be set up against the Government. *United States* v. *Dalles Military Road Co.,* 140 U. S. 599, citing *United States* v. *Kirkpatrick,* 9 Wheat. 720; *United States* v. *Van Zandt,* 11 Wheat. 184; *United States* v. *Nicholl,* 12 Wheat. 505; *Dox* v. *Postmaster General,* 1 Pet. 318; *Lindsey* v. *Miller,* 6 Pet. 666; *Gibson* v. *Chouteau,* 13 Wall. 92; *Gaussen* v. *United States,* 97 U. S. 584; *Steele* v. *United States,* 113 U. S. 128; *United States* v. *Insley,* 130 U. S. 263. And if laches were ever imputable to the United States, it certainly can not be recognized as a defense where the suit is to assert the rights of a people dependent upon it for protection and actually incapable of asserting their own rights against the State, even though they may be citizens thereof. The mere granting of citizenship does not dissolve the tribal relation and leave the Indians to assert their own rights in the courts. The United States may, and still does continually, bring suits in its own name, without joining them as plaintiffs, to enforce the

trusts which devolve upon it under treaties and Acts of Congress. *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; *United States* v. *Rickert,* 188 U. S. 432; *United States* v. *Celestine,* 215 U. S. 278; *Tiger* v. *Western Investment Co.,* 221 U. S. 286; *United States* v. *Sandoval,* 231 U. S. 28; *United States* v. *Nice,* 241 U. S. 591. *United States* v. *Waller,* 243 U. S. 452, distinguished.

The jurisdictional objection is without merit.

The swamp-land grant of 1850 did not pass an immediate, indefeasible title to lands unsurveyed, not open to settlement, and still in the actual occupancy of Indians. *Tubbs* v. *Wilhoit,* 138 U. S. 134.

The Act of March 2, 1855, (10 Stat. 634,) shows clearly that Congress did not then understand that the original grant conveyed an immediate and indefeasible title to specific tracts of swamp land. Otherwise it would not have directed the issuance of patents to entrymen under other land laws, of lands "claimed as swamp." It is manifest that, if the grant conveyed an absolute present title, Congress had no right, as in the second Act of March 3, 1857, (11 Stat. 251,) to except from the confirmation swamp lands "interfered with by an actual settlement under any existing law," etc.

So far as concerns the general expressions used in the opinions, all the cases in this Court agree that the swamp land grant was a grant *in praesenti;* and the earlier opinions, especially those of Mr. Justice Field, lay special stress upon this feature. Later cases, with equal emphasis, say that the grant is inchoate.

As to concrete decisions, the cases divide themselves into three classes.

1. Cases in which the States had sold the lands to others, and the Secretary had failed or refused to identify them as swamp or non-swamp. In these the Court, expressly on the ground that the Secretary had failed to perform his duty, and in order to prevent a failure of

justice, held that the true character of the lands could be shown by parol or other evidence, and if proven to be swamp, the swamp-land claimant should prevail. *Railroad Co.* v. *Fremont County,* 9 Wall. 89; *Railroad Co.* v. *Smith,* 9 Wall. 95; *Wright* v. *Roseberry,* 121 U. S. 488. *Tubbs* v. *Wilhoit,* 138 U. S. 134, was of the same general character, though a resort to parol evidence was not found necessary in that case. Besides, the decisions in the last two cases mentioned were not made under the swamp-land grant alone, but under that Act and the Act of July 23, 1866, (14 Stat. 218, c. 219,) to quiet titles in California.

2. Cases in which the Secretary had made a timely identification of the lands as swamp or non-swamp, either by listing them as swamp or by patenting or certifying them under other grants. In these, the Secretary's determination is always held to be conclusive, and no other evidence is admissible to show the true character of the lands. *Chandler* v. *Calumet & Hecla M. Co.,* 149 U. S. 79; *Ehrhardt* v. *Hogaboom,* 115 U. S. 67; *French* v. *Fyan,* 93 U. S. 169; *McCormick* v. *Hayes,* 159 U. S. 332; *Rogers Locomotive Works* v. *Emigrant Co.,* 164 U. S. 559.

3. Cases holding that, even where the lands have been surveyed and the field-notes have been agreed on as the test of swamp or non-swamp, it is still within the power of the Secretary, up to the actual issuance of the patent, to cause a resurvey and determination of the character of the lands to be made. *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 589; *Brown* v. *Hitchcock,* 173 U. S. 473; *Niles* v. *Cedar Point Club,* 175 U. S. 300; *Little* v. *Williams,* 231 U. S. 335; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee Dist.,* 232 U. S. 186; *Lee Wilson & Co.* v. *United States,* 245 U. S. 24.

The result of all these cases, therefore, is that, even under the original swamp-land grant, the States' rights prior to survey, identification, and patenting or certifica-

tion were at most "inchoate," "not perfected." A grant by the United States without consideration, not consummated by patent or any other instrument of title, "inchoate," and not enforceable by any judicial or other process, is certainly not of such dignity that the United States may not, in the performance of compelling moral obligations to its dependent wards, by treaties reserve a portion of those lands for their use and finally dispose of it for their benefit.

In the present case, the fact is that, before any patents were issued to the State for these lands, before any attempt by it or the land department to identify them as swamp or dry, even before any survey, the United States, recognizing that it had failed to make adequate provision for the future of these Indians, by solemn treaties established, out of lands formerly ceded but never actually vacated by them, new and enlarged reservations, by language containing no exceptions and nothing whatever from which the Indians (or any white man) could have understood that the large areas of swamp land within the boundaries named were not to become theirs as much as the dry lands. Looking for the moment at the more technical side of the question, the general rule is that while, as between rival private claimants under the general land laws, or under grants to the States, railroads, etc., the title when once passed by formal instrument relates back to the initiatory act, or to the date of the granting statute, yet, as against the United States, no right or title vests until payment is made for the lands or they are earned (being the equivalent of payment) by the doing of the things required of the grantee in fulfillment of the purposes of the grant. *Frisbie* v. *Whitney,* 9 Wall. 187; *Yosemite Valley Case,* 15 Wall. 77; *Shepley* v. *Cowan,* 91 U. S. 330.

The recent cases of *Payne* v. *Central Pac. Ry.,* 255 U. S. 228; *Payne* v. *New Mexico,* 255 U. S. 367; *Wyoming* v.

United States, 255 U. S. 489, are no exceptions to this rule.

The present case is the first ever brought by the United States to recover swamp lands on any ground, and it is further differentiated by the fact that it is to recover Indian lands erroneously patented as swamp; and we can conceive of no valid reason why *Frisbie* v. *Whitney,* 9 Wall. 187, and the two cases cited with it, do not apply.

The swamp-land grant was of no higher dignity and gave a right of no greater sanctity until the lands were surveyed and identified than the school grant itself, as to which this Court has repeatedly held that Congress may otherwise dispose of the lands up to the time the school sections are identified by actual survey. Certainly, the inchoate right to unsurveyed, unidentified swamp lands was not superior to that trust, arising out of the Constitution itself, upon which the United States held the beds of navigable waters in the territories for the benefit of future States. And yet, that trust did not prevent the United States, before the admission of a State, from diverting portions of the beds of navigable waters to the purpose of fulfilling "international obligations," "or to carry out other public purposes appropriate to the objects for which the United States holds the Territory." *Shively* v. *Bowlby,* 152 U. S. 1. And, applying this doctrine, this Court has upheld the power of the Government, by an Indian treaty, to subject lands under navigable waters to an easement inconsistent with the full exercise of property and sovereign rights therein by the subsequently created State. *United States* v. *Winans,* 198 U. S. 371.

The Act extending the swamp-land grant to Minnesota so modified its original terms as clearly to indicate that neither the legal title nor any vested equitable right was to pass until the issuance of patent. Act of March 12, 1860, c. V, 12 Stat. 3. If the Act was in any sense a

grant *in praesenti,* then the lands revert to the United States on the failure of the State to select them within the prescribed time. *Pengra* v. *Munz,* 29 Fed. 830. A promise of a grant is made if and when the States shall make the selections within the times prescribed.

The lands reserved to the Indians by the treaties of 1863–4 and 1867 are embraced by the express exception in § 1 of the act extending the swamp-land grant to Minnesota. The State is estopped by her silence while the two treaties were in the making and while the cessions under the Nelson Act were in course of negotiation.

Even if the State had acquired a right, inchoate or otherwise, that right was divested by the two treaties. The treaty-making power has no express limitations. It therefore extends at least to all matters which, in the intercourse of nations and peoples, have customarily been the subjects of negotiation and settlement by treaty. Some limitations are, of course, necessarily implied. One power vested in the general Government can not be made the means of destroying others, or of destroying the powers reserved to the States, or of placing one State on an inequality with the others. But a treaty ceding landed property of a State does none of these things. It leaves the sovereignty and status of the State absolutely untouched. *Missouri* v. *Holland,* 252 U. S. 416; Attorney General's opinion (25 Opin. 626).

If the State originally acquired any rights, inchoate or otherwise, she had forfeited them as to these lands, long before any patents issued, by a constitutional amendment tying the hands of her legislature and irrevocably diverting the swamp lands and their proceeds from the express purpose for which they were given her by the United States. After the patents issued she again forfeited the lands by actually diverting all the proceeds of these very lands from that purpose.

The Pillager, Winnibigoshish and the Mille Lac Reservations have an exceptional status.

The State should account for all that she has received, or is to receive, for lands sold by her, with interest; for the price of any minerals removed from lands sold with reservation of mineral rights; and for the price of the lumber or timber sold from lands still retained, or sold after removal of the timber, with interest.

Messrs. M. J. Brown and *G. A. Youngquist,* Assistant Attorney General of Minnesota, with whom *Messrs. Clifford L. Hilton,* Attorney General of Minnesota, and *Charles R. Pierce,* were on the brief, for defendant.

This suit is one against the State of Minnesota by citizens thereof; and, as a consequence, the Court is without jurisdiction to entertain it. *California* v. *Southern Pac. Ry.,* 157 U. S. 229; *Minnesota* v. *Hitchcock,* 185 U. S. 373; *Hans* v. *Louisiana,* 134 U. S. 1; *Hollingsworth* v. *Virginia,* 3 Dall. 378; *Ex parte Madrazzo,* 7 Pet. 625; *Chandler* v. *Dix,* 194 U. S. 590; *Lankford* v. *Platte Iron Works,* 235 U. S. 461; *American Water Softener Co.* v. *Lankford,* 235 U. S. 496; *New Hampshire* v. *Louisiana,* and *New York* v. *Louisiana,* 108 U. S. 76; *Louisiana* v. *Texas,* 176 U. S. 1; *North Dakota* v. *Minnesota,* 263 U. S. 365.

The suit is barred by the statute of limitations. It is to cancel patents issued by the United States to Minnesota, and was not commenced within six years following the issuance thereof. Act of March 3, 1891, c. 561, § 8, 26 Stat. 1096; *Cramer* v. *United States,* 261 U. S. 219. Assuming that the suit is maintainable by the United States, the Minnesota statute of limitations applies, the suit being one against Minnesota for the sole benefit of the Indians. *Curtner* v. *United States,* 149 U. S. 662.

The swamp-land grant was one *in praesenti.* This Court has consistently adhered to the fundamental rule of the *Roseberry Case,* 121 U. S. 488, namely, that the

grant was one *in praesenti* and that upon perfection of title such title relates back to the date of the grant. Later decisions, relied on by plaintiff, are not to the contrary. *Mich. Land & Lbr. Co.* v. *Rust,* 168 U. S. 589; *Brown* v. *Hitchcock,* 173 U. S. 473; *Niles* v. *Cedar Point Club,* 175 U. S. 300; *Little* v. *Williams,* 231 U. S. 335; *Chapman & Dewey Lbr. Co.* v. *St. Francis Levee Dist.* 232 U. S. 186; *Lee Wilson & Co.* v. *United States,* 245 U. S. 24.

Upon the issuance of patents, perfect title vested in Minnesota, and such title related back to the date of the grant, March 12, 1860, cutting out all claims based on the Treaties of 1863, 1864 and 1867.

The character of the grant with respect to its application to Minnesota was not changed by the Act of 1860.

The act as extended to Minnesota was administered, and with particular reference to the lands in question, in strict accord with the construction of many years' standing by those charged with the duty of administering the act.

The construction of the grant by the Interior Department is in accord with the true intent and meaning of the act; if doubt exists as to this, the grant having been consistently administered in accordance with it, such construction should be accepted by the court.

The Treaties of 1863, 1864 and 1867 did not operate to cancel the grant of 1860.

The lands in question did not pass to the United States as a result of cessions made pursuant to the Nelson Act (25 Stat. 642,) for disposition for the benefit of the Indians or otherwise.

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

This is a suit in equity brought in this Court by the United States against the State of Minnesota to cancel

patents issued to her for certain lands under the swamp land grant, or, where the State has sold the lands, to recover their value and to leave the patents uncanceled as to such lands. Seven patents for about 153,000 acres are brought in question. The first was issued May 13, 1871, and the others at different times from May 17, 1900, to June 10, 1912. The bill was filed May 7, 1923. The State answered, and the case was heard and submitted on the pleadings and much documentary evidence. The issues presented are chiefly of law.

It is not questioned that the lands were swampy and in this respect within the swamp land grant, nor that the patents were sought by the State and issued by the land officers in good faith. But it is insisted, on behalf of the United States, first, that by treaties and other engagements with the Chippewa Indians entered into before the patents were issued the United States became obligated to apply the lands and the proceeds of their sale exclusively to the use, support and civilization of the Chippewas, and that this operated to exclude or withdraw the lands from the swamp land grant; secondly, that the State failed to select or claim the lands within the period prescribed in the act making the grant, and thereby lost any right which she may have had to have them patented to her; and, thirdly, that the grant was subject to a condition whereby the State was required to apply the lands or the proceeds of their sale in effecting their reclamation by means of needed ditches, and that before the patents were issued the State, by an amendment to her constitution, had disabled herself from complying with that condition and proclaimed her purpose to apply the lands and their proceeds otherwise, and thereby had lost any right she may have had to receive the patents. Stating it in another way, the insistence, on the part of the United States, is that the lands were appropriated or set apart for the Chippewas, that the land officers, misconceiving their au-

thority in the premises, issued the patents contrary to the provisions of the act making the swamp land grant and in disregard of obligations to the Indians which the United States had assumed and was bound to respect, that those obligations are still existing and must be performed, and that to enable the United States to proceed with their performance it is entitled to a cancelation of the patents as respects such of the lands as still are held by the State and to recover the value of such as she has sold.

Besides disputing the several contentions just stated, the State advances two propositions, either of which her counsel conceive must end the case.

The first proposition is that the suit is essentially one brought by the Indians against the State, and therefore is not within the original jurisdiction of this Court. In support of the proposition it is said that the United States is only a nominal party—a mere conduit through which the Indians are asserting their private rights,—that the Indians are the real parties in interest and will be the sole beneficiaries of any recovery, and that the United States will not be affected whether a recovery is had or denied.

It must be conceded that, if the Indians are the real parties in interest and the United States only a nominal party, the suit is not within this Court's original jurisdiction. *New Hampshire* v. *Louisiana,* 108 U. S. 76; *Hans* v. *Louisiana,* 134 U. S. 1; *North Dakota* v. *Minnesota,* 263 U. S. 365, 374–376. But the allegations and prayer of the bill—by which the purpose and nature of the suit must be tested—give no warrant for saying that the Indians are the real parties in interest and the United States only a nominal party. At the outset the bill shows that the Indians although citizens of the State, are in many respects, and particularly in their relation to the matter here in controversy, under the guardianship of the

United States and entitled to its aid and protection. This is followed by allegations to the effect that the Indians had an interest in the lands before and when they were patented to the State, that the patents were issued by the land officers without authority of law and in violation of an existing obligation of the United States to apply the lands and the proceeds of their sale exclusively to the use and benefit of the Indians, and that it is essential to the fulfillment of that obligation that the lands—or, where any have been sold, their value in their stead—be restored to the control of the United States. And the prayer is for a decree compelling such a restoration and declaring that the lands and moneys are to be held, administered and disposed of by the United States conformably to that obligation.

Whether in point of merits the bill is well grounded or otherwise, we think it shows that the United States has a real and direct interest in the matter presented for examination and adjudication. Its interest arises out of its guardianship over the Indians and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations; and in both aspects the interest is one which is vested in it as a sovereign. *Heckman* v. *United States,* 224 U. S. 413, 437–444; *United States* v. *Osage County,* 251 U. S. 128, 132–133; *La Motte* v. *United States,* 254 U. S. 570, 575; *Cramer* v. *United States,* 261 U. S. 219, 232; *United States* v. *Beebe,* 127 U. S. 338, 342–343; *United States* v. *New Orleans Pacific Ry. Co.,* 248 U. S. 507, 518. And see *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.,* 118 U. S. 120, 126; *In re Debs,* 158 U. S. 564, 584.

Counsel for the State point out that the Indians could neither sue the State to enforce the right asserted in their behalf nor sue the United States for a failure to call on the State to surrender the lands or their value; and from this they argue that the United States is under no duty

and has no right to bring this suit. But the premise does not make for the conclusion. The reason the Indians could not bring the suits suggested lies in the general immunity of the State and the United States from suit in the absence of consent. Of course the immunity of the State is subject to the constitutional qualification that she may be sued in this Court by the United States, a sister State, or a foreign State. *United States* v. *Texas,* 143 U. S. 621, 642, *et seq.* Otherwise her immunity is like that of the United States. But immunity from suit is not based on and does not reflect an absence of duty. So the fact that the Indians could not sue the United States for a failure to demand that the State surrender the lands or their value does not show that the United States owes no duty to the Indians in that regard. Neither does the fact that they could not sue the State show that the United States is without right to sue her for their benefit. But it does make for and emphasize the duty, and therefore the right, of the United States to sue. This is a necessary conclusion from the ruling in *United States* v. *Beebe, supra,* where much consideration was given to the duty and right of the United States in respect of the cancelation of patents wrongly issued. This Court there pointed out special instances in which the Government might with propriety refrain from suing and leave the individuals affected to settle the question of title by personal litigation, and then said that where the patent, if allowed to stand, "would work prejudice to the interests or rights of the United States, or would prevent the Government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the Government to institute judicial proceedings to vacate such patent."

The State's second proposition is that the suit is barred by the provision in the Act of March 3, 1891, c. 561, § 8.

26 Stat. 1095, 1099 (also c. 559, p. 1093), limiting the time within which the United States may sue to annul patents, and, if not by that provision, then by a law of the State. But both branches of the proposition must be overruled. The provision in the Act of 1891 has been construed and adjudged in prior decisions—which we see no reason to disturb—to be strictly a part of the public land laws and without application to suits by the United States to annul patents, as here, because issued in alleged violation of rights of its Indian wards and of its obligations to them. *Cramer* v. *United States, supra,* p. 233; *La Roque* v. *United States,* 239 U. S. 62, 68; *Northern Pacific Ry. Co.* v. *United States,* 227 U. S. 355, 367. And it also is settled that state statutes of limitation neither bind nor have any application to the United States when suing to enforce a public right or to protect interests of its Indian wards. *United States* v. *Thompson,* 98 U. S. 486; *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co., supra,* pp. 125–126; *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123, 125.

We come therefore to the merits, which involve a consideration of the past relation of the Indians to the lands and of the nature and operation of the swamp land grant to the State.

The lands are all within the region formerly occupied by the Chippewas. By a treaty made in 1837 the Indians ceded the southerly part of that region to the United States, 7 Stat. 536; and by a treaty made in 1855 they ceded to it a further part adjoining that ceded before, 10 Stat. 1165. But by the latter treaty nine reservations were set apart out of the ceded territory as " permanent homes " for designated bands. Four of these reservations were called the Mille Lac, the Leech Lake, the Winnibigoshish and the Cass Lake. This was the situation in 1860 when the swamp land grant theretofore made to other States was extended to Minnesota. Most of the

lands in question are within what was then ceded territory and outside those reservations. The rest are within the Mille Lac, Leech Lake, Winnibigoshish and Cass Lake reservations as then defined.

By a treaty made in 1863 six of the reservations, including the Mille Lac but not the Leech Lake, the Winnibigoshish or the Cass Lake, were ceded to the United States, and a large reservation, surrounding the Leech Lake, the Winnibigoshish and the Cass Lake reservations, was set apart as "future homes" for the Indians then on the ceded reservations, 12 Stat. 1249. The twelfth article of that treaty declared that the Indians were not obligated to remove from the old reservations to the new until certain stipulations respecting preparations for their removal were complied with by the United States. The United States complied with the stipulations and most of the Indians on the ceded reservations other than the Mille Lac removed, but some remained on and around those reservations. The same article declared: "Owing to the heretofore good conduct of the Mille Lac Indians [the band occupying the ceded Mille Lac reservation], they shall not be compelled to remove as long as they shall not in any way interfere with or in any manner molest the persons or property of the Whites." Some of the Mille Lac band removed, but many remained on and around the ceded reservation. A treaty negotiated in 1864 and amended and ratified in 1865 enlarged the large reservation set apart in 1863, 13 Stat. 693. By a treaty made in 1867 the greater part of the large reservation set apart in 1863 and enlarged in 1865 was ceded to the United States and an area of approximately 36 townships around White Earth Lake was set apart as a new reservation, to which the Indians in the ceded territory were to remove, 16 Stat. 719. That treaty left the Leech Lake, Winnibigoshish and Cass Lake reservations within what remained of the large reservation established in 1863 and

1865. After the White Earth reservation was created many of the Indians in the ceded territory removed to it, but some remained on or around the ceded tracts. By executive orders made in 1873, 1874 and 1879 additions were made to some of the reservations. The next change came in 1889.

Under the Act of January 14, 1889, c. 24, 25 Stat. 642, the Chippewas ceded and relinquished to the United States all of their reservations, here described as then existing, save as a part of the White Earth reservation was set aside for allotments in severalty which were to be made by the United States and accepted by the Indians as their homes. The cession was declared to be for the purposes and on the terms stated in that Act and was to become effective on the President's approval, which was given March 4, 1890. The Act provided that the lands so ceded should be surveyed, classified as pine or agricultural and disposed of at regulated prices, and that the net proceeds should be put into an interest-bearing fund of which the Chippewas were to be the beneficiaries.

The Mille Lac reservation, although included in the cession of 1863, was again included in the cession under the Act of 1889. It was surveyed and opened to settlement and disposal under the public land laws after the cession of 1863; but this led to a controversy with the Indians over the meaning and effect of the clause in the twelfth article of the treaty of 1863, relating to the removal of the Mille Lac band, and that controversy resulted in a suspension of disposals. The controversy continued up to the cession under the Act of 1889 and was adjusted and composed in that cession. *United States* v. *Mille Lac Chippewas,* 229 U. S. 498. But after the survey and before the suspension about 700 acres,* shown by

* This may include one or two small subdivisions which had been patented theretofore to a Mille Lac chief, Shaw-vosh-kung, under the first article of the treaty of 1865.

the field notes of the survey to be swampy, were patented to the State under the swamp land grant. The patent of May 13, 1871, was for these lands.

In 1909, under a permissive statute, c. 126, 35 Stat. 619, the Mille Lac band brought a suit against the United States in the Court of Claims to recover for "losses sustained by them or the Chippewas of Minnesota" by reason of the opening of the Mille Lac reservation to settlement and disposal. In that suit recovery was sought in respect of all lands in that reservation which the United States had disposed of otherwise than under and in conformity with the Act of 1889, including those patented to the State as swamp lands May 13, 1871. Evidence was introduced showing the lands so patented and their value, and one of the questions discussed in the briefs and pressed for decision at the final hearing was whether the Indians were entitled to recover in respect of the lands in that patent, or were precluded therefrom by a provision in the Act of 1889, as accepted by the Indians, which the United States insisted had operated to confirm the State's claim under the patent. By the ultimate findings and judgment that controversy was resolved against the Indians and in favor of the United States. 51 Ct. Cls. 400. No appeal was taken from that judgment and it became final. It awarded about $700,000 to the Indians on account of the disposal of other lands, held not within the confirmatory provision, and the award was paid by putting the money in the Chippewa fund before mentioned, c. 464, 39 Stat. 823. Of course, the United States is without right to any recovery here in respect of the lands as to which it was adjudged there to be free from any obligation or responsibility to the Indians. So the lands in the patent of May 13, 1871, need not be considered further.

The other reservations were surveyed after the cession under the Act of 1889. The field notes of the survey

showed some of the lands to be swampy, and 152,124.18 acres so shown were patented to the State under the swamp land grant. They are the lands for which patents were issued from May 17, 1900, to June 10, 1912. Of these lands 706 acres were within the Leech Lake, Winnibigoshish and Cass Lake reservations as defined and existing in 1860, when the swamp land grant was extended to the State, and the others are lands which had been ceded by the treaty of 1855 and were public lands in 1860.

In the brief on behalf of the United States an effort is made to overcome the cession in the treaty of 1855 by inviting attention to particular statements in correspondence and other papers of that period and arguing therefrom that the treaty was hastily negotiated with chiefs and warriors, not fairly representative of the bands affected, who were brought to Washington for the purpose and were there subjected to influences and pressure which prevented them from exercising a free judgment and adequately portraying and protecting the interests of such bands. But we think the argument is without any real basis in fact. The inferences sought to be drawn from the statements to which attention is invited are refuted rather than supported by the papers as a whole. While it appears that there was some dissatisfaction with the original selection of those who were to represent the Indians, it also appears that other chiefs and warriors representing the Indians who were dissatisfied were sent to Washington by the local superintendent of Indian affairs and that they actively participated in the negotiations and signed the treaty. The negotiations occupied ten sessions spread over a period of seven days and were reported. The reports indicate that the Indians who participated ably and loyally represented all the bands and spoke for them openly and with effect. Indeed, they persuaded the representatives of the United States to make concessions advantageous to all the bands which were

much more favorable than those first proposed. They included headchiefs, subchiefs and warriors, 16 in all. Several had represented these Chippewas in making earlier treaties, and afterwards came to represent them in making others.

But, while the earnestness of counsel has induced us to examine the basis of the argument advanced, there is another reason why the effort to overcome the cession must fail. Under the Constitution the treaty-making power resides in the President and Senate, and when through their action a treaty is made and proclaimed it becomes a law of the United States, and the courts can no more go behind it for the purpose of annulling it in whole or in part than they can go behind an act of Congress. Among the cases applying and enforcing this rule some are particularly in point here. In *United States* v. *Brooks,* 10 How. 442, where a grant made to certain individuals by the Caddo Indians in a treaty between them and the United States was assailed by the United States as induced by fraud practiced on the Indians, the Court held that "the influences which were used to secure" the grant could not be made the subject of judicial inquiry for the purpose of overthrowing the treaty provision making it. In *Doe* v. *Braden,* 16 How. 635, a provision in the treaty whereby Spain ceded Florida to the United States which annulled a prior grant to the Duke of Alagon was assailed as invalid on the ground that the King, who made the treaty, was without power under the Spanish constitution to annul the grant. But the Court refused to go behind the treaty and inquire into the authority of the King under the law of Spain—and this because, as was explained in the decision, it was for the President and Senate to determine who should be recognized as empowered to represent and speak for Spain in the negotiation and execution of the treaty, and as they had recognized the King as possessing that power it was

not within the province of the courts to inquire whether they had erred in that regard. And in *Fellows* v. *Blacksmith,* 19 How. 366, 372, where a treaty with the New York Indians was asserted to be invalid on the ground that the Tonawanda band of Senecas was not represented in the negotiation and signing of the treaty, the Court disposed of that assertion by saying: "But the answer to this is, that the treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress." The propriety of this rule and the need for adhering to it are well illustrated in the present case, where the assault on the treaty cession is made seventy years after the treaty and forty years after the last instalment of the stipulated compensation of approximately $1,200,000 was paid to the Indians.

By the act of September 28, 1850, Congress granted to the several States the whole of the swamp lands therein then remaining unsold, c. 84, 9 Stat. 519. The first section was in the usual terms of a grant *in praesenti,* its words being that the lands described "shall be, and the same are hereby, granted." The second section charged the Secretary of the Interior with the duty of making out and transmitting to the governor of the State accurate lists and plats of the lands described, and of causing patents to issue at the governor's request; and it then declared that on the issue of the patent the fee simple to the lands should vest in the State. The third section directed that, in making out the lists and plats, all legal subdivisions the greater part of which was wet and unfit for cultivation should be included, but where the greater part was not of that character the whole should be excluded. The question soon arose whether, in view of the terms of the first and second sections, the grant was *in praesenti*

and took effect on the date of the Act, or rested in promise until the issue of the patent and took effect then. The then Secretary of the Interior, Mr. Stuart, concluded that the grant was *in praesenti* in the sense that the State became immediately invested with an inchoate title which would become perfect, as of the date of the Act, when the land was identified and the patent issued, 1 Lester's Land Laws, 549. That conclusion was accepted by his successors, was approved by the Attorney General, 9 Op. 253, was adopted by the courts of last resort in the States affected, and was sustained by this Court in many cases. *French* v. *Fyan,* 93 U. S. 169, 170; *Wright* v. *Roseberry,* 121 U. S. 488, 500, *et seq.; Rogers Locomotive Works* v. *Emigrant Co.,* 164 U. S. 559, 570; *Work* v. *Louisiana,* 269 U. S. 250. A case of special interest here is *Rice* v. *Sioux City & St. Paul R. R. Co.,* 110 U. S. 695. The question there was whether the Act of 1850 operated, when Minnesota became a State in 1858, to grant to her the swamp lands therein. The Court answered in the negative, saying that the Act of 1850 " operated as a grant *in praesenti* to the States then in existence," that it " was to operate upon existing things, and with reference to an existing state of facts," that it " was to take effect at once, between an existing grantor and several separate existing grantees," and that as Minnesota was not then a State the Act made no grant to her.

By the Act of March 12, 1860, c. 5, 12 Stat. 3, Congress extended the Act of 1850 to the new States of Minnesota and Oregon, the material terms of the extending act being as follows:

" That the provisions of the act [of 1850] be, and the same are hereby, extended to the States of Minnesota and Oregon: Provided, That the grant hereby made shall not include any lands which the government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the con-

firmation of title to be made under the authority of the said act.

"Sec. 2. That the selection to be made from lands already surveyed in each of the States including Minnesota and Oregon, under the authority of the act aforesaid, . . . shall be made within two years from the adjournment of the legislature of each State at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the governor of the State, that the surveys have been completed and confirmed."

The words "be, and the same hereby are, extended" in the principal provision and the words "the grant hereby made" in the proviso signify an immediate extension to these new States of the grant *in praesenti* made to other States in 1850. Other parts of the proviso signify an exclusion of particular lands from the grant as extended, but not a change in its nature. Indeed, if the grant as extended were regarded as taking effect only on the issue of the patent, the proviso would be practically an idle provision; while if the grant be regarded as *in praesenti*, like the original, the proviso serves a real purpose. Of course, the principal provision and the proviso are to be read together and taken according to their natural import, if that be reasonably possible—and we think it is. Thus understood, they show that Congress, while willing and intending to extend to these new States the grant *in praesenti* made to other States in 1850, was solicitous that the reservation, sale and disposal of lands (pursuant to laws in existence at the date of the extension) should not be interrupted or affected pending the identification and patenting of lands under the grant, and that the proviso was adopted for the purpose of excluding from the grant as extended all lands which might be reserved, sold or disposed of (in pursuance of any law

theretofore enacted) prior to the confirmation of title under the grant—the confirmation being the issue of patent. Many acts of that period granting lands in words importing a present grant—where the lands were to be afterwards identified under prescribed directions—contained provisions excluding lands that might be disposed of in specified ways before the identification was effected. But those provisions never were regarded as doing more than excepting particular lands from the grants; and, unless there were other provisions restraining the words of present grant, the grants uniformly were held to be *in praesenti,* in the sense that the title, although imperfect before the identification of the lands, became perfect when the identification was effected and by relation took effect as of the date of the granting act, except as to the tracts falling within the excluding provision. *St. Paul & Pacific R. R. Co.* v. *Northern Pacific R. R.,* 139 U. S. 1, 5; *Missouri, Kansas and Texas Ry. Co.* v. *Kansas Pacific Ry. Co.,* 97 U. S. 491, 497; *Schulenberg* v. *Harriman,* 21 Wall. 44, 60–62.

The Act of 1860 was construed as we here construe it by Secretary Delano in 1874, 1 Copp's P. L. L. 475, and by Secretary Schurz in 1877, 2 *id.* 1081; and their construction was adopted and applied by their successors up to the time of this suit,* and was approved by the Attorney General in 1906, 25 Op. 626. So, even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction. *United States* v. *Burlington and Missouri River R. R. Co.,* 98 U. S. 334, 341; *Schell's Executors* v. *Fauche,* 138 U. S. 562, 572; *Louisiana* v. *Garfield,* 211 U. S. 70, 76; *United States* v. *Hammers,* 221 U. S. 220, 228; *Logan* v. *Davis,* 233 U. S. 613, 627.

* 3 L. D. 474, 476; 22 *id.* 388; 27 *id.* 418; 32 *id.* 65, 328; 37 *id.* 397.

While the grant as extended to Minnesota was a grant *in praesenti,* it was restricted to lands which were then public. The restriction was not expressed, but implied according to a familiar rule. That rule is, that lands which have been appropriated or reserved for a lawful purpose are not public and are to be regarded as impliedly excepted from subsequent laws, grants and disposals which do not specially disclose a purpose to include them. *Wilcox* v. *Jackson,* 13 Pet. 498, 513; *Leavenworth, Lawrence & Galveston R. R. Co.* v. *United States,* 92 U. S. 733, 741, 745; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts,* 152 U. S. 114, 119; *Scott* v. *Carew,* 196 U. S. 100. Thus the general words of the Acts of 1850 and 1860 must be read as subject to such an exception, *Louisiana* v. *Garfield, supra,* p. 77.

The 706 acres, before described as within the Leech Lake, Winnibigoshish and Cass Lake reservations as originally created, were not public lands when the grant was extended to the State, but were then reserved and appropriated for the use of the Chippewas, and so were excepted from the grant. Probably the patenting of them to the State was a mere inadvertence, for it was not in accord with rulings of the Secretary of the Interior on the subject. But, be that as it may, the patenting was contrary to law and in derogation of the rights of the Indians under the Act of 1889. Therefore, the United States is entitled to a cancellation of the patents as to these lands, unless the State has sold the lands, and in that event is entitled to recover their value.

The 152,124.18 acres, before described as within the cession of 1855, were not reserved or otherwise appropriated when the grant was extended, but were then public lands; and, being swampy in character, they were included in the grant and rightly patented under it, unless there be merit in some of the contentions on the part of the United States which remain to be considered.

It is said that these lands, although public when the grant was extended, were afterwards reserved and appropriated for the use of the Chippewas by treaties made before the title under the grant was confirmed by the issue of patents, and that this brought the lands within the exception made by the proviso. The contention appears to be in direct conflict with the words of the proviso which limit the exception made therein to lands reserved, sold or disposed of in pursuance of laws enacted before the grant was extended. But, by way of avoiding this conflict, it is said that the treaties were made in the exercise of a power conferred by the Constitution, which is a law adopted before the extension, and therefore that the lands must be held to have been reserved and appropriated in pursuance of a prior law in the sense of the proviso. We assent to the premise, but not to the conclusion. The words of the proviso are "in pursuance of any law heretofore enacted." We do not doubt that, rightly understood, they include a prior treaty as well as a prior statute. But we think it would be a perversion of both their natural import and their spirit to hold that they include either a subsequent treaty or a subsequent statute. Of course, all treaties and statutes of the United States are based on the Constitution; and in a remote sense what is done by or under them is done under it. But lands are never reserved, sold or disposed of directly under the Constitution, but only in pursuance of treaties made or statutes enacted under it. The words, "heretofore enacted," in the proviso are words of limitation and can not be disregarded. They show that it is not intended to have the same meaning as if it said, "in pursuance of any law," and that what it means is any treaty or statute theretofore made or enacted.

It next is said—assuming the grant was *in praesenti* and included these lands—that in virtue of the treaty-making power the United States could, and did by the

treaties of 1863, 1865 and 1867, divest the State of her right in the lands and appropriate them to the use and benefit of the Chippewas. The decisions of this Court generally have regarded treaties as on much the same plane as acts of Congress, and as usually subject to the general limitations in the Constitution; but there has been no decision on the question sought to be presented here. The case of *Rice* v. *Minnesota & Northwestern R. R. Co.*, 1 Black 358, is cited as giving some color to the contention; but in so far as it has a bearing it tends the other way. The controversy there was over the validity of an act of Congress repealing a prior act making a grant of lands to the then Territory of Minnesota in aid of the construction of a proposed railroad. The granting act, while containing words of present grant, declared that "no title" should pass to the Territory until a designated portion of the road was completed, and also that the lands should not inure to the benefit of any company constituted and organized prior to the date of that act. The Territory, anticipating a grant in aid of the undertaking, already had attempted to transfer her rights under the grant to a company incorporated theretofore; and the litigation was with that company. The repealing act was passed less than two months after the granting act and before the construction of the road was begun. The Court held that the grant was not *in praesenti,* because the words of present grant were fully overcome by other provisions; and also that the repealing act was valid, because no right had passed to the Territory or the company up to that time. But the Court deemed it proper to say (p. 373) that if the granting act had passed a present right, title or interest in the lands, the repealing act would be "void, and of no effect"; and also (p. 374) that if the granting act had operated to give to the Territory a beneficial interest in the lands, it was "clear that it was not competent for Congress to pass the repealing act and divest the title."

But if the treaty-making power be as far reaching as is contended—which we are not now prepared to hold—we are of opinion that no treaty should be construed as intended to divest rights of property—such as the State possessed in respect of these lands—unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question. And, of course, the rule before stated, that where lands have been appropriated for a lawful purpose they are to be regarded as impliedly excepted from subsequent disposals which do not specially include them, applies to treaty disposals as well as to statutory disposals.

On examining the treaties we do not find anything in them which may be said to be certainly indicative of a purpose to divest the State of her right to these lands. The areas reserved by the treaties were described in general terms—as by indicating the exterior boundaries or designating the area as a stated number of townships around a particular lake. The areas were very large—one comprising more than a million acres. No doubt the descriptions were sufficient to carry the whole of each area, if free from other claims; but there was nothing in them or in the other provisions signifying a purpose to disturb prior disposals or to extinguish existing rights under them. True, it was said that the reservations were established as "future homes" for the Indians; but this meant that the Indians were to live within the reservations, and did not have reference to any particular lands within their limits. The areas were vastly in excess of what would be needed for individual homes and farms, and included many lands wholly unfit for that purpose. The areas were dotted with lakes—some navigable—and with swamps—some almost impassable. In short, it is apparent that the treaties dealt with extensive areas in a general way and not with particular lands in a specific way. So we think they must be read as impliedly ex-

cepting the swamp lands theretofore granted to the State and leaving her right to them undisturbed.

The case of *Minnesota* v. *Hitchcock*, 185 U. S. 373, is cited as making for a different conclusion; but it does not do so. The question there was whether the State was entitled, under the school land grant, to sections 16 and 36 in the part of the Red Lake reservation which was ceded under the Act of 1889. That grant was expressed in words of promise, not of present grant. Title was to pass when the lands were identified by survey, if they were then public; and if at that time they were not public but otherwise disposed of, the State was to be entitled to other lands in their stead. The lands in question never had been public; and their cession under the Act of 1889 was not absolute or unqualified but in trust that they be sold as provided in that act for the benefit of the Indians. After that cession the lands in the ceded part of the reservation were surveyed and the government officers took up the task of selling them in pursuance of the trust. The State then sued to establish her claim to sections 16 and 36 and to prevent their sale. The Court ruled against the State, and the following excerpt from the opinion (p. 393) discloses the grounds on which the decision proceeded:

"Congress does not, by the section making the school land grant, either in letter or spirit, bind itself to remove all burdens which may rest upon lands belonging to the Government within the State, or to transform all from their existing status to that of public lands, strictly so called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends that the State shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will justify an appropriation

of a body of lands within the State to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the State must seek relief in the clause which gives it equivalent sections."

It further is said that, assuming the State was entitled to these lands, she lost her right by failing to make selection of them within the prescribed period after they were surveyed. There is no merit in this contention. It rests on a misconception of what constitutes a selection in the sense of the requirement in the second section of the Act of 1860, before quoted. The earlier statute of 1850, in its second section, charged the Secretary of the Interior with the duty of making out and transmitting to each State accurate lists of the lands falling within the grant; and to do this it was necessary that he determine which lands were swampy and which not swampy. The Act said nothing about the evidence on which his determination should be based or the mode of obtaining the evidence. In taking up the administration of the grant, the Secretary accorded to each State a choice between two propositions: first, whether she would abide by the showing in the government surveyor's field notes; and, second, if the first proposition was not accepted, whether she would through her own agents make an examination in the field and present claims for the lands believed to be swampy accompanied by proof of their character. Some of the States elected to abide by the surveyor's field notes and others elected to take the other course. In the administration of the grant these elections were respected and given effect, save as there were some merely temporary departures. Where the election was to abide by the field notes that, without more, was regarded a continuing selection by the State of all lands thus shown to be swampy. Where the election was to take the other course the presentation of claims with supporting proofs was

regarded as a selection by the State. This was the settled practice when the Act of 1860 was passed; and the provision in its second section requiring that selection be made within a designated period is to be construed in the light of that practice. Neither that act nor the one of 1850 contained any other provision which reasonably could be said to require a selection by the State. Possibly the provision in the second section of the Act of 1850 requiring the Secretary to make out and transmit to each State accurate lists of the lands falling within the grant might be said to lay on him a duty to make selections. But, if this was the selection meant by the second section of the Act of 1860, the States could not be charged with any dereliction or neglect by reason of his delay. But we think it meant a selection by the State as that term was understood in the administrative practice. There had been objectionable delay prior to the Act of 1860 on the part of some of the States in carrying out their election to make examinations in the field and present claims with supporting proof; and the second section of that Act shows that it was specially directed against unnecessary delay in making that kind of selections. It evidently was intended to accord to those States reasonable opportunity for making necessary appropriations and to require that they then proceed diligently with the examinations in the field and the presentation of their claims and proofs.

Shortly after the Act of 1860 the propositions theretofore submitted to other States were submitted to Minnesota by the Secretary's direction in a letter from the Commissioner of the General Land Office. After stating the propositions the Commissioner said: " By the adoption of the first proposition the State will receive all the lands to which she is justly entitled, as the field notes of the survey are very full in characterizing or giving descriptions to the soil; and an important reason for doing so is

that she will incur no expense in selecting or designating the lands." By an act of her legislature, passed in 1862, Minnesota elected to abide by the surveyors' field notes; and her Governor promptly notified the Commissioner and the Secretary of that election. It has been respected and given effect, with one temporary interruption, and has been treated as a continuing selection by the State of all lands shown by the surveyor's field notes to be swampy. 2 Copp's P. L. L. 1034; 32 L. D. 65, 533–535. In 1877 Secretary Schurz, in overruling a contention like that we now are considering, held that the action of the state legislature in 1862, was an effective selection. 2 Copp's P. L. L. 1081. Similar contentions were pronounced untenable by the Attorney General in 1906, 25 Op. 626, and by the Secretary of the Interior in 1909, 37 L. D. 397. On principle, as also out of due regard for the administrative practice, we think the election by the state legislature, approved by the Governor as it was, was a timely and continuing compliance with the requirement in the second section of the Act of 1860. What would have been the effect of a failure to comply with that requirement we need not consider here.

The further contention is made that the State before the issue of the patents forfeited her right to receive them by disabling herself, through an amendment to her constitution, from complying with the provision in the Act of 1850 directing that the lands passing to the State under the grant, or the proceeds of their sale, "be applied, exclusively, as far as necessary," in effecting their reclamation by means of needed levees and ditches. The State did declare in an amendment to her constitution, adopted in 1881, that the lands should be sold and the proceeds inviolably devoted to the support and maintenance of public schools and educational institutions; but it does not follow that she disabled herself from reclaiming the lands or formed or declared a purpose not to re-

claim them. On the contrary, her statutes enacted since the amendment and the published reports of her officers show that she adopted and proceeded to carry out extensive reclamation plans applicable to all swamp lands within her limits, that she and her municipal subdivisions expended many millions of dollars in this work, and that they are still proceeding with it. But, apart from this, the contention must fail. It rests on an erroneous conception of the effect and operation of the provision relied on, as is shown in repeated decisions of this Court. We think it enough to refer to *United States* v. *Louisiana,* 127 U. S. 182, for the controversy there was between the United States, the grantor, and one of the States to which the grant was made. The Court cited and reviewed the earlier cases and then said (p. 191): "Under the Act of 1850, the swamp lands are to be conveyed to the State as an absolute gift, with a direction that their proceeds shall be applied exclusively, as far as necessary, to the purpose of reclaiming the lands. The judgment of the State as to the necessity is paramount, and any application of the proceeds by the State to any other object is to be taken as the declaration of its judgment that the application of the proceeds to the reclamation of the lands is not necessary." And also (p. 192): "If the power exists anywhere to enforce any provisions attached to the grant, it resides in Congress and not in the court." The same principles have been applied in later and related cases. *Stearns* v. *Minnesota,* 179 U. S. 223, 231; *Alabama* v. *Schmidt,* 232 U. S. 168; *King County* v. *Seattle School District,* 263 U. S. 361, 364.

Finally much stress is laid on the provisions of the Act of 1889, the cession under it, and resulting rights of the Indians and obligations of the United States. But it suffices here to say that the Act of 1889 was without application to lands in which the Indians had no interest, that the cession under it was only of lands in which they had

an interest, and that the resulting rights of the Indians and obligations of the United States were limited accordingly.

Our conclusion on the whole case is that the bill must be dismissed on the merits as to all the lands, excepting the 706 acres described as within the Leech Lake, Winnibigoshish and Cass Lake reservations as defined and existing in 1860, and that as to them the United States is entitled to a decree canceling the patents for such as have not been sold by the State and charging her with the value of such as she has sold. By reason of the relation in which the United States is suing, the value should be determined on the basis of the prices which would have been controlling had the particular lands been dealt with, as they should have been, under the Act of 1889, *United States* v. *Mille Lac Chippewas, supra,* 510.

The parties will be accorded twenty days within which to suggest a form of decree giving effect to our conclusions and to present an agreed calculation of the value of so much of the 706 acres as has been sold.

L. LITTLEJOHN & CO., INC., ET AL. *v.* UNITED STATES.

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

No. 94. Argued January 7, 1926.—Decided March 1, 1926.

1. Damages are not recoverable from the United States under the Suits in Admiralty Act (March 9, 1920,) for a collision due to the fault of a vessel owned and in possession of the United States and being operated in transporting supplies and troops. P. 223.
2. In the absence of convention, every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs. P. 226.
3. The Joint Resolution of May 12, 1917, authorized the President to take over to the United States the immediate possession and title

of any vessel within the jurisdiction which, at the time of coming therein, was owned by any subject of, or was under register of, an enemy nation; and this was within the power of Congress. P. 227.

Affirmed.

APPEAL from a decree of the District Court in Admiralty, dismissing libels for damages due to collision.

Messrs. James W. Ryan and *John M. Woolsey,* with whom *Messrs. T. Catesby Jones, D. Roger Englar,* and *J. M. R. Lyeth* were on the brief, for appellants.

The relation of the United States to the seized ships was the same as the relation of the Alien Property Custodian under the Act of October 6, 1917, to the other enemy-owned private property afterwards seized by him. *Central Trust Co.* v. *Garvan,* 254 U. S. 554; *United States* v. *Chemical Foundation, Inc.,* 5 Fed. (2d) 191; *The Western Maid,* 257 U. S. 419, distinguished; "Camillus Letters" of Alexander Hamilton; Moore Dig. Int. Law, Vol. 7, p. 308.

The United States has failed to prove that the Antigone at the time of collision had a status which would prevent the ordinary maritime lien attaching. The doctrine of the offending thing which has been so thoroughly established in our law seems to have only one exception, so far as this Court has determined; namely, when the United States has a property interest in the vessel or has promised to keep her free from liens, and the vessel is engaged in a public service. *The Western Maid, The Liberty, The Carolinian,* 257 U. S. 419; *Ex Parte State of New York, No. 1,* 256 U. S. 490; *Ex Parte State of New York, No. 2,* 256 U. S. 503.

The United States confessedly not only did not have title to the vessel, but did not have any property interest in her and had not promised to keep her free from liens, because no prize court proceedings had been had to subject her to forfeiture, and the steps taken by the Presi-

dent, acting through the Shipping Board, at most only purported to go so far as to take possession of the vessel—if indeed they could have gone further without resort to judicial proceedings. It is clear that the vessel was not technically in the possession of the United States at the time of the collision, because, she had been placed out of commission in the Navy and, though transferred to the Army Transport Service, was in possession of master, officers, and crew who are not shown to have any commissions from the President and, therefore, to have been officers of the United States within the meaning of the Constitution. Furthermore, whether the vessel was actually in the physical possession of the United States or not, it is perfectly certain that the United States had not secured by any proper proceedings the right to any possession, and that, therefore, the Antigone was not rightfully in the possession of the United States. *The Appam,* 243 U. S. 124.

The proceeding taken by the United States in the Court below amounted to an independent proceeding. It was in effect an informal proceeding in prize by which the United States submitted itself to the jurisdiction of the Court to have the status of the Antigone and its rights with regard to her determined. *Ex parte Muir,* 254 U. S. 522; *United States* v. *The Thekla,* 266 U. S. 228.

The United States must take the consequences of its failure to follow orderly procedure and have the Antigone condemned by a prize court, as was done by England in the case of *The Marie Leonhardt,* 1921 Prob. 1, or requisitioned by an order of the prize court, as was done in the case of *The Edna,* 3 Brit. & Col. Prob., 407. What the President should have done in connection with the Antigone in taking her over for military use is shown in *The Pedro,* 175 U. S. 354. Cf. *The Rita,* 89 Fed. 763.

This suit if brought against the ship *in rem* immediately after the collision could not have been regarded as

a suit in which the United States, or any of its property, in effect was being sued. If the United States did not stand exactly in the position of the Alien Property Custodian, it did hold possession merely as a receiver for the German owner and, like any other receiver, was not personally liable for the negligence of navigating servants whom it had used due care to select.

This matter is justiciable and not political. This suit is brought against the United States not because of any relation it had to the Antigone at the time of the collision on October 9, 1919, but because a maritime lien for collision arose at that time on the Antigone, because this lien is a property right, and the United States has taken over title to the vessel under the treaty, subject to this property right of the appellants. At the time of the collision the United States, being merely a custodian or receiver to conserve the Antigone, was not personally liable for the collision damage. The collision, however, created a lien on the Antigone because her only ship's paper was a German merchant vessel register, and she is not shown to have been in the possession of an officer of the United States as defined by the Constitution. After the collision, the Peace Treaty with Germany ended the receivership (so to speak) and the United States took over the vessel assets, including the Antigone, under the grant and confirmation made by Germany in the Treaty. This suit was then brought against the United States under The Suits in Admiralty Act, as a substitute for a suit *in rem* against the Antigone. This form of action was necessary because the Act provides that a maritime lien on a vessel which has afterwards been acquired by the United States must be brought not against the vessel, but against the United States, according to the principles of libels *in rem*. The relation of the United States to the Antigone at the time of the collision was substantially that of a licensee. In April, 1917, it sequestrated her,

and in May, 1917, asserted the privilege of using her as licensee or trustee without confiscating or promising to pay for her use. In other words, the United States never "took" any property interest in the Antigone.

If construed as a confiscation, the Resolution of May 12, 1917, is unconstitutional because it violates international law. *Miller* v. *United States,* 11 Wall. 268; *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146; Harv. L. Rev., Vol. 34, p. 777; *Brown* v. *United States,* 8 Cr. 110; Foreign Relations, U. S. (1907), Vol. II, p. 1158; Articles 1 and 2, Sixth Hague Convention (1907); *MacLeod* v. *United States,* 229 U. S. 416. The constitutionality of the Resolution must be qualified, if not impeached, unless it be construed to imply ultimate restitution of these merchant ships, or equitable indemnification therefor, or reparation. *Murray* v. *Chicago Co.,* 92 Fed. 868. The powers of Congress in peace and in war, as well as the treaty authority, respond to the law of nations "as understood in this country." It is axiomatic that no single nation can change the law of nations adversely to its general moral (if not everywhere, constitutional) obligation. And it is peculiarly the view of the common law that the municipal laws of a country cannot change international law. *The Scotia,* 14 Wall. 170; *The Paquete Habana,* 175 U. S. 677; *Downes* v. *Bidwell,* 182 U. S. 244 and other *Insular Cases; Chisholm* v. *Georgia,* 2 Dall. 419; Cooley, Const. L. (3d ed.), p. 123; *Brown* v. *United States,* 8 Cr. 110; *United States* v. *Percheman,* 7 Pet. 51; Art. XXIV, Prussian Treaty of 1799; *Pollard* v. *Kibbe,* 14 Pet. 353; 5 Hamilton's Works, Lodge ed., 126, 218; *Society, etc.* v. *New Haven,* 8 Wheat. 464; *The Peggy,* 1 Cr. 103. The early treaties between the United States and Prussia, assuring in effect the restitution, as well as the security of private enemy-owned property upon the coming of peace, are therefore not only a recognition of a theretofore existing rule of international law, but are

themselves a part of the international law which should be enforced by this Court. It is significant that these early treaties were regarded by the political branches of the United States as being so well settled a part of international law that it was not deemed necessary even to mention them in framing the more recent Treaty of Peace and Executive Agreement with Germany. If, as the Government's claim in the present case alleges, the United States acquired by the seizure a lawful right of possession, why was it necessary for this Government afterwards to have the German Government render that possession more valid by formal treaty? Under the Treaty of Peace with Germany of August 25, 1921, the satisfaction of all private American claims against Germany and the confirming to the United States "of seizures" imposed or made by the United States during the war, are the salient or expressed conditions upon which turn the retention of German property in the possession or control of the United States.

The Antigone was at most in the *custodia legis* of the United States and could not in any real sense be said to be a vessel of the United States entitled to immunity from liability as an essential tool or part of the sovereign.

The President did not seize or take over the possession of the Antigone after the adoption of the Resolution of May 12, 1917.

The District Court had no jurisdiction on its admiralty side to entertain the claim of the United States. The court should therefore have granted the motion of the libellants to transfer the claim proceeding of the United States to the prize side and permit the collision libels to be proved as cross suits or intervening claims in that proceeding. *The Appam,* 243 Fed. 230; *The Peterhoff,* 19 Fed. Cas. No. 11025; *Sawyer* v. *Maine, etc., Ins. Co.,* 12 Mass. 291; *Bradstreet* v. *Neptune Ins. Co.,* 3 Sumn. 600. It is now the accepted rule, both in international

law and under our Constitution, that the condemnation, to be effective, must be by a judicial tribunal, and that no administrative substitute can take its place. *The Appam,* 243 U. S. 124; *The Siren,* 22 Fed. Cas. No. 12911; *Oakes* v. *United States,* 174 U. S. 778; *The Nassau,* 4 Wall. 634. This is not only a rule of international law, but a principle confirmed by the Constitution of the United States. *Jecker* v. *Montgomery,* 13 How. 498; *The Resolution,* 2 Dall. 1; *Young* v. *United States,* 97 U. S. 39. The necessity after seizure of a deposit of value or a judicial condemnation, as a condition to the taking over by the Executive of an enemy vessel for military purposes, is still more evident on consideration of the decisions of this Court holding that vessels such as the Neckar are entitled to most liberal treatment and that a noncombatant enemy has a right not only to a judicial hearing and to appear and claim the seized vessel and contest the seizor's claims, but also to prosecute an appeal to this Court if the lower court's ruling should be unfavorable. *The Pedro,* 175 U. S. 354; *The Guido,* 175 U. S. 383; *The Buena Ventura,* 175 U. S. 384; *The Panama,* 176 U. S. 535; *The Paquete Habana,* 175 U. S. 677. Indeed, the rule of law requiring a judicial proceeding as a condition to the transfer of possession to the sovereign, is so well settled that the Navy Department has recognized it by general orders. *The Santo Domingo,* 119 Fed. 388. The suggestion that the law of maritime or prize seizure is confined to seizures on the high seas is refuted not only by the British authorities but also by the following American cases: *The Joseph,* 8 Cr. 451; *The Caledonian,* 4 Wheat. 100; *Dewey* v. *United States,* 178 U. S. 510; *The Santo Domingo,* 119 Fed. 386; *United States* v. *Steever,* 113 U. S. 747; *The Rita,* 89 Fed. 763.

The resolution is unconstitutional because it reduces the extent of the constitutional grant of admiralty juris-

diction to the judiciary and impairs the substantive international maritime law. *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Gableman* v. *Peoria Ry. Co.,* 179 U. S. 335; *Walters* v. *Payne,* 292 Fed. 124.

By granting immunity in the present case, this Court would be extending the theory of immunity beyond any of its existing decisions. Harv. L. Rev., Vol. 34, p. 165; Cardozo, Growth of the Law, p. 117; Laski, Foundations of Sovereignty, pp. 109, 126; Pound, Spirit of the Common Law, pp. 83–84; Stimson, Popular Law Making, p. 10; Carter, Law, Its Origin, Growth and Function, pp. 6, 8, 13–14; Gray, Nature and Sources of Law, 1921 ed., pp. 74, 233, 288; Salmond, Jurisprudence, pp. 202–203; Lightwood, Nature of Positive Law, p. 417; Vinogradoff, Outlines of Historical Jurisprudence, p. 86; Bryce, Studies in History and Jurisprudence, p. 538; Brown, Austinian Theory of Law, p. 194.

The claim or suggestion of the United States Attorney should be dismissed because not proved and because not presented by a proper officer; or should be regarded as a submission to jurisdiction enabling the collision lien to be enforced as a cross or intervening claim.

Solicitor General Mitchell, with whom *Assistant Attorney General Letts* and *Mr. J. Frank Staley,* Special Assistant to the Attorney General, were on the brief, for appellee.

Under the Joint Resolution of May 12, 1917, and the Executive Orders issued thereunder, the United States acquired lawful possession of and title to the Antigone. *Brown* v. *United States,* 8 Cr. 110; *Miller* v. *United States,* 11 Wall. 268; *Ware* v. *Hylton,* 3 Dall. 199; *The Western Maid,* 257 U. S. 419.

The Western Maid, 257 U. S. 419, settles the point that, as the vessel was owned by or in the lawful possession of the United States, and employed in the public

service at the time of the collision, she was immune from liability.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The court below sustained a challenge to its jurisdiction, and this direct appeal followed.

October 9, 1919, in New York Harbor the steamships "Antigone" and "Gaelic Prince" collided. Serious injury resulted to the latter and its cargo. February 19, 1921, relying upon the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525), the owners seek to recover damages. The Act of March 3, 1925, c. 428, 43 Stat. 1112, is not applicable. They allege that the collision resulted from the fault of the "Antigone." Also that—

"At all the times mentioned herein prior to the 13th day of October, 1919, and particularly on the 9th day of October, 1919, the date of the collision hereinafter mentioned, the steamship 'Antigone' was owned by a private person or merchant who was solely entitled to the immediate and lawful possession, operation, and control of said vessel. At no time prior to said 13th day of October, 1919, was the said steamship 'Antigone' owned, either absolutely or *pro hac vice,* by the United States of America, nor by any corporation in which the United States of America or its representatives owned the entire outstanding capital stock, nor lawfully in the possession of the United States of America or of such corporation, nor lawfully operated by or for the United States of America or such corporation. On the 13th day of October, 1919, the respondent United States of America became, ever since has been, and now is in the lawful possession of the steamship 'Antigone,' but at no time has the United States of America held the legal title to or been the absolute owner of said steamship 'Antigone.'"

The United States appeared specially and suggested that when the collision occurred they owned, possessed and controlled the "Antigone" and therefore the court was without jurisdiction. This was denied and evidence was taken upon the consequent issue. Having considered the evidence, the court held that the United States owned the vessel and were navigating her, with a crew employed by the War Department, in transporting supplies and troops. The libels were accordingly dismissed for want of jurisdiction.

If the established facts show such ownership, possession and control, then, under the doctrine of *The Western Maid,* 257 U. S. 419, to which we adhere, the decree is clearly right.

The history of the matter is this. The "Antigone"—then the privately-owned German merchantman "Neckar"—took refuge within the United States prior to April 6, 1917, when war with Germany was declared. By Joint Resolution of May 12, 1917, c. 13, 40 Stat. 75 (copied in the margin*), Congress authorized the President to take over to the United States the immediate possession and title of any vessel within their jurisdiction which at the time of coming therein was owned by any corporation, citizen or subject of an enemy nation, or was under register of any such nation. By Executive Order of June 30, 1917, the President affirmed that the "Neckar" was

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or

such a vessel and ordered that " the possession and title " be taken over through the United States Shipping Board. He further authorized that Board to repair, equip, man and operate her. It accordingly took her, July 17, 1917, and thereafter a naval board appraised her. Subsequently she was transferred to the Navy Department, re-named the " Antigone," and later transferred to the Army Transport Service. October 9, 1919, she sailed under a master, officers and crew of the United States Transport Service from New York bound for Brest, from which port she was to return with troops.

Appellants say that the rules of international law as recognized by the United States forbade them from confiscating German vessels within their jurisdiction at outbreak of the war, and that the Resolution of May 12, 1917, should be so interpreted as to harmonize with these rules. They further insist that thus interpreted the Resolution only gave authority to detain and operate the "Antigone " as enemy property, leaving title in the original German owners and the vessel subject to ordinary maritime liens. Our attention is called to the course pursued by the British government and to certain decisions of their courts. *The Chile,* 1 Br. & Col. Prize Cases 1; *The Gutenfels,* 2 *id.* 36; *The Prinz Adalbert,* 3 *id.* 70, 72; *The Blonde,* L. R. (1922) 1 A. C. 313, 334.

---

agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise .

SEC. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation.

Both Great Britain and Germany were parties to Convention VI of the Second Hague Peace Conference, 1907,* and the action of the former, referred to by counsel, was taken in view of obligations thus assumed. The United States did not approve that convention, and the cited cases involved problems wholly different from the one here presented.

It is unnecessary to consider how far the ancient rules of international law concerning confiscation of enemy property have been modified by recent practices. In the absence of convention every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs. The Hague Conference (1907) recognized this and sought by agreement to modify the rule. *The Blonde, supra,* p. 326. Our problem is to determine the result of action taken under a Joint Resolution of Congress whose language is very plain and refers only to enemy vessels. It authorized the President to take "possession and title," and, obeying, he took them. We do not doubt the right of any independent nation so to do without violating any

*Article 1. When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

Article 2. A merchant ship unable, owing to circumstances of *force majeure,* to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, can not be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

uniform or commonly accepted rule of international law; and Congress had power to authorize the action irrespective of any general views theretofore advanced in behalf of this government. Certainly all courts within the United States must recognize the legality of the seizure; the duly expressed will of Congress when proceeding within its powers is the supreme law of the land.

Brown v. *United States,* 8 Cranch 110, 122—"That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall chuse to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the Court." See *Miller* v. *United States,* 11 Wall. 268; *The Blonde, supra.*

The decree of the court below is

Affirmed.

SANCHEZ ET AL. *v.* DEERING.

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

No. 134. Argued January 14, 1926.—Decided March 1, 1926.

1. Confirmation by Congress of a Spanish grant in Florida, (Acts of March 3, 1823, February 8, 1827,) followed by survey, passed legal title. *Wilson Cypress Co.* v. *Marcos,* 236 U. S. 635. P. 229.
2. Claimants of an undivided interest in such a grant, and their predecessors, by postponing for seventy years after survey the suit against those holding under the confirmation, were guilty of laches. *Id.*

298 Fed. 286, 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 establish an interest in a tract of land

Mr. William Whitwell Dewhurst, for appellants.

Mr. Frederick M. Hudson, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By a bill filed April 7, 1920, appellants sought to establish their right to one-half interest in 175 acres of land on Key Biscayne, Dade County, Fla., granted by Governor White to Pedro Fornells January 18, 1805, when the Floridas were under the dominion of Spain. Appellee Deering acquired legal title to the whole tract June 28, 1913.

In 1824, under claim of ownership through conveyance from Raphael Andreu, stepson of Fornells and alleged by her to be his sole heir, Mary Ann Davis obtained confirmation of the grant in herself by the Board of Commissioners empowered under the Act of March 3, 1823, c. 29, 3 Stat. 754, to ascertain and confirm title to East Florida lands arising under patents, grants, concessions or orders of survey dated prior to January 24, 1818. The Board's action was approved and confirmed by Act of February 8, 1827, c. 9, 4 Stat. 202. In 1847 the lands were surveyed under direction of the Surveyor General and segregated from the public domain.

June 30, 1827, Mrs. Davis and her husband deeded three acres to the United States and the Cape Florida Lighthouse was constructed thereon. They subsequently abandoned the light and, March 4, 1903, conveyed the three acres to Waters S. Davis, one of the heirs of Mary Ann Davis whose death occurred in 1885. He had purchased the interests of all other heirs during 1893. April 23, 1896, patent for the 175 acres issued to Mary Ann

Davis, but this was not delivered until 1898 because of protest by Venancio Sanchez, who claimed an interest. This protest was overruled by the Surveyor General, the Land Commissioner and the Secretary of the Interior. June 28, 1913, Waters S. Davis deeded the lands to Deering.

Complainants deraign their title to an undivided one-half interest through deed to Venancio Sanchez from Antonia Porsila (or Porala), daughter of Pedro Fornells and half sister of Raphael Andreu, executed by her May 26, 1843. About 1840 the husband of Mary Ann Davis sought to interest Sanchez, then and long afterwards a merchant at St. Augustine, Fla., in developing Key Biscayne. As a result, it is alleged, Sanchez discovered that Mrs. Davis did not own the entire property and that Antonia Porsila had inherited an interest therein. Accordingly he went to Havana and there secured the conveyance of the latter's interest.

Sanchez died in 1899. He knew Raphael Andreu, who lived for a long time at St. Augustine and probably died there, but the time is not shown. It does not appear when Antonia Porsila died.

Complainants sought to meet the anticipated defense of laches by alleging that they were not able to secure legal evidence of the relationship between Raphael Andreu and Antonia Porsila until the discovery of an index to the Spanish archives during the year 1919.

The trial court dismissed the bill upon motion, holding that appellants were chargeable with laches because of the long delay in seeking relief after issuance of the patent of 1896. The Circuit Court of Appeals affirmed this decree upon the view that the delay extended from the survey of 1847 when Mary Ann Davis secured full legal title. 298 Fed. 286.

Under circumstances very similar to those here presented *Wilson Cypress Co.* v. *Marcos,* 236 U. S. 635, holds

that confirmation of the Spanish grant by Congress followed by survey of the land passed the legal title. We can see no reason to depart from this view. The title of Mary Ann Davis dates from 1847. For more than seventy years thereafter appellants and their predecessors failed to assert their rights, if any, by legal proceedings. We agree with the Circuit Court of Appeals "that it is too late now to enter into the merits of a claim of title which could have been asserted and enforced if good, and rejected if bad, while the witnesses who knew about it were living and could have testified with reference to it."

The decree is

Affirmed.

SCHLESINGER ET AL., EXECUTORS, ETC., *v.* WISCONSIN ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 146. Argued January 18, 1926.—Decided March 1, 1926.

1. A conclusive statutory presumption that all gifts of a material part of a decedent's estate made by him within six years of his death were made in contemplation of death,—whereby they become subjected, without regard to his actual intent in making the gifts, to graduated inheritance taxes,—creates an arbitrary classification and conflicts with the Fourteenth Amendment. P. 239.
2. Such arbitrary classification, and consequent taxation, can not be sustained upon the ground that legislative discretion found them necessary in order to prevent evasion of inheritance taxes. P. 240.
3. The State is forbidden to deny due process of law, or the equal protection of the laws, for any purpose whatever; and a forbidden tax can not be enforced in order to facilitate the collection of one properly laid. *Id.*

184 Wisc. 1, reversed.

ERROR to a judgment of the Supreme Court of Wisconsin sustaining an inheritance tax.

Mr. Charles F. Fawsett, for plaintiffs in error.

Under the statute, as construed by the court, some donees of property are permitted to prove that their gifts were not made in contemplation of death, and thus avoid the tax, while others are not so permitted, but are subjected to the payment of the tax as the result of the conclusive presumption made by the statute that their gifts were made in contemplation of death although the fact be otherwise. That the legislature has no power to enact such a conclusive presumption is established by the authorities, without exception. *Bailey* v. *Alabama,* 219 U. S. 219; *Cockrill* v. *California,* 268 U. S. 528; *Mobile J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35; *Larson* v. *Dickey,* 39 Neb. 463; *Howard* v. *Moot,* 64 N. Y. 268; *M. K. & T. Ry.* v. *Simonson,* 64 Kans. 802; *Vega S. S. Co.* v. *Cons. El. Co.,* 75 Minn. 309; Cooley's Const. Limit'ns. (7th ed.) 526; 10 Ruling Case Law, 863. *In re Barbour's Estate,* 185 N. Y. App. Div. 445; *Bannon* v. *Burnes,* 39 Fed. 892; *Marx* v. *Hanthorn,* 30 Fed. 579; *Abbott* v. *Lindenbower,* 42 Mo. 162; *Wantlan* v. *White,* 19 Ind. 470; *White* v. *Flynn,* 23 Ind. 46; *McCready* v. *Sexton,* 29 Iowa 356; *Allen* v. *Armstrong,* 16 Iowa 508; *Groesbeck* v. *Seeley,* 13 Mich. 330; *In re Douglass,* 41 La. Ann. 765.

To justify such a tax, the necessary basis of fact must exist to invoke the taxing power to impose it. The legislature can make the law apply to the facts. It cannot make the facts to which the law is to apply. When the legislature undertakes to engraft upon a simple gift *inter vivos* the legal import of a gift made in contemplation of death, it is giving to it the legal import of a fact of an essentially different nature. If the legislature can do this in the case of such a simple fact as an ordinary gift *inter vivos,* there is no reason why it cannot do the same in the case of any fact, and attach to it the legal consequences of a fact of an entirely different nature.

A gift may be made in contemplation of death at any time during life, and it is equally true that one may be

made without any thought of death at any time during life, if gifts *causa mortis* are excepted. It is also common knowledge and experience that six years is ample time within which a person may contract even a chronic disease, and die of it. If it is permissible to enter the field of speculation, we think it may safely be said, that the great majority of people who die were not contemplating or thinking particularly about death as long as six years before the event occurred.

The fact that those gifts not made in contemplation of death, which are nevertheless taxed by the statute as gifts made in contemplation of death, may be a minority rather than a majority of all the gifts covered by the statute, cannot affect the constitutional objection. The rights of the minority under the Constitution are entitled to protection as well as those of the majority. Cf. *Ex parte Reilly,* 94 Ala. 82; *Bailey* v. *State,* 158 Ala. 25.

As to the "public necessity of not allowing large estates to escape the provisions of the law," this necessity should not be allowed to supersede the right of the individual taxpayer to have the question of his liability to the tax fairly determined. The legislature can not do by indirection that which, admittedly, it has no power to do directly. *Choctaw O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *St. Louis S. W. Ry. Co.* v. *Arkansas,* 235 U. S. 350.

The classification is invalid because it includes gifts not made in contemplation of death if made within six years prior to the death of the donor, but does not include other gifts of like character made under like circumstances and conditions. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; *Southern R. Co.* v. *Greene,* 216 U. S. 400; *Black* v. *State,* 113 Wis. 205; *Borgniss* v. *Falk,* 147 Wis. 327; *Nunnemacher* v. *State,* 129 Wis. 190; *Johnson* v. *City of Milwaukee,* 88 Wis. 383.

The classification, insofar as it includes gifts not made in contemplation of death merely because they were made

within six years prior to the death of the donor, is arbitrary and unreasonable. *Gulf C. & S. F. Ry. Co.* v. *Ellis,* 165 U. S. 150; *Southern R. Co.* v. *Greene,* 216 U. S. 400; *Black* v. *State,* 113 Wis. 205. Under the decisions of the Supreme Court of the State, the tax is imposed according to the value of the property, and at the rates in force, at the time of the death of the donor. *Estate of Stephenson,* 171 Wis. 452. Until the death of the donor, or the expiration of six years, no one can tell what the amount of the tax will be, or whether there will be any tax. The tax is upon the transfer made by the gift, but it is not determined, either as to amount or whether or not there will be a tax, by the fact of the transfer or by any circumstances or conditions existing at the time; but by a contingency in the future entirely disconnected with the transfer, in no way related to it and entirely beyond human control.

The right to make an ordinary gift of money or property, which may be completed by manual delivery, is a property right. Because the gifts in this case include property of that character, and the tax imposed is at a progressive rate, different from other property taxes, the statute denies to plaintiffs in error the equal protection of the law. *Keeney* v. *New York,* 222 U. S. 525; *Thomas* v. *United States,* 192 U. S. 363; *St. L. & S. W. Ry. Co.* v. *Arkansas,* 235 U. S. 350; *Dawson* v. *Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288; *Knowlton* v. *Moore,* 178 U. S. 41; *Wynehamer* v. *People,* 13 N. Y. 378; Ruling Case Law, vol. 26, §§ 19, 210. The tax is imposed at a progressive rate which could not be justified except on the theory that the legislature has practically a free hand to impose any rate it pleases even to the point of confiscation of the property. *Beals* v. *State,* 139 Wis. 544. To annul the amendment will result merely in leaving the statute imposing the tax on inheritances and gifts made in contemplation of death, as it was before the amendment, without serious consequences to the State.

Mr. Franklin E. Bump, Assistant Attorney General of Wisconsin, with whom *Mr. Herman L. Ekern,* Attorney General, was on the brief, for defendants in error.

The classification for the purposes of the inheritance tax of all gifts made within a reasonable time before the donor's death as gifts made in contemplation of death is an administrative necessity, and has such a substantial relation to the object of the taxing statute that it is reasonably founded in the purposes and policies of taxation, and is therefore valid; and the imposition of taxes accordingly neither takes property without due process of law nor denies the equal protection of the laws to the recipients of such gifts. The power of the legislature to impose an excise tax upon the recipient of all transfers of property *inter vivos,* made with or without adequate valuable consideration, and whether made in contemplation of death or otherwise, cannot be successfully challenged. *Hatch* v. *Reardon,* 204 U. S. 152. It is enough that the classification is reasonably founded in the "purposes and policies of taxation." *Stebbins* v. *Riley,* 268 U. S. 137.

The classification was made in the exercise of legislative judgment and discretion, for the legitimate purpose of preventing a common and effective method (adopted particularly by men of wealth) of evasion of the inheritance taxes imposed upon the recipients of transfers of property by will or descent; and the fact that that classification results in the discrimination complained of, between gifts made within the six year period and those made without that period, is no objection to the classification, when viewed in the light of the object and purpose of the legislature in making it. *Stebbins* v. *Riley, supra.*

The inducement for, and the object and purpose of, the amendment is well stated in the case of *Estate of Ebeling,* 169 Wis. 432. It may be noted also that the Wis-

consin Tax Commission, (which is charged with the duty of administering the inheritance tax law,) in its report to the Governor and the Legislature of the State, (under date of December 3, 1912, and laid before the legislature of 1913,) which enacted the statute in question, made, among several recommendations for amendments to the law based upon its experience with the difficulties of enforcement, the following: "3. . . . At present large estates, or large portions of an estate may be, and frequently are, conveyed during the latter years of the owner's life to his children, in a manner that is clearly testamentary in its nature, yet that cannot readily be proved to have been made either in contemplation of death nor to evade the tax. The law should be made as broad in its language as it is in its purpose." *In re Uihlein's Will,* 187 Wis. 101.

A rebuttable presumption would be ineffectual. A number of the States besides Wisconsin have determined that it is necessary to the enforcement of their inheritance or succession tax laws to put all gifts made within a certain determined period (varying from two to six years) before death in the class of those made in contemplation of death, and to declare that all gifts made within such period shall be so deemed or construed. McElroy, The Law of Taxable Transfers, (2d ed.) 109.

The classification which the statute makes is so substantially related to the object of the taxing law that it must be upheld as reasonably founded in the State's purposes and policies of taxation. *Watson* v. *Comptroller,* 254 U. S. 122. Plaintiffs in error do not complain of the amount of the tax imposed, but only of the imposition of any tax at all. There is therefore no taking of property without due process of law. *Dane* v. *Jackson,* 256 U. S. 589; *Stebbins* v. *Riley,* 268 U. S. 137. The fundamental nature of the excise tax imposed by the law is not changed by the classification so as to make it a property

tax and subject to the rule of uniformity of taxation. *Stebbins* v. *Riley, supra.*

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Section 1087–1, Chapter 64ff, of the Wisconsin Statutes 1919, provides—

"A tax shall be and is hereby imposed upon any transfer of property, real, personal, or mixed . . . to any person . . . within the State, in the following cases, except as hereinafter provided:

"(1) When the transfer is by will or by the intestate laws of this State from any person dying possessed of the property while a resident of the State.

"(2) When a transfer is by will or intestate law, of property within the State or within its jurisdiction and the decedent was a nonresident of the State at the time of his death.

"(3) When a transfer is of property made by a resident or by a nonresident when such nonresident's property is within this State, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. *Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section.*"

These provisions were taken from § 1, c. 44, Laws of 1903, except that the last sentence of subdiv. 3 (italicized) was added by c. 643, Laws of 1913.

Section 1087–2, c. 64ff, imposes taxes upon transfers described by § 1087–1 varying from one to five per

centum, according to relationship of the parties, when the value is not above twenty-five thousand dollars. On larger ones the rates are from two to five times higher, with fifteen per centum as the maximum.

"Section 1087–5 [c. 64ff]. 1. All taxes imposed by this act shall be due and payable at the time of the transfer, except as hereinafter provided; and every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is transferred and the administrators, executors, and trustees of every estate so transferred shall be personally liable for such tax until its payment."

Other provisions of c. 64ff provide for determination, assessment and collection of the tax. In the Revised Statutes of 1921 and 1925, c. 64ff became c. 72, and section numbers were changed—1087–1 became 72.01, 1087–2 became 72.02, 1087–5 became 72.05, etc.

In *Estate of Ebeling* (1919), 169 Wis. 432, the court held: "Section 1087–1, Stats., as amended by c. 643, Laws 1913, which provides that gifts of a material part of a donor's estate, made within six years prior to his death, shall be construed to have been made in contemplation of death so far as transfer taxes are concerned, constitutes a legislative definition of what is a transfer in contemplation of death, and not a mere rule of law making the fact of such gifts *prima facie* evidence that they were made in contemplation of death."

Estate of Stephenson, 171 Wis. 452, 459—A gift of twenty-three thousand dollars constitutes a material part of an estate valued at more than a million dollars; also, gifts by decedents in contemplation of death must be treated, for purposes of taxation, as part of their estates.

In re Uihlein's Will, 187 Wis. 101—"As stated in the Schlesinger case, the statute was enacted for the purpose of enabling the taxing officials of the State to make an

efficient and practical administration of the inheritance tax law. . . . It is settled in this State that the tax attaches, not at the date of the transfer of the gift, but at the date of the death of the donor. . . . Under our decisions the gifts that have been made within six years of the donor's death, together with the amount of the estate left by the donor at the time of his death, constitute his estate, and must be administered, so far as inheritance tax proceedings are concerned, as one estate. The tax does not attach and become vested in the State until the death of the donor. When the gift is made and the donee receives it, there is no certainty that an inheritance tax will ever be levied upon the gift."

In the present cause the Milwaukee County Court found that Schlesinger died testate January 3, 1921, leaving a large estate; that within six years he had made four separate gifts, aggregating more than five million dollars, to his wife and three children; that none of these was really made in view, anticipation, expectation, apprehension or contemplation of death. And it held that because made within six years before death these gifts "are by the express terms of § 72.01 [formerly § 1087–1], Clause (3), of the statutes subject to inheritance taxes, although not in fact made in contemplation of death." An appropriate order so adjudged. The executors and children appealed; the Supreme Court affirmed the order (184 Wis. 1); and thereupon they brought the matter here.

Plaintiffs in error maintain that, as construed and applied below, the quoted tax provisions deprive them of property without due process of law, deny them the equal protection of the laws, and conflict with the Fourteenth Amendment.

The Supreme Court of the State said: "The tax in question is not a property tax but a tax upon the right to receive property from a decedent. It is an excise law."

"Such [legislative] intent was to tax only gifts made in contemplation of death. That is the only class created. The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death," [which means] "that they shall conclusively be held to be gifts made in contemplation of death and shall fall within the one taxable class of gifts created by the legislature." "In our case the legislative intent we think is clear that the specified gifts were to be conclusively construed to be gifts in contemplation of death." "We agree with the applicants that the classification made will not support a tax as one on gifts *inter vivos* only. Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event. It is because only one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid. Gifts made in contemplation of death stand in a class by themselves, and as such they are made a part of the inheritance tax law to the end that it may be effectively administered. We adhere to the ruling in the Ebeling case."

No question is made of the State's power to tax gifts actually made in anticipation of death, as though the property passed by will or descent; nor is there denial of the power of the State to tax gifts *inter vivos* when not arbitrarily exerted.

The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere *prima facie* presumption of fact.

The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six

years of the donor's death and exempt all others—this would be "wholly arbitrary." We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, they are subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character.

The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, "A" may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against "B." Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

No new doctrine was announced in *Stebbins* v. *Riley,* 268 U. S. 137, cited by defendant in error. A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid. *Mobile, etc., R. R.* v. *Turnipseed,* 219 U. S. 35, 43, discusses the doctrine of presumption.

The judgment of the court below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed

Mr. Justice Sanford concurs in the result.

Mr. JUSTICE HOLMES, dissenting.

If the Fourteenth Amendment were now before us for the first time I should think that it ought to be construed more narrowly than it has been construed in the past. But even now it seems to me not too late to urge that in dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate.

The present seems to me one of those questions. I leave aside the broader issues that might be considered and take the statute as it is written, putting the tax on the ground of an absolute presumption that gifts of a material part of the donor's estate made within six years of his death were made in contemplation of death. If the time were six months instead of six years I hardly think that the power of the State to pass the law would be denied, as the difficulty of proof would warrant making the presumption absolute; and while I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall. I think that our discussion should end if we admit, what I certainly believe, that reasonable men might regard six years as not too remote. Of course many gifts will be hit by the tax that were made with no contemplation of death. But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured. A typical instance is the prohibition of the sale of unintoxicating malt liquors in order to make effective a prohibition of the sale of beer. The power " is not to be denied simply because some innocent articles or transac-

tions may be found within the proscribed class." *Purity Extract & Tonic Co.* v. *Lynch,* 226 U. S. 192, 201, 204. *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, 283. In such cases (and they are familiar) the Fourteenth Amendment is invoked in vain. Later cases following the principle of *Purity Extract & Tonic Co.* v. *Lynch* are *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303; *Pierce Oil Co.* v. *Hope,* 248 U. S. 498, 500. See further *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 246.

I am not prepared to say that the legislature of Wisconsin, which is better able to judge than I am, might not believe, as the Supreme Court of the State confidently affirms, that by far the larger proportion of the gifts coming under the statute actually were made in contemplation of death. I am not prepared to say that if the legislature held that belief, it might not extend the tax to gifts made within six years of death in order to make sure that its policy of taxation should not be escaped. I think that with the States as with Congress when the means are not prohibited and are calculated to effect the object we ought not to inquire into the degree of the necessity for resorting to them. *James Everard's Breweries* v. *Day,* 265 U. S. 545, 559.

It may be worth noticing that the gifts of millions taxed in this case were made from about four years before the death to a little over one year. The statute is not called upon in its full force in order to justify this tax. If I thought it necessary I should ask myself whether it should not be construed as intending to get as near to six years as it constitutionally could, and whether it would be bad for a year and a month.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concur in this opinion.

FIRST MOON *v.* WHITE TAIL AND UNITED STATES.

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

No. 191. Argued January 29, 1926.—Decided March 1, 1926.

1 A decision of the Secretary of the Interior determining who are the heirs of an Indian allottee, who died intestate after receiving his trust patent under the General Allotment Act and before issuance of a fee simple patent, is made conclusive by the Act of June 10, 1910; and the District Court is without jurisdiction to re-examine it for alleged error of law. So *held,* in a suit against an adverse claimant and the United States. P. 243.

2. The Act of December 21, 1911, amending § 24 of the Judicial Code and conferring on District Courts jurisdiction of actions involving the rights of persons of Indian blood or descent to allotments, was but a codification of earlier provisions, and refers to original allotments claimed under some law or treaty, and not to disputes concerning the heirs of one who held a valid and unquestioned allotment. P. 244.

Affirmed.

APPEAL from a decree of the District Court dismissing, for want of jurisdiction, a bill to establish an interest in an Indian allotment.

Mr. L. A. Maris, with whom *Mr. E. Barrett Prettyman* was on the brief, for appellant.

Mr. H. L. Underwood, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Appellant seeks to establish an interest in certain lands allotted to Little Soldier, a Ponca Indian, under the General Allotment Act of 1887, c. 119, 24 Stat. 388, as amended by the Act of 1891, c. 383, 26 Stat. 794. Trust

patents were issued therefor in 1895, and he died March 1, 1919. It appears from the bill that the Secretary of the Interior after due consideration determined who were the heirs, and in doing so eliminated appellant, although she claimed to be the only surviving lawful wife. It is alleged that upon the facts found by him the Secretary misapplied the law.

The court below held, correctly we think, that it was without jurisdiction, since the matter had been entrusted to the exclusive cognizance of the Secretary of the Interior by the Act of June 25, 1910, c. 431, 36 Stat. 855, which provides: " That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

The question presented must be regarded as settled by what this court has said in *Hallowell* v. *Commons,* 239 U. S. 506; *Lane* v. *Mickadiet,* 241 U. S. 201; *United States* v. *Bowling,* 256 U. S. 484. The legislative history of the Act of 1910—Cong. Rec. vol. 45, p. 5811—lends support to this construction; and abundant reason for the provision becomes apparent upon consideration of the infinite difficulties which otherwise would arise in connection with the sundry duties of the Secretary of the Interior relative to Indian allotments.

We cannot accept the suggestion that the above-quoted exclusive feature of the Act of 1910, was repealed by the Act of December 21, 1911, c. 5, 37 Stat. 46, which amended § 24 Judicial Code and conferred upon District Courts jurisdiction " of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian

blood or descent, to any allotment of land under any law or treaty." This paragraph is but a codification of provisions found in the Act of August 15, 1894, c. 290, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, 31 Stat. 760. It has reference to original allotments claimed under some law or treaty, and not to disputes concerning the heirs of one who held a valid and unquestioned allotment.

The decree is

Affirmed.

ISELIN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 119. Argued January 12, 1926.—Decided March 1, 1926.

1. Par. 3 of § 800(a) of Revenue Act of 1918, laying taxes on theater and opera tickets sold at newstands, hotels, etc., for more than the "established price" at the ticket office of the theater or opera house, *held* inapplicable to sale by a stockholder of box tickets, issued as an incident of his investment in an opera house company, which were not sold at the box-office and for which there was no established price. P. 247.
2. A statute imposing taxes with particularity, and in plain, unambiguous language, cannot be enlarged by construction to cover other cases omitted through presumable inadvertence of the legislature. P. 250.
3. An administrative practice which enlarges the scope of an unambiguous statute, and which is neither uniform, general, nor long continued, can not be given legal force or effect, nor be accepted as a reason why subsequent reënactment of the statute without change should be taken as a legislative interpretation of its original meaning as justifying such practice. P. 251.

59 Ct. Cls. 654, reversed.

APPEAL from a judgment of the Court of Claims rejecting a claim for money paid by Georgine Iselin, under protest, as a tax on receipts from sale of admissions to an opera box.

Mr. H. G. Pickering, with whom *Messrs. Eldon Bisbee* and *Henry Root Stern* were on the brief, for appellant.

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

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Metropolitan Opera House in New York City is owned by a corporation which leased it to the producing company. The use of all the parterre boxes was reserved by the lessor, with the privilege of six free admissions to each box at every performance. Before the passage of the Revenue Law of 1918, the lessor conferred upon Georgine Iselin, as owner of 300 of its shares, a license so to use a designated parterre box. During the season of 1919–20, being authorized so to do, she sold through a personal agent, the license to use her box for 47 of the 70 performances given during the season, and received therefor $9,525 net, after deduction of the agent's commissions. On the amount received Miss Iselin was assessed a tax of $3,352.50, under paragraph 3 of § 800(a) of the Revenue Act of 1918, Act of February 24, 1919, c. 18, 40 Stat. 1057, 1120–21. She paid the amount under protest and presented a claim that it be refunded. The Commissioner of Internal Revenue rejected the application, holding that the tax was payable under paragraph 4 of that Act.[1] Then, Miss Iselin brought this suit in the Court of Claims to recover the amount. A judgment

[1] Paragraph (4) provides: "A tax equivalent to 50 per centum of the amount for which the proprietors, managers, or employees of any opera house, theater, or other place of amusement sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor, such tax to be returned and paid, in the manner provided in section 903, by the person selling such tickets."

dismissing the petition, rendered upon findings of fact, was entered March 5, 1924. 59 Ct. Cls. 654. The case is here on appeal under § 242 of the Judicial Code.

Paragraph 3 of § 800(a), under which the tax was assessed, provides:

" Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 50 cents in excess of the sum of the established price therefor at such ticket offices plus the amount of any tax imposed by paragraph (1), a tax equivalent to 5 per centum of the amount of such excess; and if sold for more than 50 cents in excess of the sum of such established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess, such taxes to be returned and paid, in the manner provided in § 903, by the person selling such ticket."

Neither stockholders' boxes nor tickets to them were on sale at any ticket office, as all the parterre boxes were reserved by the lease for the stockholders. For this reason there was no regular or established price for parterre boxes. Nor was any other box exactly like them on sale. Each sale of a stockholders' box or tickets was made as the individual transaction of a particular stockholder, for a particular performance, and to a designated purchaser. The price paid varied widely for different performances. There was, above the parterre boxes, a tier of boxes, known as the grand tier. These boxes, which were on sale at the ticket office, also had seats for six persons, were uniform in size with the stockholders' boxes, and were otherwise similar. The ticket office price for grand tier boxes was $60 for each performance. The Commissioner of Internal Revenue, though sustaining the tax under paragraph 4, assessed the tax under paragraph 3, appar-

ently on the theory that Congress intended to tax sales of boxes like the plaintiff's; that, since there was no "regular established price or charge" for boxes exactly like hers and no such boxes were sold at the ticket office, the basis for taxation should be sought in the established price for the class of boxes actually on sale most like hers; that it should, therefore, be assumed that the box office price for the similar grand tier boxes was the "established price at the ticket offices" of parterre boxes; and that, with such price as a standard, the calculation involved in determining the item of "any tax imposed by paragraph (1)," and in assessing the supertax under paragraph (3) should be made.[2]

Miss Iselin contended that § 800(a) had no application to stockholders' boxes or tickets; that the section provided for a tax only on the tickets customarily sold at box offices, for which there is an established price there, and which are commonly sold at news stands, hotels and other places of business for higher prices; that it was the purpose of Congress to impose a small tax upon tickets sold at the ticket office, a moderate tax on those sold at a moderate advance over the ticket office price, and a large tax upon any resale of admission tickets if made at a price above a reasonable advance on the regular price, and also a large tax upon an original sale, if made at a price in excess of the regular or established price; that tickets issued under the peculiar circumstances stated, which were received by her as an incident of her investment in the lessor company and in return for obligations assumed by her as a stockholder to ensure performance of operas, were not within the purview of the section; that she was

---

[2] Paragraph (1) provides:

"A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place . . including admission by season ticket or subscription, to be paid by the person paying for such admission."

not taxable at all, since her tickets had not been sold at a box office and there was no established price for them; but that if taxable, it could be only under paragraph 5, under which she had without protest paid a tax on these tickets amounting to $242.[3]

The Court of Claims held that the tax was properly assessed under paragraph 3. It concluded that there was an "established price" for box tickets of this character, and that Miss Iselin herself had established the price, because, prior to the assessment to her of the tax here in question, she had paid without protest a tax assessed under paragraph 5, the amount of which the Government had determined by fixing $60 as the established price on which the tax so paid was calculated. The court held that the term "established price" did not imply a fixing of the price by the producing company or others having the general power of establishing the prices of tickets; that it was of no legal significance that plaintiff had in fact made no sale at the price fixed in the assessment, that she had actually sold the tickets for the different performances at widely varying prices, and that no sale had been made of such tickets at the ticket office.

The Government concedes that neither paragraph 1, paragraph 3, paragraph 4, paragraph 5, nor any other paragraph[4] of § 800(a), provides in terms for taxing a

[3] Paragraph (5) provides:

"In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement (in lieu of the tax imposed by paragraph (1)) a tax equivalent to 10 per centum of the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder, such tax to be paid by said lessee or holder; and . . ."

[4] The remaining paragraphs, so far as they impose a tax, are:

"(2) In case of persons (except . .) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, a tax of

privilege like that enjoyed by the plaintiff. It makes no contention here that the tax can be sustained under any paragraph of § 800(a) unless it be paragraph 3. It argues that Congress clearly intended to tax all sales of tickets; that there is in the section no indication of intention to exempt from the tax any sale of tickets or any resale at a profit; that the receipts here taxed are in character substantially similar to those specifically described in paragraph 3; that this general purpose of Congress should be given effect, so as to reach any case within the aim of the legislation; and that the Act should, therefore, be extended by construction to cover this case. It may be assumed that Congress did not purpose to exempt from taxation this class of tickets. But the Act contains no provision referring to tickets of the character here involved; and there is no general provision in the Act under which classes of tickets not enumerated are subjected to a tax. Congress undertook to accomplish its purpose by dealing specifically, and in some respects differently, with different classes of tickets and with tickets of any one class under different situations. The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax, were specified, preclude an extension of any provision by implication to any other subject. The statute was evidently drawn with care. Its language is plain and unam-

---

1 cent for each 10 cents or fraction thereof of the price so charged to such other persons for the same or similar accommodations to be paid by the person so admitted;

"(6) A tax of 1½ cents for each 10 cents or fraction thereof of the amount paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service, or merchandise; the amount paid for such admission to be deemed to be 20 per centum of the amount paid for refreshment, service, and merchandise; such tax to be paid by the person paying for such refreshment, service, or merchandise."

biguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. Compare *United States* v. *Weitzel,* 246 U. S. 533, 543; *Peoria & Pekin Union Ry. Co.* v. *United States,* 263 U. S. 528, 534, 535.

The Government calls attention to the fact that, as early as October 24, 1919, the Commissioner of Internal Revenue made the ruling pursuant to which the tax here in question was assessed; that on March 22, 1920, the Attorney General sustained that ruling; that the provisions here in question were re-enacted without substantial change in the Revenue Act of 1921, Act of November 23, 1921, § 800(a), c. 136, 42 Stat. 227, and the Revenue Act of 1924, Act of June 2, 1924, § 500(a), c. 234, 43 Stat. 253; and that the administrative practice adopted in 1919 has been steadfastly pursued. It suggests that these facts imply legislative recognition and approval of the executive construction of the statute. But the construction was neither uniform, general, nor long-continued; neither is the statute ambiguous. Such departmental construction cannot be given the force and effect of law. Compare *United States* v. *Falk & Brother,* 204 U. S. 143; *National Lead Co.* v. *United States,* 252 U. S. 140, 146.

Reversed.

MIDLAND LAND & IMPROVEMENT COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 105. Argued January 8, 1926.—Decided March 1, 1926.

Where a contractor, though not in default, abandons the work and refuses to complete the contract, the Government may re-let the unfinished work to another and apply retained percentages towards recoupment of additional expenses so incurred.

58 Ct. Cls. 671, affirmed.

APPEAL from a judgment of the Court of Claims in favor of the United States in a suit to recover the amount of moneys retained by the Government from payments made to the claimant on account of work done under a contract which the claimant afterwards abandoned.

Mr. Clarence C. Calhoun, for appellant.

Mr. Assistant Attorney General Galloway, with whom *Solicitor General Mitchell* was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On August 12, 1907, the Midland Land & Improvement Company agreed with the United States to dredge and dispose of 4,177,110 cubic yards of material in Newark Bay and Passaic River at 16¼ cents per yard, payable as the work progressed. The contract provided that the work should be prosecuted with "faithfulness and energy" and that the rate of work "will be at least 50,000 cubic yards per month." On September 24, 1912, the company stopped work, leaving much unperformed. In 1913, the Government declared the contract "annulled," and had the uncompleted part of the work done by another contractor, who was paid 26 7/10 cents per yard. See *United States* v. *O'Brien,* 220 U. S. 321, 328. The additional cost to the Government was $141,127.31. The Midland contract provided that the Government would reserve from each payment ten per cent. until half the work was completed, and that the amount reserved might be applied toward reimbursing it for any additional cost resulting from the contractor's default. The sum of $33,998.15, which had been reserved, was so applied. In 1917, the company brought this suit in the Court of Claims to recover the amount. Upon elaborate findings

of fact that court entered judgment for the United States. 58 Ct. Cls. 671. The case is here on appeal, taken May 15, 1924, under § 242 of the Judicial Code.

It is contended that at the time when the Government annulled the contract the amount of work done had exceeded the aggregate of the monthly requirements, and, hence, that the company was not in default. This question we have no occasion to consider. The correspondence between the parties and other facts found warranted the conclusion that the company had abandoned the work and refused to complete the contract. There was thus an anticipatory breach by the company which entitled the Government to relet the uncompleted part of the work. Compare *Smoot's Case,* 15 Wall. 36, 48; *Dingley* v. *Oler,* 117 U. S. 490, 503. It is also contended that the judgment is erroneous, because it was incumbent upon the Government to show that the uncompleted work done under the later contract did not materially depart from that described in the repudiated contract and that this was not shown. See *United States* v. *Axman,* 234 U. S. 36. The lower court concluded that the uncompleted part of the work was relet on the same specifications. Enough appears to show that the loss to the Government resulting from the plaintiff's repudiation of the contract far exceeded the amount reserved.

Affirmed.

ARMOUR & COMPANY *v.* FORT MORGAN STEAMSHIP COMPANY, LIMITED, ET AL.

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

No. 135. Argued January 14, 1926.—Decided March 1, 1926.

1. The liability of a ship as surety for damage resulting from her unseaworthiness to a shipment undertaken by her charterer, is re-

leased by a compromise between the shipper and charterer discharging the primary obligation of the latter. P. 257.

2. A chartered ship is not liable for damage to a shipment from unseaworthiness, when the unseaworthiness was caused by her conversion by the charterer and shipper to a use not authorized by the charter-party. P. 258.
3. The existence of admiralty jurisdiction can not be established conclusively by allegations in the libel but depends upon the facts as revealed in the case. P. 258.
4. Admiralty jurisdiction over a libel based on maritime contracts is not defeated by the bringing in of non-maritime contracts by way of defence. P. 259.

297 Fed. 813, affirmed.

CERTIORARI to review a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court dismissing the libel in a suit *in rem* brought by Armour and Company against the Steamship *Fort Morgan,* to collect damages to cargo alleged to have been due to the unseaworthiness of the ship. The Fort Morgan Steamship Company defended as claimant and impleaded the Central-American Cattle Company.

Mr. John D. Grace, with whom *Messrs. M. A. Grace* and *Edwin H. Grace* were on the brief, for petitioner.

Mr. Victor Leovy, with whom *Messrs. George Denegre* and *Henry H. Chaffe* were on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This libel was filed on January 25, 1918, by Armour & Company against the steamship Fort Morgan in the federal District Court for eastern Louisiana. Recovery was sought for loss and damage to a shipment of 420 head of cattle received by the ship at Port Limon, Costa Rica, for delivery at Jacksonville, Florida. The charge was that unseaworthiness had caused her to list so heavily as to compel return to port and abandonment of the voyage,

and that thereby half of the cattle were killed and the rest seriously injured. The libel alleged that the vessel was engaged as a common carrier between the ports named; that the cattle belonged to the libelant; that the bill of lading signed by the master was issued after delivery of the cattle on board. The copy of the bill of lading annexed to the complaint was signed "The Central American Cattle Co., Inc. By Thomas Johannesen, Master S. S. Fort Morgan." It recited: "Freight prepaid as per contract subject to Live Stock Agreement."

The owner made claim, impleaded the Cattle Company, and showed that the actual transaction was very different from that set forth in the libel. The shipment was an incident of a contract made October 3, 1917, by the Cattle Company with Armour & Company to procure in Central American countries about 25,000 head of cattle and sell them to Armour & Company; to assemble these from time to time at Port Limon for rest, inspection and loading; to charter and equip two steamers; and by means of these vessels to transport the cattle from Port Limon to Jacksonville and make delivery there. The contract provided further for attendance of an Armour representative at the inspection, grading, weighing and loading at Port Limon; that the vessels should carry only cattle for Armour & Company; and that a supercargo representing them should have supervision over the care of the cattle during the voyage. It fixed the price per pound to be paid for different grades of cattle and the freight per head; and provided that payment of the purchase price and the freight be made at New Orleans upon receipt of cable advice from the Armour representative.

The Fort Morgan had been chartered by the Cattle Company. She listed when she left Port Limon and had to return to port and abandon the voyage. But she had been seaworthy when delivered to the Cattle Company as charterer and was thereafter. The loss is claimed to

have resulted from the abuse of the ship by the Cattle Company, under the supervision of Armour & Company's supercargo. The charter party, entitled a "Time Charter—West India Fruit Trade," provided the privilege of and facilities for erecting a light fruit deck to carry a load of fruit. At Port Limon she was, without the consent of the owner, converted into a cattle ship. On the deck, authorized as a fruit deck, cattle pens were constructed and the heavy cattle were loaded. Freight had not been paid when the bill of lading issued; nor was it ever paid. No payment for the cattle was ever made under the contract. After the voyage was abandoned, the Cattle Company brought suit against the Armours at New Orleans. Later the parties entered into an agreement to settle their differences out of court. The compromise provided for a new trade arrangement; for holding on joint account the surviving 200 head of injured cattle then at Port Limon; and for the payment by the Armours of $19,000 upon performance by the Cattle Company of conditions set forth in the new agreement. Seven days later this libel was filed. There was no reservation of right under the bill of lading, or of any rights against the ship. Through investigations incident to the defense the owner first learned the facts.

The District Court dismissed the libel with costs, finding the facts substantially as stated above. The libelant had insisted that the ship was liable because the master had signed the bill of lading; and that, having been unseaworthy, she would have been liable even without such signing, since the master had received the cattle on board. The court held, in an unpublished opinion, that while the vessel would ordinarily be liable for any damage resulting from unseaworthiness, there could be no recovery in this case, because the unseaworthiness had resulted from the conversion of the vessel into a cattle ship; that this conversion involved a change in the charter party which

the master was without authority to make, *Gracie* v. *Palmer,* 8 Wheat. 605, 639; that the owner could not be subjected thereby to liability; that, morever, under the terms of the charter party, the owner would be entitled to be indemnified by the charterers for any judgment in favor of Armour & Company; that the compromise made by Armour & Company with knowledge that the vessel was chartered barred this suit; and that, in any event, recovery could not be had on the allegations of the libel.

The Circuit Court of Appeals affirmed the judgment of the District Court, 297 Fed. 813. It held that the bill of lading, although signed by the master, did not indicate a purpose to bind the ship; that this fact, taken in connection with the pre-existing contract, required the conclusion that the shipper's contract of affreightment was only with the Cattle Company; and that, under these circumstances, the ship could not be held. That court did not pass upon or discuss the grounds of decision adopted by the District Court. Nor did it refer to the well-established rule that the ship is ordinarily liable to the shipper upon an implied warranty of seaworthiness although a bill of lading signed by the charterer is given. See *The Carib Prince,* 170 U. S. 655, 660; *The Esrom,* 272 Fed. 266. A petition for a writ of certiorari sought on the ground that this basis of liability had been ignored was granted. 266 U. S. 597. The respondent had not opposed the granting of the writ; and it did not attempt here, in the brief and argument on the merits, to support the ground of decision stated by the Court of Appeals. It insisted that the judgment should be affirmed substantially for the reasons stated by the District Court.

The suit is brought to enforce the lien or privilege against the vessel which the maritime law gives as security for the contract of affreightment. The contract contained in the bill of lading was that of the Cattle Company. The bill of lading, which was signed by that com-

pany, is not to be treated as an isolated transaction. It referred to a contract between the parties. It was in fact given in part performance of the obligations assumed by the Cattle Company by the original contract to purchase the cattle, assemble them at Port Limon, sell them to the Armours, and transport them to Jacksonville. The compromise agreement substituted new rights and obligations for the obligations assumed by, and the liabilities incurred under, the original contract. Thereby, it discharged the primary liabilities of the Cattle Company to the Armours under both the original contract and the bill of lading to carry safely the cattle from Port Limon to Jacksonville. The discharge of this primary liability necessarily discharged also the liability of the ship as surety for the charterers' obligation set forth in the bill of lading. For this reason, and also because of the facts found by the District Court concerning the unauthorized conversion of the vessel into a cattle ship with the participation of the Armours, the libel was properly dismissed.

An objection to the jurisdiction taken by the owner both here and below must be noticed. On the face of the libel there was confessedly admiralty jurisdiction. The contention is that the facts developed later disclosed a transaction not wholly maritime, and that, for this reason, the libel should have been dismissed under the rule declared in *Grant* v. *Poillon,* 20 How. 162, 168–9. The District Court stated that it was "inclined to agree with the contention," but apparently did not pass definitely upon the matter. The Circuit Court of Appeals did not mention the objection. The decree entered was a general one dismissing the libel, as on the merits. If there was no jurisdiction, the decree should have recited that ground of dismissal, so as to be without prejudice.

The case is not of that class where the existence of jurisdiction is conclusively determined by the first pleading of him who institutes the suit. Compare *Clarke* v.

Mathewson, 12 Pet. 164; *Boston & Montana Mining Co.* v. *Montana Ore Purchasing Co.,* 188 U. S. 632. Jurisdiction in admiralty cannot be effectively acquired by concealing for a time the facts which establish that it does not exist. Compare *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.,* 258 U. S. 377, 382. We must, therefore, consider whether the facts developed after the filing of the libel preclude the exercise of admiralty jurisdiction. The bill of lading and the charter party are both maritime contracts and, hence, enforceable in a court of admiralty. *Morewood* v. *Enequist,* 23 How. 491; *The Eddy,* 5 Wall. 481, 494. The original contract to purchase, assemble, and sell the cattle, to charter vessels and therein transport the cattle to Jacksonville, and the agreement of compromise, are not maritime contracts. *The Richard Winslow,* 71 Fed. 426; *The Ada,* 250 Fed. 194. Both the original contract and the compromise agreement are referred to in order to establish the fact that the obligation for which the ship was surety had been discharged. The original contract was referred to, also, to explain the relation of the shipper named in the bill of lading to the charterer and in order to establish that by reason of their co-operation in converting the vessel into a cattle ship there was no liability. Such uses of non-maritime contracts to establish the absence of a valid maritime claim, or a defence as distinguished from a counterclaim [1] (see *The Eclipse,* 135 U. S. 599, 609), do not de-

[1] Also *Willard* v. *Dorr,* 3 Mason 161, 171; *Southwestern Transp. Co.* v. *Pittsburg Coal* Co., 42 Fed. 920; *United Transp. & Lighterage Co.* v. *New York & Baltimore Transp. Line,* 185 Fed. 386; *Anderson & Co.* v. *Susquehanna S. S. Co.,* 275 Fed. 989, 991, aff'd in 6 F. (2d) 858. Compare *The Electron,* 48 Fed. 689; *Meyer* v. *Pacific Mail S. S. Co.,* 58 Fed. 923. The application of Admiralty Rule 56 is limited by similar considerations of jurisdiction. *The Goyaz,* 281 Fed. 259; *Aktieselskabet Fido* v. *Lloyd Braziliero,* 283 Fed. 62; *Reichert Towing Line* v. *Long Island Machine & Marine Const. Co.,* 287 Fed. 269. See also *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 123.

prive the admiralty court of jurisdiction. No party to this suit sought to enforce any right under either of the non-maritime contracts.

Affirmed.

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

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* WESTINGHOUSE, CHURCH, KERR & CO., INC.

MELLON, DIRECTOR GENERAL OF RAILROADS, *v.* WESTINGHOUSE, CHURCH, KERR & CO., INC.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Nos. 170 and 171. Argued January 25, 1926.—Decided March 1, 1926.

1. Where spotting service is included in the line-haul tariff charge, the carrier can not charge extra for it, even when done by assigning a special engine and crew for handling the cars on a shipper's industrial tracks to expedite delivery at a time of freight congestion at the terminal. P. 265.
2. A contract for such special service *held* void, and the extra charge under it uncollectible, both because such charge was illegal and because such special service was an undue preference. P. 266.

138 Va. 647, affirmed.

CERTIORARI to judgments of the Supreme Court of Appeals of Virginia, affirming judgments rendered for the respondents in two actions brought, the one by the Railway Company, the other by the Director General of Railroads, to recover special charges for the use of an engine and crew.

Messrs. Sherlock Bronson and *David H. Leake,* with whom *Messrs. Walter Leake* and *A. A. McLaughlin* were on the brief, for petitioners.

No obligation rests upon a carrier, under the "line-haul" tariff rate, to furnish switching and "spotting" service solely for the convenience of a shipper. Under the "line-haul" tariff rate for carload shipments, and what is spoken of as the "standard terminal rule," filed with the Interstate Commerce Commission, the shipper is ordinarily entitled to one placement of a car, free of further charge, upon industrial sidings or spur tracks, such as involved here. *The Los Angeles Switching Case,* 234 U. S. 294; 18 I. C. C. 310. See 57 I. C. C. 677; *Pittsburgh Forge & Iron Co.* v. *Director General,* 59 I C. C. 29; *Downey Shipbuilding Corp.* v. *S. F. R. T. Ry.,* 60 I. C. C. 543; *Merchants' Shipbuilding Corp.* v. *P. R. R. Co.,* 61 I. C. C. 214.

The engine and crew, after the making of the contract, were under the exclusive control of the respondent and conformable to its convenience at all times while the contract was in force. By this arrangement respondent was enabled to get better and more expeditious service than would otherwise have been possible under existing conditions. The Supreme Court of Appeals, in declaring the contract void for supposed want of consideration, necessarily held that respondent was entitled, under the tariffs, to the exclusive use of an engine and crew—which was the precise service it received. This holding we believe to be untenable and certainly at variance with the rulings of the Interstate Commerce Commission.

The obligation to place or "spot" cars, under the "line-haul" tariff rate, does not contemplate the furnishing of special facilities to a shipper to meet abnormal and unprecedented conditions. The Supreme Court of Appeals, in its decision, evidently overlooked the consideration that, while it is the duty of a carrier under its "line-haul" rate to once "spot" a car for a shipper, this duty is subject to the same duty which is owed to all other shippers at the same time, and same place, and

under the same conditions; and that, consequently, it is not the carrier's duty to furnish special facilities to "spot" cars for a special shipper. Such a shipper, so far as common carrier duty is concerned, must bide his time along with all other shippers, and wait for the placement of his cars in regular course. Moreover, since a common carrier is only under obligation to furnish facilities adequate for normal conditions, if abnormal, and particularly if unprecedented, conditions exist, such as undoubtedly prevailed in the present case, the carrier is under no further duty than to use such facilities as it has at hand with such reasonable dispatch as these facilities will afford, and this, too, with due regard to the equal rights of all the shippers respectively. *P. R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121. The effect of war conditions upon the obligations of carriers was considered by the Interstate Commerce Commission in *Waste Merchants Assoc.* v. *Director General*, 57 I. C. C. 686.

The contract did not constitute an undue preference, or an illegal expedited service. The contract, being one for a mere rental of equipment, was not a common-carrier service, and was in no wise illegal under the Interstate Commerce Act or otherwise. 4 Elliott on Railroads, 3d ed., § 2101, p. 463.

If the carrier "was under no statutory or common law obligation to render the special service, there were no reasons of public policy which forbade the rendition of such service upon such terms as the parties might stipulate." Mr. Justice Lurton in *Clough* v. *Grand Central R. Co.* 155 Fed. 81; *Santa Fe, etc. R. Co.* v. *Grant Bros. Cons. Co.*, 228 U. S. 177; *Chicago, etc. R. Co.* v. *Maucher*, 248 U. S. 359. Cf. *Davis* v. *Cornwell*, 264 U. S. 560.

That the rental or letting out of equipment by carriers, for a special service as, for instance, to a circus, is not within ordinary common-carrier duties, is recognized in *Chicago, etc. R. Co.* v. *Maucher, supra*, and has been

so held in many decisions of state and federal courts. *Clough* v. *Grand Trunk R. Co., supra; Robertson* v. *Old Colony R. Co.,* 156 Mass. 525; *Coup* v. *Wabash, etc. R. Co.,* 56 Mich. 111; *Forepaugh* v. *Del., etc. R. Co.,* 128 Pa. 217; *Chicago, etc. R. Co.* v. *Wallace,* 66 Fed. 506; *Wilson* v. *Atlantic, etc. R. Co.,* 129 Fed. 774; *Yazoo & M. V. R. Co.* v. *Crawford,* 107 Miss. 355; *Sager* v. *Northern Pac. R. Co.,* 166 Fed. 526.

If the question of a preferential or expedited service is here involved, it is believed the failure to exact payment for the engine and crew will constitute a preference, since respondent is thereby given a preference over other shippers during the term of this contract of a service valued by the parties themselves at the sum of $13,298.93. *C. & A. R. Co.* v. *Kirby,* 225 U. S. 155; *Davis* v. *Cornwell, supra.* Preferences and discriminations, in violation of the Acts of Congress, may as well result from acts not within common-carrier duties or transportation service, as otherwise. *New Haven R. Co.* v. *I. C. C.,* 200 U. S. 361; *United States* v. *Union Stock, etc., Co.,* 226 U. S. 307.

The respondent was constructing embarkation facilities at Newport News for the Government, in war time, on a contract for emergency work. The contract upon which the suits are premised was one in which the Government was vitally interested. Certain it is that it concerned the "military traffic." It follows, then, that the shipments handled by the leased engine were shipments for the United States Government, of war materials in time of a national emergency.

Section 6 of the Interstate Commerce Act, August 29, 1916, 39 Stat. 604; also § 3, par. (1).

Mr. Wirt T. Marks, Jr., with whom *Messrs. Henry W. Anderson* and *Thomas B. Gay* were on the brief, for respondent.

The facilities furnished and services performed were a part of "transportation" as defined by the Interstate Commerce Act. § 1, par. (2); Act of June 18, 1910, c. 309, § 7, 39 Stat. 544; *Cleveland, etc., Ry. Co.* v. *Dettlebach,* 239 U. S. 588; *Southern Ry. Co.* v. *Reid,* 222 U. S. 424; *Southern Ry. Co.* v. *Prescott,* 240 U. S. 632; *P. R. R. Co.* v. *Lowman Shaft Coal Co.,* 242 U. S. 120; *United States* v. *Texas & Pacific R. Co.,* 185 Fed. 820.

The facilities furnished and services performed being "transportation" facilities and services, the petitioners violated §§ 3 and 6 of the Interstate Commerce Act and § 1 of the Elkins Act, if the facilities and services were in addition to those provided for in the lawfully filed tariffs. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *Southern Ry. Co.* v. *Reid,* 222 U. S. 424; *Davis* v. *Cornwell,* 264 U. S. 560.

The facilities furnished and the services performed being "transportation" facilities and services, the petitioners violated § 1, par. (3), § 2, and § 6, par. (7) of the Interstate Commerce Act, if the facilities and services were not in addition to those provided for in the lawfully filed tariffs. *Louisville & Nashville R. Co.* v. *Maxwell,* 237 U. S. 94; *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467; *Chicago, etc., Ry. Co.* v. *United States,* 219 U. S. 486; *United States* v. *Union, etc., Transit Co. of Chicago,* 226 U. S. 286; *United States* v. *Tozer,* 37 Fed. 635; *Lewis, Leonhardt & Co.* v. *Southern Ry. Co.,* 217 Fed. 321.

The alleged agreement, being violative of the Interstate Commerce Act and the Elkins Act, and the corresponding provisions of the statutes of the State of Virginia, is void and no action can be maintained thereon. *Cleveland, etc., Ry. Co.* v. *Hirsch,* 204 Fed. 849; *Central R. R. Co. of N. J.* v. *U. S. Pipe Line Co.,* 290 Fed. 983; *Lewis, Leonhardt & Co.* v. *Southern Ry. Co.,* 217 Fed. 321.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These actions were brought in a state court of Virginia to recover amounts alleged to be due for the use of an engine and crew rented or assigned by the Chesapeake & Ohio Railway Company to Westinghouse, Church, Kerr & Co., Inc., under a contract made in September, 1917. The latter corporation was engaged in construction work for the Government on premises at Newport News connected by industrial tracks with the Railway's main line. Owing to war conditions, there was then serious congestion of traffic at Newport News, and the Railway failed duly to perform spotting service for the company. To remedy this condition the engine and crew were assigned to the exclusive use of its traffic, payment to be made therefor as prescribed in the contract. The use continued from that date until April, 1918. The Railway sued for the period prior to December 28, 1917; the Director General for that later. The defences were want of consideration and that the contract was void because it violated the Interstate Commerce Act and a similar law of the State. A judgment for the defendant, entered in each case by the trial court, was affirmed by the Supreme Court of Appeals on the ground of want of consideration. 138 Va. 647. This Court granted writs of certiorari. 266 U. S. 598. No question under the state law is before us.

The service of spotting cars was included in the line haul charge under both interstate and state tariffs. The Railway contends that under the tariffs no obligation rested upon the carrier either to furnish spotting service solely for the convenience of a shipper or to furnish him special facilities to meet abnormal and unprecedented conditions; that the contract was, therefore, not without consideration; and that, being for rental of equipment, it was not for a common carrier service and, hence, a contract therefor was legal under the Interstate Commerce

Act, although no tariff provided for the charges. The service by special engine and crew contracted for and given was not spotting solely for the convenience of the shipper. It was the spotting service covered by the tariff. Compare *Car Spotting Charges,* 34 I. C. C. 609; *Downey Shipbuilding Corp.* v. *Staten Island Rapid Transit Ry. Co.,* 60 I. C. C. 543. It is true that abnormal conditions may relieve a carrier from liability for failure to perform the usual transportation services, but they do not justify an extra charge for performing them. The carrier is here seeking compensation in excess of the tariff rate for having performed a service covered by the tariff. This is expressly prohibited by the Interstate Commerce Act, Act of February 4, 1887, c. 104, § 6(7), 24 Stat. 379, 381, as amended. A contract to pay this additional amount is both without consideration and illegal. It is no answer that by virtue of the contract the shipper secured the assurance of due performance of a transportation service which otherwise might not have been promptly rendered; that ordinarily rental of engine and crew is not a common carrier service; and that such rental may be charged without filing a tariff providing therefor. Compare *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher,* 248 U. S. 359. To so assure performance to a shipper was an undue preference. Hence the contract would be equally void for illegality on this ground. *Davis* v. *Cornwell,* 264 U. S. 560.

Affirmed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* GULF, COLORADO & SANTA FE RAILWAY COMPANY.

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

No. 417. Argued December 2, 1925.—Decided March 1, 1926.

1. In a suit, under par. 18 of § 402, Transportation Act, 1920, to enjoin the construction of railway tracks as constituting an exten-

sion for which a certificate of public convenience and necessity must first be obtained under par. 18 from the Interstate Commerce Commission, the District Court has jurisdiction to decide the issue whether the track is an extension (rather than an industrial track excepted by par. 22) without waiting for that question to be presented to the Commission. P. 271.

2. When applied to for a certificate, (pars. 19–20,) the Commission may pass incidentally upon the question whether the proposed extension is in fact such; for, if it be only an industrial track (par. 22,) the Commission must decline, on that ground, to issue a certificate. P. 272.
3. A carrier desiring to construct new tracks does not necessarily admit, by applying for a certificate, that they constitute an extension, but may submit, and secure a determination of, the question, without waiving any right. P. 273.
4. A party in interest, though entitled to appear and resist an application if one be made, can not initiate proceedings before the Commission against the project, but is afforded an absolute and complete remedy by injunction, under par. 20. *Id.*
5. Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist. P. 274.
6. On the facts described in the opinion—*held* that a proposed line would be an extension, and not a spur or industrial track. *Id.*
7. In determining what is an extension, the purpose of the Act to develop and maintain an adequate railway system, and therein to curb wasteful competition and the building of unnecessary lines, is the important guide. P. 277.
8. "Spur, industrial, team, switching or side tracks, . . . located wholly within one State," (par. 22,) are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who, being within the same territory and similarly situated, are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. P. 278.
9. But if the purpose and effect of the new trackage is to extend, substantially, the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of par. 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. P. 278.

10. The plaintiff, which, immediately upon learning of defendant's intention to extend its line without obtaining a certificate under § 402, par. 18 of the Transportation Act, protested to the federal and state commissions and began suit for injunction before the construction contract was made—*held* not guilty of laches. P. 279.

4 Fed. (2d) 904, reversed.

APPEAL from a decree of the Circuit Court of Appeals reversing a decree of the District Court (298 Fed. 488) enjoining the construction and operation of a railway extension. See also 266 U. S. 588.

Messrs. T. D. Gresham and *Thomas J. Freeman,* for appellant.

Mr. J. W. Terry, with whom *Messrs. Homer W. Davis, Gardiner Lathrop,* and *Thomas J. Norton* were on the brief, for appellee.

The rulings or definitions of the Interstate Commerce Commission should have controlling weight.

The testimony of the witnesses as to what constituted a spur or industrial track prior to 1920 should be considered.

It is not the purpose of the Transportation Act of 1920, amending the Interstate Commerce Act, to destroy competition between competing systems.

The construction of an extension of a railroad without a certificate of authority by the Interstate Commerce Commission is prohibited by the Act. In the Interstate Commerce Commission there clearly is vested the primary jurisdiction to determine whether or not a proposed extension is compatible with public interest. Surely it was the intention of Congress also to vest in the Commission the primary power to determine the corollary and subordinate question as to whether or not any proposed track, the construction of which is undertaken without its authority, is an extension and, if an extension, to make an order requiring the carrier to cease and desist from

completing the project unless upon, application, a certificate of convenience and necessity is obtained. Plainly the construction or operation of a track confessedly an extension may be enjoined; but when in any such injunction suit the question arises as to whether or not the track under construction is a spur track or an extension, then the burden is upon the plaintiff to show that such track is an extension; and that burden may only be sustained by introducing in evidence a finding of the Interstate Commerce Commission to that effect. Otherwise, the court loses jurisdiction.

The Texas and Pacific Company could have filed a petition and it would have been the duty of the Commission to investigate it. If the Commission found that the work entered upon was an extension of the defendant's railroad, a finding to that effect would have been made. Thereupon the Commission or any state commission, or party in interest, including the Texas and Pacific Company, could have brought a suit to restrain the construction or operation (in interstate commerce) of the extension.

Considered and construed alone, the other provisions of the Act authorizing suits for damages by the shipper or other injured party, or suits for mandamus, would have given the courts jurisdiction of such suits without any resort to the Interstate Commerce Commission. But, notwithstanding such apparent authority, this Court construed those provisions with reference to other provisions, and the general design, of the Act, to secure uniformity in its application and remedies. *T. & P.* v. *American Tie Co.,* 234 U. S. 138; *T. & P.* v. *Abilene Oil Co.,* 204 U. S. 426; *Loomis* v. *Lehigh, etc., Ry. Co.,* 240 U. S. 43; *Morrisdale* v. *P. R. R. Co.,* 230 U. S. 304; *Robinson* v. *B. & O. R. R.,* 222 U. S. 506; *Northern Pacific* v. *Solum,* 247 U. S. 477; *Director General* v. *Viscose,* 254 U. S. 498;

United States v. *Pacific & Arctic Co.*, 228 U. S. 87; *Houston, etc., Ry. Co.* v. *United States*, 234 U. S. 342. So, upon principle, when Congress adopted the general language at the end of par. 20, § 1, authorizing suit, it must be presumed to have intended that it be construed in the same way as other general language in the Act authorizing suit had been construed. *Great Nor. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 291; *W. & A. R. R.* v. *Georgia Pub. Ser. Comm.*, 267 U. S. 497.

Only appellant could appropriately have invoked the jurisdiction of the Commission.

Mr. Justice Brandeis delivered the opinion of the Court.

Transportation Act, 1920, c. 91, § 402, 41 Stat. 456, 477–8, provides, Paragraph (18): ". . . no carrier by railroad subject to this Act shall undertake the extension of its line of railroad . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such extended line . . ." Paragraph (22): "The authority of the Commission [so] conferred . . . shall not extend to the construction . . . of spur, industrial, team, switching or side tracks, . . . to be located wholly within one State . . ." Paragraph (20): "Any construction . . . contrary to the provisions . . . of paragraph (18) . . . may be enjoined by any court of competent jurisdiction at the suit of . . . any party in interest."

This suit was brought by the Texas & Pacific Railway Company [1] in the federal district court for southern Texas

[1] The suit was begun by Lancaster and Wallace, receivers of the corporation. The receivership terminated before entry of the final decree in the District Court; and the corporation was substituted as plaintiff.

to enjoin the Gulf, Colorado & Santa Fe Railway Company from constructing wholly within that State projected trackage, sometimes called the Hale-Cement Line. The bill alleges that the line is, within the meaning of the above provision, an extension of the defendant's railroad; that the prescribed certificate from the Interstate Commerce Commission has not been secured; and that operation of the line will result in irreparable injury to the plaintiff, because it will divert to the Santa Fe traffic which would otherwise be enjoyed by the Texas & Pacific. By answer the defendant challenged the jurisdiction of the court, insisted that the line is merely an industrial track, and asserted that the plaintiff is barred by laches. After a full hearing, the District Court entered a final decree enjoining the construction or operation of the line unless and until the prescribed certificate should have been obtained. 298 Fed. 488. The case was first brought to this Court by the Santa Fe on constitutional grounds by direct appeal under § 238 of the Judicial Code. Because no substantial constitutional question was presented, this Court transferred it to the Circuit Court of Appeals for the Fifth Circuit, 266 U. S. 588. There the decree of the District Court was reversed. 4 Fed. (2d) 904. The second appeal to this Court was then taken by the Texas & Pacific under § 241 of the Judicial Code; and the case was docketed here on May 5, 1925. The three objections to granting relief which had been set up in the answer were renewed here.

First. The Santa Fe contends that the decree of the District Court was properly reversed, because the Texas & Pacific had not secured a determination by the Interstate Commerce Commission that the projected line constitutes an extension. It is admitted that where projected tracks would confessedly constitute an extension and no certificate has been obtained, a court may enjoin construction, although such prior determination by the Commission

was not made or sought. The claim is that where the defendant asserts that the proposed tracks do not constitute an extension, the court must, under the doctrine of *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, and *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483, either dismiss the bill because it is without jurisdiction, or postpone action because it is without power to proceed, unless and until a determination by the Commission of the controverted question shall have been made. It is argued that the issue whether tracks constitute an extension presents an administrative question; that the Commission has power to decide it, because Congress, by conferring authority to determine whether an extension is compatible with the public interest, has by implication conferred authority to determine also the subordinate question whether a proposed track constitutes an extension; that if the Commission finds the track to be an extension, it may under its general powers make an order requiring the carrier to cease and desist from construction and operation unless and until the prescribed certificate is obtained; and that, as the Commission has such primary jurisdiction, its aid must have been invoked before a court can grant relief.

To this argument the provisions of the Act afford a conclusive answer. Paragraph 18 prohibits construction of an extension without obtaining the certificate. Paragraphs 19 and 20 provide that a carrier desiring to construct one may apply for the certificate and prescribe the method of proceeding. Whenever such an application is made, the Commission may pass incidentally upon the question whether what is called an extension is in fact such;[2] for, if it proves to be only an industrial track, the Commission must decline, on that ground, to issue a cer-

[2] See *Application of Atlanta & St. Andrews Bay Ry. Co.*, 71 I. C. C. 784, 792; *Operation of lines by Coal River & Eastern Ry. Co.* 94 I. C. C. 389, 393.

tificate.[3] A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track.[4] But a party in interest who is opposed to the construction is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph 20 affords him the only remedy. That remedy is both affirmative and complete.

The function of the court upon an application for an injunction under paragraph 20 is a very different one from that exercised by the Commission when, having taken jurisdiction under paragraphs 19 and 20, it grants or refuses a certificate. The function confided in the Commission is comparable to that involved in a determination of the propriety or application of a rate, rule or practice. It is the exercise of administrative judgment. Where the matter is of that character, no justiciable question arises ordinarily until the Commission has acted. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 295. The function of the Court upon the application for an injunction is to construe a statutory provision and apply the provision as construed to the facts. The prohibition of paragraph 18 is absolute. If the proposed track is an extension and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction. The is-

[3] See *Abandonment of line of Missouri Pacific R. R.*, 76 I. C. C. 635.

[4] See *Construction of line by Delaware, Lackawanna & Western R. R.*, 94 I. C. C. 541.

sue presented to the court by a denial that the proposed trackage is an extension does not differ in its nature from that raised when the denial is directed to the allegation that the defendant is an interstate carrier. Compare *Smyth* v. *Asphalt Belt Ry. Co.*, 267 U. S. 326, 328–9. If the facts are agreed, the question is one of law. If they are not agreed, the court must find them. In the case at bar, the District Court, having jurisdiction generally of the parties and of the subject matter, was called upon to determine whether an allegation in the bill, essential to the cause of action, was established. This, the court clearly had power to do. Moreover, even if the question presented were, as contended, properly one of jurisdiction, the objection urged could not prevail. Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist.

Second. The facts on which the Santa Fe contends that the proposed line is merely an industrial track are undisputed. Dallas is a large interior city. The Texas & Pacific extends through it and beyond in a general westerly direction; the Santa Fe in a general southwesterly direction. Both lines have been operated for many years. Along the Texas & Pacific, commencing at a point 2½ miles west of the city and extending westward about 2½ miles farther, lies territory known as the Industrial District. To its development the facilities and services furnished by the Texas & Pacific have been essential. In it are cement works, oil refineries and metal works. The traffic moves in carload lots. All the industries are either located on its right of way or connect with it by spurs. To serve the plants that carrier has long switches and assembling tracks. No other railroad has any direct connection with any of these industries. Their traffic from or destined to the Santa Fe or other lines is interchanged by the Texas & Pacific at points on its line distant from these industries from 12 to 30 miles. Thus, the Texas

& Pacific receives either the whole or a part of the revenue on all the traffic of the district—the richest freight-producing territory in all Texas.

The Santa Fe has no branch line running near to, or in the direction of, any part of the Industrial District. Hale is a station on its road. The proposed line is to begin at Hale, where storage and assembling yards are to be located, and is to end in the Industrial District, near the Texas & Pacific right of way. The air-line distance from Hale to the proposed terminus is only 3¼ miles; but the length of line is 7½ miles, besides spurs, sidings and other subsidiary tracks. The greater length is necessitated in part by topographical conditions. These are such that the cost of construction is estimated at $510,000. There is to be one under crossing, where the new line intersects an interurban line, another where it intersects a highway. There are to be two small trestles and numerous fills and cuts. In some respects the character of the construction is that commonly used for industrial tracks. No intention appeared to ballast the track save in stretches where the material was bad. Second hand 75-pound rails, lighter than those commonly used by the Santa Fe, are to be laid. But these are heavier than those used on some of its branches. The ruling grade of the Hale-Cement Line is that prevailing on the Santa Fe branch line running out of Dallas to Paris and Cleburne with which it is to connect. The right of way averages 100 feet; and it is to be fenced on both sides for its full length.

No industry is now located along the proposed line between Hale and the Industrial District. The territory adjacent to that part of the line does not now produce any freight tonnage. The Hale-Cement Line was projected by the Santa Fe in order to reach on its own rails the six plants within the district which lie south of the Texas & Pacific Railroad. These furnish 80 per cent. of the traffic of the District. If enabled thus to tap it direct, the Santa

Fe can secure a part of the strictly competitive business, and can eliminate the division of rates with the Texas & Pacific on all freight of the District received from or destined to the Santa Fe lines, which is now necessarily handled as inter-line traffic. The freight revenues which the Santa Fe would thus obtain and divert from the Texas & Pacific are estimated at more than $500,000 a year. No plant now served by the Texas & Pacific lies directly on the proposed line. They are so located that the Santa Fe must, in order to reach them, build in each case a spur track to the plant from the Hale-Cement main line, although it describes a curve, due in part to the desire to connect with each of these plants. The Santa Fe must, in order adequately to perform the transportation service, also build near the industries two side tracks, one 1,200 feet, the other 1,500 feet in length.

The Hale-Cement Line is clearly not a spur in the sense in which that word is commonly used. It presents some of the characteristics of a branch; and a branch is clearly an extension of a railroad within the meaning of paragraph 18. The Santa Fe contends that it constitutes an industrial track within the meaning of paragraph 22, because the line is to be constructed solely for industrial purposes. It shows that, according to the plans, the general public is not to be served; that, except at Hale, there will be no public station for the receipt or delivery of freight; no telegraph service; no express, mail or passenger traffic; that the transportation between Hale and the industries will be confined to carload freight; that it will be conducted as a switching service for which no charge will be made; and that the Hale rate will apply to all traffic on the projected line. It argues that a branch is a line serving one or more stations beyond the point of junction with the main line or another branch, and to or from which stations regular tariff rates are in effect; that an industrial track is a line constructed to

serve or reach industries over which regular scheduled passenger or freight train service is not performed and for transportation over which only a switching charge, if any, is made; and that neither the length of the line, nor the character of the construction, can convert into a branch a line of the nature described.

In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in forms long prescribed for accounting purposes. It points also to uses made of these terms in other connections by courts,[5] by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The*

[5] Compare *Los Angeles Switching Case*, 234 U. S. 294; *Detroit & Mackinac Ry. Co.* v. *Michigan Railroad Commission*, 240 U. S. 564; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic & Commerce Association*, 247 U. S. 490, 501.

Chicago Junction Case, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331. The Act sought, among other things, to avert such losses.

When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, "spur, industrial, team, switching or side tracks . . . to be located wholly within one State." Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiary fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal commission issues its certificate that public necessity and convenience require its

construction. The Hale-Cement Line is clearly an extension within this rule.

Third. The Santa Fe contends that the judgment denying relief was proper also because the Texas & Pacific had been guilty of laches. This defense was not passed upon by the Court of Appeals. The District Court overruled it as unsupported in fact, and also on the ground that a plaintiff suing under paragraph 20 represents the public as well as private interests and that, hence, a plaintiff's laches cannot operate as a bar. We need not determine whether the latter ground is sound; for the facts do not warrant a finding of laches. The Santa Fe gave no publicity to its purpose. It had purchased some of the right of way before the Texas & Pacific learned that the line was planned. The latter protested immediately to both the state and the federal commissions and insisted that the proposed line constituted an extension. The Santa Fe, having been advised by the Interstate Commerce Commission of the Texas & Pacific protest, had some correspondence with the Director of Finance. We need not discuss its import. The Santa Fe did not file an application for a certificate of public necessity and convenience. It continued its purchase of the right of way despite the Texas & Pacific protests. It made the contract for construction of the line after the commencement of the suit. It proceeded with the construction until stopped by the injunction. It acted at its peril.

In its appeal to the Circuit Court of Appeals the Santa Fe assigned as error that the decree entered was too broad or was indefinite. If the objection is well founded, the error may be cured by application to the District Court.

Reversed.

MR. JUSTICE MCREYNOLDS dissents on the ground that the question should have been first submitted to the Interstate Commerce Commission.

MARION & RYE VALLEY RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 315. Argued January 6, 1926.—Decided March 1, 1926.

1. Where the taking (if any) of a railroad, under the Federal Control Act, was purely technical, resulting from the generality of the President's proclamation, etc., and the Director General did not in fact take over its possession or control or deal with it specifically in any way, so that it continued to be operated by the owner company as theretofore, without interference, the company could not maintain an action for "just compensation" under § 3 of the Act, since nothing of value was taken from it, it was subjected to no pecuniary loss by the Government, and nominal damages are not recoverable in the Court of Claims. P. 282.
2. The Federal Control Act, in authorizing the President to agree with any carrier of whose railroad he took possession and control that it should "receive as just compensation an annual sum . . . for each year, and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ending June thirtieth, nineteen hundred and seventeen" (§ 1), did not establish a rule of compensation applicable when there was no agreement, but relegated the carrier in that case to proceedings for the ascertainment of just compensation (§ 3), in which the burden was on the carrier of proving the value of the use taken from it, or the damage suffered by it, under rules ordinarily applicable to takings by eminent domain. P. 283.
3. Although § 3 of the Federal Control Act declares that, in such proceedings, the report of a board of referees appointed by the Interstate Commerce Commission shall be *prima facie* evidence of the amount of just compensation and the facts stated therein, a report which by its face, and by the findings of the Court of Claims, is shown to have been based upon mere assumptions, without evidence of loss or damage, has no evidential value. P. 285.

60 Ct. Cls. 230, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for compensation for the alleged taking of the petitioner's short line railway.

Messrs. Ben B. Cain and *Milton C. Elliott,* for appellant.

Mr. *A. A. McLaughlin,* Solicitor of the United States Railroad Administration, with whom *Solicitor General Mitchell* and *Mr. Sidney F. Andrews* were on the brief, for the United States.

Messrs. Victor A. Remy and *Milton C. Elliott* filed briefs as *amici curiae,* by special leave of Court.

Mr. Justice Brandeis delivered the opinion of the Court.

The Marion & Rye Valley Railway Company, a short-line railroad, brought this suit in the Court of Claims to recover $14,425.94 as compensation for the alleged taking possession and use by the United States of its railroad during the period beginning December 28, 1917 and ending June 29, 1918. That sum is the amount which, on September 30, 1922, a board of referees appointed by the Interstate Commerce Commission pursuant to § 3 of the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451, 454, found to be just. The application for the appointment of the board was made after the Director General had refused to pay the company any compensation.[1] The suit was begun after he had refused to accept the report as a basis for settlement. The case was heard upon a stipulation of the facts which the court adopted as its findings. The Government denied liability. It contended that there was not a legal taking, because the President did

[1] The board entered upon the hearing and made its report despite objection by the Director General that it was without jurisdiction, because the proceeding was commenced after Transportation Act, 1920, February 28, c. 91, 41 Stat. 456, 460, had provided by § 204 another and exclusive remedy for carriers which, like the plaintiff, had operated their own railroads throughout the period for which compensation was claimed.

not take actual possession of the railroad, did not operate it, and did not otherwise exercise control. It contended, also, that, even if there was a technical taking of possession, the plaintiff was not entitled to any compensation, because it suffered no pecuniary loss. Both contentions were sustained by the court; and judgment was entered for the defendant on January 26, 1925, 60 Ct. Cls. 230. The appeal was duly taken under § 242 of the Judicial Code. We have no occasion to determine whether in law the President took possession and assumed control of the Marion & Rye Valley Railway. For even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss. Nominal damages are not recoverable in the Court of Claims. *Grant* v. *United States,* 7 Wall. 331, 338.

Power to take possession and assume control of any railroad, on account of the war emergency, had been conferred upon the President by Act of August 29, 1916, c. 418, 39 Stat. 619, 645. See *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 142–147; *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554, 556–7; *St. Louis, Kennett & Southeastern R. R. Co.* v. *United States,* 267 U. S. 346. The President issued, on December 26, 1917, a Proclamation which recited that "[I] do hereby . . . take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation . . . consisting of railroads, . . . "; and a Director General was appointed. 40 Stat. 1733. Some general notices or orders issued by the Director General were received by the Marion & Rye Railway Company shortly after the issue of the Proclamation; but no order dealing specifically with that railroad was given by him. He did not at any time take over the actual possession or operation of the rail-

road; did not at any time give any specific direction as to its management or operation; and did not at any time interfere in any way with its conduct or activities. The company retained possession and continued in the operation of its railroad throughout the period in question. The railroad was operated during the period exactly as it had been before, without change in the manner, method or purpose of operation. The railroad did not serve any military camp; nor did it transport troops or munitions. The character of the traffic remained the same. Nothing appears to have been done by the Director General which could have affected the volume or profitableness of the traffic or have increased the requirements for maintenance or depreciation; and apparently it retained its earnings; expended the same as it saw fit; and, without accounting to the Government, devoted the net operating income to the company's use.

The company urges that the claim sought to be enforced rests upon a statutory right to the just compensation specifically defined in § 1 of the Federal Control Act; that the compensation there prescribed is for the rental value at the rate of the average annual railway operating income for the three years ended June 30, 1917; that by the taking, although technical, the Government agreed to pay the compensation defined in the statute; that the function of the board of referees, acting under the statute, was to find that sum "as nearly as may be," and that by its report it had done so. It is true that in this case the claim is founded upon "a law of Congress"; not upon a "contract, express or implied." Judicial Code, § 145, Par. First. Recovery can not be sought upon the contract implied in fact which, in view of the constitutional obligation justly to compensate for property taken by eminent domain, ordinarily arises on a taking of private property by the Government pursuant to law, where no provision is made by statute for ascertaining the amount

of compensation or for enforcing payment. Compare *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645; 124 U. S. 581; *Tempel* v. *United States*, 248 U. S. 121, 129. Here, both the method of determining the amount and the means of enforcing payment are prescribed by statute. Compare *William Cramp & Sons, etc. Co.* v. *International Curtis Marine Turbine Co.*, 246 U. S. 28. But the question remains what is the amount recoverable. Did the Federal Control Act merely confer authority upon the President to enter into an agreement to pay as much as the so-called "standard return," or did it also direct him, if such an agreement was not reached, to make payment on the basis of the "standard return"?

Congress has power to recognize moral obligations. *United States* v. *Realty Co.*, 163 U. S. 427, 441–443. Hence, it could have provided for payment on the basis of the standard return, even where there was no damage according to the rules of law ordinarily applicable to takings by eminent domain. Congress did not, however, direct the President to make such payment. It merely authorized him to agree with any carrier of whose railroad he took possession and control that it should "receive as just compensation an annual sum . . for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen." The provision did not establish a rule of compensation. The President was not permitted to agree to pay more, but he was left free to refuse to pay that sum. The carrier was left free to reject any offer that might be made. Where no agreement was reached, the carrier was relegated by § 3 to proceedings for ascertaining the amount of just compensation. The question thus becomes one of determining the "just compensation" for the use taken or damage done. If Congress had intended

that the " standard return " should be taken as the measure of just compensation, in any event, there would have been no occasion for a hearing before a board of referees. The amount so payable could have been determined by calculation from the " average " annual railway operating income which, by § 1 of the Federal Control Act, p. 452, the Interstate Commerce Commission itself was required to ascertain and to certify to the President.

Thus, the fact that the right to recover compensation is a statutory one, did not relieve the railroad from the burden of proving the value of the use taken from the company or the damage suffered by it under rules ordinarily applicable to takings by eminent domain. Compare *Mitchell* v. *United States,* 267 U. S. 341, 345. Nor did the report of the board of referees supply the necessary evidence. It is true that § 3 of the Federal Control Act makes the report of the referees " prima facie evidence of the amount of just compensation and of the facts therein stated." But the legal effect of evidence is a question of law. The presumption otherwise attaching to a finding of the board was overcome by the facts stated in the report and in the findings of the Court of Claims. The board was required to " consider all the facts and circumstances "; and to " report as soon as practicable in each case to the President the just compensation " so ascertained. Its report discloses that it did not consider " the facts and circumstances." Its finding of just compensation rests wholly upon assumptions. It was assumed that compensation for the use of the company's property should be calculated upon the basis of an implied lease and agreement by the Government to pay a fair rental although, as the report states, there was " no evidence as to the amount for which the railroad could have been rented; and there is no likelihood that there was any market for its rental." It was assumed further that the assumed lease must be deemed to have been made

for an indeterminate period, because the duration of federal control could not be foretold on December 28, 1917; that this rental value should be ascertained as of the date of the commencement of federal control, and should be measured, not upon the then immediate outlook for business for the first six months of 1918, but by the then probable earnings for a period of years; and finally that the amount should be fixed at one-half of the average annual operating income for the three years prior to January 1, 1918, and not at the smaller amount actually shown to have been earned during the six months' period and retained by the company. In other words, the board simply adopted as its measure the so-called "standard return" of the Federal Control Act. No evidence was introduced before it to show that the alleged taking had subjected the company to any pecuniary loss or had deprived it of anything of pecuniary value, although the hearing before the board was commenced long after the period of alleged possession and control had expired.[2] The report was, therefore, without evidential value.

The opinion of the Court of Claims discloses, pp. 253–255, that the company claimed there that, if it was not entitled to recover under the Federal Control Act, it was entitled to recover under § 204 of the Transportation Act, 1920. This contention, overruled below, was not renewed here.

Affirmed.

---

[2] On or before July 4, 1918, the plaintiff received from John Barton Payne, General Counsel for the Director General, the following notice:

"June 24, 1918.

"DEAR SIR: It is not clear whether the Marion & Rye Valley Railway Company has at any time been under Federal control. To remove any possible question this order is issued definitely relinquishing same.

"Very truly yours,

"JOHN BARTON PAYNE.

"T. S. AMBLER, Gen. Mgr., Marion & Rye Valley Ry. Co.."

Syllabus.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY ET AL. *v.* UNITED STATES ET AL.

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

No. 150. Argued January 19, 1926.—Decided March 1, 1926.

1. An order of the Interstate Commerce Commission requiring several carriers to remove discrimination against another carrier resulting from their refusal to make switching arrangements with it such as exist among themselves, does not require them to extend this service to the other but leaves them free to remove the discrimination by any appropriate action. P. 292.
2. The fact that a complaining carrier has physical connection with only one of several other carriers is not a reason why the Commission may not order these to remove unjust discrimination against the complaining carrier, found to result from a reciprocal switching arrangement among the others from which it is excluded. *Id.*
3. The court can not substitute its judgment for that of the Commission as to the similarity of the circumstances and conditions of carriers charged with unjust discrimination to those of the complaining carrier. P. 293.
4. Where an electric railroad charged unjust discrimination in its exclusion from a switching arrangement existing among four steam railroads,—*held* that the facts of its being an electric railroad, connected physically with but one of the others, with relatively limited terminal facilities, freight cars, industries on its line, exchange points, and business to exchange, did not constitute, as a matter of law, such difference of circumstances as negatives discrimination. *Id.*
5. The fact that an order to remove discrimination resulting to a carrier from a traffic interchange arrangement existing among other carriers may, as a practical matter, require them to admit it to a part in business adequately handled by them, does not make the order a taking of property without due process of law. P. 294.
6. The provision of the Transportation Act, 1920, § 418, Interstate Commerce Act § 15(3), forbidding the Commission to establish any through route, etc., between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character, does not deprive the Commission of jurisdiction

to order steam railroads to desist from discrimination in switching against a complaining electric railroad, not engaged in general transportation of freight. P. 294.

7. A finding of the Commission that an electric railroad was engaged in the general transportation of freight, *held* conclusive, where the evidence taken before the Commission was not introduced in the court below. P. 295.

Affirmed.

APPEAL from a decree of the District Court denying a preliminary injunction, in a suit by appellant railway companies against the United States, to suspend and set aside an order of the Interstate Commerce Commission. The Commission and an electric railroad, on whose behalf the order was entered, intervened.

Messrs. C. C. Hine and *E. S. Ballard,* with whom *Mr. William L. Taylor* was on the brief, for appellants.

An order of the Commission that is contrary to the facts, is contrary to law, and should be set aside. *Interstate Commerce Commission* v. *L. & N. R. Co.,* 227 U. S. 88; *St. Louis, I. M. & S. R. Co.* v. *United States,* 217 Fed. 80; *United States* v. *Louisiana & P. R. Co.,* 234 U. S. 1.

The order is contrary to, and not sustained by, the undisputed facts, because: (a) Unlawful discrimination cannot exist unless there is a physical connection by the carrier alleged to be guilty of the discrimination with the railroad or shipper claiming to be discriminated against, or a service being performed for the railroad or shipper discriminated against through the medium of joint routes or joint rates. Here, three of the appellants do not come in contact and have no physical connection with the South Shore and its shippers, and do not perform any service for them through the medium of joint routes or joint rates. *St. Louis, I. M. & S. R. Co.* v. *United States,* 217 Fed. 80; *St. Louis S. W. R. Co.* v. *United States,* 245 U. S. 136; *Central R. Co. of N. J.* v. *United States,* 257 U. S. 247.

(b) The circumstances and conditions are dissimilar. *United States* v. *Oregon R. R. & Navigation Co.,* 159 Fed. 975; *Seaboard Air Line* v. *United States,* 254 U. S. 57; *Central R. Co. of N. J.* v. *United States,* 257 U. S. 247.

The order deprives these appellants of their property without due process of law, in violation of the Fifth Amendment. *L. & N. R. Co.* v. *Central Stock Yards,* 212 U. S. 132; *C. I. & L. R. Co.* v. *Public Service Commission,* 188 Ind. 334; *Indiana Harbor Belt R. Co.* v. *Public Service Commission,* 187 Ind. 660.

No satisfactory evidence was introduced before the Commission to show that the South Shore is such a common carrier as comes within the provisions of the Interstate Commerce Act. *United States* v. *Village of Hubbard,* 266 U. S. 474; *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274; *Interstate Commerce Commission* v. *L. & N.,* 227 U. S. 88.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

Mr. R. Granville Curry, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

Mr. Ernest S. Ballard, with whom *Messrs. Rush C. Butler, William E. Lamb,* and *James Dale Thom* were on the brief, for Chicago, Lake Shore and South Bend Railway Company.

Mr. Justice Brandeis delivered the opinion of the Court.

Four steam railroads whose lines enter Michigan City, Indiana, brought this suit against the United States, in the federal district court for that State, to set aside an order of the Interstate Commerce Commission entered

April 2, 1924. The order directed the steam railroads to remove the unjust discrimination which the Commission found was being practiced against an electric railroad, which also entered that city, by refusal to switch its interstate carload traffic and to make arrangements with it for reciprocal switching. *Chicago, Lake Shore & South Bend Ry. Co.* v. *Lake Erie & Western R. R. Co.*, 88 I. C. C. 525. The order was assailed on the grounds,—that the facts found did not in law sustain the finding of unjust discrimination; that the order deprives the plaintiffs of their property in violation of the due process clause; and that the electric railroad was not shown to be within the class of carriers entitled to relief against discrimination. The Commission and the electric railroad on whose behalf the order was entered intervened in the suit as defendants. The case was heard before three judges on application for a preliminary injunction, which was denied without opinion. It is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

The essential facts are these. The Chicago, Lake Shore & South Bend Railway Company, sometimes called the South Shore, is an electric passenger railroad which is engaged also in the general transportation of freight. *Indiana Passenger Fares, etc.*, 69 I. C. C. 180. Its line extends from South Bend, Indiana, to Kensington, a station within the corporate limits of Chicago. At Michigan City it has physical connection with the Lake Erie and Western—a steam railroad which is a part of the New York Central system. The Lake Erie refused to establish through routes and joint rates to or from points on the South Shore, and also refused to establish with it satisfactory interchange switching charges to industries at Michigan City. It had established such switching interchange with the three other steam railroads which enter that city—the Chicago, Indianapolis & Louisville, commonly called the Monon, the Michigan Central and the

Pere Marquette. To remove the alleged discrimination, the South Shore brought against the Lake Erie alone the proceeding reported in *Chicago, Lake Shore & South Bend Ry. Co.* v. *Director General,* 58 I. C. C. 647. By the order there entered the Lake Erie was directed to establish such through routes and joint rates with the South Shore, and was also directed to cease and desist from discriminating by refusing to perform reciprocal switching service with it while performing such switching with the three steam railroads named. The Lake Erie elected to remove the discrimination by entering into such reciprocal switching arrangements with the South Shore.

None of the other three steam railroads had been a party to the proceeding against the Lake Erie. None of them had established through routes or joint rates with the South Shore to points on its line. Each of them refused to enter into an arrangement with it for reciprocal switching. But each of the four steam railroads had an arrangement for reciprocal switching with each of the others. Thus the South Shore still remained at a disadvantage in handling traffic at Michigan City. To remove the discrimination so arising, a second petition was filed, which resulted in the order here assailed. The position of the other steam railroads differed in one respect from the Lake Erie. It alone had a direct physical connection with the South Shore at Michigan City. Cars from the South Shore could not reach either the Michigan Central or the Monon without passing over tracks of the Lake Erie. They could not reach the Pere Marquette without passing over tracks of both the Lake Erie and the Monon.

The South Shore was within the switching district at Michigan City, and through routes and arrangements were already in effect by which traffic from the Monon, the Michigan Central and the Pere Marquette would be delivered there to the South Shore as an industry; and on such traffic the switching charges would be absorbed.

Compare *Missouri Pacific R. R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366. The refusal of the steam railroads complained of relates to interchange traffic with the South Shore as a carrier for shippers on its line. The Commission found that this refusal constituted a discrimination, because each steam railroad rendered a like service for each of the others. The steam railroads contend that the circumstances and conditions in respect of the steam railroads were not similar, and that, hence, there could not in law be unjust discrimination. But the absence of direct physical connection between the South Shore and the three steam railroads other than the Lake Erie is the basis of the main attack upon the validity of the order.

First. The steam railroads contend that, in effect, the order directs them to establish through routes and joint rates, or to allow a common use of terminals; that such extensions of service can legally be made only upon a finding that public necessity and convenience require them, Transportation Act, 1920, c. 91, amending Interstate Commerce Act, § 1, par. 21; § 3, par. 4; § 15, pars. 3 and 4, 41 Stat. 456, 478, 479, 485, 486; and that, without making such a finding, the Commission has, under the guise of a discrimination order, compelled them to extend their service. It is argued that, as a matter of law, a carrier cannot be guilty of unjust discrimination unless it is able by its own act to remove the inequality; that where there is no direct physical connection with the railroad alleged to be discriminated against, and no joint service is being rendered by the three steam railroads with the South Shore, there cannot, in law, be unjust discrimination, because the existing inequality can be removed only by the consent of a third party, the intermediate carrier.

The order does not require the steam railroads to extend any service to the South Shore. It leaves them free to

remove the discrimination by any appropriate action. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624; *United States* v. *Illinois Central R. R. Co.,* 263 U. S. 515, 521. Direct physical connection with the carrier subjected to prejudice is not an essential. *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 144. Unjust discrimination may exist in law as well as in fact, although the injury is inflicted by a railroad which has no such direct connection. Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury. *United States* v. *Pennsylvania R. R. Co.,* 266 U. S. 191, 197–9. There is nothing to the contrary in *Central R. R. Co. of N. J.* v. *United States,* 257 U. S. 247. The relief sought there was denied solely because the Central, although it participated in establishing the through route and joint rate, did not participate in the service which alone was alleged to constitute discrimination. Here each of the steam railroads was an effective instrument of the discrimination complained of.

Second. It is contended that the circumstances and conditions under which the interchange switching service was performed by the steam railroads for each other were essentially dissimilar from those under which such service would be performed for the South Shore. As establishing dissimilarity, the steam railroads point to the South Shore's absence of direct physical connection with any of the carriers except the Lake Erie; to the South Shore's relatively limited terminal facilities at Michigan City; to its relatively small number of freight cars; to the relative fewness of industries on its line; to the fact that the steam railroads exchange traffic at many points, while the South Shore will exchange traffic with them only at Michigan City; to the fact that the South Shore will originate relatively little business which can pass to the lines of

the steam railroads, while they originate much which may pass to the South Shore. Despite these facts, the Commission found that the circumstances and conditions were similar. The court cannot substitute its judgment for that of the Commission. *United States* v. *New River Co.*, 265 U. S. 533, 542. The alleged lack of reciprocity and the other facts stated do not constitute, as a matter of law, differentiating circumstances which negative discrimination. Compare *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 364; *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 523.

Third. It is contended that the order takes the steam railroads' property without due process of law. The argument is that, while in form the order leaves open to them alternatives, no one would seriously urge that they can, as a practical matter, comply with the Commission's order by ceasing to interchange traffic between themselves, as that would be contrary to obvious public interest and necessity; that, therefore, in effect, the order requires them to permit the South Shore to take a part of the business which they are handling adequately; that business now enjoyed by them is their property, and that the order, therefore, amounts to taking their property in violation of the Constitution. Substantially the same objection was made and overruled in *Pennsylvania Co.* v. *United States*, 236 U. S. 351, and *Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S. 1, 20. Compare *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57; *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 523; *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 437–8.

Fourth. It is contended that the effect of the Commission's order is to require the steam railroads to establish the practice of reciprocal switching with the South Shore, and to establish rates and charges covering such switching; that power to issue such an order exists only where

the carrier is "engaged in the general business of transporting freight in addition to" its passenger business, as required by § 418 of Transportation Act, 1920, February 28, 1920, c. 91, §§ 418, 421, 41 Stat. 456, 484, 487–8; and that the Commission was without jurisdiction to enter the order because there is not in the record satisfactory evidence that the South Shore was engaged in the general transportation of freight. See *The Chicago Junction Case,* 264 U. S. 258. Since the decision of this case below, it has been held by this Court that the Commission has power to prevent unjust discrimination practiced by an electric railroad against a steam railroad engaged in interstate commerce, even if the electric line is neither operated as part of a steam railway system nor engaged in the general transportation of freight in addition to its passenger and express business. *United States* v. *Village of Hubbard,* 266 U. S. 474. It is insisted, however, that the limitation contained in § 418 applies, because in this case it is the electric line which is seeking relief. The contention is groundless. Moreover, the Commission found that the South Shore is also engaged in the general transportation of freight. Its finding is necessarily conclusive as the evidence taken before the Commission was not introduced below. *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U. S. 114.

Affirmed.

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

MICHIGAN *v.* WISCONSIN.

IN EQUITY.

No. 19, Original. Argued January 5, 1926.—Decided March 1, 1926.

1. Long acquiescence by one State in the possession of territory, and in the exercise of sovereignty and dominion over it, by another

State, is conclusive of the latter's title and rightful authority. Pp. 308, 313, 316.

2. Where part of the boundary between two States was described in the enabling act of the one senior in time of admission, as the center of the main channel of a river, but, in the enabling act and act of admission of the junior State, as the river, with specific provision that the line be so run as to include within the jurisdiction of that State all the islands in a designated stretch of the river, *held* that the two acts last mentioned gave the junior State color of title so that her original and long continued possession of, and assertion and exercise of dominion and jurisdiction over, most of the islands on the other side of the channel extended her adverse possession to all of them, in the absence of actual possession of, or exercise of dominion over, any part of the included territory by the other State, the area within the described boundary, both land and water, being considered as together constituting a single tract of territory. P. 313.

3. The controversy in this suit involved portions of the boundary between Michigan and Wisconsin extending from Lake Superior via the Montreal River, Lake of the Desert, and Menominee River to Green Bay, and thence through the center of the most usual ship channel to the center of Lake Michigan. From the evidence summarized in the opinion the Court concludes:

(1) That the description in the enabling act under which Michigan was admitted as a State in 1837, of a line from the mouth of the Montreal River to the Lake of the Desert, was inserted under the mistaken belief that the river connected with the lake; that this mistake was discovered as early as 1841, of which discovery Michigan, long prior to the admission of Wisconsin, had knowledge; that the line, as claimed by Wisconsin, which pursues the easterly branch of the river (instead of the westerly, now claimed by Michigan as the one originally intended,) and which runs from a monument at the head of that branch in a direct course to the Lake of the Desert, was surveyed and marked by Government surveyors, in 1841 and 1847; that Michigan not only assented to the result of these surveys, but actively participated in securing the insertion of the description of that line in the Wisconsin Enabling Act and herself substantially adopted it by her Constitution of 1850; that for a period of more than 60 years she stood by without objection with full knowledge of the possession, acts of dominion, and claim and exercise of jurisdiction on the part of Wisconsin over the area in question; that, in addition, the line as claimed by Wisconsin has been, from the time of the survey of 1847, accepted as the true

one by the United States and, in its surveys, plats and maps, sales and other acts in respect of the public lands, continuously and consistently recognized, with the knowledge of Michigan and without protest on her part; that there is no merit in the contention of Michigan that she labored under an excusable mistake; and that the territory between the two opposing lines belongs to Wisconsin in view of her long continued possession, etc., acquiesced in by Michigan. P. 301.

(2) That, upon like considerations, where the line was described in the Michigan Enabling Act as running through the fork of the Menominee River whose head waters were nearest in direct line to the Lake of the Desert and down the center of the main channel of the Menominee to Green Bay, and in the Wisconsin Enabling Act as running from Lake Brulé, along its southern shore to Brulé River, thence down that river to the Menominee, and down the main channel of the Menominee to its mouth, with specific directions that the line be so run as to include within Michigan all the islands in the Brulé and the Menominee down to and inclusive of Quinnesec Falls, and within Wisconsin all the islands in that river between those falls and its junction with Green Bay,—the boundary, as fixed and established by long acquiescence, follows the channels of the Brulé and Menominee rivers wherever they are free from islands, but wherever islands are encountered above the Quinnesec Falls, it follows the channel nearest the Wisconsin mainland, so as to throw all such islands into Michigan; and, wherever islands are encountered below those falls, it follows the channel nearest the Michigan mainland, so as to throw all such islands into Wisconsin. P. 308.

(3) That, upon like considerations, the boundary through Green Bay to Lake Michigan, (described in both enabling acts as "the most usual ship channel,") is not the channel claimed by Michigan, which runs easterly across the bay to near the westerly shore of Door County peninsular, and thence northerly and through Death's Door Channel to the lake, but the channel claimed by Wisconsin, which goes north from the Menominee to a point opposite Rock Island Passage, and through that passage to the lake,—the title of Wisconsin to the disputed area being established by long possession of and dominion over the included islands, acquiesced in by Michigan. P. 314.

4. In a boundary suit between States, the costs are generally to be divided. P. 319.

Bill dismissed.

SUIT brought in this Court by Michigan against Wisconsin to determine boundary questions.

Mr. Meredith P. Sawyer, with whom *Messrs. Andrew B. Dougherty,* Attorney General of Michigan, and *Carl D. Mosier,* Assistant Attorney General, were on the brief, for complainant.

Mr. R. M. Rieser, with whom *Messrs. Herman L. Ekern,* Attorney General of Wisconsin, and *Emmert L. Wingert* were on the brief, for defendant.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an original suit in equity brought in this court to determine the boundary between the states of Michigan and Wisconsin from the mouth of the Montreal River at Lake Superior to the ship channel entrance from Lake Michigan into Green Bay. By the Enabling Act of June 15, 1836, c. 99, 5 Stat. 49, under which Michigan became a state in 1837, c. 6, 5 Stat. 144, this boundary is described as follows:

". . . thence [the mouth of the Montreal River] through the middle of the main channel of the said River Montreal, to the middle of the Lake of the Desert; thence, in a direct line to the nearest head water of the Menominee River; thence, through the middle of that fork of the said river first touched by the said line, to the main channel of the said Menominee River; thence, down the centre of the main channel of the same, to the centre of the most usual ship channel of the Green Bay of Lake Michigan; thence, through the centre of the most usual ship channel of the said bay to the middle of Lake Michigan; . . ."

The Territory of Wisconsin was created by an act of April 20, 1836, c. 54, 5 Stat. 10, 11, and this boundary is there described in the reverse direction:

". . . to a point in the middle of said lake [Michigan], and opposite the main channel of Green Bay, and through said channel and Green Bay to the mouth of the Menominee River; thence through the middle of the main channel of said river, to that head of said river nearest to the Lake of the Desert; thence in a direct line, to the middle of said lake; thence through the middle of the main channel of the Montreal River, to its mouth; . . ."

The only difference between the two descriptions is that in the former the call is for the "most usual ship channel," while in the latter it is for the "main channel," of Green Bay. In the Wisconsin Enabling Act of August 6, 1846, c. 89, 9 Stat. 56–57, under which the state was admitted by the Act of May 29, 1848, c. 50, 9 Stat. 233, this boundary is described as

". . . running with the boundary line of the State of Michigan, through Lake Michigan, Green Bay, to the mouth of the Menominee River; thence up the channel of said river to the Brulé River; thence up said last mentioned river to Lake Brulé; thence along the southern shore of Lake Brulé in a direct line to the centre of the channel between Middle and South Islands, in the Lake of the Desert; thence in a direct line to the head-waters of the Montreal River, as marked upon the survey made by Captain Cramm; thence down the main channel of the Montreal River to the middle of Lake Superior; . . .

". . . That, to prevent all disputes in reference to the jurisdiction of islands in the said Brulé and Menominee Rivers, the line be so run as to include within the jurisdiction of Michigan all the islands in the Brulé and Menominee Rivers, (to the extent in which said rivers are adopted as a boundary,) down to, and inclusive of, the Quinnesec Falls of the Menominee; and from thence the line shall be so run as to include within the jurisdiction of Wisconsin all of the islands in the Menominee River, from the falls aforesaid down to the junction of said river

with Green Bay: *Provided,* That the adjustment of boundary, as fixed in this act, between Wisconsin and Michigan shall not be binding on Congress, unless the same shall be ratified by the State of Michigan on or before the first day of June, one thousand eight hundred and forty-eight."

The history of events leading up to the present controversy extends over a period of eighty years, and the evidence, including a multitude of official and other maps and documents, constitutes a long and involved record. The case is reviewed in voluminous but well prepared briefs, and was helpfully argued at the bar. This mass of material we have examined with the care properly due the importance of the issue and the high character of the parties litigant; but much of it may be put aside as unnecessary for final consideration, since the determination we have reached depends upon a comparatively few decisive facts and circumstances, either undisputed or clearly established.

In the briefs and oral arguments the boundary is divided for purposes of convenient discussion into three distinct sections, namely: (1) the Montreal River section, extending from the mouth of the Montreal River to the Lake of the Desert and thence to the head-waters of the Menominee River (or to Lake Brulé); (2) the Menominee River section, extending from its head-waters (or from Lake Brulé) to Green Bay; and (3) the Green Bay section, extending from the last named point through the center of the most usual ship channel of the Green Bay to Lake Michigan. Although our ultimate determination in respect of these three sections rests upon the same basic principle, they are so distinct in their physical characteristics and in respect of much of the evidence peculiarly applicable to each apart from the others, that our conclusions will be more clearly formulated and better understood if we adopt the same plan in the examination of the questions which follows.

The Montreal River Section.

If we had before us nothing but the language of the Michigan Enabling Act, describing this section of the boundary as extending "through the middle of the main channel of the said river Montreal, to the middle of the Lake of the Desert," it would not be easy to avoid the conclusion that it was the understanding of the framers of the act that the river Montreal could be followed to a connection with the Lake of the Desert. And that such was the understanding clearly appears from the record. Moreover, maps in existence at the time of the passage of the act, which were available and must have been known to the framers, depict the Lake of the Desert (or, as it is there called, *Lac Vieux Desert*) as the source of the Montreal River. But the locality at that time was a wilderness, the topography of which was practically unknown except to the aboriginal inhabitants and the occasional *voyageur,* trapper and hunter; and, following the date of the passage of the act, it was found that, in fact, the head-waters of the Montreal did not extend to the Lake of the Desert, but fell short of it some fifty or sixty miles. It was subsequently revealed by exploration and surveys that the river from its mouth follows a winding course for several miles eastwardly and then divides into two branches, the westerly branch to its head following a southerly direction and the easterly branch a southeasterly direction. The westerly branch finds its source in a body of water called Island Lake. The easterly branch finally divides into two small tributaries, called, respectively, the Balsam and Pine. The lake, which, in our opinion is sufficiently identified as the one which Congress meant by its call for the Lake of the Desert, is several miles nearer to the point of junction of these tributaries than it is to any point on the westerly branch. Much evidence was submitted on behalf of Michigan in an effort

to demonstrate that the westerly branch of the river was the larger stream and was in fact, and was understood by Congress to be, the upper portion of that river, and that Island Lake at the head of the westerly branch was intended by the designation "Lake of the Desert." We think it fairly appears, to the contrary, that the easterly, and not the westerly, branch was, and was understood to be, the upper portion of the Montreal, but a positive conclusion to that effect is not necessary, since our judgment turns upon other and independent considerations.

In 1838, an act of Congress, c. 101, 5 Stat. 244, directed that the boundary line in question be "surveyed, marked, and designated," and by a later act, approved July 20, 1840, c. 54, 5 Stat. 404, 407, the making of the survey was placed under the superintendence of the War Department. Pursuant to this legislation, one Captain Cram was directed to make the survey, which he proceeded to do, completing it in 1841. He submitted two reports to Congress, from which it appears that the description of the boundary "through the middle of the main channel of the said river Montreal, to the middle of the Lake of the Desert" was an impossible one, and that the line could not be run in complete accordance with it. Carrying out as nearly as possible what he conceived to be the intention of Congress, he fixed the head-waters of the Montreal at the junction of the Balsam and Pine, at a point designated and marked "Astronomical Station No. 2," from which point the line was extended in a direct course to the Lake of the Desert. His reports embodied data for the information of Congress and recommended that action be taken by that body definitely to establish the boundary.

Captain Cram's first report is dated December, 1840. He begins it with an analysis of the description we have quoted from the Michigan Enabling Act, from which he infers, that Congress supposed that the Lake of the Desert

discharged itself into the Montreal River; that somewhere between Lake Superior and Green Bay there was a known lake bearing that name, since the description is "to the middle of the Lake of the Desert"; that of the various head-waters discharging into the Menominee River one would be found nearest to the Lake of the Desert, since that is the call; and that this would be found to be a branch of the Menominee, and not a lake, since the description is, "through the middle of that *fork* . . . first touched by the said line."

Following these inferences, he states that the Lake of the Desert has no connection either with the Montreal River or with the Menominee, but constitutes the principal head of the Wisconsin River. His conclusion is that additional action on the part of Congress will be required to the end that the boundary may be defined "in such a manner that it can be established either upon the ground or laid down on a map with that degree of definiteness which should always characterize a boundary line between two states."

On January 12, 1841, the Governor of Michigan addressed a special message to the state Legislature in which he stated that a strict adherence to the terms of the Michigan Enabling Act defining the boundary in question, according to information recently communicated to him by the state geologist, would seem to be "absolutely impracticable." With the message was transmitted the communication referred to, together with a sketch of the country which the Governor thought would present with sufficient certainty the disagreements between the description contained in the enabling act and the actual geography of the region. Thereupon, the Legislature—evidently with Captain Cram's report before it, since the bill avers that action was taken "relying on the representations made in said report as to the impossibility of locating said boundary in accordance with the [Michigan

Enabling Act]"—adopted a joint resolution, reciting that from a critical examination of the country it appeared that a strict and literal conformity with the description was impossible and that presumptively the general intent could be attained without much difficulty if the line be immediately marked and described, and requesting Congress to cause the boundary in question to be surveyed and marked and a commissioner appointed to act with a state commissioner to the end that the boundary be established in conformity with the manifest general intent of the act. The state delegation in Congress was requested by the resolution to endeavor to secure congressional action to effect this object.

In 1842, and again in 1843, a bill was introduced in the United States Senate by a Michigan senator to amend the Michigan Enabling Act so as to make the disputed boundary conform substantially to the line as it was subsequently defined in the Wisconsin Enabling Act, including that portion relating to the division of the islands in the Brulé and Menominee rivers. These bills failed, apparently for parliamentary reasons and not because there was any substantive objection to them. Then followed the Wisconsin Enabling Act of 1846, the pertinent words of which we have quoted. The provision of this act describing the boundary now in question, and providing for a division of the islands in the Brulé and Menominee, was submitted in the House by a Michigan congressman, with the statement that it had been agreed upon between the members from Michigan and the Wisconsin delegate. Shortly thereafter, Congress directed a survey of "so much of the line between Michigan and Wisconsin as lies between the source of Brulé River and the source of Montreal River, as defined by the [Wisconsin Enabling Act]," c. 175, § 4, 9 Stat. 85, 97; and in pursuance thereof a survey was made by William A. Burt, in 1847. Burt's line, which was marked with posts set at

half-mile intervals and otherwise identified, substantially followed Cram's recommendation and is the line now claimed by Wisconsin.

It does not appear that Michigan acted affirmatively in respect of the proviso that the adjustment of boundaries as fixed in the Wisconsin Enabling Act should not be binding on Congress unless the same should be ratified by Michigan on or before June 1, 1848. Nevertheless, Wisconsin was admitted by the Act of May 29, 1848, *supra,* with the express provision that its boundaries should be as prescribed by the Enabling Act of 1846.

But, while Michigan did not in terms ratify the proviso just mentioned, there was inserted in her constitution of 1850, and ratified by the people, the following description of the boundary in question:

" . . . to the mouth of the Montreal River; thence through the middle of the main channel of the said River Montreal to the head waters thereof; thence in a direct line to the center of the channel between Middle and South Islands in the Lake of the Desert; thence in a direct line to the southern shore of Lake Brulé; thence along said southern shore and down the River Brulé to the main channel of the Menominee River; thence down the center of the main channel of the same to the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said Bay to the middle of Lake Michigan; . . ." 1915 Comp. L. Mich. 133, 134.

This description was adopted by the constitutional convention held in 1867, with the addition of the words found in the Wisconsin Enabling Act: "as marked upon the survey made by Captain Cram." The same description, including the reference to the Cram survey, was again re-adopted by the Michigan special constitutional commission of 1873. The proceedings of both the convention and the commission show that these re-adoptions were

made deliberately and with full understanding. Both proposed constitutions, however, were rejected by the people, but apparently for reasons having no relation to the question of boundaries. Thus the matter rested until 1908, in which year a new and amended constitution was adopted, containing a radically different description of the boundary in question, namely:

" . . . thence in a direct line through Lake Superior to the mouth of the Montreal River; thence through the middle of the main channel of the westerly branch of the Montreal River to *Island Lake,* the head waters thereof; thence in a direct line to the center of the channel between Middle and South Islands in the Lake of the Desert; thence in a direct line to the southern shore of Lake Brulé; . . ." 1915 Comp. L. Mich. 209, 210.

By this description for the first time the westerly branch of the Montreal was brought in and the line carried through the main channel thereof to Island Lake. During the same year, the Attorney-General of the State was directed by the state Legislature to investigate and institute proceedings to secure a determination of the correct boundary. The investigation was made and reported; and again the matter rested until 1919, at which time the state Legislature provided for the appointment of a commission to investigate the "disputed" boundary line. This commission made a report in 1921 and was continued by an act of the Legislature passed the same year. The bill was filed in this court on October 8, 1923.

When admitted to statehood, Wisconsin was, and ever since has continued to be, in possession of the area in dispute, that is to say, of all lands within the boundary which she now claims. As early as 1850, county government was established upon the basis of this boundary. In 1874, taxes were assessed and collected by Wisconsin, and by 1886, practically the entire area had been subjected to such taxation. During this time, towns were

built, highways constructed, public buildings erected, elections held, Wisconsin law enforced, and other customary acts of dominion and jurisdiction exercised by that state within the disputed area.

From the foregoing facts and circumstances the conclusions are inevitable: that the description in the Michigan Enabling Act of the line from the mouth of the Montreal to the Lake of the Desert was inserted under the mistaken belief that the river connected with the lake; that this mistake was discovered as early as 1841, of which discovery Michigan, long prior to the admission of Wisconsin, had knowledge; that the line as now claimed by Wisconsin was surveyed and marked by Cram and Burt at the dates already stated; that Michigan not only assented to the result of these surveys, but actively participated in securing the insertion of the description of that line in the Wisconsin Enabling Act and herself substantially adopted it by the Constitution of 1850; and that for a period of more than 60 years she stood by without objection with full knowledge of the possession, acts of dominion, and claim and exercise of jurisdiction on the part of the State of Wisconsin over the area in question.

In addition to this, the line as claimed by Wisconsin has been, from the time of the Burt survey, accepted as the true boundary by the United States and, in its surveys, plats and maps, sales and other acts in respect of the public lands, continuously and consistently recognized, with the knowledge of Michigan and without protest on her part. Indeed, nothing appears to indicate dissatisfaction with the boundary thus established until the adoption of the Constitution of 1908, and, even then, except to the extent that this may be regarded as a continuing assertion of a claim to the boundary as there set forth or as originally described in the Michigan Enabling Act, the matter was allowed to rest until 1919.

To meet this situation, it is contended that the State of Michigan through all these years labored under a mistake

in respect of the real facts and that this was the result of excusable ignorance on her part. The contention is devoid of merit. The material facts, since at least the date of the Wisconsin Enabling Act, have been so obvious that knowledge of them on the part of the Michigan authorities, if it were not shown, as it is shown, by the evidence, must necessarily be assumed.

Notwithstanding, the State of Michigan at this late day insists that the boundary now be established by a decree of this court in accordance with the description contained in her Constitution of 1908. Plainly, this cannot be done. That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well, *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*, [1877] L. R. 2 A. C. 394, 421; Wheaton, International Law, 5th Eng. Ed. 268–269; 1 Moore, International Law Digest, 294 *et seq.*, and, *a fortiori,* to the quasi-sovereign states of the Union. The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority. *Indiana* v. *Kentucky,* 136 U. S. 479, 509, *et seq.; Virginia* v. *Tennessee,* 148 U. S. 503, 522–524; *Louisiana* v. *Mississippi,* 202 U. S. 1, 53; *Maryland* v. *West Virginia,* 217 U. S. 1, 40–44; *Rhode Island* v. *Massachusetts,* 4 How. 591, 639; *Missouri* v. *Iowa,* 7 How. 660, 677; *New Mexico* v. *Colorado,* 267 U. S. 30, 40–41. That rule is applicable here and is decisive of the question in respect of the Montreal River section of the boundary in favor of Wisconsin.

The Menominee River Section.

The description in the Michigan Enabling Act of this section of the boundary begins at the head waters of the

Menominee River nearest to the Lake of the Desert in a direct line,

"thence, through the middle of that fork of the said river first touched by the said line, to the main channel of the said Menominee River; thence, down the centre of the main channel of the same, to the centre of the most usual ship channel of the Green Bay."

The description in the act creating the Territory of Wisconsin is the same, but in the opposite direction:

". . . thence through the middle of the main channel of said [Menominee] river, to that head of said river nearest to the Lake of the Desert; thence in a direct line to the middle of said lake; . . ."

But the description in the Wisconsin Enabling Act contains important differences:

". . . thence up the channel of said [Menominee] river to the Brulé River; thence up said last mentioned river to Lake Brulé; thence along the southern shore of Lake Brulé in a direct line to the centre of the channel between Middle and South Islands in the Lake of the Desert; . . ." or, stated in the order of the Michigan act: From the center of the channel between Middle and South Islands in the Lake of the Desert in a direct line to the southern shore of Lake Brulé; thence along the southern shore of Lake Brulé to the Brulé River; thence down the Brulé River to the Menominee; thence down the channel of the Menominee to its mouth.

The evidence shows that Lake Brulé is not the head of the Menominee nearest to the Lake of the Desert, as called for by the Michigan Enabling Act, though the Brulé River is the principal tributary of the Menominee; and the inference is pretty clear that the change of description was made in the Wisconsin Enabling Act as a part of a general readjustment of the boundary. At any rate, since this part of the line is not in controversy, we need not consider the matter except as it may reflect light

upon the effect of, and the question of Michigan's acquiescence in, the further provision, that, to prevent disputes as to jurisdiction, the line shall be so run as to include within the jurisdiction of Michigan all islands in the Brulé and Menominee down to and including the Quinnesec Falls of the Menominee, and thence so as to include within the jurisdiction of Wisconsin all islands in the Menominee below the falls. As to this part of the line, the contention of Wisconsin is that the description in the Wisconsin Enabling Act was in effect a proposed adjustment of the boundary as an undividable unit, and that Michigan, by the Constitution of 1850, having expressly adopted that part of the line from the Lake of the Desert to Lake Brulé, cannot be heard to say that she did not also adopt the adjustment of the line in respect of a division of the islands. There is force in this contention, and especially so in view of the fact that the change from the nearest head-water of the Menominee to Lake Brulé operated to give Michigan additional territory. To permit her to reap the benefit of the adjustment so far as it is to her advantage and reject it to the extent that it is advantageous to her sister state would be plainly inequitable. We prefer, however, to rest our determination upon the conclusion, fully justified by the record, that,—whatever were the rights of the respective states in respect of the islands in question immediately upon the adoption of the Constitution of 1850,—Wisconsin, for a period of more than half a century following that time, had the undisputed and undisturbed possession of substantially all of the islands in the river below the Quinnesec Falls, and, without reference to the main channel of the river, exercised jurisdiction and dominion over them with the knowledge and acquiescence of the complainant.

Captain Cram's first report to Congress, dated December, 1840, points out the impracticability of following the center of the main channel of the river:

"The 'center' of the main channel of the Menominee River is made a part of the boundary. The River contains numerous islands, and consequently more than one channel, where these islands occur. It will be impossible in many of these cases to know which is the 'main channel' without minute surveys. In many cases it was tried and found impossible to decide by a simple inspection or reconnaissance which was the 'main channel.' It should also be remarked here that the term 'main channel' applied to the multiplicity of channels of the Menominee, would be somewhat ambiguous in any event—for, it may be asked—Is the main channel the widest channel of the river? Or is it the deepest? If it is the widest or deepest now, will it be the widest or deepest hereafter? Or shall the main channel be that through which the greater quantity of water shall be found to pass at the time of the survey? And if it should occur that two channels at the same island pass equal quantities of water—which would then be regarded as the boundary? These questions are sufficient to show the indefiniteness of the term 'Main Channel'—There are also a few islands in the Brulé River to which similar questions might apply in reference to the term 'Main Channel.'

"To avoid all ambiguity in reference to these channels, it might be specified in the act defining the boundary, that in ascending the stream, the boundary shall follow the extreme left hand channel of the Brulé and the extreme right hand channel of the Menominee down to a well known point of the river—say Pe-me-ne Falls; and thence to follow the extreme left hand channel of the remainder of the Menominee to its mouth. Such a division would leave most of the islands in Michigan and the remainder in Wisconsin, and would avoid much expense in minute surveys to ascertain the 'main channel' and would leave no indefiniteness upon this part of the boundary. The free use of either channel for the purposes of naviga-

tion would, from an established principle of law, be open at all times to the citizens of either state, and the islands would be nearly distributed in equal proportions between the two states."

Following the date of this report in respect of the impossibility—or extreme difficulty practically amounting to that—of locating the boundary in accordance with the provisions of the Michigan Enabling Act, and, it fairly may be assumed, with a view of effectuating Captain Cram's recommendation, the Michigan Legislature passed the resolution already referred to, calling upon Congress to cause the boundary to be surveyed and marked in conformity with the manifest general intent of the Michigan Enabling Act, and requesting the delegation of the state in Congress to use their efforts to secure such action. This was followed, as already stated, by the introduction of the bills in the Senate and the subsequent insertion, by agreement between the members of Congress from Michigan and the Wisconsin delegate, of the provision in the Wisconsin Enabling Act dividing the islands in accordance with Captain Cram's suggestion, except in a particular not important here.

In 1854, the survey of all of the islands below Quinnesec Falls as a part of Wisconsin, was directed by the United States Surveyor General for Wisconsin, and such survey was immediately begun and thereafter continuously prosecuted. The evidence, in our opinion, fairly shows that, as early as 1879, the greater part in area of all of them had been thus surveyed and platted as belonging to Wisconsin, including many which would fall on what Michigan claims is the Michigan side of the main channel. On behalf of Michigan, it is strongly contended that to this there are important exceptions. But, without going into details, it is enough to say that the clear weight of the evidence is to the contrary. It is true that so-called Island No. 8, or Merryman's Island, was surveyed as in

both states; that the Wisconsin survey was subsequently cancelled; and that, thereafter, exclusive jurisdiction over the tract of land constituting it was exercised by Michigan. It is said that, nevertheless, the "island" is now claimed by Wisconsin; but, on the contrary, Wisconsin concedes that it belongs to Michigan. The fact is that the tract was originally considered to be an island and, consequently, surveyed as a part of Wisconsin. Upon further investigation, it was found by the United States Surveyor not to be an island, but, in reality, a part of the Michigan mainland. The Wisconsin survey was, accordingly, cancelled and the title of Michigan thereafter fully conceded. Two other so-called islands of small area in the same vicinity are in like situation.

Some of these islands, comparatively small in area and of little consequence, have never been surveyed or any definite acts of dominion exercised over them by either state. But to this we attach no importance. The assertion and exercise of dominion by Wisconsin over the islands on the Michigan side of the channel was begun and has continued in virtue of, and in reliance upon, the readjustment of the boundary set forth in the Wisconsin Enabling Act. The rule is well-settled in respect of individual claimants that actual possession of a part of a tract by one who claims the larger tract, under color of title describing it, extends his possession to the entire tract in the absence of actual adverse possession of some part of it by another. *Clarke's Lessee* v. *Courtney,* 5 Pet. 319, 354; *Hunnicutt* v. *Peyton,* 102 U. S. 333, 368; *Ellicott* v. *Pearl,* 10 Pet. 412, 442; *Smith* v. *Gale,* 144 U. S. 509, 525–526; *Montoya* v. *Gonzales,* 232 U. S. 375, 377; *Houston Oil Co. of Texas* v. *Goodrich,* 213 Fed. 136, 142. Upon like grounds and with equal reason, under circumstances such as are here disclosed, the principle of the rule applies where states are the rival claimants. It results that the Wisconsin Enabling Act, together with the Act

of Admission, gave color of title in that state to all of the islands within the limits there described; and that her original and continued possession, assertion and exercise of dominion and jurisdiction over a part of these islands, pursuant to such legislation and with the acquiescence of Michigan, extended Wisconsin's possession, dominion and jurisdiction to all of them, in the absence of actual possession of, or exercise of dominion over, any territory within the boundary by Michigan. The fact that the islands constitute separated tracts of land is of no consequence here, whatever its effect might be under other conditions. In applying the rule, the area within the described boundary, both land and water, must be considered as together constituting a single tract of territory.

We, therefore, hold, as to this section of the boundary, that from Lake Brulé to the mouth of the Menominee the line, which is now fixed and finally established by long acquiescence, follows the channels of the Brulé and Menominee wherever they are free from islands; that wherever islands are encountered above the Quinnesec Falls the line follows the channel nearest the Wisconsin mainland, so as to throw all such islands into Michigan; and that wherever islands are encountered below the Quinnesec Falls the line follows the channel nearest the Michigan mainland, so as to throw all such islands into Wisconsin.

The Green Bay Section.

In determining the boundary through this section, the question is not embarrassed by differences of description. The calls of the Michigan Enabling Act are down the channel of the Menominee to "the centre of the most usual ship channel of the Green Bay of Lake Michigan; thence through the centre of the most usual ship channel of the said Bay to the middle of Lake Michigan." The Wisconsin Enabling Act calls for the same boundary.

The evidence shows that there are two distinct ship channels, to either of which this description might apply. From the mouth of the Menominee, the channel, according to the Michigan claim, proceeds across the waters of Green Bay in an easterly direction until near the westerly shore of the Door County peninsula; thence, in close proximity to the shore, in a northerly direction to a point opposite Death's Door Channel (or *Porte des Morts*); thence through that channel into Lake Michigan. The channel claimed by Wisconsin, after leaving the mouth of the Menominee, turns to the north and pursues a northerly direction to a point opposite the Rock Island passage which lies between Rock Island and St. Martin's Island; thence through the Rock Island passage into Lake Michigan. The territory in dispute lies between these rival channels, and embraces two groups of islands: (1) Chambers Island, the Strawberry Islands, and a few others, small and unnamed, all within the main waters of Green Bay west of the Door County peninsula; and (2) Rock, Washington, Detroit and Plum islands, lying between Death's Door Channel and the Rock Island passage, at the north end of the peninsula. The evidence as to which of the two ship channels was the usual one at the time of the adoption of the Michigan Enabling Act is not only conflicting, but of such inconclusive character that, standing alone, we could base no decree upon it with any feeling of certainty. Living witnesses are no longer available; and tradition, recollection of statements made by persons long since dead—if of any legitimate value—, deductions drawn from ancient documents, more or less cryptic, and inferences based on more recent uses of the channels or on their relative safety and convenience as indicated by physical characteristics, all relied upon in the absence of first-hand evidence, constitute at best most unsatisfactory substitutes. If it were necessary, we should, of course, undertake the task—as we should be

bound to do—of reaching a conclusion from these dubious premises. But, it is not necessary, for, as in the case of the two sections of the boundary just discussed, the title of Wisconsin to the disputed area now in question, is established by long possession and acquiescence; and this conclusion is justified by evidence and concessions of the most substantial character.

There is evidence of acts of dominion and possession of some of the disputed islands while Wisconsin was yet a territory. Almost from the day of her admission, the state has continuously possessed, asserted title and exercised jurisdiction and dominion over all of the islands within the boundary claimed by her. In support of this general statement, the following, among other things, may be cited: On March 21, 1855, Washington, Detroit, Rock and Plum islands, described as being in the waters of Green Bay in Door County, were organized by an act of the Wisconsin Legislature as the town of Washington. Ch. 210, Laws of Wisconsin, 1855. A census taken the same year by the town clerk showed a population of 318, which has since grown, it is said, to about 1000. Since before that time, the United States Land Department, by its surveys, plats and sales of public lands, has uniformly and notoriously recognized the islands as a part of Wisconsin, without objection on the part of Michigan. Indeed, as early as 1837, they were surveyed and platted as a part of Wisconsin Territory. A large number of maps published and available to the public during the years between 1837 and 1878, without exception, show the islands as a part of Wisconsin; and during the same time they do not appear in any survey or upon any map as belonging to Michigan. Never, so far as we are able to find from the record, have they been recognized in any practical way as a part of Michigan or, prior to the commencement of this suit, claimed by that state.

The evidence in respect of the other group of islands, while perhaps not so complete, is definite and clear to the

same effect. The taxation of lands on Chambers Island began while Wisconsin was still a territory. In 1861, voters on that island participated in a Wisconsin election. A history of Door County, introduced by complainant, recites that the island constituted an organized town forming a part of Door County, Wisconsin, as early as 1867. Evidence of early and continued recognition and treatment of the island as a part of Wisconsin by the United States through its surveys, etc., is to the same effect as that in respect of the other group. And the evidence is likewise the same in respect of the uniform appearance of Chambers Island and the other small islands of the group upon the old maps as a part of Wisconsin, and their absence from Michigan surveys and maps. The absence of evidence of specific acts of dominion over the Strawberry and the other small islands of this group is easily understood and does not affect the result. They are of little consequence, lying well within the boundary as claimed by Wisconsin, easterly from Chambers Island and near the westerly shore of the Door County peninsula. They appear on all maps as, and have never been regarded or treated otherwise than, a part of Door County. It is impossible to give them a status differing from that of the larger island and the peninsula, between, and within the shadows of, which they lie.

That Wisconsin since statehood has continuously asserted title and has exercised complete and exclusive dominion over all the islands of both groups is really not a serious issue. Indeed, the bill of complaint avers that Wisconsin has possessed herself of, and exercised sovereignty over, the islands, including Washington, Plum, the Strawberries, and numerous other valuable islands, and has excluded and continues to exclude the State of Michigan from her rights thereto; and, more particularly, that "Wisconsin has for many years disregarded the true and

rightful boundary . . . and has for a long time past possessed and does now possess, and has asserted and does now assert, civil, criminal and political jurisdiction over those portions of the territory within the Michigan boundaries above described as the Montreal River section, the Menominee River section, and Green Bay section of the disputed territory, aggregating approximately 255,000 acres, . . . and has unlawfully taxed and still continues to unlawfully tax said property, . . ." The explanation relied upon is that the State of Michigan, as a result of her excusable ignorance, has not been aware of the real facts and, therefore, should not be held to have lost rights by long acquiescence which she otherwise might have had. This view cannot be accepted and may be dismissed with a reference to what we have already said as to the same defense in respect of the Montreal River section.

In respect of the controversy as a whole, and each of the three sections, the words of this court in *Indiana* v. *Kentucky, supra,* p. 509, are singularly apposite and conclusive:

" . . . It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the

rights of sovereignty both as to soil and jurisdiction over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues.

"This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

The result is that complainant has failed to maintain her case in any particular; and that the claims of Wisconsin as to the location of the boundary in each of the three sections are sustained.

The decree, therefore, will be for Wisconsin, costs to be divided between the parties in accordance with the general rule in cases of this character. *North Dakota* v. *Min-*

nesota, 263 U. S. 583. The boundary seems to be sufficiently defined for all purposes of future possession and jurisdiction; but the parties, or either of them, if so advised, may within 30 days submit the form of a decree more particularly to carry this opinion into effect; failing which, a simple decree dismissing the bill will be entered.

It is so ordered.

UNITED STATES *v.* READING COMPANY.

READING COMPANY *v.* UNITED STATES.

UNITED STATES *v.* SOUTHERN RAILWAY COMPANY.

UNITED STATES *v.* ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY.

UNITED STATES *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

UNITED STATES *v.* CENTRAL NEW ENGLAND RAILWAY COMPANY.

UNITED STATES *v.* NEW ENGLAND STEAMSHIP COMPANY.

UNITED STATES *v.* BALTIMORE & OHIO RAILROAD COMPANY. (2 cases.)

PERE MARQUETTE RAILWAY COMPANY *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 401, 402, 403, 404, 398, 399, 400, 499, 500, 36. Argued December 3, 1925.—Decided March 1, 1926.

1. Where amounts earned by military transportation before federal control were paid, either to the respective railroads entitled or to the Director General of Railroads, (who, on taking over their

properties, assumed the administration of their existing credits and liabilities, and kept accounts of them, as matters distinct from those arising during federal control;) and where, subsequently to such payments, the claims paid were in part disallowed, through error, by the government accounting officials, and the amounts disallowed were collected by them from the Director General by deductions from Railroad Administration bills for transportation during federal control, and were in turn charged by him against the respective carriers,—*held* that final settlements made, upon the return of the railroad properties, between the respective carriers and the Director General, acting for the United States, based upon accounts showing the above mentioned charges, and covering all demands "as between the parties hereto, growing out of the federal control of railroads," were not intended, and did not operate, to release the United States from liability to the carriers for the amounts so erroneously collected. Pp. 327, 330, 331, 332, 333, 336, 337.

2. A railway company which, in error but without protest, accepts payment of bills for government transportation at reduced, 'land-grant,' rates, can not maintain a suit in the Court of Claims for the difference between the amounts paid and the larger amounts to which it was entitled. P. 330.

60 Ct. Cls. 131, *et seq.* affirmed, as to all cases, except No. 36, reversed.

APPEALS from judgments of the Court of Claims in suits to recover amounts due the plaintiffs for transportation service to the Government.

Mr. J. Harry Covington, with whom *Messrs. Spencer Gordon, Alexander Britton,* and *Lawrence H. Cake* were on the briefs, for the appellant in No. 36 and the appellees in Nos. 403 and 404.

Mr. L. T. Michener, with whom *Messrs. William L. Kinter* and *F. Carter Pope* were on the brief, for the appellee in No. 401 and the appellant in No. 402, submitted.

Mr. Benjamin D. Winner, for the appellees in Nos. 398, 399, and 400.

100569°—26——21

Mr. John F. McCarron, with whom *Mr. George E. Hamilton* was on the brief, for the appellees in Nos. 499 and 500.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Solicitor General Mitchell* was on the briefs, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

No. 401.

The United States appeals from a judgment against it for $14,236.04. December 3, 1920, the Philadelphia & Reading Railway Company, to which plaintiff, the Reading Company, is successor, brought this action to recover its charges for transportation of troops and military impedimenta by that company and connecting carriers prior to federal control of railroads. When the railroads were taken over, the United States owed the company $24,900.01 for that transportation.

Federal control of railroads commenced December 28, 1917, and ended March 1, 1920. Pursuant to the Federal Control Act, approved March 21, 1918, c. 25, 40 Stat. 451, the Director General, February 18, 1920, entered into the standard form contract with the Philadelphia & Reading and its affiliated companies. It was agreed that the President took the company's accounts receivable as of midnight, December 31, 1917; that all amounts collected by the Director General on account of receivables should be credited by him to the company; that he was authorized, to the extent of cash realized upon the company's assets then on hand, to pay and charge to the company expenses growing out of operation prior to federal control, including reparation claims; that, unless objected to by the company, he might pay and charge to the company expenses and claims in excess of the cash so realized, and that, at the end of federal control, the Director General should return to the company all uncollected accounts.

Prior to June 14, 1918, there was paid by the disbursing officer of the army to the Director General, $26,157.20 on account of the bills for transportation before federal control. February 18, 1920, the auditor of the War Department deducted $1257.19—as to which there is no controversy—from the Director General's bills for transportation during federal control, and the latter reimbursed himself by deducting that amount from the $26,157.20 paid him by the disbursing officer, leaving in his hands, a balance of $24,900.01.

June 18, 1918, the Comptroller ruled (24 Comp. Dec. 774) that, for each twenty-five officers and enlisted men traveling, the United States was entitled to a free car for the transportation of camp equipment and property. But that decision was erroneous; and it was so held, June 13, 1921. *Missouri Pacific R. R. Co.* v. *United States,* 56 Ct. Cls. 341, 348.

At different times in 1920, prior to July 16, the auditor of the War Department, in order to adjust payments to the basis of the Comptroller's ruling, disallowed as overpayments items aggregating $14,236.04 of the amount paid by the disbursing officer to the Director General, and took that amount from pending Railroad Administration bills for transportation during federal control. The Director General deducted the same amount from the $24,900.01 remaining in his hands, leaving a balance of only $10,663.97 which was credited to the company in the account "Assets, December 31, 1917, collected." February 24, 1920, the Director General promulgated General Order No. 66, providing for accounting incident to the termination of federal control. This order (§ 5a) directed that, where there were paid out of federal funds overcharge freight claims in respect of traffic, the revenues from which were included in corporate revenue, the amounts should be charged on the federal books to the corporation in the account "Corporate transactions," and

on the corporate books such amounts should be charged to an appropriate suspense account and credited to the United States in a corresponding account. This required the amount of the deduction, $14,236.04, so to be charged and credited.

August 25, 1920, the War Department paid the Railroad Administration a large sum in full settlement for all transportation during federal control. Thereupon, the Director General issued accounting circular 152, which announced the settlement, and stated: "Special attention is directed to the fact that the settlement above referred to involves the War Department only; . . . and does not include bills rendered in the Federal accounts for transportation service performed prior to Federal control," and directed that unpaid bills for such transportation "shall not be closed into the account 'War Department transportation charges,' but instead shall be charged to the corporation through the account '(Name of corporation)—Corporate transactions'."

The Court of Claims found that, "The final account of the final settlement between the Director General of Railroads and the plaintiff reads as follows: 'United States Railroad Administration, Director General of Railroads.—Comparison of claim submitted by the Philadelphia & Reading Railway Co. . . . with books of the central administration adjusted to March 31, 1922'." The statement is printed in the margin.* The two accounts in-

*

	Corporation claims as of Mar. 31, 1922	Administration books as of Mar. 31, 1922	Difference
DUE TO CORPORATION			
Compensation	$36, 861, 152. 00	$36, 814, 668. 84	$46, 483. 16
Less advances, loans, etc	23, 515, 000. 00	23, 515, 000. 00	
	13, 346, 152. 00	13, 299, 668. 84	46, 483. 16
Rental interest on completed	421, 260. 54	421, 260. 54	
	13, 767, 412. 54	13, 720, 928. 38	46, 483. 16

volved are "Assets, Dec. 31, 1917, collected," in which only $10,663.97 of the amount received by the Director General for company transportation before federal control was credited to the company, and "Corporate transactions," in which the deductions making up the balance, $14,236.04, were charged to the company. The final account of the final settlement shows that the claims of the corporation and the administration books were identical in respect of these accounts.

The final settlement agreement is set forth in the findings. So far as material, it is as follows:

"This agreement, entered into this 30th day of June, A. D. 1922, by and between James C. Davis, Director

*—Continued.

	Corporation claims as of Mar. 31, 1922	Administration books as of Mar. 31, 1922	Difference
OPEN ACCOUNTS DUE TO CORPORATION			
Cash on hand, Dec. 31, 1917	$3,751,989.43	$3,751,989.43	
Agent's and conductor's balance, Dec. 31, 1917	5,741,370.49	5,741,370.49	
Assets, Dec. 31, 1917, collected	4,959,283.87	4,959,283.87	
Total	14,452,643.79	14,452,643.79	
OPEN ACCOUNTS DUE FROM CORPORATION			
Liabilities, Dec. 31, 1917, paid	13,543,371.73	13,543,371.73	
Corporate transactions	3,195,291.81	3,195,291.81	
Expense prior to Jan. 1, 1918	2,301,240.96	2,301,240.96	
Revenue prior to Jan. 1, 1918	523,946.05	523,946.05	
Total	19,563,850.55	19,563,850.55	
Balance due from corporation on open accounts	5,111,206.76	5,111,206.76	
Balance due to corporation	8,656,205.78	8,609,722.62	$46,483.16
OTHER ITEMS DUE TO CORPORATION			
Material and supplies	4,468,333.00	1,188,287.23	3,280,045.77
Equipment retired—Normal	1,983,888.05	1,925,887.31	58,000.74
Road property retired and not replaced—Normal	233,331.36	63,653.95	169,677.41
Road property retired and not replaced—Fire	13,846.00	11,108.12	2,737.88
Road property retired and replaced	654,723.04		654,723.04
Preliminary surveys—Projects abandoned	10,405.54	10,405.54	
Total	7,364,526.99	3,199,342.15	4,165,184.84

General of Railroads and agent of the President, acting on behalf of the United States and the President, hereinafter called the 'director general,' and the Philadelphia and Reading Railway Company [and here are given the names of affiliated companies], hereinafter called the 'companies,' witnesseth:

"The said director general hereby acknowledges payment of the sum of eight million dollars ($8,000,000.00) by the said companies, the receipt whereof is hereby acknowledged, in full satisfaction and discharge of all claims, rights, and demands, of every kind and character,

*—Continued.

	Corporation claims as of Mar. 31, 1922	Administration books as of Mar. 31, 1922	Difference
27 OTHER ITEMS DUE FROM CORPORATION			
Additions and betterments	$13,768,317.83	$13,768,317.83	
Salvage from A. & B. for war purposes	4,932.43	4,932.43	
Office furniture	16,985.24	16,985.24	
Interest other than rental	446,002.06	336,655.93	$109,346.13
Allocated equipment account	12,747,077.42	12,747,077.42	
Adjustments subsequent to March, 1922	4,141.22	4,141.22	
Interest on subsequent adjustments	465.84	465.84	
Adjustments unapproved by corporation		5,905.46	5,905.46
Interest on unapproved adjustments		664.29	664.29
Total	26,987,922.04	26,885,145.66	102,776.38
Balance due from corporation on other items	19,623,395.05	23,685,803.51	4,062,408.46
Balance due from corporation	19,967,189.27	15,076,080.89	4,108,891.62
DEPRECIATION OBLIGATION			
Equipment	3,866,526.91	3,777,229.00	89,297.91
Balance due from corporation	7,100,662.36	11,298,851.89	4,198,189.53
MAINTENANCE			
Way and structures—Under	2,609,552.71	2,321,411.00	288,141.71
Equipment—Under	611,689.21	977,440.89	365,751.68
Balance due to corporation on maintenance	3,221,241.92	3,298,851.89	77,609.97
Net balance due from corporation	3,879,420.44	8,000,000.00	4,120,579.56

which the said director general, or any one representing or claiming to represent the director general, the United States, or the President, now has or hereafter may have or claim against the said companies, or any of them, growing out of or connected with the possession, use, and operation of the companies' property by the United States during the period of Federal control, or out of the contract between the parties dated the 18th day of February, 1920; and the said companies, both jointly and severally, hereby acknowledge the return to and receipt by them of all their property and rights which they are entitled to, and further acknowledge that the director general has fully and completely complied with and satisfied all obligations on his part, or on the part of the United States, or the United States Railroad Administration, growing out of Federal control."

"The purpose and effect of this instrument is to evidence a complete and final settlement of all demands, of every kind and character, as between the parties hereto, growing out of the Federal control of railroads, save and except that the following matters are not included in this adjustment and are not affected thereby. . . . [The exceptions specified do not include the claim in suit.]"

The United States contends that payment by the War Department of the company's bills to the Director General charged him with liability for the money, and that, when he paid part to the company, and the latter executed the contract in final settlement of all demands of every kind and character growing out of federal control, the United States was released from the remainder.

By this instrument, the company acknowledged that the Director General had returned to it all its property and rights and had satisfied all obligations on his part or on the part of the United States or the Railroad Administration "growing out of Federal control"; and it declared that the purpose of the agreement was to evidence a final

settlement of all demands "as between the parties hereto, growing out of the Federal control of railroads." The United States relies on the phrase "growing out of Federal control" to show that plaintiff's claim was an obligation or demand included in the settlement. The phrase is general and, if considered independently of context and the transactions which led up to the agreement, its meaning would be too indefinite and vague to have any significance. The surrounding circumstances must be considered. *Reed* v. *Insurance Company,* 95 U. S. 23, 30. The President, as a war measure, took possession and the use of the transportation systems of the country. The taking was temporary. The Federal Control Act authorized agreements in respect of compensation for the use of the property. The Transportation Act of 1920, § 202, c. 91, 41 Stat. 456, 459, directed that, as soon as practicable after the termination of federal control, the President should settle and wind up all matters "arising out of or incident to Federal control." A Director General was appointed and a Railroad Administration was created to unify control of all the properties for the more efficient transportation of troops and war materials. All control was taken out of the hands of the companies; but the Director General made use of their former organizations, officials and employees. When the transfer of control was made, it was convenient for all concerned—if not indeed necessary—that freight bills then remaining unpaid should be handled by the persons in charge of the operating properties. There was no expropriation of the companies' accounts receivable for transportation before federal control. They did not become the property of the United States. Amounts collected or paid out by the Director General on account of assets or liabilities of the companies existing or arising before federal control were dealt with separately and respectively credited and charged to the companies. In making such collections

and disbursements, the Director General acted in respect of the affairs of the company which were wholly distinct from transactions arising from operation during federal control.

The War Department made use of Railroad Administration bills to retake the supposed overcharges. The effect was the same as if $14,236.04 had been deducted before payment directly from the company's bills. Assuming that he had the power, the Director General did not undertake to settle questions between the War Department and the company in respect of freight bills for transportation before federal control. Accounting Circular 152 shows that the Railroad Administration did not attempt to secure the release of the War Department from liability for the unpaid balance owing on company bills. The Director General's charge of $14,236.04 against the company in the corporate transactions account was the same as if the company had paid the amount in cash to the Railroad Administration to make it whole in respect of its efforts to collect the company's bills. So far as the book entries are concerned, the company retained its claim for transportation against the United States; and plaintiff is entitled to recover unless the Philadelphia & Reading gave up its claim by the final settlement agreement.

But the Government contends that "the final account of the final settlement" cannot be considered, and argues that it purports only to adjust claims to March 31, 1922, while the "final settlement" agreement was made June 30, 1922; that these documents have no relation to each other, and that the account deals only with details, whereas the contract of settlement embraces all demands, whether included in the account or not. These contentions are not sustained. The findings of fact must be accepted. The court found that: "The final account of the final settlement . . . reads as follows;" this is

unequivocal; the meaning is plain, and there is no room for exposition. The only sum included for the company's transportation before federal control is $10,663.97. The amount retaken, $14,236.04, was charged to the company. In final settlement, the company paid $8,000,000, the exact sum stated in the final account.

Obviously, the transportation for which claim is made, and the auditor's ruling that the disbursing officer made overpayment, did not grow out of federal control. And, if collection of company bills by the Director General otherwise might be deemed to have been incident to federal control, the book entries and the final account show that the balance owing for the transportation in question belonged to the company. By the standard form of contract, the Director General was bound, at the termination of federal control, to return to the company all uncollected accounts. This action was pending more than a year and a half when the settlement was made. If the parties intended to settle the claim sued on, a dismissal of the action by consent should have followed. The transactions out of which the Auditor's erroneous deductions grew did not concern the Railroad Administration; and, in respect of them, there never was any question between it and the company. Plaintiff's claim was in no sense an obligation or demand against the Railroad Administration or the United States in respect of the federal control of railroads. The facts make it clear that the final agreement did not release the United States from liability for the freight charges in question.

No. 402.

This is the Reading Company's cross appeal. On the findings, it claims judgment for $6,990.92 additional. Certain bills prepared by the company were based on Class A rates on military impedimenta. These bills were restated by the company without protest on the basis of

Class D rates with land grant deductions. The restated bills were paid. Certain other bills for like transportation were originally stated on the basis of Class D rates with land grant deductions and were paid. And other bills for similar service were withdrawn and restated for lesser sums; the amounts so claimed were paid. The facts found by the Court of Claims are not sufficient to justify any recovery, and bring the case presented on cross appeal within the ruling in *Oregon-Washington R. R. Co.* v. *United States,* 255 U. S. 339, 345; *Louisville & Nashville R. R.* v. *United States,* 267 U. S. 395, 401; *C., M. & St. P. Ry.* v. *United States,* 267 U. S. 403. The cross appeal is without merit.

No. 403.

The United States appeals from a judgment against it for $48,439.68. This case is similar to No. 401. In 1916 and 1917, plaintiff, Southern Railway Company, transported military impedimenta for the United States, and presented its bills therefor. The disbursing officer of the army paid some of them to plaintiff in 1917; and, after the plaintiff's railroad was taken over, paid others to the Director General. These amounts were credited on federal books to plaintiff as "revenue prior to January 1, 1918." The Auditor of the War Department, following a ruling made by the Comptroller, June 18, 1918, held that the disbursing officer had made overpayments on account of these bills amounting to $48,439.68; and, to recover the supposed overpayments, deductions were made at different times from the bills of the Railroad Administration for transportation during federal control. Then the Director General charged the amount of these deductions to plaintiff in an account designated "Corporate transactions"; and they were credited to the Railroad Administration on the books of plaintiff in a corresponding account.

The auditor's finding that overpayments were made was erroneous. Plaintiff was entitled to the amounts paid by the disbursing officer. The Government's sole contention is that the final settlement in respect of matters growing out of federal control, operated to discharge the claim sued on. The Court of Claims incorporated in its findings the final account of the final settlement between the Director General and the plaintiff. Its form is substantially the same as that set out in the margin in No. 401. At the top of the statement, there is this notation, "[Final settlement contract, June 22, 1921]." The amount admitted by the plaintiff to be due the Railroad Administration on the account "Corporate transactions" was less than the amount claimed by the Railroad Administration. But the Court of Claims expressly found that prior to the settlement the parties agreed upon the smaller amount, and that there was no compromise of the amount charged against the plaintiff in "Corporate transactions"; that the full amount charged by the Railroad Administration was paid by the plaintiff, and included therein was the sum of $48,439.68, deducted from Railroad Administration bills on account of supposed overpayments of plaintiff's bills. The final settlement agreement was made June 22, 1921. It is in the same form and, so far as concerns the matters here in controversy, has the same force and effect as that quoted in No. 401. That decision controls this case.

No. 404.

The United States appeals from a judgment for $15,143.91. This case is similar to Nos. 401 and 403. In 1916 and 1917 plaintiff, the St. Louis, Brownsville & Mexico Railway Company, and connecting carriers, transported military impedimenta for the United States, and plaintiff presented bills therefor. The disbursing officer of the army paid some of them to plaintiff in 1917. When auditing the disbursing officer's account, the

Auditor of the War Department erroneously disallowed payments made by him; and, pending settlement of the account, the company's railroad was taken over by the President. In order to recover the supposed overpayments, the auditor deducted $15,143.91 from bills of the Railroad Administration for transportation during federal control, $13,035.97 during federal control, and the balance later. The Railroad Administration charged the amount deducted against plaintiff in the account "Corporate transactions" in accordance with General Order No. 66, and that amount was credited to the Railroad Administration and charged against the War Department on the plaintiff's books. There was a final settlement agreement between the Director General and the plaintiff dated July 29, 1921. The final account of settlement was made as of May 31, 1921. It consisted of a comparison of claims submitted by the plaintiff with the books of the central administration adjusted to that date. The court expressly found that there was no dispute as to the amount due from plaintiff to the Railroad Administration on the account "Corporate transactions," and that the same was paid in full in the final settlement. Included in the amount was the sum of $15,143.91 deducted from Railroad Administration bills on account of supposed overpayments. The final account relates to the settlement agreement. The agreement shows that the Director General paid the company the exact amount shown by the final account to be due the corporation according to the Administration books. The agreement is in the same form and, so far as concerns the matters herein controversy, has the same force and effect, as that quoted in No. 401. That decision controls in this case.

No. 398, No. 399, No. 400.

In No. 398, the United States appeals from a judgment against it for $12,176.00. The amount here in contro-

versy is $9,160.89. In 1916 and 1917 plaintiff, the New Haven, and connecting carriers transported certain military impedimenta on government bills of lading; and plaintiff, as last carrier, presented its bills therefor. Plaintiff's transportation system was taken over by the President, December 28, 1917. The disbursing officer of the army paid some of these bills to plaintiff before, and some to the Railroad Administration after, the railroads were taken over. In auditing the accounts of the disbursing officer, the Auditor of the War Department, following the erroneous ruling of the Comptroller (24 Comp. Dec. 774) disallowed as overpayments $9,160.89 of the amount paid on these bills. The plaintiff refused to refund. Then, in order to recover the supposed overpayments, the auditor deducted from the bills of the Railroad Administration presented to the disbursing officer, $7,295.54 during, and $1,865.35 after, federal control. The total was charged on the books of the Railroad Administration to the plaintiff. General Order No. 68 created a trustee account to take effect at the termination of federal control, midnight February 29, 1920. By this order, railroads that had been under federal control were made trustees of the Railroad Administration to collect its unpaid bills, to pay its liabilities, and generally to wind up its unfinished business. The cash pertaining to the transportation business was turned over to the railroads to be carried to that account; and money erroneously paid into the trustee account by deposit could be withdrawn by the consent of the Director General. In January, 1921, plaintiff paid into the trustee account $9,160.89 to make good to the Railroad Administration the deductions erroneously made by the Auditor of the War Department; and on its own books plaintiff charged that amount to the War Department. March 21, 1922, this action was commenced.

October 26, 1923, there was a final settlement between the plaintiff and the Director General consisting of a final

account and agreement. The form of the account is similar to that printed in the margin in No. 401. And that agreement, so far as concerns the Government's insistence that plaintiff released the claim in suit, contains the same language as that quoted and discussed in No. 401; and in this case the agreement contains an exception: "This settlement does not include or affect any moneys or assets of the Director General turned over to the company pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made."

There was no overpayment on account of plaintiff's bills. Plaintiff was entitled to the amount paid by the disbursing officer, and rightly refused to refund. The effect of the auditor's deductions was to compel the Railroad Administration to refund for account of plantiff the amount of the supposed overpayments. The amount so refunded was rightly charged to plaintiff, and was repaid by deposit in the trustee account. The agreement expressly excluded that account and left it to be adjusted as if no settlement had been made. The transaction out of which the auditor's deductions arose did not concern the Railroad Administration; and, in respect of that matter, there never was any question or dispute between it and plaintiff. The matter in controversy was wholly between the War Department and plaintiff. The effect of the exception quoted was to exclude plaintiff's claim from the settlement, and to leave the plaintiff free to continue to prosecute this action to recover the amount erroneously deducted as overpayments on plaintiff's bills. And plaintiff's claim was in no sense an obligation or a demand against the United States in respect of the federal control of railroads.

No. 399 and No. 400 are controlled by our decision in this case.

No. 499 AND No. 500.

No. 499 is an appeal by the United States from a judgment against it for $18,796.68. The amount here involved is $16,588.13. The transportation system of plaintiff, the Baltimore & Ohio Railroad Company, was taken over by the President December 28, 1917, and federal control continued until March 1, 1920. In 1916 and 1917, plaintiff and connecting carriers transported troops upon government transportation requests. Plaintiff, as initial carrier, presented bills therefor based on net per capita fares obtained by combinations only on the western gateways specified in the interterritorial military arrangements of 1916 and 1917. Payments amounting to $289,774.89 were made by the proper disbursing officer. Some of these payments, $172,210.31, were made to plaintiff before federal control. The balance were made during federal control to the Director General, and were credited to plaintiff. The Auditor of the War Department, in auditing the accounts of the disbursing officer, disallowed as overpayments on account of these bills, $20,978.45; and, at different times from March 12 to September 17, 1920, deducted from bills of the Railroad Administration the amount of the supposed overpayments. These deductions, to the amount of $16,588.13, were obtained by routing not authorized by the interterritorial military arrangements. The disallowances were held erroneous on the authority of *Atchison &c. Ry.* v. *United States,* 256 U. S. 205. The Government does not support them. The Court of Claims held that deductions made by the auditor amounting to $4,390.32 were proper; and, as no cross appeal was taken, they are not here involved.

Of the total amount deducted, plaintiff refunded $13.58 to the War Department; and the Railroad Administration charged back to plaintiff $20,939.52 through the account "Federal assets collected," and $25.35 through the account "Corporate transactions."

In December, 1921, the plaintiff paid into the trustee account, created in accordance with General Order No. 68, to the credit of the Administration, $20,939.52, and charged that amount against the War Department.

July 27, 1922, there was a final settlement between the Director General and the plaintiff. That agreement, so far as concerns the Government's insistence that plaintiff released the claim in suit, contains the same language as that quoted in No. 401. The agreement also contains an exception in the same language, and having the same force and effect, as that quoted in No. 398. Our decisions in those cases are controlling here.

No. 500 is also controlled by them.

No. 36.

This is an appeal by the plaintiff, the Pere Marquette, from a judgment that it is not entitled to recover. In 1917, plaintiff transported military impedimenta on Government bills of lading, and presented its bill, based on lawfully published tariffs less land grant deductions, amounting to $3,828.08. The disbursing officer paid that amount to plaintiff. Subsequently, the Auditor of the War Department, following a decision of the Comptroller, erroneously disallowed the full amount. The plaintiff's railroad was then under federal control, and the auditor deducted an equal amount from sums due the Railroad Administration for transportation in October and November, 1918. The Government does not support the auditor's disallowance of plaintiff's claim or the deduction of an equivalent amount from the Railroad Administration.

July, 1920, in an adjustment of accounts between plaintiff and the Railroad Administration, the amount in question was credited by plaintiff to the Railroad Administration, and it remains outstanding on plaintiff's books as an unpaid balance on its bill, paid, but afterwards disallowed by the auditor. November 12, 1921, a final settlement

was made between the plaintiff and the Railroad Administration. The contract contains the same general language in respect of the purpose of the instrument as that considered in our decision in No. 401.

This action was commenced, September 2, 1921, and on December 10, 1923, the Court of Claims gave judgment, citing *Louisville & Nashville R. R.* v. *United States,* and *Philadelphia & Reading R. R.* v. *United States,* decided in that court, November 5, 1923. But in the *Louisville & Nashville Case* the judgment was vacated; and, on rehearing, a judgment was entered in favor of the company, April 26, 1925. After the appeal in the case at bar, new trials were granted by the Court of Claims in other similar cases, which had been decided for the United States, and, January 5, 1925, judgment was entered for plaintiff in each. Appeals were taken by the United States; motions to advance were granted. This case and the others decided with it were argued and submitted at the same time.

The Government contends that there is no finding that plaintiff repaid the Railroad Administration the amount erroneously deducted by the auditor; that the book entries are not sufficient evidence of repayment, and that it was the intention of the settlement agreement to include this claim as one growing out of federal control. But the finding is that plaintiff gave appropriate credit to the Railroad Administration, and that plaintiff's books show its bill has not been paid. General Order No. 66, General Order No. 68, and Accounting Circular 152 were promulgated by the Railroad Administration for general application. It is to be presumed that the rules there laid down were followed; that the amount in question was charged back to plaintiff on the federal books, and that settlement was made on that basis. Moreover, if it had been the intention of the settlement agreement to include this claim as one growing out of federal control, a consent

dismissal of this action, then pending, should have followed. Our decision in No. 401 controls this case.

Judgments in Nos. 401, 402, 403, 404, 398, 399, 400, 499 and 500 affirmed.

Judgment in No. 36 reversed.

MR. JUSTICE HOLMES took no part in the consideration of these cases.

UNITED STATES *v.* COHN.

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

No. 130. Submitted January 13, 1926.—Decided March 1, 1926.

1. Obtaining the possession of non-dutiable goods from a collector is not obtaining the approval of a "claim upon or against" the Government, within the meaning of § 65 of the Penal Code, as amended October 23, 1918. P. 345.
2. Neither is the wrongful obtaining of such goods from a collector a "defrauding" of the Government within the meeting of this section, since it deals with defrauding only in the primary sense of cheating out of property or money; therein differing from § 37, which extends to conspiracies to defraud in the secondary sense of obstructing governmental functions by fraudulent means. P. 346.

Affirmed.

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

Solicitor General Mitchell and *Assistant to the Attorney General Donovan* were on the brief, for the United States.

Under the facts as set forth in the indictment, the defendant was not entitled to make entry.

Section 35 of the Penal Code, properly construed, applies to the fraud in this case. In the absence of decisions construing this section, we may properly resort to de-

cisions under § 37, penalizing conspiracies to defraud the Government, which extends to all deceitful practices for procuring official action not warranted by law or regulations. *United States* v. *Plyler,* 222 U. S. 15; *Haas* v. *Henkel,* 216 U. S. 462; *United States* v. *Barnow,* 239 U. S. 74; *United States* v. *Foster,* 233 U. S. 515; *Wolf* v. *United States,* 283 Fed. 885; *United States* v. *Brokerage Co.,* 262 Fed. 459; *United States* v. *Fung Sam Wing,* 254 Fed. 500; *Curley* v. *United States,* 130 Fed. 1; *Hammerschmidt* v. *United States,* 265 U. S. 182.

The possession of valuable goods has been surrendered. It makes no difference that the ultimate title was not in the Collector or in the United States, or that the goods were entitled to entry as "free goods" without the payment of duty, under Art. 192 of the Customs Regulations of 1915. They were none the less required to be entered, and the Collector was entitled to custody of them in the orderly administration of the revenue laws. Of that possession he has been deprived by "deceit, craft, or trickery." It is submitted that, under every test known to the law, a fraud has been perpetrated, and that it is properly punishable under § 35 of the Penal Code.

Section 35 of the Penal Code, as amended, is no longer restricted to frauds committed in the presentation of "claims" against the Government, but, by the amendment of 1918, the scope of the section was materially widened; and the element of a "claim" is no longer essential. The section punishes the concealment or misrepresentation of material facts whenever the defendant's purpose is to obtain the payment or approval of a claim, or to cheat and swindle or defraud the United States or any department thereof. Even if the element of a "claim" is held necessary to establish a case, that element is here present. Bouvier L. Dict. Vol. 1, p. 332; Co. Litt. 291b; *Prigg* v. *Pennsylvania,* 16 Pet. 539; *Cornell* v. *Travellers' Insurance Co.,* 175 N. Y. 239. It

has repeatedly been held that offenses which involve the "presenting of false claims against the United States" are not confined to claims for money alone, or to matters over which the Court of Claims might have jurisdiction. *United States* v. *Davis,* 231 U. S. 183; *United States* v. *Spalding,* 3 Dak. 85; *United States* v. *Bickford,* Fed. Cas. No. 14591; *United States* v. *Wilcox,* Fed. Cas. No. 16691.

Messrs. Benjamin P. Epstein and *Bernhardt Frank* were on the brief, for defendant in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

Cohn, the defendant in error, was indicted in the District Court for a violation of § 35 of the Penal Code, as amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015. This entire section is set forth in the margin.[1]

[1] "Sec. 35. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in

The indictment was dismissed, on demurrer, upon the ground that the statute did not make the matters charged a crime against the United States.[2] This writ of error was then allowed by the District Judge under the provision of

---

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

[2] This appears from a certificate filed by the District Judge after the entry of the judgment and before the allowance of the writ of error.

the Criminal Appeals Act,[3] permitting the United States a direct writ of error from a judgment sustaining a demurrer to an indictment, based upon the construction of the statute upon which the indictment is founded. *United States* v. *Patten,* 226 U. S. 525, 535.

The statute provides, *inter alia,* that: Whoever "for the purpose of obtaining or aiding to obtain the payment or approval of" any "claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder," or "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof," or any such corporation, "shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations or make or use or cause to be made or used any false bill, receipt, voucher," etc., shall be punishable by fine or imprisonment, or both.

The indictment charged that Cohn, for the purpose of obtaining the approval of a claim against the Government and the Treasury Department to the possession of imported merchandise, and for the purpose and with the intent of defrauding the Government and the Treasury Department through a perversion and obstruction of the custom-house function and of the proper and orderly administration of the laws of the United States and the regulations of the Department, had concealed and covered up material facts by a trick, scheme or device, and had knowingly caused false and fraudulent statements to be made, as follows:

In October, 1920, a certain lot of cigars arrived at Chicago from the Philippine Islands for entry at the custom-house, and came into the possession of the col-

[3]Act of March 2, 1907, c. 2564, 34 Stat. 1246.

lector of customs. They were consigned to order "notify Cohn Bros. Cigar Co.," the name under which Cohn conducted his business. The next day, a Chicago Bank received from a Philippine Bank a bill of lading covering the cigars, indorsed in blank by the consignor, with an attached draft drawn by the consignor upon the Cigar Co., and instructions to deliver the bill of lading only upon payment of the draft. Two days later, the draft not having been paid, Cohn, knowing these facts, fraudulently procured certain custom-house brokers to make entry of the cigars and obtain possession of them from the collector by giving a bond for the production of the bill of lading. The possession of the cigars was thus secured by Cohn upon false and fraudulent statements and representations made by him to the brokers, and through them, as his innocent agents, to the collector, that the bill of lading had not arrived in Chicago and that he was entitled to the entry and possession of the cigars, and the fraudulent concealment by him from the brokers and the collector of the material facts that the bill of lading and attached draft had arrived in Chicago, with the condition stated, and that the draft had not then been paid; thereby inducing the collector to deliver the possession of the cigars, when he "would and should have refused so to do" if he had known these facts and that Cohn consequently had no right to make the entry or obtain possession of the cigars.

While the cigars were admissible into the United States free of duty, the Customs Regulations nevertheless required that they should be entered at the custom-house. Arts. 192, 215. The Regulations also provided that a bill of lading was necessary to establish the right to make the entry, Art. 219; that merchandise consigned to order should be deemed the property of the holder of a bill of lading indorsed by the consignor, Art. 219;[4] that such

[4] This Regulation embodied a provision in Sec. III, B of the Tariff Act of 1913, c. 16, 38 Stat. 114, 181.

holder might make the entry, Art. 220; and, further, that the collector might in his discretion permit entry to be made without the production of the bill of lading, on a bond conditioned for its subsequent production and indemnifying him against any loss or damage which might be sustained by reason of such permission. *Customs Regulations of 1915,* pp. 126, 138, 140.

We may assume, without deciding, that under these Regulations Cohn was not entitled to enter and obtain possession of the cigars until he had paid the draft and become the holder of the bill of lading. But even so, the acts by which the possession of the cigars were obtained did not constitute an offense against the United States unless done for one or other of the purposes entering into the statutory definition of the offense and charged in the indictment, that is, either for the purpose of obtaining the approval of a "claim upon or against" the Government or for the purpose of "defrauding" the Government. It is contended by the United States that, although the cigars were duty free, the facts alleged in the indictment show that their possession was wrongfully obtained for both of these purposes. We cannot sustain this contention in either of its aspects.

Obtaining the possession of non-dutiable merchandise from a collector is not obtaining the approval of a "claim upon or against" the Government, within the meaning of the statute. While the word "claim" may sometimes be used in the broad juridical sense of "a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty," *Prigg* v. *Pennsylvania,* 16 Pet. 539, 615, it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Gov-

ernment, based upon the Government's own liability to the claimant. And obviously it does not include an application for the entry and delivery of non-dutiable merchandise, as to which no claim is asserted against the Government, to which the Government makes no claim, and which is merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession. This is not the assertion of a "claim upon or against" the Government, within the meaning of the statute; and the delivery of the possession is not the "approval" of such a claim.

Neither is the wrongful obtaining of possession of such non-dutiable merchandise a "defrauding" of the Government within the meaning of the statute. It is contended by the United States that, by analogy to the decisions in *Haas* v. *Henkel,* 216 U. S. 462, 479, and *Hammerschmidt* v. *United States,* 265 U. S. 182, 188, and other cases involving the construction of § 37 of the Penal Code relating to conspiracies to defraud the United States, the word "defrauding" in the present statute should be construed as being used not merely in its primary sense of cheating the Government out of property or money, but also in the secondary sense of interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means. The language of the two statutes is, however, so essentially different as to destroy the weight of the supposed analogy. Section 37, by its specific terms, extends broadly to every conspiracy "to defraud the United States in any manner and for any purpose," with no words of limitation whatsoever, and no limitation that can be implied from the context. Section 35, on the other hand, has no words extending the meaning of the word "defrauding" beyond its usual and primary sense. On the contrary it is used in connection with the words "cheating or swindling," indicating that it is to be construed in the manner in which those words are ordinarily

used, as relating to the fraudulent causing of pecuniary or property loss. And this meaning is emphasized by other provisions of the section in which the word "defraud" is used in reference to the obtaining of money or other property from the Government by false claims, vouchers and the like; and by the context of the entire section, which deals with the wrongful obtaining of money and other property of the Government, with no reference to the impairment or obstruction of its governmental functions.

We hence conclude that the indictment did not show, within the meaning of § 35 of the Penal Code, either the purpose of obtaining the approval of a "claim upon or against" the United States and the Treasury Department, or the purpose and intent of "defrauding" them. The demurrer was rightly sustained; and the judgment of the District Court is

Affirmed.

CHAMBERLAIN MACHINE WORKS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 123. Argued January 12, 13, 1926.—Decided March 1, 1926.

A petition relying upon fraud and coercion to overcome a release of the claim sued on, must state distinctly the particular acts, specifying by whom and in what manner they were perpetrated, so that the court may see that, if proven, they would warrant the setting aside of the settlement.

59 Ct. Cls. 972, affirmed.

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

Mr. Raymond M. Hudson, with whom *Mr. Burton E. Sweet* was on the brief, for appellant.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* was on the brief, for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Chamberlain Machine Works filed its petition in the Court of Claims to recover compensation for the partial performance of a war contract for the machining of steel shells, which had been cancelled by the United States before completion, pursuant to the terms of the contract. The petition was dismissed on demurrer, without opinion. 59 Ct. Cls. 972. The appeal was allowed in June, 1924.

The petition and an exhibit thereto disclosed that the claim was originally prosecuted in the War Department, under the Dent Act, in various proceedings before the Ordinance Section of the Claims Board, the Board of Contract Adjustment,[1] and the Appeal Section of the Claims Board;[2] and that the Secretary of War made an award to the petitioner of $41,300.05, "in full adjustment, payment, and discharge" of the contract, which was accepted by the petitioner, in writing, in "full satisfaction of any and all claims or demands" which it had or might have pertaining to, growing out of, or incident to the contract.

The petition sought to recover on the original contract, despite the settlement made more than three years before. It alleged, broadly, that this settlement was iniquitous and unjust, and not the voluntary act of the petitioner, but was secured by "fraud" of the officers of the War Department in the handling of the claim, by "continued brow-beating," and by "coercion" through which they "literally forced" the petitioner to take the sum offered.

[1] 6 Dec. War Dept. 242. [2] 8 Dec. War Dept. 298.

The general allegations of "fraud" and "coercion" were mere conclusions of the pleader; and were not admitted by the demurrer. *Fogg* v. *Blair,* 139 U. S. 118, 127. To show a cause of action it was necessary that the petition state distinctly the particular acts of fraud and coercion relied on, specifying by whom and in what manner they were perpetrated, with such definiteness and reasonable certainty that the court might see that, if proved, they would warrant the setting aside of the settlement. See *Stearns* v. *Page,* 7 How. 818, 829; *Perkins-Campbell Co.* v. *United States,* 264 U. S. 213, 218; *Cairo Railroad* v. *United States,* 267 U. S. 350, 352. The petition contained no such specific allegations; and since its vague and general averments did not overcome the effect of the release, the demurrer was properly sustained. See *St. Louis Railroad* v. *United States,* 267 U. S. 346, 350.

The judgment of the Court of Claims is

Affirmed.

FLEISCHMANN CONSTRUCTION COMPANY ET AL. v. UNITED STATES TO THE USE OF FORSBERG ET AL.

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

No. 50. Argued October 15, 1925.—Decided March 1, 1926.

1. A bill of exceptions is not valid as to any matter that was not excepted to at the trial, and can not incorporate into the record *nunc pro tunc,* as of the time when an exception should have been taken, one which in fact was not then taken. P. 356.
2. In a law case tried by the District Court without a jury, (Rev. Stats. §§ 649, 700,) where there are no special findings of fact, and no exceptions to rulings of law taken during the trial and preserved by bill of exceptions, questions relating to matters of fact or conclusions of law embodied in the general finding are not reviewable. P. 355.

3. But preliminary rulings on the pleadings made by the District Court under its general authority, before the issues are submitted under the statutory stipulation, are reviewable as in ordinary cases, independently of the statute. P. 357.
4. Under the Materialmen's Act, if suit on a contractor's bond be not brought by the United States "within six months from the completion and final settlement" of the contract, suit by any person who supplied labor or materials, etc., may be brought in the name of the United States, "within one year after the performance and final settlement of the contract," but not later. *Held* that allegations in the use plaintiff's declaration and in intervening petitions, that the contract was "completed and final settlement had" on a date specified, more than six months, but within a year, before institution of the suit, were not mere conclusions of law but allegations of fact. P. 358.
5. Amendments, in such a suit, which do not set up a new cause of action, but merely supplement the defective statement of previously existing rights, relate back, and may be filed after expiration of the year following final settlement. So *held* where the amendments brought in a supplementary contract amending, but not otherwise affecting, the original construction contract. P. 359.
6. The strict letter of an Act must yield to its evident spirit and purpose, when this is necessary to effectuate the intent; and unjust or absurd consequences are to be avoided if possible. P. 359.
7. The Materialmen's Act provides that where suit is instituted by a creditor or creditors, only one action shall be brought, which must be within one year from "performance and final settlement" of the contract, and any creditor may file his claim and be made a party within one year from the completion of the "work" under the contract, and not later. *Held*, in view of the remedial purpose of the Act and the liberal construction called for, that intervening claimants, like original plaintiffs, have one year from final settlement. P. 360.
8. Amendments *held* germane to causes of action originally alleged. P. 362.
9. A judgment of the District Court may validly be entered at a term following that in which the case was heard and taken under advisement. P. 363.

298 Fed. 330, affirmed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court (298

Fed. 320) recovered by the plaintiffs and intervening claimants, in a suit against a contractor and surety, under the federal Materialmen's Act.

Mr. Levi H. David, with whom *Mr. William F. Kimber* was on the brief, for plaintiffs in error.

Mr. Bynum E. Hinton, with whom *Messrs. David W. Kahn, Milton M. Leichter,* and *Isidor Weissberger* were on the briefs, for defendants in error.

Mr. Justice Sanford delivered the opinion of the Court.

This is a suit under the Materialmen's Act of 1894, 28 Stat. 278, c. 280, as amended by the Act of 1905, c. 778.[1] It was brought in the name of the United States by Forsberg, a materialman, as use plaintiff, in the federal district court for Eastern Virginia, to recover on a bond given by the Fleischmann Construction Company, as contractor, and the National Surety Company, as surety, for the construction, under a contract with the United States, of a torpedo assembly plant in Alexandria. Various materialmen and subcontractors filed intervening petitions in the suit. The plaintiff and the intervenors recovered judgment, 298 Fed. 320, which was affirmed by the Circuit Court of Appeals, 298 Fed. 330. This writ of error was allowed in March, 1924. A motion was interposed to dismiss the writ of error upon the ground that the record presents no question properly reviewable by this Court, or to affirm the judgment; the consideration of which was postponed to the hearing on the merits.

The Materialmen's Act, as amended,[1] provides that the usual penal bond required of anyone entering into a contract with the United States for the construction of any

[1] 33 Stat. 811. This is set forth in full in the margin of *Texas Cement Co.* v. *McCord,* 233 U. S. 157, 160, note 1.

public work, shall contain an additional obligation for the payment by the contractor of all persons supplying labor and materials in the prosecution of the work. Any such person not thus paid may intervene in any action instituted by the United States on the bond and obtain judgment *pro rata* with other intervenors, subject to the priority of the claim of the United States. If no suit is brought by the United States "within six months from the completion and final settlement" of the contract, any such person shall have a right of action upon the bond, and may, "within one year after the performance and final settlement" of the contract, but not later, commence suit against the contractor and his sureties, in the name of the United States, for his use and benefit, in the federal court of the district in which the contract was performed, and prosecute the same to final judgment and execution. Where suit "is so instituted by a creditor or by creditors, only one action shall be brought; and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later." If the recovery on the bond is inadequate to pay the amounts due to all of the creditors, judgment shall be given to each *pro rata*.

The first question to be determined is whether any of the matters presented by the assignment of errors—which relate chiefly to the times at which the suit was brought and the intervening petitions filed—are now open to review upon the record.

Shortly outlined, the proceedings in the case were these: The suit was brought by Forsberg on April 6, 1921. The declaration alleged that the Construction Company entered into a contract with the United States for the construction of the plant and gave bond to secure its performance, in October, 1918; and that this contract "was completed and final settlement had on" September 25, 1920, "more than six months and within one year before"

the filing of the suit. The intervening petitions, which were filed between June 15 and September 24, 1921, contained substantially the same general averments as the declaration, and alleged further that they were filed "before the expiration of one year after the completion" of the contract. In December, 1921, the plaintiff, by leave of court, amended the declaration so as to allege that the original contract had been amended by a supplemental contract in May, 1919, and the defendants had thereafter executed an additional bond; and that the contract as amended "was completed and final settlement had" on September 25, 1920. The intervening petitions were likewise amended so as to incorporate substantially these same averments, and allege further that the petitions were filed "before the expiration of one year after the completion of said original contract as amended."

The defendants filed demurrers to the original and amended declaration and petitions. All of these were overruled. And the amended declaration and petitions were then put at issue under pleas filed by the defendants.

By agreement of all the parties the case was referred to a special master to hear the evidence and find the facts. In his report, he found that the work was completed February 5, 1920, and that the date of final settlement was October 1, 1920.

Thereafter, in April, 1923, before action had been taken on this report, the parties filed a written stipulation, under § 649 of the Revised Statutes, waiving a jury and agreeing that all the issues might be tried and determined by the court.

In August, the District Judge handed down an extended written opinion in which he considered the entire case as to the facts and law, and concluded, *inter alia,* that the master had found correctly that the date of the final settlement was October 1, 1920; that it was unnecessary to determine the date on which the work had been com-

pleted, since the intervenors had filed their petitions within one year after the final settlement; that the actions were not barred because the amendments setting up the supplemental contract were made more than a year after the final settlement, the original and supplemental contracts being one and the same, and the amendments relating back to the bringing of the original suit and the filing of the original petition; and that the claims of the plaintiff and the intervenors were severally established. No special findings of fact had been requested; and none were made.

On the same day a judgment was entered, which "for reasons stated" in the opinion, awarded the plaintiff and the intervenors recoveries upon their several claims, the aggregate of which was less than the amount of either bond.

The defendants, without having excepted to any of the rulings or conclusions of the court or requested any special findings of fact, sued out, in September, a writ of error from the Circuit Court of Appeals. After this writ had issued, however, the District Judge, in October, granted them a "bill of exceptions," which recited that the court had filed its opinion and entered its final judgment on the same day, without notice to the parties; set forth various exceptions then, for the first time, noted by the defendants "to the rulings, findings of fact and conclusions of law by the court" in the opinion and judgment; and stated that, by reason of the circumstances, these exceptions were "to be taken as severally made at the time thereof and before the entry of judgment thereon." And later the District Judge granted them another "bill of exceptions," embodying the evidence and the proceedings before the master, and setting forth in the same manner other exceptions to be taken, for like reason, as made before the entry of the judgment.

The Circuit Court of Appeals disposed of the case in a *per curiam* opinion stating that, while there was a serious

question whether there was anything before it because of the want of due exceptions, it preferred to rest the affirmance of the judgment on the merits, as it thought the District Court was clearly right on all the points decided.

1. The assignment of errors challenges the affirmance of the judgment because of the action of the District Court in overruling the demurrers to the original and amended declaration and petitions; in allowing the amendments to the original declaration and petitions; and in making various other "holdings" and "findings" in reference to matters of law and fact. It is clear that none of these questions are open to review except those which arise upon the pleadings.

Section 700 of the Revised Statutes—re-enacting a like provision in the Act of March 3, 1865, c. 86[2]—provides that when an issue of fact in a civil cause is tried and determined by the court without the intervention of a jury, according to § 649, "the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed" upon writ of error; "and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

The opinion of the trial judge, dealing generally with the issues of law and fact and giving the reasons for his conclusion, is not a special finding of facts within the meaning of the statute. *Insurance Co.* v. *Tweed,* 7 Wall. 44, 51; *Dickinson* v. *Planters' Bank,* 16 Wall. 250, 257; *Raimond* v. *Terrebonne Parish,* 132 U. S. 192, 194; *British Mining Co.* v. *Baker Mining Co.,* 139 U. S. 222; *York* v. *Washburn* (C. C. A.), 129 Fed. 564, 566; *United States* v. *Stock Yards Co.* (C. C. A.), 167 Fed. 126, 127. And it is settled by repeated decisions, that in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry

[2] 13 Stat. 500, 501.

into the conclusions of law embodied therein, except in so far as the rulings during the progress of the trial were excepted to and duly preserved by bill of exceptions, as required by the statute. *Norris* v. *Jackson,* 9 Wall. 125, 128; *Miller* v. *Insurance Co.,* 12 Wall. 285, 300; *Dickinson* v. *Planters' Bank, supra,* 257; *Insurance Co.* v. *Folsom,* 18 Wall. 237, 248; *Cooper* v. *Omohundro,* 19 Wall. 65, 69; *Insurance Co.* v. *Sea,* 21 Wall. 158, 161; *Martinton* v. *Fairbanks,* 112 U. S. 670, 673; *Boardman* v. *Toffey,* 117 U. S. 271, 272; *British Mining Co.* v. *Baker Mining Co., supra,* 222; *Lehnen* v. *Dickson,* 148 U. S. 71, 73; *St. Louis* v. *Telegraph Co.,* 166 U. S. 388, 390; *Vicksburg Ry.* v. *Anderson-Tully Co.,* 256 U. S. 408, 415; *Law* v. *United States,* 266 U. S. 494, 496; *Humphreys* v. *Third National Bank* (C. C. A.), 75 Fed. 852, 855; *United States* v. *Stock Yards Co., supra,* 127. To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. *Norris* v. *Jackson, supra,* 129; *Martinton* v. *Fairbanks, supra,* 673. That is, as was said in *Humphreys* v. *Third National Bank, supra,* 855, "he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits."

These rules necessarily exclude from our consideration all the questions presented by the assignment of errors except those arising on the pleadings. All the others relate either to matters of fact or to conclusions of law embodied in the general finding. These are not open to review, as there were no special findings of fact and no

exceptions to the rulings on matters of law were taken during the progress of the trial or duly preserved by a bill of exceptions. The defendants offered no exceptions to the rulings of the court until after the writ of error had issued, transferring jurisdiction of the case to the Court of Appeals. And the recitals in the subsequent "bills of exceptions" that the exceptions, then for the first time presented, were to be taken as made before the entry of the judgment, are nugatory. A bill of exceptions is not valid as to any matter which was not excepted to at the trial. *Walton* v. *United States,* 9 Wheat. 651, 657; *Insurance Co.* v. *Boon,* 95 U. S. 117, 127. And it cannot incorporate into the record *nunc pro tunc* as of the time when an exception should have been taken, one which in fact was not then taken. *Walton* v. *United States, supra,* 658; *Turner* v. *Yates,* 16 How. 14, 29.

The statute, however, relates only to those rulings of law which are made in the course of the trial, and by its terms has no application to the preliminary rulings of the District Judge made, in the exercise of his general authority, before the issues are submitted to him for hearing under the statutory stipulation. Such rulings on the pleadings and the sufficiency of the complaint are therefore subject to review as in any other case, independently of the statute. *Norris* v. *Jackson, supra,* 128; *Martinton* v. *Fairbanks, supra,* 673; *Lehnen* v. *Dickson, supra,* 72; *St. Louis* v. *Telegraph Co., supra,* 390; *Vicksburg Railway* v. *Anderson-Tully Co., supra,* 415. And see *Campbell* v. *Boyreau,* 21 How. 223, 226, *Bond* v. *Dustin,* 112 U. S. 604, 606, *Erkel* v. *United States* (C. C. A.), 169 Fed. 623, 624, and *Ladd Bank* v. *Hicks Co.* (C. C. A.), 218 Fed. 310, 311, as to the questions which are open to review where the case is heard by the judge by consent, but without the jurisdictional stipulation.

Since, therefore, the questions arising on the pleadings in this case are now open to review, the motion to dismiss the writ of error must be denied.

2. This brings us to the consideration of the questions arising on the pleadings as to which errors are assigned. We may assume for present purposes, without deciding, that the defendants did not waive their demurrers by pleading over to the merits after they had been overruled. Compare, however, *Young* v. *Martin,* 8 Wall. 354, 357; *Stanton* v. *Embrey,* 93 U. S. 548, 553; *Teal* v. *Walker,* 111 U. S. 242, 246; *Bauserman* v. *Blunt,* 147 U. S. 647, 652; *Nalle* v. *Oyster,* 230 U. S. 165, 174; *Denver* v. *Home Savings Bank,* 236 U. S. 101, 104; *Harper* v. *Cunningham,* 8 App. D. C. 430, 434.

The demurrers to the original declaration and petitions were based upon the grounds that they were insufficient in law, since the averment in the declaration that the contract was completed and final settlement had on September 25, 1920, was a mere conclusion of law, and the facts averred did not show that a right of action had accrued or that the court had jurisdiction of the cause when the suit was instituted. And the demurrers to the amended declaration and petitions were based on like grounds, and on the further ground that they set up new causes of action and were not filed within the times required by the Materialmen's Act.

These demurrers were rightly overruled. The averments in the declaration, as originally filed and as amended, that the contract between the Construction Company and the United States was completed and finally settled on September 25, 1920, were not mere conclusions of law, but specific averments of an ultimate fact, appropriately pleaded. And since, as appeared from the record, the original suit was brought on April 6, 1921, they showed upon their face that it was instituted more than six months and "within one year after the performance and final settlement" of the contract, as required by the Act; thereby tendering an issue of fact as to the date of the final settlement which was conclusively

determined against the defendants by the general finding of the court.

And although the amended declaration and petitions showing the supplemental contract between the Construction Company and the United States, were filed more than one year after the date of the final settlement, they did not set up new causes of action at a time beyond that permitted by the Act. The original declaration set forth a provision in the original bond that it was given to secure the performance of the contract "as it now exists or may be modified according to its terms." And the supplemental contract—a copy of which was attached to and made a part of the amended declaration—specifically provided that it should be regarded as amendatory of the original contract; that all provisions and requirements of the original contract should remain in full force, except as specifically changed; and that the original bond should not be released or otherwise affected, but should remain in full force as though the changes provided for had been included in the original contract; and it expressly recited that the Surety Company, which also signed the supplemental contract, was made a party thereto "for the purpose of extending the obligation of said bond to cover the changes herein provided." It is clear that the amended declaration and petitions did not set up new causes of action, but merely supplemented by appropriate allegations the defective statements of the rights which had existed when the original declaration and petitions were filed; and that the amendments when made related back, by operation of law, to the dates on which the original suit was brought and the original petitions filed. *Texas Cement Co.* v. *McCord,* 233 U. S. 157, 164; *Illinois Surety Co.* v. *Peeler,* 240 U. S. 214, 222.

Furthermore, it was not essential that the petitions should allege the date on which the work was completed, in order to show that the intervenors' rights of action had

accrued when the claims were filed. It is urged that while the Act permits the original suit to be brought "within one year after the performance and final settlement" of the contract, it requires intervening creditors to file their claims in such action "within one year from the completion of the work" under the contract. It is obvious that if this latter provision is to be taken literally, the time allowed intervening creditors in which to file their claims would expire earlier than the time allowed for bringing the original suit, since such suit might be instituted within one year after the final settlement, but other creditors could only intervene within one year after the completion of the work, a period necessarily terminating within less than a year after the final settlement.

The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress. *Holy Trinity Church* v. *United States,* 143 U. S. 457, 459; *Ozawa* v. *United States,* 260 U. S. 178, 194. And unjust or absurd consequences are, if possible, to be avoided. *Lau Ow Bew* v. *United States,* 144 U. S. 47, 59; *Hawaii* v. *Mankichi,* 190 U. S. 197, 213.

The purpose of the Materialmen's Act, which is highly remedial and must be construed liberally, is to provide security for the payment of all persons who supply labor or material in a public work, that is, to give all creditors a remedy on the bond of the contractor, to be enforced within a reasonable time in a single proceeding in which all claimants shall unite. *Bryant Co.* v. *Steam Fitting Co.,* 235 U. S. 327, 337; *Illinois Surety Co.* v. *Davis,* 244 U. S. 376, 380. In resolving the ambiguities in its provisions the court must endeavor to give coherence to them in order to accomplish the intention of Congress, and adapt them to fulfill its whole purpose. *Bryant Co.* v. *Steam Fitting Co., supra,* 337, 339. In this case it was further stated, as the premise on which the court rested

the solution of the particular ambiguity there involved, that the Act "imposes a limitation of time on all claimants, . . . beginning to run from the same event," that is, the performance and final settlement of the contract; and that, just as the creditor who institutes the original suit has one year from the final settlement in which to commence the action, other creditors must file their claims "within the same limit of time." A like construction of the Act was also adopted in *Pederson* v. *United States* (C. C. A.), 253 Fed. 622, 626, and *London Indemnity Co.* v. *Smoot* (App. D. C.) 287 Fed. 952, 956. And this we now confirm.

By the terms of the Act no creditor can institute a suit until after six months from the completion and final settlement of the contract, within which period the United States alone has the right to commence an action. *Texas Cement Co.* v. *McCord, supra,* 163; *Miller* v. *Bonding Co.,* 257 U. S. 304, 307. And if a suit is then instituted by a creditor or creditors, "only one action shall be brought," and all shall file their claims in that suit. If, therefore, the provision limiting the right of other creditors to file their claims to twelve months after the completion of the work, is to be taken literally, the result would be that where, for any reason, the final settlement of the contract between the United States and the contractor is delayed until more than six months after the completion of the work, as may frequently happen, the only creditors who could recover on the contractor's bond would be those who should succeed in first commencing a suit after the expiration of the six months from the final settlement, since more than a year having then elapsed after the completion of the work, other creditors would be debarred from any recovery whatever, either in the suit thus brought or in any independent action. In such case the bond would be appropriated solely to the payment of the debts due the creditors who instituted the suit; and to

the extent of any surplus the contractor and his surety would be entirely released from liability.

It is clear, considering the entire provisions of the Act, that such an anomalous and unreasonable result was not intended, frustrating the plain purpose that the bond should inure to the benefit of all creditors and that all should share *pro rata* in the recovery. And to give effect to the manifest intention of Congress it must be held that the phrase "within one year from the completion of the work" was used in reference to the filing of intervening claims in the same sense as the phrase "within one year after the performance and final settlement of the contract" in reference to the commencement of the original suit; that is to say, not only that the original suit may be commenced within one year after the performance and final settlement of the contract but that other creditors may file their claims in such suit within the same period of time. In other words, as was said in the *Bryant Co. Case,* there is the same limit of time for the commencement of the suit and for the filing of intervening claims, "beginning to run from the same event," namely, the performance and final settlement of the contract; thereby avoiding a race of diligence between creditors and bringing about the equality in the distribution of the avails of the bond among all creditors which Congress obviously intended.

3. We find no error in the allowance of the amendments to the declaration and petitions, setting up the supplemental contract. Aside from the fact that the defendants did not object to the allowance of these amendments or except to the orders of the court permitting them to be made, they were plainly germane to the causes of action originally alleged; and, as already stated, did not bring in any new causes of action. Their allowance was entirely proper. *Illinois Surety Co.* v. *Peeler, supra,* 222.

4. It is also contended that the judgment of the District Court is void for the reason that it is recited in one of

the "bills of exceptions," and in a memorandum subsequently filed by the District Judge, that the case was heard and taken under advisement in April, while the opinion was filed and the judgment entered in August, that is, after the commencement of a new term of court. There was no exception to the judgment on this ground, and no assignment of error in reference to this matter. And even if the statements thus made by the District Judge, after the writ of error had issued, could be looked to for the purpose of contradicting a specific recital in the judgment that it was entered on the same day on which the case was heard and argued, the contention is in conflict with the long established practice and immemorial usage of the federal courts in this respect, and entirely wanting in merit.

The judgment of the Circuit Court of Appeals is

Affirmed.

SEABOARD RICE MILLING COMPANY *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

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

No. 311. Motion to affirm submitted January 25, 1926.—Decided March 1, 1926.

1. Under § 51, Judicial Code, a suit brought by a non-resident in the District Court upon the basis of diverse citizenship, or because it arises under the laws of the United States, must be dismissed for want of jurisdiction over the person of the defendant, if the defendant be not a resident of the district, and seasonably assert his privilege. P. 365.
2. A corporation (within the meaning of the jurisdictional statutes) is a resident of the State in which it is incorporated, and not a resident or inhabitant of any other State—even of one within which it is engaged in business. P. 366.

3. Section 28, Judicial Code, allowing removal of suits of which the District Courts "are given original jurisdiction," relates to the general jurisdiction of those courts and not to their local jurisdiction over the defendant's person, dealt with in § 51; so that the fact that a suit between non-residents might have been brought in the state court and removed to the District Court does not show that, if brought originally in the District Court, it could have been retained there over the defendant's objection. P. 366.

Affirmed on motion.

ERROR to a judgment of the District Court dismissing an action for want of jurisdiction over the defendant.

Messrs. Thomas P. Littlepage, Lon O. Hocker, Frank H. Sullivan, W. F. Dickinson, Luther Burns, and *M. L. Bell,* for the defendant in error, in support of the motion.

Mr. Alfred A. Hagerty for the plaintiff in error, in opposition thereto.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This is an action at law brought by the Milling Company against the Railway Company, in the District Court for the Eastern District of Missouri, to recover the sum of $3,035.73 for damages alleged to have been sustained through the negligence of the Railway Company, the initial carrier, and its connecting carriers, in the interstate transportation of rice shipped from Arkansas to New York. The Railway Company, appearing specially, filed a plea to the jurisdiction, on the ground that neither it nor the Milling Company was a resident or inhabitant of the district. This plea was sustained, without opinion, and the suit was dismissed for want of jurisdiction. This direct writ of error was allowed and the jurisdictional question certified, in February, 1925, under § 238 of the Judicial Code.

The Railway Company has interposed a motion to affirm the judgment, upon the ground that the question

upon which the decision depends is so unsubstantial as not to need further argument. *Hodges* v. *Snyder,* 261 U. S. 600, 601. This motion must be granted.

The declaration and the testimony heard upon the plea show that the Milling Company is a corporation organized under the laws of Texas; and that the Railway Company is a corporation organized under the laws of Illinois and Iowa, having its principal office in Chicago, but maintaining a branch office and operating a branch line within the eastern district of Missouri.

Section 51 of the Judicial Code, which deals with the venue of suits originally begun in the District Courts—re-enacting in part a similar provision in the Judiciary Act of 1888[1] provides, subject to certain exceptions not material here, that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." That is to say, the suit must be brought within the district of which the defendant is an inhabitant, unless the general federal jurisdiction is founded upon diversity of citizenship alone, in which case it must be brought either in that district or in the district in which the plaintiff resides.

While this provision does not limit the general jurisdiction of the District Courts, it confers a personal privilege on the defendant, which he may assert, or may waive, at his election, if sued in some other district. *Lee* v. *Chesapeake Railway,* 260 U. S. 653, 655; and cases cited. If this privilege is seasonably asserted, the suit must be dismissed for want of jurisdiction over the person of the defendant. *Macon Grocery Co.* v. *Atlantic Coast Line,* 215 U. S. 501, 510; and cases cited.

[1] 25 Stat. 433, 434, c. 866.

It is immaterial whether the general federal jurisdiction in the present suit is founded upon diversity of citizenship alone, or whether the suit is also one arising under the laws of the United States, since neither the Milling Company nor the Railway Company is a resident of the Eastern District of Missouri; a corporation being, within the meaning of the jurisdictional statutes, a resident of the State in which it is incorporated, and not a resident or inhabitant of any other State, although it may be engaged in business within such other State. *Re Keasbey & Mattison Co.*, 160 U. S. 221, 229; *Macon Grocery Co.* v. *Atlantic Coast Line, supra,* 509; and cases cited.

The Milling Company contends, however, that since it might have brought the suit originally in a state court of concurrent jurisdiction within the Eastern District of Missouri, in which the Railway Company is transacting business, and the Railway Company, under the decisions in *General Investment Co.* v. *Lake Shore Railway,* 260 U. S. 261, and *Lee* v. *Chesapeake Railway, supra,* might then have removed it to the District Court, this necessarily involves the conclusion that the District Court also has "original jurisdiction" of the suit, since § 28 of the Judicial Code provides only for the removal of suits of which the District Courts "are given original jurisdiction." The fallacy of this argument lies in the failure to distinguish between the general jurisdiction of the District Courts, to which § 28 relates, and the local jurisdiction over the person of the defendant, to which § 51 relates. The same contention was made, in a converse form, in the *General Investment Company Case,* in which it was argued that a suit could not be removed from a state court to a district court in which, under § 51, it could not have been brought over the defendant's objection, since it was not a suit of which the District Court was given "original jurisdiction;" and it is completely answered by the holding in that case, at p. 275, that the term

"original jurisdiction" as used in § 28 refers only to the general jurisdiction conferred on the District Courts, and does not relate to the venue provision in § 51; there being "no purpose in extending to removals the personal privilege accorded to defendants by § 51, since removals are had only at the instance of defendants." This was approved and followed in *Lee* v. *Chesapeake Railway, supra,* 657.

Whether the suit be originally brought in the District Court or removed from a state court, the general federal jurisdiction is the same; and the venue or local jurisdiction of the District Court over the person of the defendant is dependent in the one case as in the other upon the voluntary action of the non-resident defendant, being acquired in an original suit by his waiver of objection to the venue, and in a removed suit by his application for the removal to the District Court.

Since the question does not require further argument, the motion of the Railway Company is granted, and the judgment of the District Court is

Affirmed.

GENERAL AMERICAN TANK CAR CORPORATION ET AL. *v.* DAY, SHERIFF AND EX-OFFICIO TAX COLLECTOR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

No. 162. Argued January 21, 1926.—Decided March 1, 1926.

1. A decision by the highest state court holding a state tax conformable to the requirement of the constitution of the State as regards uniformity of taxation, is binding on this Court. P. 371.
2. A state tax imposed, in lieu of local taxes, on rolling stock which is owned by non-resident corporations having no domicile in the State and is operated over railroads within the State (Act 109, La. Ls. 1921), is not objectionable, under the Com-

merce Clause, as an attempt to compel non-residents doing interstate business in the State to declare a local domicile, if the amount and method of computing the tax are not in question, and if it does not operate to discriminate in some substantial way between property of such non-residents and that of residents or domiciled non-residents. P. 372.

3. The method of allocating taxes between the State and its political subdivisions, is a matter within the competency of the state legislature. P. 372.
4. Where a state taxing statute, which imposes a property tax on non-residents in lieu of local taxes imposed on residents, discloses no purpose to discriminate against non-residents, and in substance does not do so, it is not invalid under the Equal Protection Clause merely because equality in its operation, as compared with local taxation, has not been attained with mathematical exactness. P. 373.
5. Parties challenging a state tax on non-residents, upon the ground that it discriminates against them by exceeding the average taxes imposed on residents from which non-residents are exempt, have the burden of proving such excess. P. 374.

Affirmed.

APPEAL from a decree of the District Court dismissing the bill in a suit brought by several corporations, not domiciled in Louisiana, to enjoin the appellee, a tax-collector for one of the Louisiana parishes, from seizing their property in satisfaction of a tax assessed on their rolling stock, operated over railroads within the State.

Mr. Sigmund W. David, with whom *Messrs. Elias Mayer* and *Edwin T. Merrick* were on the brief, for appellants.

A State has no right to require a non-resident to procure a license or declare a domicile for the privilege of engaging in interstate commerce; and a state tax, which in effect does that, violates the Commerce Clause of the Constitution. *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Int. Text Book Co.* v. *Pigg,* 217 U. S. 91; *Buck Stove & Range Co.* v. *Vickers,* 226 U. S. 205; *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197; *Crutcher*

v. *Kentucky,* 141 U. S. 47; *Horn Mining Co.* v. *New York,* 143 U. S. 305; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282; *Barrett* v. *New York,* 232 U. S. 14; *Looney* v. *Crane Co.,* 245 U. S. 178; *Crenshaw* v. *Arkansas,* 227 U. S. 389; *McCall* v. *California,* 136 U. S. 104; *Pensacola Tel. Co.* v. *Western Union Tel. Co.,* 96 U. S. 1. A tax which is intended to and does affect the rolling stock of only those engaged in interstate commerce who have failed or refused to declare a domicile in the State is not a property tax within the rule laid down by the decisions of this Court. *Looney* v. *Crane Co., supra; Western Union Tel. Co.* v. *Kansas ex rel. Coleman,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Int. Paper Co.* v. *Massachusetts,* 246 U. S. 135. Assuming, however, that this is a property tax and not a special license tax, still it burdens interstate commerce by discriminating against the property of the plaintiffs because they are non-resident corporations not domiciled within the State. *Darnell & Son Co.* v. *Memphis,* 208 U. S. 113; *Brimmer* v. *Rebman,* 138 U. S. 78; *Walling* v. *Michigan,* 116 U. S. 446; *Guy* v. *Baltimore,* 100 U. S. 434; *Welton* v. *Missouri,* 91 U. S. 275; *Ward* v. *Maryland,* 12 Wall. 418; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Lyng* v. *Michigan,* 135 U. S. 161.

The tax also violates § 1 of the 14th Amendment. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400; *Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421; *Ward* v. *Maryland, supra; Chalker* v. *Birmingham & N. W. Ry.,* 249 U. S. 522; *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60; *Leecraft* v. *Texas Co.,* 281 Fed. 918. The contention that residents and non-residents who have declared a local domicile must pay local taxes in addition to the 5¼ mill state tax, and that the local taxes average approximately 25 mills, is unsound. The purpose of the 25 mill tax was not to equalize the burdens. Even if the average of all local taxes is approximately 25 mills, and the pur-

pose of the tax is to equalize the burdens, the special tax is void because, in principle, the discrimination still exists.

Sections 5, 6, and 7 of Act 109, and the 25-mill tax, violate § 1, Art. 10 of the Louisiana Constitution, 1921, providing: "All taxes shall be uniform throughout the territorial limits of the authority levying the tax."

Mr. Harry P. Sneed for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

Appellants brought suit in the United States District Court for eastern Louisiana to enjoin the appellee from collecting, by seizure of appellants' property, a tax assessed against them by the State of Louisiana. From a judgment dismissing the bill the case comes here on direct appeal by reason of the constitutional questions involved. Jud. Code § 238, before amendment of 1925; *Hays* v. *Port of Seattle,* 251 U. S. 233; *Arkadelphia Milling Co.* v. *St. Louis & S. W. Ry. Co.,* 249 U. S. 134.

The tax in question was imposed under § 5 of Act 109 of the Louisiana Laws of 1921. Section 1 of that Act imposes a tax, for state purposes, of five and one-fourth mills on the dollar on all property within the State. Section 5 authorizes the assessment of an additional tax for state purposes of twenty-five mills on the dollar "of the assessed value of all rolling stock of non-resident . . . corporations, having no domicile in the State of Louisiana, operated over any railroad in the State of Louisiana within or during any year for which such tax is levied . . ." Article X, § 16 of the Louisiana constitution exempts from all local taxation non-residents paying the twenty-five mill tax. Appellants do not complain of the five and one-fourth mill tax assessed against them under § 1; nor do they question the amount or method of computation of the twenty-five mill tax assessed under § 5;

but they object to it on the ground that it violates the constitution of Louisiana, which requires that "all taxes shall be uniform upon the same class of subjects" (Art. X, § 1), and on the ground that, as applied to appellants, it violates the federal Constitution by imposing a burden on interstate commerce, and denies to appellants the equal protection of the laws, in that it discriminates unreasonably between residents of Louisiana or non-residents domiciled within the State, and non-residents not so domiciled and engaged in interstate commerce.

All the appellants are corporations organized in States other than Louisiana and are not domiciled or licensed to do business in that State. All own and operate within the State tank cars, for the transportation of oil, which are used in interstate commerce. Taxes on property within the State of Louisiana, other than state taxes, are assessed where the taxpayer is domiciled, by the several parishes and by municipalities in the parishes, both of which are political subdivisions of the State. In some parishes, local taxes exceed twenty-five mills, and in others they are less than that amount; but it is asserted by the appellee that the average of all local property taxes is approximately twenty-five mills.

The tax in question is authorized by Art. X, § 16, of the Louisiana constitution, which reads as follows:

"Section 16: Rolling stock operated in this State, the owners of which have no domicile therein, shall be assessed by the Louisiana Tax Commission, and shall be taxed for State purposes only, at a rate not to exceed forty mills on the dollar of assessed value."

The constitutionality of the twenty-five mill tax imposed under this section was upheld by the Supreme Court of Louisiana in *Union Tank Car Co.* v. *Day,* 156 La. 1071, and that case disposes of the objections urged here to the validity of the tax under the state constitution.

It is argued that the twenty-five mill tax, which was imposed on tank cars belonging to the several appellants, is a thinly disguised attempt to compel non-residents doing interstate business in Louisiana to declare a domicile in the State, and that it is therefore an unconstitutional burden on interstate commerce, within the principle of those cases holding that a State may not require a non-resident to procure a license to do business or to declare a domicile within the State as a condition to engaging in commerce across its boundaries. *International Text Book Co.* v. *Pigg,* 217 U. S. 91; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282. But it is obvious from an inspection of the statute that the tax in question is imposed on property of non-residents in lieu of the local tax assessed in the several parishes of the State on property of persons or corporations domiciled there, and that the non-resident may either pay the state tax assessed under § 5 or, at his option, by becoming domiciled in a parish, pay instead of it the local taxes assessed within the parish. The effect of § 5 is not to require the non-resident corporation to take out a license to do business within the State, but only to subject its property within the State to state taxation. There being no question as to the amount of the tax or the method of its computation, the taxation of appellants' property within the State can be open to no objection unless it operates to discriminate in some substantial way between the property of the appellants and the property of residents or domiciled non-residents. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; and see *Pullman Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18.

We are not concerned with the particular method adopted by Louisiana of allocating the tax between the State and its political subdivisions. That is a matter within the competency of the state legislature. *Columbus Southern Ry. Co.* v. *Wright,* 151 U. S. 470, 475, 476.

The court below found, as did the state Supreme Court in *Union Tank Car Co.* v. *Day, supra,* that all local taxes throughout the State, from which appellants are exempted by the Louisiana constitution, average approximately twenty-five mills, and that, since the tax assessed under § 5 was substantially the equivalent of the local tax in lieu of which it was assessed, there was no unjust discrimination. Such a classification is not necessarily discriminatory. *Travellers' Insurance Co.* v. *Connecticut,* 185 U. S. 364. Where the statute imposing a tax which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against non-resident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary. *Travellers' Insurance Co.* v. *Connecticut, supra;* and see *State Railroad Tax Cases,* 92 U. S. 575, 612; *Shaffer* v. *Carter,* 252 U. S. 37, 56.

But appellants challenge the District Court's finding of fact that local taxation throughout the State will average about twenty-five mills. They insist that the average of local taxation is twenty-one mills, and that this disparity between the rate of tax assessed on appellant and the local tax on the property of residents, is a substantial discrimination establishing the invalidity of the tax. In the absence of a purpose to discriminate, disclosed by the legislation itself, we are not prepared to say that a four mills variation in one year not shown to be a necessary or continuing result of the scheme of taxation adopted, would be an unconstitutional discrimina-

tion; for in such a scheme of complementary tax statutes, however fairly devised, it would be impossible to provide in advance against occasional inequalities as great as that here complained of.

The record, however, does not support appellants' contention. It was stipulated by the parties that the total of all state and local taxes on property in some of the parishes exceeds thirty and one-quarter mills, the sum of the general state tax of five and one-quarter mills and the special twenty-five mills tax on property of non-residents; and that in other parishes, it is less than that amount. The stipulation does not, however, show the amount of the variation in the rate of local taxation nor its average throughout the State. The only evidence on the subject is an extract from the annual report of the Louisiana Tax Commission, purporting to relate to taxes "for the parishes." From the data embodied in this report, appellants make their own calculation that the average rate of all parish and local taxes is twenty-one mills. It is, however, conceded that municipalities within the parishes have independent power of taxation. In some instances they are exempt from taxation by the parish (La. Const., Art. XIV, § 12,) and the power of parishes to tax property in incorporated cities and towns for parochial purposes is, in certain instances, limited. (La. Const., Art. XIV, §§ 7 and 8.) It is contended by appellee that appellants' computation does not include in local taxes, all the taxes assessed by municipalities within the parishes except in the case of the parish of Orleans, whose limits coincide with those of the city of New Orleans, and that there the rate exceeds thirty-one mills, as is shown by the report of the Tax Commission. It is impossible to say from an inspection of the extract from the report in evidence, which of these contentions is correct. The report is stated to cover taxes for the parishes and includes numerous items of parish taxes, but it does

not show on its face whether all taxes assessed by cities, towns, and villages within the parish are included in the report, and there is nothing in the record which will enable us to ascertain that fact. The appellant has, therefore, failed to show that the tax is discriminatory either in principle or in its practical operation and has laid no foundation for assailing its constitutionality.

The judgment of the District Court is

Affirmed.

TOWAR COTTON MILLS, INC. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 196. Argued January 29, 1926.—Decided March 1, 1926.

1. Where there are no findings of the Court of Claims that claimant suffered any loss or damage under, or by reason of the cancelation of, his contract with the War Department, it is unnecessary to consider whether an award, made by the Secretary of War and accepted by the claimant, was binding on the latter. P. 377.
2. Where claimant entered into two contracts, one to supply goods to the Government and the other, later, by which the Government advanced money to carry out the first and took his note, upon which were to be credited deductions from payments falling due under the first, an award to the claimant on the first, (after its cancelation,) did not bar the Government's counterclaim on the note; and the award was properly credited as of its date, rather than the date when the earlier contract was canceled. P. 377.

59 Ct. Cls. 841, affirmed.

APPEAL from a judgment of the Court of Claims dismissing claimant's petition and awarding recovery to the United States on a counterclaim.

Mr. Raymond M. Hudson for appellant.

Assistant Attorney General Galloway, with whom *Solicitor General Mitchell* was on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

This appeal was taken from a judgment of the Court of Claims (Jud. Code, § 142, before its repeal by Act of February 13, 1925,) dismissing appellant's petition and adjudging that the United States was entitled to recover on a counterclaim set up in its answer in that court.

The appellant entered into a contract with the Government, dated June 24, 1918, to supply it with a quantity of cloth at a specified price. It was provided by the contract that the Government might, in the event of the termination of the war, cancel the contract with respect to cloth not delivered. The contract contained a clause for ascertaining the balance due and payable to the appellant in case of cancellation. By a second contract, of July 6, 1918, the Government undertook to advance money to appellant for the purchase of machinery, equipment and raw material required for the performance of its original contract. Appellant gave its demand note for the principal sum advanced, with interest at 6%, and it was provided by the contract that specified deductions from payments, as they became due from the Government for the cloth delivered, should be credited on the note.

On November 15, 1918, the Government cancelled the original contract after 19.02% of the deliveries stipulated for had been made. Appellant presented a claim to the War Department for the amount due under this contract, and, after proceedings had before the Purchase Claims Board and an appeal to the Board of Contract Adjustment, an award was made to appellant, by authority of the Secretary of War, in the sum of $14,054.59, which was stated by its terms to be "in full adjustment, payment and discharge of said agreement" of June 24, 1918.

On June 3, 1920, appellant accepted the award by a formal statement to that effect written at the end of it and signed by the appellant, by its treasurer.

The cause of action stated by appellant is upon its first contract, of June 24, 1918, and, as the Court of Claims found, all of the items set up by appellant in this suit were embodied in its claim to the War Department on which the award was made. The Government pleaded, by way of counterclaim, the balance due upon the appellant's promissory note, less the amount of the award; and judgment was given against the appellant for this amount, with accrued interest.

Appellant, notwithstanding such cases as *United States* v. *Adams,* 7 Wall. 463; *Savage, Executrix,* v. *United States,* 92 U. S. 382, 388; *United States* v. *Child & Co.,* 12 Wall. 232, 243; *United States* v. *Justice,* 14 Wall. 535; *Mason* v. *United States,* 17 Wall. 67, seeks to avoid the effect of the accepted award by setting up that the Secretary of War was without authority to make it and, upon various technical grounds, that appellant's acceptance was not binding.

It is unnecessary for us to consider these contentions; for there are no findings by the Court of Claims that appellant suffered any loss or damage by reason of the cancellation of the contract, and in fact, no findings which would support a judgment in its favor on any theory.

The appellant also objects that, if the award is valid, it is a bar to the Government's counterclaim. But an examination of the award, which is set out in detail in the findings, shows that the award was concerned only with the first contract, of June 24, 1918, and that the items and computations which entered into it related only to that contract. The amount due from the Government upon appellant's note and second contract was unaffected by it.

There is no merit in the objection that the amount of the award should have been credited on appellant's note as of the date of the cancellation of the first contract, thus reducing the amount of interest payable on the note. If the award was valid, it was properly credited as of its

date. If it was invalid, appellant, as already pointed out, has laid no foundation for any offset to the amount due on the note.

Judgment affirmed.

RISTY ET AL., COUNTY COMMISSIONERS, ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

THE SAME *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

THE SAME *v.* CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

THE SAME *v.* NORTHERN STATES POWER COMPANY.

THE SAME *v.* CITY OF SIOUX FALLS.

THE SAME *v.* GREAT NORTHERN RAILWAY COMPANY.

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

Nos. 95–100. Argued January 7, 8, 1926.—Decided March 1, 1926.

1. When the District Court and Circuit Court of Appeals agree upon all material facts, this Court will consider them only so far as needful to pass on questions of law. P. 381.
2. The statutes of South Dakota (Rev. Code 1919, §§ 8458 et seq., §§ 8467, 8470,) contain no provision by which the cost of reconstructing or maintaining existing drainage works may be assessed on lands which were not embraced within or assessed in connection with the project as originally established. P. 383.
3. It is the duty of the federal courts, in suits brought in or removed to the District Courts, to decide for themselves all relevant questions of state law, including the meaning of the state statutes where they have not been clearly and decisively passed upon by the state court. P. 387.

4. Questions involving the Federal Constitution, giving the federal court jurisdiction, need not be passed upon when the case is decided by applying the state law. P. 387.
5. Suits in the federal court to enjoin state officials from equalizing benefits of drainage work and making assessments of the cost, *held* not premature, but within equitable jurisdiction, where the ground of the suits was the invalidity of the whole proceedings, and not merely inequality in apportionment of benefits, and where the effects of the proceedings would be to establish liens on plaintiffs' lands, clouding the titles, and subject them to liability for future assessments. P. 387.
6. The remedy, in such cases, afforded by § 8465 of So. Dak. Code, 1919, does not appear to be coextensive with the relief afforded by equity. *Id.*
7. The test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court, and not the inadequacy of the remedies afforded by the state courts. P. 388.
8. It does not appear that the law of South Dakota affords a remedy, in cases like the present, by payment of the assessment and suit to recover it back, which could be availed of in the federal court, or that such remedy, if available, would not entail a multiplicity of suits. P. 388.
9. Where the legal remedy under the state law is uncertain, the federal court, (having jurisdiction as such of the case,) has jurisdiction in equity to enjoin illegal assessments. P. 389.
10. Jurisdictional amount *held* involved in suits against a board to enjoin illegal apportionments and assessments of cost of drainage work, where the board had made tentative assessments against plaintiffs in excess of that amount, and the basis of the suits was want of jurisdiction to make such apportionments and assessments. P. 389.
11. Plaintiffs *held* not estopped to question the legality of proceedings to extend drainage assessments to their land outside the drainage area, because of their relation to the proceeding or to the construction before they had knowledge of the purpose so to extend the assessments. P. 389.
12. A bill by a city to restrain the laying of drainage assessments under a law of its own State, as violative of the Fourteenth Amendment, is too unsubstantial to confer jurisdiction on a federal court, since the Amendment does not restrain the power of the State and its agencies over its municipal corporations. P. 389.

297 Fed. 710, affirmed in part; reversed in part.

APPEALS from decrees of the Circuit Court of Appeals, which affirmed decrees of the District Court (282 Fed. 364,) in favor of four railroad companies, a power company, and a city, in six suits brought by them to enjoin a board of county commissioners and certain state officers, of South Dakota, from extending apportionment of benefits and assessments of costs, of a drainage project, to outside lands.

Messrs. Benjamin I. Salinger, N. B. Bartlett, and *E. O. Jones,* for appellants.

Mr. Edward S. Stringer, for appellee in No. 95, submitted. *Messrs. M. L. Bell, W. F. Dickinson, Thomas D. O'Brien,* and *Alexander E. Horn* were also on the brief.

Mr. E. L. Grantham, for appellee in No. 96, submitted. *Messrs. C. O. Bailey, J. H. Voorhees, T. M. Bailey, H. H. Field,* and *O. W. Dynes,* were also on the brief.

Mr. C. O. Bailey, with whom *Messrs. J. H. Voorhees, T. M. Bailey, Roy D. Burns,* and *R. L. Kennedy* were on the brief, for appellees in Nos. 97 and 99.

Mr. R. M. Campbell, for appellee in No. 98, submitted. *Messrs. Harold E. Judge* and *John H. Roemer* were also on the brief.

Mr. Harold E. Judge, for appellee in No. 100, submitted. *Mr. F. G. Dorety* was also on the brief.

MR. JUSTICE STONE delivered the opinion of the Court.

Separate suits were brought by the several appellees, in the United States District Court for South Dakota, to enjoin the County Commissioners, the Auditor and the Treasurer of Minnehaha County, South Dakota, from making any apportionment of benefits or assessments of costs affecting the property of the several appellees, for

the construction or repair of a drainage system in the area within the county embraced in a project known as "Drainage Ditch No. 1 and 2."

In all of the suits, except No. 99, there was diversity of citizenship. In each it was alleged that an amount in excess of the jurisdictional requirement was in controversy, and in each it was alleged that proceedings purporting to be had under the South Dakota drainage statutes, with respect to the lands of the appellees, were unauthorized and void, and that those statutes and proceedings denied to appellees due process of law and the equal protection of the laws, in contravention of the Constitution of the United States. The suits were tried together and decrees were given for the plaintiffs by the District Court. 282 Fed. 364. The Circuit Court of Appeals for the Eighth Circuit, on appeal, affirmed the decrees, 297 Fed. 710, and the cases are brought here on appeal. Jud. Code, §§ 128, 241, before Act of February 13, 1925. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508. Petition for certiorari was denied, 266 U. S. 622.

The two courts below agree as to all material facts. We accordingly consider them here only so far as is needful to pass on questions of law. *United States* v. *State Investment Co.*, 264 U. S. 206, 211.

In 1907 the Board of County Commissioners of Minnehaha County, acting under the constitution and laws of the State, established "Drainage Ditch No. 1," extending from a point north of the city of Sioux Falls, thence south, and then to the east of Sioux Falls, three miles in all, to the Big Sioux River, into which it emptied. From the main ditch, a spur ditch was extended northwest to a point near the Big Sioux River, which from that point passes to the southwest and thence flows east, forming a loop about the principal part of the city of Sioux Falls, and finally flows through the city on its easterly side in a northeasterly direction.

In 1910 the Board of County Commissioners established drainage ditch No. 2, extending northerly from the north terminus of ditch No. 1 for a distance of twelve miles. The two ditches thus formed one continuous ditch, draining agricultural lands lying to the north of the city. Both ditches, and the assessment districts in connection with them, are conceded to have been lawfully established.

In 1916 the river broke through its banks into the area drained by the spur ditch, and, uniting with the flood water flowing from the river through ditch No. 2, flooded the main ditch, No. 1, washed out and destroyed a spillway on ditch No. 1, and, in its uncontrolled flow caused extensive damage. There was danger that the river by its flow through the ditch would be diverted from its natural course, cutting off the city's water supply and causing other damage to the city and to individuals.

In August, 1916, a proceeding was instituted by petition to the Board of County Commissioners, purporting to be pursuant to statute, "to reconstruct and improve drainage ditches numbers one and two . . . and to pay therefor by an assessment upon the property, persons and corporations benefited." This proceeding resulted in resolutions of the Commissioners purporting to establish "Drainage District No. 1 and 2" and providing for the construction of the proposed ditch. The location fixed for it, however, was identical with that of the old ditches No. 1 and No. 2. The County Commissioners then caused the previously established ditch No. 1 and ditch No. 2 to be diked, cleaned out, and widened and deepened at certain points; the river to be straightened, and the spillway to be reconstructed so as to continue and safeguard the flow of water through ditch No. 1 and ditch No. 2. The cost was approximately $255,000.

Proceedings were then had by the County Commissioners for the assessment of benefits to defray the expenses thus incurred. The assessments of benefits were extended

to areas not embraced in the assessment districts of ditch No. 1 and ditch No. 2, as previously established, and resulted in the assessment of benefits now complained of, made against all the appellees, some of whom did and some of whom did not own land within the area originally assessed for the establishment of ditch No. 1 and ditch No. 2. When the present suits were commenced, notice had been given to the appellees of a tentative assessment of benefits to their land, and of a proceeding to be had to equalize benefits before final assessments for the cost of construction.

Both courts below found that the drainage ditch No. 1 and 2 was not a new project, but was in fact identical with the previously established ditches No. 1 and No. 2; that no new or additional drainage was established, and that the only purpose of the proceedings was to provide for the maintenance and repair of the previously established ditches by assessing the cost on tracts not included within the area originally assessed for their construction. For these reasons, among others, both courts held that the proceedings had by the Board of County Commissioners to apportion and assess benefits on land outside the original drainage districts were unauthorized and void under the statutes of South Dakota. In this we think they were right.

Section 8458 of the South Dakota Revised Code of 1919 provides that the Board of County Commissioners "may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any water course or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse . . ."

Section 8476 provides that the powers conferred for establishing and constructing drains "shall also extend to and include the deepening and widening of any drains

which have heretofore been or may hereafter be constructed," and that no proceedings shall be had under this section "except upon notice and the other procedure prescribed herein for the construction of drains."

The procedure prescribed by the South Dakota statutes embraces two distinct schemes or methods for carrying into effect the authority of the Board of County Commissioners. The one relates exclusively to the establishment and construction of proposed drainage; the other to assessments for further costs and maintenance of drainage already established. With reference to the establishment of proposed drainage, it is provided that the Board shall act only on petition of a landowner affected by the "proposed drainage" (§ 8459), and upon the filing of the petition the Board shall cause the "proposed route" of the drainage to be inspected and, if necessary, surveyed. (§ 8460.) It is required to hold a hearing on notice describing the proposed drainage (§ 8461), and after hearing the drainage "may be established" in accordance with the petition or the findings of the Board (§ 8462). After the establishment of the drainage, the Board is required to determine "the proportion of benefits of the proposed drainage," and to fix a time and place for equalization of benefits, on notice describing the land affected by the "proposed drainage"; and to state the proportion of benefits fixed for each tract, benefits being considered "such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains which may be subsequently constructed." (§ 8463.) Following equalization of benefits as prescribed, the Board is authorized to make an assessment against each tract, "in proportion to benefits as equalized," for the purpose of paying damages and the cost of establishment, which are stated to include all the expenses "incurred or to be incurred that in any way contributed or will contribute to the establishment or con-

struction of the drainage." All assessments are made perpetual liens upon the tracts assessed. (§ 8464.)

The only provisions contained in the statutes for equalization of benefits are those found in the sections referred to, which have to do with the establishment of proposed drainage. By § 8477 all drains, when constructed, are in charge of the Board of County Commissioners, who are made responsible for keeping them open and in repair. The statutory provisions which deal with assessments for further costs of construction and for maintenance are found in §§ 8467 and 8470, the material portions of which are printed in the margin.* It will be observed that there is no provision for the assessment or equalization of benefits in connection with the procedure provided in those sections for assessing for further costs of construction and maintenance. No such provision is required; for by the

*§ 8467. Assessments for Further Costs. At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction . . . and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforcible as such first assessment and certificates. . . . In any case, in the discretion of the board, several assessments may be made as the work progresses. . . .

§ 8470. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof. . . . Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens . . . in all respects as original assessments. . . .

express terms of § 8467 the procedure for making assessments for the additional cost of construction is like that provided for the first assessment for construction (§ 8464) after the equalization of benefits has been had under § 8463; and by § 8470 assessments for maintenance are to be made "upon the land owners affected in the proportions determined for such drainage." Both sections clearly contemplate that assessments for additional construction and for maintenance are to be made upon those lands which are already embraced within the drainage project, and on which the proportion of benefits has been determined by equalization proceedings had after the establishment of the original project.

The statutes of South Dakota contain no provision for assessing the cost of reconstruction or maintenance of an existing drainage project except in the two sections last referred to, and they make no provision for assessing such costs upon lands not embraced within or assessed in connection with the drainage as originally established. Whether the cost of construction work actually done on ditch No. 1 and ditch No. 2 and involved in this litigation be regarded as additional costs of construction or as cost of maintenance, or partly one and partly the other, there is no statutory authority for assessing that cost on lands not included in the original drainage district.

By § 8489 it is provided that "If any proceeding for the location, establishment or construction of any drain . . . has been . . . voluntarily abandoned . . . for any cause, the board of county commissioners may nevertheless . . . locate a drain . . . under the same or different names and in the same or different locations from those described in the . . . abandoned proceeding under the provisions of this article." But the original proceedings for the establishment and construction of ditch No. 1 and ditch No. 2 were not abandoned, and the proceedings had for levying the assessments now

in question were not framed or conducted on that theory. They were consequently without authority in law and could not affect the rights of appellees.

While there are expressions in the opinion in *Gilseth* v. *Risty,* 46 S. D. 374, decided after these suits were begun, which, standing by themselves, might be regarded as supporting the view that the proceedings now in question were authorized by the statutes of South Dakota, the court clearly rested its decision upon other grounds. It is the duty of the federal courts, in suits brought in or removed to the districts courts, to decide for themselves all relevant questions of state law, and while they will follow the decisions of state courts as to the interpretation of a state statute, we do not think that the case of *Gilseth* v. *Risty, supra,* so clearly or decisively passed upon the question here involved as to control our decision. *Kuhn* v. *Fairmount Coal Co.,* 215 U. S. 349; *Barber* v. *Pittsburgh, &c. Railway,* 166 U. S. 83, 99; and see *Edward Hines Yellow Pine Trustees* v. *Martin,* 268 U. S. 458.

As our decision in these cases turns on the construction and application of the state law, we do not pass upon the constitutional questions raised. See *Bohler* v. *Calloway,* 267 U. S. 479, 489; *Chicago, G. W. Ry.* v. *Kendall,* 266 U. S. 94, 97–98. They are, however, questions of substance and sufficient to give the court jurisdiction to pass on the whole case. *Greene* v. *Louisville & Interurban R. R. Co., supra; Chicago, G. W. Ry.* v. *Kendall, supra; Bohler* v. *Calloway, supra.*

The objections to the exercise of equity jurisdiction in these cases require no extended comment. When the appellees filed their bills, the drainage project had been completed and construction warrants had been issued for the work done; benefits apportioned to the lands of the appellee had been tentatively fixed and notice of a hearing for the equalization of benefits had been given. The steps next in order after the hearing would have been the

assessment of costs of construction and the filing of copies of the assessment with the County Treasurer, which would have established a lien on the property assessed. (§ 8464.) As the principal ground for appellees' suits was the invalidity of the whole proceeding and not merely inequality in apportionment of benefits, and as the effect of the proposed equalization would have been to bring the lands of appellees into the newly established drainage district and subject them to future assessments for construction costs and for maintenance, the threatened injury was imminent and the suits were not premature. The assessment, if made, would have established a lien on the appellees' property which would be a cloud on title—to say nothing of the fact that the effect of the pending proceeding would have been to subject their property to future assessments; hence the case was one for equitable relief unless there was a plain and adequate remedy at law. *Ohio Tax Cases,* 232 U. S. 576; *Shaffer* v. *Carter,* 252 U. S. 37, 46; *Chicago, B. & Q. R. R.* v. *Osborne,* 265 U. S. 14. The remedy by appeal to the state court under § 8469 does not appear to be coextensive with the relief which equity may give In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. *Smyth* v. *Ames,* 169 U. S. 466; *Chicago, B. & Q. R. R. Co.* v. *Osborne, supra.*

It does not appear that the state law affords a remedy by payment of the assessment and suit to recover it back, which, if it exists, can be availed of in the federal courts, *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481, 486, or that such remedy, if available, would not entail a multiplicity of suits. It is not suggested that § 6826 of the state code, which permits suits to recover taxes and forbids injunctions to restrain their collection, has any

application to assessments for drainage. In *Gilseth* v. *Risty, supra,* the Supreme Court of the State evidently did not deem that section applicable, as it did not rely upon it in denying relief. The legal remedy under the state law being uncertain, the federal court has jurisdiction in equity to enjoin the assessment. *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288.

The objection that it was not shown that these cases involve the jurisdictional amount is unsubstantial. The court below found that the amount due on outstanding construction warrants was approximately $300,000 and that the tentative apportionment of benefits, if undisturbed, would result in assessments for amounts ranging from $6,000 to $50,000 against the lands of the appellees. As the substantial basis of the suits was want of jurisdiction in the Board of County Commissioners to make the apportionment and assessment, we think the jurisdictional amount was necessarily involved.

Appellees are not estopped to seek the relief which was granted because of any relations which they may have had to the proceedings or to the construction work which had been carried on before notice of the tentative apportionment of benefits. The decrees of the District Court, which remain undisturbed, enjoin the assessments and further proceedings only so far as they affect lands lying outside of the original assessment areas of ditch No. 1 and ditch No. 2. As none of the appellees could have had any notice of the proposal to assess lands lying outside of these areas, until the published notice of the apportionment of benefits, their previous conduct cannot estop them from seeking the relief granted. Other objections were made to the decrees below, but they are not of sufficient gravity to require notice here.

There is no diversity of citizenship in No. 99, the appellee in that case being the city of Sioux Falls, a South Dakota municipal corporation. Nor was any substantial

federal question raised by the bill of complaint in that suit. The power of the State and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment. *Trenton* v. *New Jersey*, 262 U. S. 182; and see *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394. The decree in that case must therefore be reversed, and the cause remanded with directions to dismiss the plaintiff's bill.

No. 99 reversed and remanded.
Nos. 95, 96, 97, 98 and 100 affirmed.

ALEXANDER MILBURN COMPANY *v.* DAVIS-BOURNONVILLE COMPANY.

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

No. 107. Argued January 11, 12, 1926.—Decided March 8, 1926.

1. Where a patent application fully and adequately disclosed, but did not claim, the thing patented to a later applicant alleging a later date of invention, the later applicant was not the "first inventor" within Rev. Stats. § 4920. P. 399.
2. As regards "reduction to practice," a description that would bar a patent if printed in a periodical or in an issued patent is equally effective in an application. P. 401.

1 Fed. (2d) 227, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals which affirmed a decree of the District Court (297 Fed. 846) enjoining an alleged infringement of plaintiff's patent.

Mr. James A. Watson, for petitioner.

The court below erred in assuming that under the defense of R. S. 4920 it was necessary to show that Clifford was the "first inventor," whereas the statute simply requires proof that Whitford "was not the original and

first inventor." No *inter partes* question of priority of invention is involved in this defense. It also erred in overlooking the presumption of law that what Clifford disclosed and did not claim was old and known when he filed his application. *Millett & Reed* v. *Duell,* 18 App. D. C. 186; *Mahn* v. *Harwood,* 112 U. S. 354. It erred further in overlooking the inequity of the grant to Whitford of a monopoly which would deprive Clifford of the right to use important features of his own device and deprive the public of the right to use what was disclosed in Clifford's prior application and which was either known to Clifford to be old, or, if invented by Clifford, deliberately dedicated to the public. There are many cases in which this Court and the lower courts have held that the first inventor, having reduced his invention to practice, may abandon or dedicate his invention to the public, by failure to claim, or for other reasons, but we have found no case in which such abandonment or dedication has been held to entitle a later inventor to a patent for the invention. *Keystone Bridge Co.* v. *Phoenix Iron Co.,* 95 U. S. 274; *Miller* v. *Brass Co.,* 104 U. S. 350; *Eames* v. *Andrews,* 122 U. S. 40; *Deering* v. *Winona Harvester Works,* 155 U. S. 286; *McClain* v. *Ortmayer,* 141 U. S. 419. Assuming that Clifford was the inventor of the thing he failed to claim, he made it public property as soon as the patent issued and every day that passed thereafter added to the strength of the public right. *Mahn* v. *Harwood,* 112 U. S. 354.

The right of the public to use the invention was tentative during the period of two years from the date of the Clifford patent, as during this period Clifford might have filed an application for a reissue, or a divisional application, claiming the invention, and the application would have related back to the date of filing the original application. *Chapman* v. *Wintroath,* 252 U. S. 126; *Smith & Griggs Mfg. Co.* v. *Sprague,* 123 U. S. 249; *Millett &*

Reed v. *Duell,* 18 App. D. C. 186; *Ex parte Grosslin,* 97 O. G. 2977. The issuance of such a patent to Clifford, after interference with Whitford, would have invalidated the Whitford claims, as, obviously, there cannot be two monopolies of the same thing. The Whitford patent was allowed through oversight of the Patent Office and contrary to established practice as pointed out in the Patent Office Rules. Clifford perfected his invention when he filed his application.

The application was a constructive reduction to practice—of what it disclosed—before Whitford conceived. *Chapman* v. *Wintroath, supra; Smith & Griggs Mfg. Co.* v. *Sprague, supra; Von Recklinghausen* v. *Dempster,* 34 App. D. C. 474.

Clifford had an inchoate right to claim the invention or to re-claim it up to the instant the public came into full possession. *Roberts* v. *Ryer,* 91 U. S. 150; *Pope Mfg. Co.* v. *Gommully Mfg. Co.,* 144 U. S. 224; *Naceskid Service Chain Co.* v. *Perdue,* 1 Fed. (2d) 924; *Diamond Drill Mch. Co.* v. *Kelly Bros.,* 120 Fed. 295; *Westinghouse* v. *Chartiers Val. Gas Co.,* 43 Fed. 582; *Barnes Automatic Sprinkler Co.* v. *Walworth Mfg. Co.,* 51 Fed. 88, 60 Fed. 605; *Farmers' Handy Wagon Co.* v. *Beaver Silo & Box Mfg. Co.,* 236 Fed. 731; *Hamilton Beach Mfg. Co.* v. *Geirer Co.,* 230 Fed. 430; *Camp Bros. & Co.* v. *Portable Wagon Dump & E. Co.,* 251 Fed. 603; *Willard* v. *Union Tool Co.,* 253 Fed. 48.

The decisions of the Court of Appeals of the District of Columbia are of great importance as they control the interpretation of the law in the Patent Office. See *Millett & Reed* v. *Duell,* 18 App. D. C. 186.

The doctrine announced by the court below is in conflict with the uniform practice in the Patent Office during the last 50 years. *United States* v. *Hill,* 120 U. S. 169; *Baltzell* v. *Mitchell,* 3 Fed. (2d) 428; *Ex parte Wright,* 1870 C. D. 60; *Bell* v. *Gray,* 15 O. G. 776; *Ex parte Bland,*

16 O. G. 47. It appears that, shortly after the Bland decision, the practice of declaring an interference between a pending application claiming and a patent disclosing but not claiming an invention was discontinued. The practice of rejecting an application claiming upon a patent disclosing but not claiming an invention was continued and has been the uniform practice of the Patent Office to the present time. Instead of declaring an interference and determining the question of priority *inter partes*, present Patent Office Rule 75 permits the applicant to overcome such a patent by making "oath to facts showing a completion of the invention in this country before the filing of the application on which the domestic patent issued." This rule is at present in force and no change has been made in it during the past twenty-seven years.

Under the practice of the Patent Office, for at least fifty years, the application for the Whitford patent should have been rejected upon the Clifford patent which was issued while the Whitford application was pending and which admittedly disclosed, without claiming, the invention claimed by Whitford. The allowance of the Whitford patent was an oversight.

Mr. D. S. Edmonds, with whom *Messrs. R. Morton Adams, J. F. Brandenburg,* and *William H. Davis* were on the brief, for respondent.

There are two ways in which an earlier filed patent can be used to invalidate a later one, by establishing prior knowledge, or by establishing prior invention. Our patent system, in defining the conditions under which an inventor is entitled to a patent, adopts the fundamental view that the invention must not have been known before, and adds that it will be deemed known if it has been printed in a publication or patented in this or a foreign country, but not if it has only been used in a foreign

country (§ 4923, R. S.). The conditions giving rise to the right to a patent are defined by § 4886, R. S., and the procedural requirements which must be complied with in procuring the grant after the right has arisen are defined in §§ 4888 to 4893, R. S., inclusive. Broadly stated, any failure to comply with the conditions of § 4886 prevents the right to a patent from arising, and is a defense to a suit on the patent; and any failure to comply with the procedural requirements of §§ 4888 to 4893, inclusive, invalidates the grant because of a defect in the procedure.

The date of conception by an inventor becomes important only when someone else asserts a right to a patent for the same invention and it is necessary to determine which was first. There may be two persons who are original inventors within the meaning of § 4886, but they cannot both be first inventors. If each asserts his right to a patent, a contest of priority arises. The statute provides for such a contest in the Patent Office under § 4904, R. S., and in the courts under § 4918, R. S.

The application is not a printed publication. Nor is it a patent. It indicates nothing as to the completeness of the disclosure of the patent in suit or as to whether the invention in suit was in public use or on sale or abandoned. It therefore has no bearing on the matters set out in the first, third, and fifth clauses of § 4920. It can have a bearing only on the defenses of the second and fourth clauses. The second clause, in its literal wording, is directed to a situation where the patentee secured a patent for an invention which had been conceived at an earlier date by another who was using diligence in perfecting it, and it has been held to recognize the right of an inventor, in a contest of priority, to go back to his date of conception. *Reed* v. *Cutter* [1841], 1 Story, 590. It is this defense which is pleaded in the case at bar; and Clifford is set up as the prior inventor. But, since the issue on the conflict of law involves more than

this, it is necessary to consider the fourth clause, which holds that, if the prior knowledge be shown by the fact of prior invention by another, it must be a completed invention actually reduced to practice and available to the public. The mere fact of prior invention is not enough, as it is well settled that a concealed, forgotten, or abandoned invention is not a bar to a patent to a subsequent inventor. *Gayler* v. *Wilder,* 10 How. 477; *Mason* v. *Hepburn,* 13 App. D. C. 86.

A patent application does not establish prior invention or priority of right unless the subject matter disclosed is claimed. It is true that the fact of prior invention may be used to invalidate if the prior invention was in fact reduced to practice so that it was actually available to the public. But in such case it becomes a part of the public knowledge, and may be proved as such, and the assertion of a right to a patent has no bearing.

Briefly stated, the history, substance, and application of the doctrine of constructive reduction to practice are as follows:

1. From the point of view of the patent system, an invention is not complete until the inventor has taken it out of the realm of speculation into that of fact; until he has actually built the machine which he is supposed to have invented so that it has a real existence and is available to the public.

2. The patent statutes (§ 4886) do not require this actual reduction to practice if a complete allowable application for a patent on the invention is filed. This act has been called a "constructive reduction to practice."

3. It is essential that the patentee claim his invention.

4. The doctrine has no application to unclaimed subject-matter, and has been evolved solely for the benefit of one asserting a right to a patent. When relied upon by the defendant in a suit for infringement, it may be used only insofar as the subject-matter is claimed.

Reduction to practice consists of making and using the invention so that it has a physical existence. This does not mean the mere making of sketches or description. There must be more than this. The invention must be taken out of the realm of speculation into that of reality. *Reed* v. *Cutter,* 1 Story 590; *Agawam* v. *Jordan,* 7 Wall. 583; *Seymour* v. *Osborne,* 11 Wall. 516; *Draper* v. *Potomska Mills Corp.,* 3 Ban. & A. 214; *Automatic* v. *Pneumatic,* 166 Fed. 288; *Warren Bros. Co.* v. *Owosso,* 166 Fed. 309; *Sydeman* v. *Thoma,* 32 App. D. C. 362.

Conception may be evidenced by sketches or description showing a complete idea of means. But not so with reduction to practice. *Lyman Co.* v. *Lalor,* 12 Blatch. 303; *Howes* v. *McNeal,* 15 Blatch. 103; *Porter* v. *Louden,* 7 App. D. C. 64; *Mason* v. *Hepburn,* 13 App. D. C. 86, and cases cited; *Sydeman* v. *Thoma,* 32 App. D. C. 362. In the early years of our patent system reduction to practice could be proved only by a showing that there was an actual successful practice of the invention. And it was held that such a reduction to practice was necessary before any right to a patent arose. *Reed* v. *Cutter,* 1 Story 590; *Washburn* v. *Gould,* 3 Story 122; *Cahoon* v. *Ring,* 1 Cliff. 592; *Whiteley* v. *Swayne,* 7 Wall. 685; *Agawam* v. *Jordan,* 7 Wall. 583; *Seymour* v. *Osborne,* 11 Wall. 516; *Lyman* v. *Lalor,* 12 Blatch. 303; *Herring* v. *Nelson,* 14 Blatch. 293; *Howes* v. *McNeal,* 15 Blatch. 103. Later cases held, however, that, where one is asserting his right to a patent, the statutes do not require an actual reduction to practice if the patent is allowed. *Wheeler* v. *Clipper,* 10 Blatch. 181; *Telephone Cases,* 126 U. S. 1; *Automatic* v. *Pneumatic,* 166 Fed. 288. It is essential that the application be not only allowable, but be allowed. Abandoned or rejected applications are not considered evidence of prior invention. *Corn Planter Patent,* 23 Wall. 181; *Lyman* v. *Lalor,* 12 Blatch. 303; *Fire Extinguisher Co.* v. *Philadelphia,* 1 Ban. & A. 177; *Herring* v. *Nelson,* 14 Blatch. 293; *Webster* v. *Sanford,* 1888 C. D. 92.

Section 4888, R. S., requires the applicant to "particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery." Section 4892 requires him to "make oath that he does verily believe himself to be the original and first inventor or discoverer of the . . . improvement for which he solicits a patent." The time at which the claim is made does not affect this, as it may be made by amendment, in a divisional application, or by reissue. *Smith & Griggs Co.* v. *Sprague,* 123 U. S. 249; *Austin* v. *Johnson,* 18 App. D. C. 83; *Ex parte Waterman,* C. D. 235; *Hopfelt* v. *Read,* C. D. 319; *Duryea & White* v. *Rice,* 28 App. D. C. 423; *Von Recklinghausen* v. *Dempster,* 34 App. D. C. 474; *Chapman v. Wintroath,* 252 U. S. 126. The original disclosure cannot be materially changed. The statement of invention and the claims may be changed; but when an applicant presents a claim for matter originally shown or described, but not substantially embraced in the statement of invention or claim originally presented, he is required to file a supplemental oath to the effect that the subject-matter of the proposed amendment was part of his invention and was invented before he filed his original application. The purpose of the disclosure is to make the invention so clear that no further invention is necessary to put it into practice, so that, upon issuance of the patent, the public will be as fully aware of the invention as if it actually saw and used it. It is essential that this requirement be complied with before allowance, and patents are held invalid for noncompliance. *Wood* v. *Underhill,* 5 How. 1; *Tannage Co.* v. *Zahn,* 66 Fed. 986; *Natl. Chemical Co.* v. *Swift & Co.,* 100 Fed. 451; *Featheredge Rubber Co.* v. *Miller Rubber Co.,* 259 Fed. 565. To determine this, the Patent Office examines the part claimed to determine its operability. There is no occasion to consider any part which is not claimed or which is not essential to the part claimed.

Patents which are inoperative in unclaimed and non-essential features are not held invalid for that reason. *Keystone Foundry Co.* v. *Fastpress Co.,* 263 Fed. 99; *Pickering* v. *McCullough,* 194 U. S. 319; *Dalton Adding Mch. Co.* v. *Rockford Mch. Co.,* 253 Fed. 187, aff. 267 Fed. 422; *Manhattan Book Co.* v. *Fuller Co.,* 204 Fed. 286.

The doctrine of "constructive reduction to practice" was evolved, therefore, only to assist one asserting in a formal way a right to a patent, and it had nothing to do with proving prior invention as a defense. The fact that the applicant is actively engaged in securing a patent on an invention and at the same time is disclosing matter which he does not claim, seems to us to be evidence that the unclaimed matter was not his invention. *Electric Co.* v. *Westinghouse Co.,* 171 Fed. 83.

The unclaimed disclosure in a patent application does not constitute prior knowledge within the meaning of § 4886 as of the date of filing of the application. Section 4886 provides that if a device is in use publicly it is within the knowledge of the art, or if it is described in a printed publication or in a patent it will be deemed to be within the knowledge of the art. But it has always been held that sketches, drawings or description, regardless of how complete they may be, and regardless of the fact that they are known to several people, do not constitute knowledge within the meaning of § 4886 unless they are published. *Searls* v. *Bouton,* 12 Fed. 140; *Stitt* v. *Eastern R. Co.,* 22 Fed. 649; *Judson* v. *Bradford,* 3 Ban. & A. 539; *Westinghouse* v. *General Elec. Co.,* 199 Fed. 907, aff. 207 Fed. 75; *De Kando* v. *Armstrong,* 37 App. D. C. 314; Robinson, Vol. I, page 310. To regard the subject-matter disclosed but not claimed in an application as part of the prior art as of the date of filing of that application is, we think, so far in conflict with the practical purpose of the patent law and so inconsistent with all the other rules and procedures that have grown up in the practical carrying out of that purpose that it must be rejected.

Mr. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit for the infringement of the plaintiff's patent for an improvement in welding and cutting apparatus alleged to have been the invention of one Whitford. The suit embraced other matters but this is the only one material here. The defense is that Whitford was not the first inventor of the thing patented, and the answer gives notice that to prove the invalidity of the patent evidence will be offered that one Clifford invented the thing, his patent being referred to and identified. The application for the plaintiff's patent was filed on March 4, 1911, and the patent was issued June 4, 1912. There was no evidence carrying Whitford's invention further back. Clifford's application was filed on January 31, 1911, before Whitford's, and his patent was issued on February 6, 1912. It is not disputed that this application gave a complete and adequate description of the thing patented to Whitford, but it did not claim it. The District Court gave the plaintiff a decree, holding that, while Clifford might have added this claim to his application, yet as he did not, he was not a prior inventor, 297 Fed. Rep. 846. The decree was affirmed by the Circuit Court of Appeals. 1 Fed. (2d) 227. There is a conflict between this decision and those of other Circuit Courts of Appeals, especially the sixth. *Lemley* v. *Dobson-Evans Co.,* 243 Fed. 391. *Naceskid Service Chain Co.* v. *Perdue,* 1 Fed. (2d) 924. Therefore a writ of certiorari was granted by this Court. 266 U. S. 596.

The patent law authorizes a person who has invented an improvement like the present, 'not known or used by others in this country, before his invention,' &c., to obtain a patent for it. Rev. Sts. § 4886, amended, March 3, 1897, c. 391, § 1, 29 Stat. 692. Among the defences to a suit for infringement the fourth specified by the statute is that the patentee 'was not the original and first in-

ventor or discoverer of any material and substantial part of the thing patented.' Rev. Sts. § 4920, amended, March 3, 1897, c. 391, § 2, 29 Stat. 692. Taking these words in their natural sense as they would be read by the common man, obviously one is not the first inventor if, as was the case here, somebody else has made a complete and adequate description of the thing claimed before the earliest moment to which the alleged inventor can carry his invention back. But the words cannot be taken quite so simply. In view of the gain to the public that the patent laws mean to secure we assume for purposes of decision that it would have been no bar to Whitford's patent if Clifford had written out his prior description and kept it in his portfolio uncommunicated to anyone. More than that, since the decision in the case of *The Cornplanter Patent,* 23 Wall. 181, it is said, at all events for many years, the Patent Office has made no search among abandoned patent applications, and by the words of the statute a previous foreign invention does not invalidate a patent granted here if it has not been patented or described in a printed publication. Rev. Sts. § 4923. See *Westinghouse Machine Co.* v. *General Electric Co.,* 207 Fed. 75. These analogies prevailed in the minds of the Courts below.

On the other hand, publication in a periodical is a bar. This as it seems to us is more than an arbitrary enactment, and illustrates, as does the rule concerning previous public use, the principle that, subject to the exceptions mentioned, one really must be the first inventor in order to be entitled to a patent. *Coffin* v. *Ogden,* 18 Wall. 120. We understand the Circuit Court of Appeals to admit that if Whitford had not applied for his patent until after the issue to Clifford, the disclosure by the latter would have had the same effect as the publication of the same words in a periodical, although not made the basis of a claim. 1 Fed. (2d) 233. The invention is made public property

as much in the one case as in the other. But if this be true, as we think that it is, it seems to us that a sound distinction cannot be taken between that case and a patent applied for before but not granted until after a second patent is sought. The delays of the patent office ought not to cut down the effect of what has been done. The description shows that Whitford was not the first inventor. Clifford had done all that he could do to make his description public. He had taken steps that would make it public as soon at the Patent Office did its work, although, of course, amendments might be required of him before the end could be reached. We see no reason in the words or policy of the law for allowing Whitford to profit by the delay and make himself out to be the first inventor when he was not so in fact, when Clifford had shown knowledge inconsistent with the allowance of Whitford's claim, [*Webster*] *Loom Co.* v. *Higgins,* 105 U. S. 580, and when otherwise the publication of his patent would abandon the thing described to the public unless it already was old. *McClain* v. *Ortmayer,* 141 U. S. 419, 424. *Underwood* v. *Gerber,* 149 U. S. 224, 230.

The question is not whether Clifford showed himself by the description to be the first inventor. By putting it in that form it is comparatively easy to take the next step and say that he is not an inventor in the sense of the statute unless he makes a claim. The question is whether Clifford's disclosure made it impossible for Whitford to claim the invention at a later date. The disclosure would have had the same effect as at present if Clifford had added to his description a statement that he did not claim the thing described because he abandoned it or because he believed it to be old. It is not necessary to show who did invent the thing in order to show that Whitford did not.

It is said that without a claim the thing described is not reduced to practice. But this seems to us to rest on

a false theory helped out by the fiction that by a claim it is reduced to practice. A new application and a claim may be based on the original description within two years, and the original priority established notwithstanding intervening claims. *Chapman* v. *Wintroath,* 252 U. S. 126, 137. A description that would bar a patent if printed in a periodical or in an issued patent is equally effective in an application so far as reduction to practice goes.

As to the analogies relied upon below, the disregard of abandoned patent applications, however explained, cannot be taken to establish a principle beyond the rule as actually applied. As an empirical rule it no doubt is convenient if not necessary to the Patent Office, and we are not disposed to disturb it, although we infer that originally the practice of the Office was different. The policy of the statute as to foreign inventions obviously stands on its own footing and cannot be applied to domestic affairs. The fundamental rule we repeat is that the patentee must be the first inventor. The qualifications in aid of a wish to encourage improvements or to avoid laborious investigations do not prevent the rule from applying here.

Decree reversed.

WEAVER *v.* PALMER BROTHERS COMPANY.

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

No. 510. Argued December 11, 1925.—Decided March 8, 1926.

1. Legislative determinations are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. P. 410.
2. Invalidity of a legislative act may be shown by things that may be judicially noticed, or by facts established by evidence, the burden being on the attacking party to establish the invalidating facts. P. 410.

3. A state law (Pa. Ls. 1923, c. 802,) forbidding the use, in comfortables, of shoddy, even when sterilized, is so far arbitrary and unreasonable that it violates the due process clause of the Fourteenth Amendment. Pp. 410, 415.
4. Without considering whether the mere failure of the Act to prohibit the use of other filling materials is sufficient to invalidate the prohibition of the use of shoddy as a violation of the equal protection clause, the number and character of the things permitted to be used in such manufacture properly may be taken into account in deciding whether the prohibition of shoddy is a reasonable and valid regulation or is arbitrary and violative of the due process clause. P. 412.
5. Such a prohibition can not be sustained, as a health measure, in face of evidence showing that shoddy, even when composed of secondhand materials, is rendered harmless by sterilization, and in face of permission, in the same Act, to use numerous other kinds of materials, if sterilized when secondhand. P. 411.
6. Nor can such prohibition be sustained as a measure to prevent deception, since deception may be avoided by adequate regulations. P. 414.
7. Constitutional guaranties can not be made to yield to mere convenience. P. 415.
8. Every opinion of the Court is to be read with regard to the facts of the case and the question actually decided. *Powell* v. *Pennsylvania,* 127 U. S. 678, distinguished. P. 414.

3 Fed. (2d) 333, affirmed.

APPEAL from a decree of the District Court enjoining the defendant (appellant), an official of Pennsylvania, from enforcing against the plaintiff (appellee) a law of that State regulating the manufacture and sale of bedding, in so far as it forbade the use of shoddy. Plaintiff manufactured comfortables in Connecticut, using shoddy made of new and secondhand materials, and sold its product in Pennsylvania. See also 266 U. S. 588.

Mr. E. Lowry Humes, with whom *Messrs. George W. Woodruff,* Attorney General of Pennsylvania, and *James O. Campbell,* Deputy Attorney General, were on the brief, for appellant.

The legislature enacted the statute for the purpose of protecting the public health, and securing the public against fraud and deception. That these are proper purposes for the exercise of the police power is admitted. The evil was the insanitary condition that existed in the bedding industry, and the insanitary product which was coming into the hands of the consuming public, as well as the fraud and deception which was being practiced in the make-up of the articles sold. Much knowledge of this evil was and is a part of the common knowledge of mankind. The Pennsylvania statute of 1913 and its amendments related only to mattresses, and absolutely prohibited the use of shoddy in their manufacture. With the advantage of ten years' experience in the enforcement of that Act, as well as a knowledge of the activities in twenty-five other States where the police power had already been invoked for the same purpose, the legislature, estimating the extent and character of the evil, enacted the Act of 1923; and in this Act, extended the regulations to all articles of stuffed and filled bedding, including comfortables; and, to make effective enforcement possible, prescribed a new method of tagging and labeling. Since this enactment, Maryland has adopted a similar law, and the city of Spokane, Washington, has passed an ordinance on the same subject.

The growth of the bedding industry and the development of the practices which led to such a general recognition of the existence of evil as to require the exercise of the police power by the legislatures of twenty-seven States and two large cities within a period of fourteen years, demonstrates the wisdom of the words of this Court in *Holden* v. *Hardy,* 169 U. S. 366, that the law is, to a certain extent, a progressive science. The questions raised in this case are more far reaching in their effect than is evident on the face of the record; and the affirmation of the judgment of the court below would have the

effect of striking down the legislative enactments of a large number of States.

The state legislatures have a wide discretion in classifying subjects for police regulation. *Heath & Milligan Mfg. Co.* v. *North Dakota,* 207 U. S. 338; *Ward and Gow* v. *Krinsky,* 259 U. S. 503; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540. Inasmuch as the Pennsylvania legislation made a classification "which bears a reasonable and just relation to the act" in question, it cannot be seriously contended that the appellee or any other person has been denied the equal protection of the law. The prohibitions, restrictions, regulations, penalties, and burdens fall equally on all persons similarly situated. *Magoun* v. *Illinois Trust & Sav. Bk.,* 170 U. S. 283; *Powell* v. *Commonwealth,* 127 U. S. 678. The conclusion of the court below is that the only provision of the Act which violates the 14th Amendment is the provision which absolutely prohibits the use of shoddy in the articles covered by the Act. Every provision of the Act is based upon the same classification and therefore if the classification is arbitrary the equal protection of the laws clause of the 14th Amendment is violated by the entire Act, and the entire Act must fall. Under the definitions in the Act, secondhand materials are materials whose identity and prior use can be readily determined, and are confined almost entirely to materials formerly used as bedding and re-used only in remaking and renovating. Except when remade and renovated for the owner, the use of these materials is limited. Shoddy, however, in the process of manufacture, loses its identity. Its nature facilitates the practice of fraud and deceit.

The question as to whether or not the legislature exercised good judgment in enacting the measure is immaterial for the purposes of this case. *Heath & Milligan Mfg. Co.* v. *North Dakota,* 207 U. S. 338; *State* v. *Emery,* 178 Wis. 147; *Price* v. *Illinois,* 238 U. S. 446. This case

is clearly ruled by *Powell* v. *Commonwealth,* 127 U. S. 678. Cf. *People* v. *Weiner,* 271 Ill. 74; *Hannibal & St. Joseph R. R.* v. *Husen,* 95 U. S. 465.

The question for determination is the limited one whether the challenged provisions had a reasonable relation to the purposes of the Act. That the cases cited by the court below deny rather than establish the large discretionary judicial power which the court below assumed to exercise, is shown by analysis of the cases themselves. *Meyer* v. *Nebraska,* 262 U. S. 390; *Welch* v. *Swasey,* 214 U. S. 91; *Dobbins* v. *Los Angeles,* 195 U. S. 223; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Lawton* v. *Steele,* 152 U. S. 133; *Burns Baking Co.* v. *Bryan,* 264 U. S. 504.

To argue the merit of this legislation, or the efficacy of the remedies it invokes, would be to adopt the error into which that court has already fallen.

Mr. Edwin W. Smith, with whom *Messrs. Carl E. Glock* and *Frank L. McGuire* were on the brief, for appellee.

There is nothing in the Act nor in the testimony that would indicate that the legislature, in the prohibition of shoddy, was attempting to prevent fraud and deception. It would seem that if anything could be seen it would be that a certain material was shoddy, as against any other kind of filling that might be used. But the provisions of the statute as to labels seem to be effective as preventing any fraud and deception, and these provisions the court below has permitted to stand.

The history of the legislation is of little value in determining the case. It is well known that if a movement of some sort is started, resulting in the passage of a statute by one of the state legislatures, in a short time it is followed by other States, apparently without very much consideration. Thus it is that, starting in 1909, this bedding legislation has spread in sixteen years to twenty-eight

States. The futility of all this legislation is shown by testimony in the record. It is only in Pennsylvania and Maryland that the law is so broad as to cover filling made by grinding up perfectly new and unused fabric. The Maryland statute was passed in 1924, modelled after the Pennsylvania statute. None of this legislation in Pennsylvania related to comfortables until the Act of 1923. There has been no judicial interpretation of any of these statutes except in the case of *People* v. *Weiner,* 271 Ill. 74.

The world's supply of new wool is insufficient to clothe the people of the temperate zones and to meet other demands. This scarcity and the public demand for cheaper substitutes require the commercial use of reclaimed wool and cotton fiber. It is undenied and is a well recognized fact that any fabric from which shoddy may be made, may be sterilized by processes which are comparatively cheap to operate.

The statute works a deprivation of liberty and property. If the interference is an unreasonable and arbitrary exercise of the police power, or if it has no substantial relation to the public health, the Act violates the 14th Amendment and is unconstitutional. *Mugler* v. *Kansas,* 123 U. S. 523; *Jay Burns Baking Co. et al.* v. *Charles W. Bryan et al.,* 264 U. S. 504; *Allgeyer* v. *Louisiana,* 165 U. S. 578. Where there is any doubt as to whether or not a thing prohibited is obnoxious, poisonous or harmful, the determination by the legislature is conclusive; but if there is no doubt; that is, if the testimony in the case shows that the thing prohibited is not harmful, or that it may be rendered harmless by proper regulation, then the court may say that its prohibition is unreasonable and arbitrary. *Price* v. *Illinois,* 238 U. S. 466; *Meyer* v. *Nebraska,* 262 U. S. 390. The equal protection clause protects from discriminatory or class legislation. *Missouri* v. *Lewis,* 101 U. S. 22; *Terrace* v. *Thompson,* 263 U. S. 197. Similar legislation was held

unconstitutional in *People* v. *Weiner,* 271 Ill. 74; *Greensboro* v. *Ehrenreich,* 80 Ala. 579; *State* v. *Taft,* 118 N. C. 1190; *Koscinsko* v. *Slomberg,* 68 Miss. 469. The prohibition of an article is unconstitutional if regulation will accomplish the intended purpose. *People* v. *Weiner, supra; Hannibal & St. Joseph R. R.* v. *Husen,* 95 U. S. 465; *Greensboro* v. *Ehrenreich, supra; State* v. *Taft, supra; Valley Rys.* v. *Harrisburg,* 280 Pa. 385; *St. Louis* v. *Evraiff,* 256 S. W. 489; *Booth* v. *Illinois,* 184 U. S. 424; *Marymont* v. *Nevada State Banking Board,* 33 Nev. 333; Tiedeman on Police Power, p. 301. Distinguishing *Powell* v. *Pennsylvania,* 127 U. S. 678; *Crane* v. *Campbell,* 245 U. S. 304; and *Price* v. *Illinois,* 238 U. S. 446.

The Act permits the use of the same mattresses and blankets by different persons night after night in hotels and Pullman cars. It permits hospitals to use the same bedding over and over again for one diseased patient after another. The mattresses from the pesthouse are remade and renovated legally under the Act with sterilization. Shoddy, however, is prohibited. The Act permits shoddy in blankets, which come into immediate contact with the body. It prohibits shoddy in comfortables, which encase the shoddy in a cover of new fabric.

Mr. Justice Butler delivered the opinion of the Court.

Appellee is a Connecticut corporation, and for more than fifty years it and its founders have manufactured comfortables in that State, and have sold them there and in other States. An Act of the legislature of Pennsylvania, approved June 14, 1923, regulates the manufacture, sterilization and sale of bedding. Section 1 of the Act prescribes the following definitions: "Mattress" means any quilted pad, mattress, mattress pad, mattress protector, bunk quilt or box spring, stuffed or filled with excelsior, straw, hay, grass, corn husks, moss, fibre, cotton, wool,

hair, jute, kapok, or other soft material. "Pillow," "bolster," or "feather bed" means any bag, case, or covering made of cotton or other textile material, and stuffed or filled with any filler mentioned in the definition of mattress, or with feathers or feather down. The word "comfortable" means any cover, quilt, or quilted article made of cotton or other textile material, and stuffed or filled with fibre, cotton, wool, hair, jute, feathers, feather down, kapok, or other soft material. "Cushion" means any bag or case made of leather, cotton, or other textile material, and stuffed or filled with any filler, except jute and straw, mentioned in the definition of "pillow," or with tow. The word "new" as used in the Act means any material or article which has not been previously manufactured or used for any purpose. "Secondhand" means any material or article of which prior use has been made. "Shoddy" means any material which has been spun into yarn, knit or woven into fabric, and subsequently cut up, torn up, broken up, or ground up.

Section 2 provides: "No person shall employ or use in the making, remaking, or renovating of any mattress, pillow, bolster, feather bed, comfortable, cushion, or article of upholstered furniture: (a) Any material known as 'shoddy,' or any fabric or material from which 'shoddy' is constructed; (b) any secondhand material, unless, since last used, such secondhand material has been thoroughly sterilized and disinfected by a reasonable process approved by the Commissioner of Labor and Industry; (c) any new or secondhand feathers, unless such new or secondhand feathers have been sterilized and disinfected by a reasonable process approved by the Commissioner of Labor and Industry." Punishment by fine or imprisonment is prescribed for every violation of the Act, and each sale is declared to be a separate offense.

The Act took effect January 1, 1924. Appellant is charged with its enforcement, and threatened to proceed

against the appellee and its customers. January 29, 1924, appellee brought this suit to enjoin the enforcement of the Act on the grounds, among others, that, as applied to the business of appellee, it is repugnant to the due process and equal protection clauses of the Fourteenth Amendment. An application under § 266 of the Judicial Code for a temporary injunction was denied. The decree was affirmed by this court. 266 U. S. 588. Later, defendant answered, and there was a trial at which much evidence was introduced. The District Court found that the statute infringes appellee's constitutional rights insofar as it absolutely prohibits the use of shoddy in the manufacture of comfortables; and to that extent the decree restrains its enforcement. This appeal is under § 238 of the Judicial Code.

The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause of the equal protection clause. The answer depends on the facts of the case. Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. *Penna. Coal Co.* v. *Mahon,* 260 U. S. 393, 413. Invalidity may be shown by things which will be judicially noticed (*Quong Wing* v. *Kirkendall,* 223 U. S. 59, 64), or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts. See *Minnesota Rate Cases,* 230 U. S. 352, 452.

For many years prior to the passage of the Act comfortables made in appellee's factories had been sold in Pennsylvania. In 1923, its business in that State exceeded $558,000 of which more than $188,000 was for comfortables filled with shoddy. About 5000 dozens of these were filled with shoddy made of new materials, and about 3000 dozens with secondhand shoddy. Appellee

makes approximately 3,000,000 comfortables annually, and about 750,000 of these are filled with materials defined by the Act as shoddy. New material from which appellee makes shoddy consists of clippings and pieces of new cloth obtained from cutting tables in garment factories; secondhand shoddy is made of secondhand garments, rags, and the like. The record shows that annually many million pounds of fabric, new and secondhand, are made into shoddy. It is used for many purposes. It is rewoven into fabric; made into pads to be used as filling material for bedding; and is used in the manufacture of blankets, clothing, underwear, hosiery, gloves, sweaters and other garments. The evidence is to the effect that practically all the woolen cloth woven in this country contains some shoddy. That used to make comfortables is a different grade from that used in the textile industry. Some used by appellee for that purpose is made of clippings from new woolen underwear and other high grade and expensive materials. Comfortables made of secondhand shoddy sell at lower prices than those filled with other materials.

Appellant claims that, in order properly to protect health, bedding material should be sterilized. The record shows that, for the sterilization of secondhand materials from which it makes shoddy, appellee uses effective steam sterilizers. There is no controversy between the parties as to whether shoddy may be rendered harmless by disinfection or sterilization. While it is sometimes made from filthy rags, and from other materials that have been exposed to infection, it stands undisputed that all dangers to health may be eliminated by appropriate treatment at low cost. In the course of its decision the District Court said, " It is conceded by all parties that shoddy may be rendered perfectly harmless by sterilization." The Act itself impliedly determines that proper sterilization is practicable and effective. It permits the use of second-

hand materials and new and secondhand feathers when sterilized, and it regulates processes for such sterilization.

There was no evidence that any sickness or disease was ever caused by the use of shoddy. And the record contains persuasive evidence, and by citation discloses the opinions of scientists eminent in fields related to public health, that the transmission of disease-producing bacteria is almost entirely by immediate contact with, or close proximity to, infected persons; that such bacteria perish rapidly when separated from human or animal organisms; and that there is no probability that such bacteria, or vermin likely to carry them, survive after the period usually required for the gathering of the materials, the production of shoddy, and the manufacture and the shipping of comfortables. This evidence tends strongly to show that, in the absence of sterilization or disinfection, there would be little, if any, danger to the health of the users of comfortables filled with shoddy, new or secondhand; and confirms the conclusion that all danger from the use of shoddy may be eliminated by sterilization.

The State has wide discretion in selecting things for regulation. We need not consider whether the mere failure to forbid the use of other filling materials that are mentioned in the Act is sufficient in itself to invalidate the provision prohibiting the use of shoddy, as a violation of the equal protection clause. But the number and character of the things permitted to be used in such manufacture properly may be taken into account in deciding whether the prohibition of shoddy is a reasonable and valid regulation, or is arbitrary and violative of the due process clause. Shoddy-filled comfortables made by appellee are useful articles for which there is much demand. And it is a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden. They are to be distinguished

from things that the State is deemed to have power to suppress as inherently dangerous.

Many States have enacted laws to regulate bedding for the protection of health. Legislation in Illinois (Laws of 1915, p. 375,) went beyond mere regulation and prohibited the sale of secondhand quilts or comfortables even when sterilized or when remade from sterilized secondhand materials. In *People* v. *Weiner,* 271 Ill. 74, the state Supreme Court held that to prohibit the use of material not inherently dangerous and that might be rendered safe by reasonable regulation transgresses the constitutional protection of personal and property rights.

The appellant insists that this case is ruled by *Powell* v. *Pennsylvania,* 127 U. S. 678. But the cases are essentially different. A law of Pennsylvania prohibited the manufacture, sale, or possession for sale, of oleomargarine. An indictment against Powell charged a sale and possession with intent to sell. At the trial he admitted the allegations and, for his defense, offered to prove certain facts which were excluded as immaterial. The question for decision was whether these facts were sufficient to show that, as applied, the law was invalid. Mr. Justice Harlan, speaking for the Court, said (p. 682) that the purpose of these offers of proof was to " show that the article sold was a new invention, not an adulteration of dairy products, nor injurious to the public health, but wholesome and nutritious as an article of food . . . [p. 684.] It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that

such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact." And see *Powell* v. *Commonwealth,* 114 Pa. St. 265, 279, 295.

"Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way." *Quong Wing* v. *Kirkendall, supra,* 64. This is well illustrated by the *Powell Case* compared with *Schollenberger* v. *Pennsylvania,* 171 U. S. 1. Every opinion is to be read having regard to the facts of the case and the question actually decided. *Cohens* v. *Virginia,* 6 Wheat, 264, 399. The facts clearly distinguish this case from the *Powell Case.* There, it was assumed that most kinds of oleomargarine in the market were or might become injurious to health. Here, it is established that sterilization eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained as a measure to protect health. And the fact that the Act permits the use of numerous materials, prescribing sterilization if they are secondhand, also serves to show that the prohibition of the use of shoddy, new or old, even when sterilized, is unreasonable and arbitrary.

Nor can such prohibition be sustained as a measure to prevent deception. In order to ascertain whether the materials used and the finished articles conform to its requirements, the Act expressly provides for inspection of the places where such articles are made, sold or kept for sale. Every article of bedding is required to bear a tag showing the materials used for filling and giving the names and addresses of makers and vendors, and bearing the word "secondhand" where there has been prior use, and giving the number of the permit for sterilizing and disinfecting where secondhand materials or feathers are used for filling. Obviously, these regulations or others

that are adequate may be effectively applied to shoddy-filled articles.

The constitutional guaranties may not be made to yield to mere convenience. *Schlesinger* v. *Wisconsin, ante,* p. 230. The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment. *Adams* v. *Tanner,* 244 U. S. 590, 596; *Meyer* v. *Nebraska,* 262 U. S. 390; *Burns Baking Co.* v. *Bryan,* 264 U. S. 504.

Decree affirmed.

MR. JUSTICE HOLMES, dissenting.

If the Legislature of Pennsylvania was of opinion that disease is likely to be spread by the use of unsterilized shoddy in comfortables I do not suppose that this Court would pronounce the opinion so manifestly absurd that it could not be acted upon. If we should not, then I think that we ought to assume the opinion to be right for the purpose of testing the law. The Legislature may have been of opinion further that the actual practice of filling comfortables with unsterilized shoddy gathered from filthy floors was wide spread, and this again we must assume to be true. It is admitted to be impossible to distinguish the innocent from the infected product in any practicable way, when it is made up into the comfortables. On these premises, if the Legislature regarded the danger as very great and inspection and tagging as inadequate remedies, it seems to me that in order to prevent the spread of disease it constitutionally could forbid any use of shoddy for bedding and upholstery. Notwithstanding the broad statement in *Schlesinger* v. *Wisconsin* the other day, I do not suppose that it was intended to overrule *Purity Extract & Tonic Co.* v. *Lynch,* 226 U. S. 192, and the other cases to which I referred there.

It is said that there was unjustifiable discrimination. A classification is not to be pronounced arbitrary because it goes on practical grounds and attacks only those objects that exhibit or foster an evil on a large scale. It is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm. "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." *Miller* v. *Wilson,* 236 U. S. 373, 384. In this case, as in *Schlesinger* v. *Wisconsin,* I think that we are pressing the Fourteenth Amendment too far.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concur in this opinion.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* THOMPSON MANUFACTURING COMPANY.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 178. Argued January 27, 1926.—Decided March 8, 1926.

1. The statement that the basis of a carrier's liability for goods lost or damaged in transit is "presumed negligence" is in effect only a statement of substantive law that the carrier is liable unless the loss or damage was due to the act of God or the public enemy, or the nature of the goods. P. 421.
2. The second proviso of the "Cummins Amendment" relieves shippers from filing notice of claim, etc., where damage to goods in transit is due to the carrier's "carelessness or negligence," only when the damage is due to the carrier's negligence in fact. P. 422.
3. The burden of proof is on the shipper to establish negligence within the meaning of the proviso. P. 422.
4 Evidence that goods were shipped in good condition and delivered in bad condition, makes a *prima facie* case. P. 422.
5. But where, to rebut such *prima facie* showing, the carrier introduced evidence of the condition of the cars in which the goods

were shipped, tending persuasively to exclude the possibility of negligence, it was error to instruct the jury that, if the damage was not due to the act of God or the public enemy or to the inherent condition of the goods, they might return a verdict for the shipper. P. 423.

99 W. Va. 670, reversed.

CERTIORARI to a judgment of the Supreme Court of Appeals of West Virginia which affirmed a recovery of damages by the appellee in an action against the Railway Company for damage to goods *in transitu.*

Mr. C. N. Davis, with whom *Mr. C. W. Strickling* was on the brief, for petitioner.

Under the second proviso of the Act of Congress, filing of claim is dispensed with when damage results from carelessness or negligence. *Barrett* v. *Van Pelt,* 268 U. S. 85; *Davis* v. *Roper Lumber Co.,* 269 U. S. 158. When a shipper shows delivery of goods to a carrier in good condition, and non-delivery or delivery to the consignee in damaged condition, there arises a *prima facie* presumption of liability. Many of the courts have said that this presumption is a presumption of negligence. But it was certainly not the intention of Congress to exempt shippers from their duty to give to carriers reasonable notice of claims where such claims were based on a mere *prima facie* presumption. Whether this presumption be called a presumption of negligence or one of liability is immaterial, as it is based entirely upon the peculiar relation that exists between shippers and carriers, which makes a carrier an insurer of goods entrusted to it for transportation, and, in case of loss, injury or damage to such goods, imposes upon it the burden of showing that such loss resulted from one of the so-called excepted risks. In such cases liability is not imposed upon carriers because of negligence, but is imposed upon them because, as insurers, they must either deliver goods entrusted to them in the same condition as when they

were received, or show affirmatively that their failure to make such delivery was the result of one of the causes coming under the excepted risk classification.

In this case the carrier had no notice of anything that might lead it to believe that any claim might be expected. The phrase "by carelessness or negligence" applies to all classes of claims,—loss, damage or injury. The rule of proof, which gives rise to a presumption against the carrier, would, if the holding of the court below were followed, entirely relieve all shippers from filing claims where there was either a loss, damage or injury; because the presumption is exactly the same, whether the claim be one of loss, or damage or injury. It was not the intention to exempt a shipper from filing claim where there was a damage in transit and no proof of negligence or carelessness other than such *prima facie* presumption. *Hailey* v. *Oregon Short Line R. Co.*, 253 Fed. 569; *Gillett Safety Razor Co.* v. *Davis*, 278 Fed. 864; *Cunningham* v. *Missouri Pacific R. Co.*, 291 S. W. 1003.

Mr. Henry Simms, with whom *Mr. Lewis A. Staker* was on the brief, for respondent.

The common carriers are conclusively presumed as a matter of law to be guilty of carelessness or negligence in the handling of shipments of freight in their possession unless in the absence of proof that the loss, damage or injury to the goods was caused by one of the exceptions, which are, acts of God, acts of public enemy, or causes due to the inherent or intrinsic nature of the shipments. *Hall* v. *Nashville & Chattanooga Ry. Co.*, 13 Wall. 367; *The Majestic*, 166 U. S. 375; *The Caledonia*, 157 U. S. 124; *The Edwin I. Morrison*, 153 U. S. 199; *Memphis, etc., R. Co.* v. *Reeves*, 10 Wall. 176; *Clark* v. *Barnwell*, 12 How. 272; 10 Corpus Juris, Carriers, § 576; *Natl. Rice Mill Co.* v. *New Orleans, etc., R. Co.*, 132 La. 615; *Collins* v. *Denver, etc., R. Co.*, 181 Mo. App. 213.

Hall v. *Nashville & Chattanooga Ry. Co., supra,* holds that, where goods are delivered to the carrier in good condition and are delivered by the carrier in bad condition at the point of destination it raises a conclusive presumption of misconduct and breach of duty on the part of the carrier; and this can only mean that it raises a conclusive presumption of negligence and carelessness on the part of the carrier. It is conceded that the respondent proved that the goods were delivered to the petitioner in good condition. The jury in finding their verdict in favor of respondent passed upon the question of negligence and decided that the railroad company was guilty of negligence in legal effect exactly the same as if there had been positive and affirmative proof of the exact cause of the damage in transit.

No one should assume that Congress in enacting the First Cummins Amendment intended to destroy the common law presumption of negligence in cases similar to the case at bar; nor should anyone assume or argue that it was the intent of Congress to change the rules of evidence as they existed in such cases. "Carelessness and negligence" as used in the Amendment include all classes of carelessness and negligence, both such as must be affirmatively proved, as in *Barrett* v. *Van Pelt,* 268 U. S. 85, and such as is conclusively presumed.

MR. JUSTICE STONE delivered the opinion of the Court.

The respondent, a corporation, brought suit in the Circuit Court of Cabell County, West Virginia, to recover from petitioner, a common carrier, for damage to an interstate shipment of goods. The case was twice tried. See *Thompson Manufacturing Co.* v. *Railroad,* 93 W. Va. 3. The second trial before a jury resulted in a judgment for the respondent, which was affirmed by the Supreme Court of Appeals of West Virginia, 99 W. Va. 670. This court granted certiorari, 267 U. S. 588. Jud. Code, § 237.

Petitioner supplied respondent, at its request, with two box cars for the transportation of a quantity of sheet iron gas stoves in car load lots from Huntington, West Virginia, to Kansas City, Missouri. The stoves were shipped by respondent in good condition on interstate bills of lading purporting to exempt the carrier from liability unless claims for damage "be made in writing to the carrier within four months after delivery of the property." Upon arrival, many of the stoves were found to be damaged by rust and unsalable. Respondent brought the present suit more than four months after the delivery of the stoves, setting up in its amended declaration that the damage was caused by the negligent conduct of the petitioner. At the trial, the respondent made no attempt to show compliance with the requirement of the bill of lading for written notice of its claim to the carrier, and relied wholly on proof of the delivery of the stoves to the carrier in good condition and the delivery by the carrier at destination in a damaged condition, to establish its right to recover. Petitioner proved that the cars supplied were in weather-tight condition; that, after the goods were loaded on the cars, they were sealed at the point of shipment, and that they arrived at destination in the same weather-tight condition, with seals unbroken.

The case turns on the meaning and application, in the circumstances, of the last proviso of the so-called Cummins Amendment, Act of March 4, 1915, 38 Stat. 1196, 1197, c. 176, amending the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended by § 7 of the Act of June 29, 1906, c. 3591, 34 Stat. 584, 593. The last two provisos of the Act, as construed in *Barrett* v. *Van Pelt*, 268 U. S. 85, read as follows:

"Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a

shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

If respondent does not bring the case within the terms of the final proviso, its failure to give written notice of claim will bar it from recovery. See *Georgia, Florida & Alabama Ry. Co.* v. *Blish Co.*, 241 U. S. 190; *Barrett* v. *Van Pelt, supra; Davis* v. *Roper Lumber Co.*, 269 U. S. 158.

It was argued by petitioner in the state court, as it argues here, that, as respondent offered no direct evidence that the damage to the goods in transit was caused by negligence of petitioner, respondent did not show compliance with the requirements of the Cummins Amendment for relieving the shipper from the necessity of filing its claim in writing with the carrier. On the other hand, it is argued by the respondent that every carrier receiving goods for carriage in good condition, and returning them in bad condition, is conclusively presumed to have been negligent and is liable for the damage resulting from its negligence, unless the injury was caused by the act of God, the public enemy, or the act of the shipper, or the nature of the goods themselves; that, as the evidence and the verdict of the jury established that the damage was not due to any of these causes, the carrier's negligence was to be conclusively presumed, and no notice of claim was necessary under the provisions of the Cummins Amendment.

It is sometimes said that the basis of the carrier's liability for loss of goods or for their damage in transit is "presumed negligence." *Hall & Long* v. *Railroad Companies*, 13 Wall. 367, 372. But the so-called presumption

is not a true presumption, since it cannot be rebutted, and the statement itself is only another way of stating the rule of substantive law that a carrier is liable for a failure to transport safely goods intrusted to its care, unless the loss or damage was due to one of the specified causes. See *Railroad Co.* v. *Reeves,* 10 Wall. 176, 189; *Railroad Co.* v. *Lockwood,* 7 Wall. 357, 376; *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174, 181.

We do not consider that the phrase "carelessness or negligence" of the carrier, as used in the Cummins Amendment in exempting shippers from giving written notice of a claim for damage, has any reference to the conclusive "presumption" to which we have referred. If such were the meaning of the statute, every case of carrier's liability for damage in transit would be a case of presumed negligence, and proof of written notice of claim for damage required by the bill of lading would always be dispensed with, and the plain purpose of the amendment would be defeated. We think that by the use of the words "carelessness or negligence," it was intended to relieve the shipper from the necessity of making written proof of claim when, and only when, the damage was due to the carrier's actual negligent conduct, and that by carelessness or negligence is meant not a rule of liability without fault, but negligence in fact. See *Barrett* v. *Van Pelt, supra.*

There is no language in the statute from which a purpose may be inferred to vary or limit the common law rules governing proof of negligence as a fact in issue, and the shipper may follow these rules when he seeks to show that no notice of claim was necessary.

The respondent therefore had the burden of proving the carrier's negligence as one of the facts essential to recovery. When he introduced evidence to show delivery of the shipment to the carrier in good condition and its delivery to the consignee in bad condition, the petitioner became subject to the rule applicable to all bailees, that

such evidence makes out a *prima facie* case of negligence. *Miles v. International Hotel Co.*, 289 Ill. 320; *Miller* v. *Miloslowsky*, 153 Ia. 135; *Dinsmore* v. *Abbott*, 89 Me. 373; *Railroad Co.* v. *Hughes*, 94 Miss. 242, 246; *Hildebrand* v. *Carroll*, 106 Wis. 324. The effect of the respondent's evidence was, we think, to make a *prima facie* case for the jury. See *Sweeney* v. *Irving*, 228 U. S. 233; *Haines* v. *Shapiro*, 168 N. C. 34, 35; *Sims* v. *Roy*, 4 App. D. C. 496, 499. But even if this "*prima facie* case" be regarded as sufficient, in the absence of rebutting evidence, to entitle the plaintiff to a verdict (*Bushwell* v. *Fuller*, 89 Me. 600, 602, 603; *Cogdell* v. *Railroad*, 132 N. C. 852), the trial court erred here in deciding the issue of negligence in favor of the plaintiff as a matter of law. For the petitioner introduced evidence of the condition of the cars from the time of shipment to the time of arrival, which persuasively intended to exclude the possibility of negligence.

The trial court properly submitted to the jury the question whether the damage was due to an act of God or the public enemy or to the inherent condition of the stoves, since upon the answer to it depended the liability of the carrier provided the shipper was entitled, under the Cummins Amendment, to maintain suit without giving the stipulated notice. But the court erroneously instructed the jury that if they found that the damage was not due to these causes, they might return a verdict for the respondent, thus, in effect, resolving the issue of negligence in favor of the respondent.

The judgment must therefore be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

ASHE, WARDEN OF THE STATE PENITENTIARY, *v.* UNITED STATES EX REL. VALOTTA.

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

No. 521. Argued March 5, 1926.—Decided March 15, 1926.

Relator, having been indicted in the state court separately for each of two closely connected murders, was given a single trial on both indictments, in which he was deprived of the full number of challenges he would have had if tried separately on each. Conviction on both indictments was sustained by the state supreme court. He was discharged by *habeas corpus* in the federal District Court. *Held:*

1. The state trial court had jurisdiction even if the joinder was contrary to state law. P. 425.

2. The decision of the state supreme court on state law, with respect to the trial and the challenges, was not re-examinable. *Id.*

3. The joint trial of the two charges, and limitations of the challenges, was within the constitutional power of the State. *Id.*

4. The interference by *habeas corpus* was unwarranted. P. 426.

2 Fed. (2d) 735, reversed.

APPEAL from an order of the District Court, in *habeas corpus,* discharging the relator Valotta from the custody of the appellant, by whom he was held for execution of a death sentence pursuant to a judgment of a state court.

Mr. James O. Campbell, Deputy Attorney General of Pennsylvania, with whom *Messrs. George W. Woodruff,* Attorney General, *Samuel H. Gardner,* and *Harry A. Estep* were on the brief, for appellant.

Mr. George R. Wallace, with whom *Mr. Franklin A. Ammon* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an appeal from an order on a writ of *habeas corpus* discharging the relator, Valotta, from the custody

of the appellant by whom he was held under a sentence of death. Valotta shot a man in a street brawl—we will assume, in circumstances that suggest considerable excuse—and then killed a policeman who pursued him, within a short distance from the first act. He was indicted separately for the murder of each man, tried in a Court of Pennsylvania, found guilty of murder in the second degree for the first killing and guilty of murder in the first degree for the second, and was sentenced to death. The judgment was affirmed by the Supreme Court of the State. (279 Pa. 84.)

No writ of error or certiorari was applied for, Valotta having no funds and his counsel being ignorant of the statute authorizing proceedings in such cases without prepayment of fees or costs. But when the time for such proceedings had gone by, a writ of *habeas corpus* was obtained from a judge of the District Court of the United States with the result that we have stated. The grounds of the order seem to have been that Valotta was tried upon two indictments for felony at the same time and was deprived of the full number of challenges that he would have had if he had been tried separately upon each.

There is no question that the State Court had jurisdiction. But the much abused suggestion is made that it lost jurisdiction by trying the two indictments together. Manifestly this would not be true even if the trial was not warranted by law. But the Supreme Court of Pennsylvania has said that there was no mistake of law, and so far as the law of Pennsylvania was concerned it was most improper to attempt to go behind the decision of the Supreme Court, to construe statutes as opposed to it and to hear evidence that the practice of the State had been the other way. The question of constitutional power is the only one that could be raised, if even that were open upon this collateral attack, and as to that we cannot doubt that Pennsylvania could authorize the whole story

to be brought out before the jury at once, even though two indictments were involved, without denying due process of law. If any question was made at the trial as to the loss of the right to challenge twenty jurors on each indictment, the only side of it that would be open here, would be again the question of constitutional power. That Pennsylvania could limit the challenges on each indictment to ten does not admit doubt.

There was not the shadow of a ground for interference with this sentence by *habeas corpus*. *Frank* v. *Mangum*, 237 U. S. 309, 326. Extraordinary cases where there is only the form of a court under the domination of a mob, as was alleged to be the fact in *Moore* v. *Dempsey*, 261 U. S. 86, offer no analogy to this. In so delicate a matter as interrupting the regular administration of the criminal law of the State by this kind of attack, too much discretion cannot be used, and it must be realized that it can be done only upon definitely and narrowly limited grounds.

Order reversed.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND *v.* TAFOYA, CHAIRMAN, ET AL.

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

No. 88. Argued January 7, 1926.—Decided March 15, 1926.

1. Where a bill for an injunction alleges that threatened action by defendant state executive officials, under a state statute as construed by them, will deprive plaintiff of rights under the Fourteenth Amendment, jurisdiction of the District Court does not depend on presence of an allegation that the statute itself is unconstitutional, since the Amendment binds the State in all its branches. P. 434.
2. A State cannot use its power to exclude a foreign corporation from local business as a means of accomplishing that which is for-

bidden to the State, such as the regulation of conduct in another jurisdiction. P. 434.

3. Section 2820, of the 1915 Code of New Mexico, as amended in 1921, which purports to make it "unlawful for any insurance company authorized to do business in New Mexico . . . . to pay, ... either directly or indirectly, any fee, brokerage or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico, for the obtaining, placing or writing of any policy or policies of insurance covering risks in New Mexico," and provides that any insurance company violating it shall have its certificates of authority to do business in the State suspended for not less than one year, the suspension to be removed only upon a written pledge that the section will be observed,—*held*, unconstitutional. P. 433.
4. The repeal of this section did not render this case moot, since, in view of a provision of the state constitution that "no act of the Legislature shall affect the right or remedy of either party . . . . in any pending case," it is uncertain whether the plaintiff might not still be held liable to lose its license. P. 433.

Reversed.

APPEAL from the decree of the District Court which dismissed the bill in a suit to enjoin the State Corporation Commission of New Mexico from suspending the license of the plaintiff to do business in that State.

Mr. Charles Markell, with whom *Mr. C. J. Roberts* was on the brief, for appellant.

The bill specifically states the defendants' construction and application of § 2820 and denies the constitutionality of § 2820 as so construed and applied by the defendants. The defendants do not deny, on the contrary, they assert the correctness of, their construction. The lower court expressly sustained the defendants' construction of the statute and the constitutionality of the statute as so construed. The jurisdiction of the lower court and of this Court, however, does not depend upon whether the defendants construed correctly or misconstrued the statute in question. *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278; *Raymond* v. *Chicago Tr. Co.*, 207 U. S. 20;

Ex parte Young, 209 U. S. 123; *Cuyahoga Power Co.* v. *Akron,* 240 U. S. 462; *Meyer* v. *Nebraska,* 262 U. S. 390; *Terral* v. *Burke Co.,* 257 U. S. 529; *Herndon* v. *C. R. I. & P. Ry. Co.,* 218 U. S. 135; *Harrison* v. *St. L. & S. F. R. R.,* 232 U. S. 318; *Wisconsin* v. *P. & R. Coal Co.,* 241 U. S. 329; *Adams* v. *Tanner,* 244 U. S. 590; *Terrace* v. *Thompson,* 263 U. S. 197.

The State of New Mexico cannot constitutionally revoke a foreign corporation's license to do business for the sole reason that the corporation has exercised a constitutional right, e. g., a right guaranteed it by the due process clause of the Fourteenth Amendment. *Doyle* v. *Cont. Ins. Co.,* 94 U. S. 535; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; *Terral* v. *Burke Co.,* 257 U. S. 529; *Bank of Augusta* v. *Earle,* 13 Pet. 519; *Ins. Co.* v. *French,* 18 How. 404. The "constitutionality of unconstitutional conditions" was not involved in *Paul* v. *Virginia,* 8 Wall. 168. The principle of *Lafayette Insurance Co.* v. *French,* 18 How. 404, followed and applied in *Insurance Co.* v. *Morse,* 20 Wall. 445, was not shaken or qualified by any decision of this Court prior to *Doyle* v. *Cont. Ins. Co.,* 94 U. S. 535. The *Doyle Case* was expressly reaffirmed in *Security Mut. Life Ins. Co.* v. *Prewitt,* 202 U. S. 246. It was in effect overruled within four years by the cases of *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; and *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; and has never been revived. In *Terral* v. *Burke Const. Co.,* 257 U. S. 529, the *Doyle* and *Prewitt* cases were expressly declared to have been overruled. The recent cases from *Western Union Tel. Co.* v. *Kansas* to *Terral* v. *Burke Const. Co.,* have by necessary implication overruled all other earlier cases consistent with the *Doyle* and *Prewitt* cases and inconsistent with this later line of cases. The decisions and opinions of this Court in

these Kansas cases in effect necessarily overruled the *Doyle* and *Prewitt* cases and the *Horn Silver Mining Company Case,* 143 U. S. 305, though the majority opinions did not expressly so state.

The right of the foreign corporation under the due process clause is no more, and certainly no less, sacred than rights under the commerce clause, the right of removal to a federal court, or other constitutional rights. *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; *Herndon* v. *C. R. I. & P. Ry.,* 218 U. S. 135; *Harrison* v. *St. L. & S. F. R. R.,* 232 U. S. 318; *New York Life Ins. Co.* v. *Head,* 234 U. S. 149; *Looney* v. *Crane Co.,* 245 U. S. 178; *Int. Paper Co.* v. *Massachusetts,* 246 U. S. 135; *N. Y. Life Ins. Co.* v. *Dodge,* 246 U. S. 357; *Western Union Tel. Co.* v. *Foster,* 247 U. S. 105; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Natl. Ins. Co.* v. *Wanberg,* 260 U. S. 71; *Terral* v. *Const. Co.,* 257 U. S. 529. The State cannot (consistently with due process of law) regulate or prohibit anything done outside New Mexico by a foreign corporation, e. g., payment of commissions or other "wages" to insurance agents outside New Mexico for services rendered outside New Mexico. The State cannot fix—still less prohibit—commissions or other "wages" of insurance agents anywhere, within New Mexico or outside New Mexico. Even if the State possessed both of these powers, it could not (without denying the plaintiff the equal protection of the laws) exercise them in such a way as to prohibit payment of commissions to agents in other States for lawful services rendered in other States by them, or to require payment of commissions to agents in New Mexico for services not rendered by them.

Mr. Milton J. Helmick for appellees.

The defendants from the beginning questioned the jurisdiction of the federal court to entertain complainant's bill on the ground that this is a suit against the

State. Nowhere is it alleged that the statutes in question are unconstitutional, but, on the contrary, the appellant alleges that the constructions given the statutes by the various state officers are the things which are invalid and of which appellant complains. It is axiomatic that such an attempted action is abortive and is in fact an attempted action against the State. *Harkrader* v. *Wadley,* 172 U. S. 148; *Arbuckle* v. *Blackburn,* 113 Fed. 616. While there is in the bill no direct concession that the statute itself is valid, yet the failure to allege its invalidity and the fact that appellant bases its complaint solely and exclusively upon the construction given the statute by the various state officers is, of course, tantamount to a concession of the validity of the statute. It is too clear for argument that a suit against an officer of the State to enjoin him from instituting prosecutions under a state statute on the ground that he is proceeding under an erroneous construction of the law which would render it invalid and in violation of the Constitution of the United States, is one, in effect against the State, of which a federal court is denied jurisdiction by the Eleventh Amendment to the Constitution.

The State has the right to regulate foreign insurance companies. The courts which have had occasion to apply the *Terral Case,* 257 U. S. 529, have almost all confined its application to the proposition that a State can not interfere with the jurisdiction of a federal court. *Central Union Fire Ins. Co.* v. *Kelly,* 282 Fed. 772; *C. M. & St. P. Ry.* v. *Schendel,* 292 Fed. 326; *Maxwell* v. *Hicks,* 294 Fed. 254; *Twohy Bros. Co.* v. *Kennedy,* 295 Fed. 462 (dissenting opinion); *Foy & Shemwell* v. *Georgia-Alabama Power Co.,* 298 Fed. 643. Several cases are to be found where it is baldly stated that no State can deprive a foreign corporation of a constitutional right as a condition precedent to doing business within the State.

It may be suggested that perhaps a limited application of the rule stated in the *Terral Case,* is deducible from the

citation of *Paul* v. *Virginia,* 8 Wall. 168 and *Hooper* v. *California,* 155 U. S. 648, with approval, in the case of *National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71. If the rule of the *Terral Case* is to be extended to include every constitutional right, as appellant contends, then it seems likely that the application of the "equal protection of the laws" clause of the Constitution will create a perfect parity between foreign and domestic corporations resulting in the complete abrogation of the power of the States to regulate foreign corporations as such. *Cf. Commonwealth* v. *Nutting,* 175 Mass. 154.

The New Mexico statutes involved in this appeal do not in fact require the surrender of any constitutional right. At least twenty-seven States have resident agent laws containing compensation features similar to the New Mexico provision. It has long since been settled that a State, acting under its power to regulate the insurance business, may require a foreign insurance company doing business in the State to maintain a resident agent within its borders. The reason is not hard to discover. A responsible authorized local person must represent the company and execute its policies as a protection against fraudulent and worthless contracts. Moreover, in case of loss, change in rate of premium, mistake in the policy or bond, transfer of policy, change in risk, and the like, it is imperative that the citizen have access to some *bona fide* representative of the company with power to act, and bind his principal.

If the State possesses the power to insist upon a resident agent, it likewise possesses the power to make sure that he be a *bona fide* agent, and not a mere dummy or pretended agent. Probably the statutes in question do nothing more than define a *bona fide* resident agent, i. e., one who receives the commissions on business placed in the State. This requirement is not for the economic ad-

vantage of the agent, but for the benefit of the public. Other States impose the requirement in their resident agent laws that the agent shall maintain his principal office within the State, as in New Jersey. It is a provision in aid of the law for the purpose of making sure the agent shall be a *bona fide* one. The New Jersey law, like the New Mexico law, in a measure defines what a resident agent must be,—in New Jersey he must be a man who actually has his principal office within the State, while in New Mexico he must be a man who collects the commission on the premium. Without these two salutary provisions, it would doubtless turn out that the so-called resident agents of New Jersey would be New Yorkers and the so-called resident agents of New Mexico mere figure heads who would countersign insurance policies and bonds at so much a signature. The issue, then, as appellees view it, resolves itself into this query; Granting that the State has a right to insist upon a resident insurance agent, can the State make such other reasonable requirements to insure that such resident agent shall be a *bona fide* one? The compensation requirement of the New Mexico statute is a fair means of insuring a *bona fide* resident agent and enforcing the law as a whole by rendering it impossible for the insurance company to circumvent the requirement by means of a mere dummy agent. *Commonwealth* v. *Cutting,* 175 Mass. 154; *Ferguson* v. *Tuttle,* 112 Atl. 596.

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought to prevent the State Corporation Commission of New Mexico from suspending the right of the plaintiff to do business in that State. A final decree was entered by which it was declared that the defendants intend to suspend that right " for the sole

reason that the plaintiff has made payments to its agents in states other than New Mexico in connection with the procurement of business made, written and placed by the plaintiff in New Mexico"; that such payments are unlawful by virtue of § 2820 of the New Mexico Code of 1915, as amended by Chapter 195 of the Laws of 1921, and that the section, so far as it makes such payments unlawful and authorizes the suspension because of this, is constitutional. On this ground the bill was dismissed. The plaintiffs, contending that the statute as construed and applied is contrary to the Fourteenth Amendment, appealed to this Court.

The statute in question, § 2820 of the Code of 1915 as amended in 1921, purports to make it "unlawful for any insurance company authorized to do business in New Mexico . . . to pay, . . . either directly or indirectly, any fee, brokerage or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico, for the obtaining, placing or writing of any policy or policies of insurance covering risks in New Mexico. Any insurance company violating this section shall have its certificates of authority to do business in the State suspended for not less than one year"—the suspension to be removed only upon a written pledge that the section will be observed. This section has been repealed by an act of 1925, which substitutes the more moderate requirement that the policy must be delivered, the premium collected and the full commission retained by an agent in New Mexico, with authority to that agent to employ a licensed non-resident broker to collect the premiums, &c., and to pay him within limits. The question has been suggested whether this repeal does not require us to dismiss the case. But the Constitution of New Mexico provides that 'no act of the Legislature shall affect the right or remedy of either party . . . in any pending case.' It is at least

possible that the state courts might hold that the plaintiff was still liable to lose its license on the old ground. Therefore it seems to us just that we should proceed to deal with the further questions raised, as both parties desire.

It is suggested that the District Court had no jurisdiction because the bill does not allege that the statute is unconstitutional, but only that the statute as construed and applied by the defendants is so. But even if the statute did not plainly purport to justify and require the threatened action, or if the bill fairly taken did not import a denial of the constitutionality of the law as applied to this case, the plaintiff still would be entitled to come into a Court of the United States to prevent such an alleged violation of its constitutional rights. *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20. *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278. *Cuyahoga River Power Co.* v. *Akron,* 240 U. S. 462.

Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. *Frick* v. *Pennsylvania,* 268 U. S. 473. *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta,* 256 U. S. 350, 358. *Badders* v. *United States,* 240 U. S. 391, 394. *United States* v. *Reading Co.,* 226 U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, *Terral* v. *Burke Construction Co.,* 257 U. S. 529; or to tax it upon property that by established principles the State has no power to tax, *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and

other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co.* v. *Cope,* 235 U. S. 107, 203; *Looney* v. *Crane Co.,* 245 U. S. 178, 188. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114. A State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the Company has tracks and does business in the State making the attempt. *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania,* 153 U. S. 628, 646.

The case last cited was one of an attempt to regulate the corporation's payments in another State. By the same principle on even stronger grounds the corporation cannot be prevented from employing and paying those whom it needs for its business outside the State. The difficulty was fully appreciated by the counsel for the appellee and he therefore sought to limit the generality of the words, at least in the case of agents, and to make out that the object was to prevent the use of dummy agents in the State. It was suggested that agents were paid by commissions at well known conventional rates, and that the statute meant to forbid the dividing of these commissions, and in that way to prevent the work being done and paid for elsewhere, while nominal agents in New Mexico were paid small sums for the use of their names. In short, it is said the purpose was to secure responsible men to represent the Company on the spot. But, whether such an interpretation would save the act or not, it is impossible to limit it in that way. It forbids the payment of any emolument of any nature to any person for the obtaining, placing or writing of any policy covering risks in New Mexico. The words go beyond any legitimate interest of the State, and although the decree is based only on payments to agents it does not declare that the payments thus made prevented the payment of appropriate commissions to the agents in the State nor does the statute limit its prohibition in that way.

The determination of the Commission to suspend the plaintiff purported to be based upon a letter written by it in reply to a notice. In this letter it appeared only that agents or branch offices in other States were paid for services of value by commission on such basis as was agreed upon outside of New Mexico, but not that there was in any case a deduction from appropriate commissions inside the State. The threat and the decree, therefore, test the validity of the statute in its extreme application and furnish no ground for an attempt to read it as meaning less than it says. See further *Palmetto Fire Insurance Co.* v. *Beha,* 13 Fed. (2d) 500; *St. Louis Compress Co.* v. *Arkansas,* 260 U. S. 346.

Decree reversed.

The separate opinion of Mr. JUSTICE McREYNOLDS.

This cause was begun January 8, 1924. Defendants were the members of the State Corporation Commission and the Bank Examiner. Section 2814, Code of New Mexico, 1915, forbade the carrying on of business within the State by any insurance company " unless it shall procure from the Superintendent of Insurance a certificate stating that the requirements of the laws of this State have been complied with and authorizing it to do business." These certificates expired annually on the last day of February. In 1921 the powers and duties of the Superintendent of Insurance were transferred to the Bank Examiner under general control and supervision of the Corporation Commission.

Section 2820 of the Code, as amended, provided that no foreign insurance company shall transact business in the State except through duly appointed resident agents; declared it unlawful to pay any emolument to a nonresident for obtaining policies covering risks therein; and authorized the exclusion of any company which failed to observe this inhibition.

The bill alleges that, although the complainant had been duly licensed to transact business in New Mexico for many years, defendants were threatening to suspend the license therefor because of supposed violations of § 2820. It asks a decree declaring that section unconstitutional insofar as payments to nonresidents for procuring insurance were prohibited; and that defendants be restrained from attempting to revoke or refusing to renew the license certificate.

The act effective March 20, 1925, codified the insurance laws of the State; expressly repealed former statutes regulating the business; transferred the powers of the Bank Examiner to the Corporation Commission, and charged the Superintendent of the Department of Insurance with general administration of the law. It sets up an entirely new system of control and contains no provision concerning payments to outside agents like the one challenged by complainant. It provides: "Upon the application of any insurance company for a license to transact an insurance business in the State of New Mexico, the Superintendent shall immediately satisfy himself that the said company . . . has . . . complied with all the . . . requirements of this Act, and shall thereupon be obligated to issue a license to the said company authorizing it to transact the forms of insurance permitted under its articles of incorporation and authorized under this Act for any one insurance company to transact."

The bill questions the validity of a statute which was repealed in 1925. There is no effective remedy which this or any other court can now grant under its allegations and prayers. The cause has become moot and should be treated accordingly.

MR. JUSTICE BRANDEIS and MR. JUSTICE SANFORD concur in this opinion.

BARNETTE *v.* WELLS FARGO NEVADA NATIONAL BANK ET AL.

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

No. 149. Submitted January 15, 1926.—Decided March 15, 1926.

1. A suit to recover land and funds in charge of a receiver of a court of Alaska, created by laws of Congress, is removable from a state to a federal court, under Judicial Code § 28, and § 33, as amended August 23, 1916. P. 441.
2. Where a suit was removable on the face of the bill, and the removal is not challenged, removal may be presumed to have been rightly taken, although, due to omission by stipulation of the removal papers from the transcript, the ground on which removal was actually sought and allowed does not affirmatively appear. P. 440.
3. Authority from a court to its receiver to appear, defend, and make counterclaim in a suit against him in another court is equivalent to leave to the plaintiff to bring the suit. P. 441.
4. Acts induced by duress which operate only on the mind and fall short of physical compulsion, are not void but voidable only. P. 444.
5. It is prerequisite to equitable relief canceling a contract that the election to disaffirm be exercised promptly after cessation of the duress, the degree of promptness depending largely upon the effect of delay upon those whose rights are sought to be divested. P. 444.
6. Unexplained delay of more than three years *held* fatal to suit to set aside a deed for duress, where the defendants were left in ignorance of plaintiff's intention and were necessarily prejudiced. P. 445.

298 Fed. 689, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which reversed a decree of the District Court favorable to the appellant in her suit to set aside a deed upon the ground of duress, and for recovery of rents, etc.

Messrs. Wm. H. Chapman and *R. P. Henshall* for appellant.

The case was not barred by laches. *Grier* v. *Union Nat. L. Ins. Co.,* 217 Fed. 293; *United States* v. *Dunn,* 268 U. S. 121; *Truebody* v. *Truebody,* 137 Cal. 172; *Wilson* v. *Oswego Tp.,* 151 U. S. 56; *Savings Bank* v. *Schell,* 142 Cal. 505; *Southern Pacific Co.* v. *Bogart,* 250 U. S. 483; *Northern Pacific Co.* v. *Boyd,* 228 U. S. 482; *Allen* v. *Leflore County,* 29 So. 161; *Eureka Bank* v. *Bay,* 135 Pac. 584; *Jesson* v. *Noyes,* 245 Fed. 46.

The depositors who practised the duress were the beneficiaries under the receiver's trust. They were the real parties in interest. *Ziang Sung Wan* v. *United States,* 266 U. S. 1; *Bryant* v. *Levy,* 52 La. Ann. 1649.

Where one is fraudulently induced to do an act, he supposes that he is, in fact, doing something different from what he has done, and whenever he becomes acquainted with the actual facts, or when such circumstances exist as put him upon notice, his rights spring into being. In the case of duress, the wronged party knows exactly what he is doing but his mind is compelled to do that which he would not otherwise have done. The time, therefore, when he may assert his legal rights is dependent upon entirely different considerations and the duress may be regarded as continuing for a long time subsequent. The plaintiff is neither a business man nor a lawyer, and her case must be viewed in a very different attitude from the case of one who is threatened with duress as against himself alone. The duress here affected her husband and children as well as herself. *Allen* v. *Leflore County,* 29 So. 161; *Eureka Bank* v. *Bay,* 135 Pac. 584; *Blither* v. *Packard,* 98 Atl. 929; *St. L. & S. F. Ry. Co.* v. *Gorman,* 100 Pac. 647; *Iron Co.* v. *Sherman,* 20 Md. 117.

Even where there is no statute authorizing a receiver to be sued, the true principle is, that the failure to obtain leave to sue does not go to the jurisdiction. The rule is one of comity and not jurisdiction. Tardy's Smith on Receivers, § 748; High on Receivers, 4th ed., § 254a;

Walcott v. *Shriner,* 153 Ind. 35; *Ray* v. *Pierce,* 81 Fed. 881; *Dow* v. *Memphis & S. R. R.,* 20 Fed. 260; *Central T. Co.* v. *St. Louis,* 40 Fed. 426; Alderson on Receivers, §§ 525–526. But whether the defect be regarded as jurisdictional, or as arising out of comity, the authorities are all agreed that it may be waived. See Tardy's Smith on Receivers, § 751.

Messrs. F. De Journel and *Sidney M. Ehrman* for appellees.

Mr. Justice Stone delivered the opinion of the Court.

The appellant brought suit in the Superior Court of San Francisco County, California, for the surrender and cancellation of a deed of land and to recover money received by the appellee Noyes, a receiver acting under the appointment of an Alaska court, and deposited by him with the appellee bank, as rents derived from the land conveyed and as proceeds of the sale of part of it. The conveyance was made by appellant to receivers, predecessors in office of the appellee Noyes, appointed by the District Court for the District of Alaska. Relief was sought on the ground that the conveyance had been procured by duress. The cause was removed to the United States District Court for northern California, and trial in that court resulted in a decree for the plaintiff. On appeal to the Circuit Court of Appeals the decree was reversed on the ground that the suit was barred by laches. 298 Fed. 689. The case comes to this Court on appeal. Jud. Code, § 241, before Act of February 13, 1925.

The jurisdiction of the District Court was not challenged in the Circuit Court of Appeals; nor is it challenged here. The petition for removal from the state court to the District Court, and the motion to remand made and denied in the latter, are not shown in the record. They were omitted from the transcript made up on appeal

to the Circuit Court of Appeals, because the parties had so stipulated under Rule 75 of the Equity Rules then in force (226 U. S. Appendix p. 23) relating to the reduction and preparation of transcripts on appeals in suits in equity. It therefore does not affirmatively appear on what ground the removal to the District Court was sought, allowed and sustained. But an examination of the bill, which is set forth in the record, shows that the purpose of the suit was to recover land and funds then in charge of the receiver of a court in Alaska, which was created by laws of Congress and derived its powers and authority from those laws. Such a suit was removable under § 28 of the Judicial Code as supplemented by the amendment of § 33 by the Act of August 23, 1916, c. 390, 39 Stat. 532. *Matarazzo* v. *Hustis,* 256 Fed. 882, 887–9; see *Texas & Pacific Ry. Co.* v. *Cox,* 145 U. S. 593, 603; *Board of Commissioners* v. *Peirce,* 90 Fed. 764. The alleged right to recover grew out of transactions between the plaintiff and the receivers within the territory of Alaska with reference to land located in Alaska, in all of which the receivers were acting in virtue of authority conferred on them as officers of the Alaska court. *Rouse* v. *Hornsby,* 161 U. S. 588, 590. As all this is apparent from the face of the bill, and as the removal is not challenged here, we think the presumption should be indulged that the removal was rightly taken, and that the District Court had jurisdiction.

We recognize that property in charge of a receiver is in the custody of the court by which he was appointed and under which he is acting, and that as a general rule other courts cannot entertain a suit against the receiver to recover such property, except by leave of the court of his appointment. *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 88–89. But the record shows that, shortly after this suit was begun, the court in Alaska expressly authorized the receiver to appear in the suit and to make defense

and present a counterclaim in it. This was the full equivalent of granting leave to bring the suit. That the order was made shortly after, instead of before the suit was begun, is not material. *Jerome* v. *McCarter,* 94 U. S. 734, 737; *Board of Commissioners* v. *Peirce, supra,* 765–6. The plaintiff contended and the District Court held that, even if there had been no such leave, the suit could be maintained under the legislative permission given in § 66 of the Judicial Code; but we need not consider that question.

On January 5, 1911, the District Court for Alaska appointed receivers for the Washington-Alaska Bank, a Nevada banking corporation engaged in business in Fairbanks, Alaska. The husband of the appellant had been the president, director and manager of the bank from its incorporation. In February, 1911, the appellant, then residing in Los Angeles, California, went with her husband to Fairbanks to assist in the liquidation of the bank's business, its assets and affairs being then in the hands of the receivers. Six weeks later, after consultation with their attorney, appellant and her husband tendered to one of the depositors of the bank, as trustee for the unpaid depositors, a deed conveying real estate of the husband and real estate which was the separate property of the appellant, located in Alaska. Acceptance of the deed was refused on the ground that by it criminal prosecution of the husband and enforcement of his civil liability might be prejudiced or waived. Later a similar deed was tendered to the receivers and rejected by them for the same reasons. Appellant and her husband then filed a verified petition in the court in which the receivership was pending, praying that the receivers be directed to accept the trust deed and expressing the desire to prevent the commencement of legal proceedings against them by the receivers and to pay all the depositors of the bank in full. The court made an order authorizing the receivers, as

such, to accept the deed and administer the trusts created by it, in connection with their duties as receivers.

The deed was executed by appellant and her husband on March 18, 1911, and was separately acknowledged by appellant, the certificate of acknowledgment stating that she executed it voluntarily and that " she did not wish to retract it." The receivers took possession of the property in Alaska; they and later their successor, the appellee, Noyes, received the rents from it and the proceeds of sale of some of the land; and the fund now in dispute was derived from the administration of the trust.

Within a week after executing the conveyance, appellant departed from Alaska with her husband and returned to her residence at Los Angeles. More than three years later, on November 16, 1914, she instituted suit in the Alaska court against the receivers, to set aside the conveyance of her separate property on the ground that it had been procured by duress. The case was not brought to trial, and, after more than three years, on August 1, 1918, she consented to a non-suit, having in the meantime, on July 24, 1918, commenced the present suit.

The district court below held that appellant's conveyance had been procured by duress. This conclusion was based on findings that, during the period of appellant's sojourn in Alaska, in 1911, threats or " suggestions " were made to her, (which it appears were made by two women depositors of the bank and by others who are unidentified,) that her children would be kidnaped and her husband and herself subjected to personal violence; that under the circumstances these threats aroused in her a reasonable fear for the safety of her children, her husband and herself, and induced the execution of the deed to the receivers.

We turn aside from the objections pressed upon us that the evidence was insufficient to establish duress and that in neither pleading nor proof is it suggested that the

receivers or the great majority of the creditors of the bank were parties to or aware of the alleged duress. See *Fairbanks* v. *Snow,* 145 Mass. 153. Nor need we consider any of the numerous defenses interposed, except the acquiescence of appellant in her deed, and her delay in asserting her rights, which, in the circumstances, are decisive of the case.

Appellant's cause of action is necessarily founded upon the assertion of the rightful and effective exercise of the power to disaffirm her conveyance, which arose as soon as she was relieved from the compulsion of the alleged duress. Acts induced by duress such as is here relied on, which operates only on the mind and falls short of actual physical compulsion, are not void in law, but are voidable only, at the election of him whose act was induced by it. *Andrews* v. *Connolly,* 145 Fed. 43, 46; *Miller* v. *Davis,* 52 Colo. 485, 494; *Eberstein* v. *Willetts,* 134 Ill. 101; *Fairbanks* v. *Snow, supra; Miller* v. *Lumber Co.,* 98 Mich. 163; *Oregon & P. R. R. Co.* v. *Forrest,* 128 N. Y. 83. If there was duress here, appellant, as soon as she was relieved from its operation, was in a position either to disaffirm her conveyance or to allow it to stand undisturbed as the free and formal disposition of her rights. If her choice was to disaffirm, it might have been evidenced by suit timely brought or by any other action disclosing her purpose to those who would be affected.

In that situation she was subject to the requirement of equity that an election to disaffirm and to recall the legal consequences of an act which has operated to alter legal rights by transferring them to others, must be exercised promptly. *Andrews* v. *Connolly* and other cases cited, *supra,* show how this requirement is applied in cases of duress. The principle has a like application where the right is founded on fraud. *Upton, Assignee,* v. *Tribilcock,* 91 U. S. 45, 54, 55; *Wheeler* v. *McNeil,* 101 Fed. 685; *Blank* v. *Aronson,* 187 Fed. 241.

What promptness of action a court may reasonably exact in these circumstances must depend in large measure upon the effect of lapse of time without such disaffirmance, upon those whose rights are sought to be divested. The appellant formed the intention of taking proceedings to set aside her conveyance immediately on her return to Los Angeles, in April, 1911. This intention remained undisclosed for more than three years until she brought suit in the district court of Alaska in November, 1914. There is no evidence that the threats of violence were renewed after she left Alaska, or that they operated to prevent the prompt exercise of her election when she had returned to her home in Los Angeles. Her husband was brought to trial upon criminal charges growing out of his administration of the affairs of the bank, and criminal proceedings were concluded in December, 1912, or in 1913. During the period from April, 1911, until November, 1914, appellant, who was represented in Alaska by counsel and by an attorney in fact, was aware that the receivers, and later the appellee Noyes, none of whom was shown to have had any knowledge of the alleged duress, were engaged in the administration of the trust created by appellant's conveyance, under an order of the court obtained on her petition. During that period, she made no effort to advise the court or the receivers of the alleged duress or of her intention to disaffirm her deed.

By the provisions of the deed, the grantees were given unrestricted power of sale of the property after November, 1914, but it was expressly provided that sales might be made in the meantime by the united action of the grantors and grantees, and the proceeds paid to the grantees under the trust provisions of the deed. Appellant joined with her husband and the appellee receiver in a sale of one of the plots of her separate property, the conveyance being executed in her behalf by her attorney

in fact and the proceeds being paid to the appellee in November, 1911. This unexplained delay of more than three years in exercising appellant's asserted right to disaffirm her conveyance, while the appellee and his predecessors were left in ignorance of her intention to assert it, and her affirmative action as well, in recognizing the validity of her deed and the authority of the appellee under it, establish conclusively her election to allow her conveyance to stand as the unrevoked and effective agency for the disposition of her rights.

The case is not one which requires us to consider the effect of mere delay in bringing suit to enforce a claim of which appellees had notice, with the consequent opportunity to protect themselves, in some measure, from the prejudice which would otherwise result from mere lapse of time, as in *Simmons Creek Coal Co.* v. *Doran,* 142 U. S. 417, and *Southern Pacific Co.* v. *Bogart,* 250 U. S. 483, relied upon by appellant. Nor have we to do with a situation where complainant's silence did not mislead or prejudice the defendants, as in *Northern Pacific Railway Co.* v. *Boyd,* 228 U. S. 482, also relied upon. Here the very existence of the appellant's right depends upon the timely exercise of her election to disaffirm the deed. Delay in its exercise was necessarily prejudicial to her grantees; for they were entitled to and did rely and act upon the authority of her deed, and their defense under the circumstances was necessarily impeded and embarrassed by the lapse of time during the period in which they were left in ignorance of appellant's claim.

The judgment of the Circuit Court of Appeals is

Affirmed.

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

In my opinion, the decree of the Circuit Court of Appeals should be reversed with directions to the District

Court to remand the case to the state court, or this Court should, in its discretion, order that copies of all papers in the District Court relating to the removal be filed here, so that we may determine whether the lower courts have properly exercised jurisdiction. Compare order issued February 1, 1926, in *Whitney* v. *California*.

The determination of the jurisdiction of the courts below is one of the essential functions of this Court. *Cochran* v. *Montgomery County*, 199 U. S. 260, 270. "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 382; *Chicago, Burlington & Quincy Ry. Co.* v. *Willard*, 220 U. S. 413, 419; *Baltimore & Ohio R. R.* v. *City of Parkersburg*, 268 U. S. 35. The record must show affirmatively "the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments." *Brown* v. *Keene*, 8 Pet. 112, 115; *Hanford* v. *Davies*, 163 U. S. 273, 279. If the jurisdictional facts appear affirmatively somewhere in the record, the case need not be dismissed merely because the pleadings fail to show them. *Robertson* v. *Cease*, 97 U. S. 646, 648; *Realty Holding Co.* v. *Donaldson*, 268 U. S. 398, 400. Amendment of the pleadings to conform to the facts shown by the record may be allowed either in the lower courts or in this Court. *Norton* v. *Larney*, 266 U. S. 511, 516. The record before this Court, which consists of 742 printed pages and several unprinted documents, includes everything which was before the Court of Appeals, but not the whole record before the District Court.

What parts were omitted does not appear. The essential jurisdictional facts are not shown in the pleadings or elsewhere in the record.

The record in this Court shows a bill of complaint to have a conveyance of real estate in Alaska annulled on the ground of duress and to have paid to the plaintiff moneys alleged to have been deposited in the Wells Fargo Nevada National Bank of San Francisco by one Noyes, claiming to act as receiver of a Nevada corporation. These funds are alleged to be the proceeds of a part of the real estate. The complaint is entitled "Superior Court of the State of California." The record shows next an answer filed in the federal court for the northern district of the State. All subsequent proceedings prior to the appeal were had in that federal court. From these facts, it may merely be surmised that the suit was begun in the state court and before answer removed to the federal court. But the record does not contain the petition for removal, nor any of the other papers ordinarily incident thereto. There is no reference to a removal in any order or decree, in any opinion, in the evidence, nor in any other paper or clerk's entry. The complaint did not allege the citizenship of the plaintiff. An amendment to the complaint, filed in the federal court two years later, states that the plaintiff has at all times been a citizen of California. The defendants named are the Wells Fargo Bank and one Noyes; the latter being joined both individually and as receiver appointed "not lawfully" by an Alaska court for a Nevada corporation. No allegation discloses the citizenship of Noyes. It does not appear anywhere in the record whether an ancillary receiver of the Nevada corporation was ever appointed in California.

A multitude of questions remain unanswered in this state of the record. Thus, we are left to conjecture whether all the defendants joined in the petition for re-

moval [1], and if not, by whom removal was sought [2]; on what ground removal was sought, whether that ground was good in law and whether it was substantiated by the facts appearing of record [3]; from what court removal was sought [4]; what action the court and the respective parties took; and whether, indeed, there was a proper petition for removal filed in time.[5] On this record it seems to me that this Court is without jurisdiction and that the lower federal courts were also. *Hegler v. Faulkner,* 127 U. S. 482. As stated in *West* v. *Aurora City,* 6 Wall. 139, 142:

"It is equally fatal to the supposed right of removal that the record presents only a fragment of a cause, unintelligible except by reference to other matters not sent up from the State court and through explanations of counsel."

"There are no presumptions in favor of the jurisdiction of the courts of the United States." *Ex parte Smith,*

---

[1] Compare *Wilson* v. *Oswego Township,* 151 U. S. 56; *Hanrick* v. *Hanrick,* 153 U. S. 192; *Chicago, Rock Island & Pacific Ry. Co.* v. *Martin,* 178 U. S. 245, 248; *Gableman* v. *Peoria, Decatur & Evansville Ry. Co.,* 179 U. S. 335, 337; *Mayor* v. *Independent Steam-Boat Co.,* 115 U. S. 248; *Marrs* v. *Felton,* 102 Fed. 775, 779; *Yarnell* v. *Felton,* 104 Fed. 161, 162; *Scott* v. *Choctaw, O. & G. R. Co.,* 112 Fed. 180; *Miller* v. *Le Mars Nat. Bank,* 116 Fed. 551, 553; *Heffelfinger* v. *Choctaw, O. & G. R. Co.,* 140 Fed. 75; *Consolidated Independent School Dist.* v. *Cross,* 7 Fed. (2d) 491.

[2] Compare *Bacon* v. *Rives,* 106 U. S. 99; *Salem Trust Co.* v. *Manufacturers' Finance Co.,* 264 U. S. 182, 189; *Turk* v. *Illinois Central R. R. Co.,* 218 Fed. 315.

[3] Compare *Woolridge* v. *M'Kenna,* 8 Fed. 650, 677–678; *Mayer* v. *Denver, T. & Ft. W. R. Co.,* 41 Fed. 723; *Gates Iron Works* v. *Pepper & Co.,* 98 Fed. 449; *Yarnell* v. *Felton,* 104 Fed. 161, 163. But see *Canal & Claiborne Streets R. R. Co.* v. *Hart,* 114 U. S. 654, 660.

[4] Compare *Noble* v. *Massachusetts Ben. Ass'n,* 48 Fed. 337.

[5] Compare *People's Bank* v. *Calhoun,* 102 U. S. 256; *Manning* v. *Amy,* 140 U. S. 137; *First Nat. Bank of Parkersburg* v. *Prager,* 91 Fed. 689.

94 U. S. 455, 456; *Bible Society* v. *Grove,* 101 U. S. 610. We may not assume that there was jurisdiction merely because two lower courts have exercised it, apparently without protest.[6] We may not assume that documents omitted from the appellate record by agreement under Equity Rule 75 showed jurisdiction. The requirement that jurisdictional facts be affirmatively shown cannot be dispensed with. Compare *Hudson* v. *Parker,* 156 U. S. 277, 284. We may not indulge in conjecture as to the ground on which jurisdiction was invoked. If we were at liberty to do so, what appears in the fragmentary record before us would preclude our sustaining jurisdiction. Jurisdiction could not be sustained on the ground of diversity of citizenship, because the citizenship of the principal defendant is not disclosed. Jurisdiction could not be sustained under § 33, Judicial Code, as amended by the Act of August 23, 1916, c. 399, 39 Stat. 532, as a civil suit against "an officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer," compare *Matarazzo* v. *Hustis,* 256 Fed. 882, because there is nothing to show that removal was sought upon this ground, or that the requirements of the statute were complied with, compare *Ex parte Anderson,* 3 Woods 124; *Rothschild* v. *Matthews,* 22 Fed. 6, or that there was "a causal connection between what the officer has done" and his asserted official authority. See *Maryland* v. *Soper, ante,* p. 9. Jurisdiction could not be sustained on the ground that the proceeding is ancillary, because no receiver of the Alaska bank was appointed in California, nor was its estate being administered there, *Mer-*

[6] It is true that, although no party can by his conduct prevent dismissal by this Court when the absence of jurisdiction is discovered, *Parker* v. *Ormsby,* 141 U. S. 81, mere irregularity in the removal may be waived where the suit might originally have been brought in the federal court. *Baggs* v. *Martin,* 179 U. S. 206.

cantile Trust Co. v. *Kanawha & Ohio Ry. Co.,* 39 Fed. 337; compare *Greene* v. *Star Cash & Package Co.,* 99 Fed. 656; and the ancillary character of the suit furnishes no ground for removal. *Gilmore* v. *Herrick,* 93 Fed. 525. Compare *Byers* v. *McAuley,* 149 U. S. 608, 618–620; *Shinney* v. *North American Savings & Loan Bldg. Co.,* 97 Fed. 9. Jurisdiction could not be sustained on the ground that the case is one "arising under the . . . laws of the United States," because the mere fact that the defendant Noyes is the reputed receiver of a state corporation appointed by a federal court is not a ground for removal.[7] *Gableman* v. *Peoria, Decatur & Evansville Ry. Co.,* 179 U. S. 335. The record shows no other way in which the case arises under the laws of the United States. There is no actual controversy as to any federal matter. Compare *Niles Bement Pond Co.* v. *Iron Moulders' Union Local No. 68,* 254 U. S. 77, 82.

---

[7] Following the decision of this Court in *Texas & Pacific Ry. Co.* v. *Cox,* 145 U. S. 593, which upheld the right of removal from a state court of a suit against a receiver of a federal corporation appointed by a federal court, some lower courts, neglectful of the qualification implicit in the fact of federal incorporation, permitted removal generally in suits against receivers appointed by federal courts. *Central Trust Co.* v. *East Tennessee, V. & G. Ry. Co.,* 59 Fed. 523, 528; *Jewett* v. *Whitcomb,* 69 Fed. 417; *Landers* v. *Felton,* 73 Fed. 311; *Keihl* v. *City of South Bend,* 76 Fed. 921; *Lund* v. *Chicago, R. I. & P. Ry. Co.,* 78 Fed. 385 (involving, however, a federal corporation); *Board of Commissioners* v. *Peirce,* 90 Fed. 764; *Pitkin* v. *Cowen,* 91 Fed. 599; *Gilmore* v. *Herrick,* 93 Fed. 525; *Winters* v. *Drake,* 102 Fed. 545, 550; *Pendleton* v. *Lutz,* 78 Miss. 322, 328. Other lower courts, recognizing that limitation and also the distinction with respect to receivers of national banks, *Grant* v. *Spokane Nat. Bank,* 47 Fed. 673, refused to permit removal in suits against receivers appointed only in exercise of the general equity jurisdiction of federal courts, confident that this Court would upon occasion uphold the limitation. *Shearing* v. *Trumbull,* 75 Fed. 33; *Marrs* v. *Felton,* 102 Fed. 775; *Chesapeake, Ohio & S. W. R. R. Co.'s Receivers* v. *Smith,* 101 Ky. 707. This Court, after holding in *Bausman*

EDWARDS, COLLECTOR, *v.* CHILE COPPER COMPANY.

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

No. 375. Argued March 10, 11, 1926.—Decided March 22, 1926.

1. The tax "with respect to carrying on or doing business," imposed on domestic corporations by Revenue Acts of 1916 and 1918, *held* applicable to a corporation organized for the purpose of holding the stock of a mining corporation, and of issuing and selling bonds secured by pledge of the stock and furnishing the proceeds from time to time to the other to enable it to carry on its work, other activities of the holding company consisting of maintaining an office, voting the shares, electing directors, lending the proceeds of bonds through a trust company on call loans when not needed for advances to the mining company, collecting interest, etc. P. 455.
2. Where a single business can not be carried on without two corporations taking part in it, each, under the above acts, must pay a tax. P. 456.

5 Fed. (2d) 1014, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals which affirmed a decree in the District Court (294 Fed.

---

v. *Dixon*, 173 U. S. 113, 114, that "the mere order of the Circuit Court appointing a receiver did not create a Federal question," held in *Gableman* v. *Peoria, Decatur & Evansville Ry. Co.*, 179 U. S. 335, that no removal could be allowed solely on the ground of the receiver having secured his appointment from a federal court. That case and the limitations it established have since been consistently recognized and followed. *Pepper* v. *Rogers*, 128 Fed. 987; *People of New York* v. *Bleecker St. & F. F. R. Co.*, 178 Fed. 156; *Wrightsville Hardware Co.* v. *Woodenware Mfg. Co.*, 180 Fed. 586; *Dale* v. *Smith*, 182 Fed. 360; *American Brake & Shoe Foundry Co.* v. *Pere Marquette R. R. Co.*, 263 Fed. 237; *State* v. *Frost*, 113 Wis. 623, 647. The principle of the decision, as there stated by the Court, 179 U. S. 338, gives effect to the avowed legislative policy underlying the enactment of the Act of Mar. 3, 1887, c. 373, 24 Stat. 552, as amended and re-enacted in § 66, Judicial Code.

581) for the Copper Company in an action to recover from the collector the amount of taxes alleged to have been erroneously collected.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. Sewall Key* were on the brief, for the United States.

Mr. Arthur A. Ballantine, with whom *Messrs. Carroll A. Wilson, George E. Cleary,* and *Lowell Turrentine* were on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of taxes alleged to have been erroneously collected for the years 1917 to 1920. The taxes were levied under the Acts of September 8, 1916, c. 463, § 407, 39 Stat. 756, 789, and of February 24, 1919, c. 18, § 1000, (a) (1) and (c), 40 Stat. 1057, 1126. Both statutes impose upon domestic corporations organized for profit a tax 'with respect to carrying on or doing business,' at certain rates for a fair value of the capital stock, and both exempt such corporations 'not engaged in business' during the preceding taxable year. The question is whether the plaintiff, the Chile Copper Company, brings itself within this exemption. The facts are set forth in the complaint and the case was heard upon a motion to dismiss. In the District Court judgment was given for the plaintiff, 294 Fed. Rep. 581. The judgment was affirmed on the opinion below by the Circuit Court of Appeals. 5 F. (2d) 1014. A writ of certiorari was granted by this Court. 268 U. S. 685.

The facts are somewhat peculiar. The Chile Exploration Company, a New Jersey corporation, owned mines in Chile and needed to borrow large sums of money in order to develop them. By the laws of Chile it could not mortgage its mines effectively and therefore could not

give security directly for bonds. To meet the difficulty the Chile Copper Company was organized in Delaware for the purpose of holding the capital stock of the Chile Exploration Company, issuing bonds secured by a pledge of the stock, and furnishing the proceeds from time to time to the Exploration Company to enable the latter to go on with its work. The purpose was carried out. On April 1, 1917, the plaintiff authorized the issue of collateral trust bonds for $100,000,000 to be secured by a pledge of all the above-mentioned stock. During the six months ending on June 30, 1917, it executed an agreement with underwriters and issued $35,000,000 of the bonds, received payments from subscribers, which were deposited in a special account with the Guaranty Trust Company of New York, paid the expenses of issue from the special account and made provision for the accrued interest payable upon the bonds. It also paid the interest on $15,000,000 of bonds outstanding under an earlier pledge. During the same time stockholders' and directors' meetings were held, directors and officers were chosen, corporate books and accounting records were kept, and such other acts were done and expenses paid as were necessary to keep up the corporate existence. An office was maintained for the activities described. The plaintiff owned and voted on the stock of the Exploration Company, and elected its directors, and made advances to it from the proceeds of the bonds issued in 1917, the Guaranty Trust Company being directed after payment of certain matters not to pay checks drawn upon the special account unless accompanied by a letter from the plaintiff stating that the proceeds would be used for specified purposes connected with the development of the mines. The plaintiff agreed to furnish and did furnish the Guaranty Company statements showing that the proceeds had been so applied. During the six months mentioned the sum of $1,250,000 was advanced to the Exploration Company, and

interest upon loans and a part of the bond discount paid by it to the plaintiff and payments on account of a dividend also were made.

The activities for succeeding years were similar, advances of the Exploration Company being made each year. The plaintiff had funds received from the issue of bonds in 1917, in excess of the amounts that it thought proper to advance during the given period to the Exploration Company. A part of these it invested in Liberty Bonds, but the greater part, which it had deposited with the Guaranty Trust Company and the Central Union Trust Company, it authorized those companies to lend on call in the plaintiff's name and at its risk, taking security. If the security was not satisfactory the plaintiff directed the Trust Company to call the loan. During the year ending June 30, 1920, 224 loans amounting to $37,200,000 were made and 180 loans amounting to $29,100,00 were called. In the same year the plaintiff received $332,366.90 as interest upon these loans. During the previous year it received $194,579.20 upon similar loans.

If the corporation was one that Congress had power to tax in this way, it is hard to say that it is not within the taxing acts. It was organized for profit and was doing what it principally was organized to do in order to realize profit. The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit. In our opinion the plaintiff was liable to the tax. We do not rest our conclusion upon the issue of bonds in the first year or the call loans made in the last, and for the same reasons we cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick. The activities and situation must

be judged as a whole. Looking at them as a whole we see that the plaintiff was a good deal more than a mere conduit for the Chile Exploration Company. It was its brain or at least the efferent nerve without which that company could not move. The plaintiff owned and by indirection governed it, and was its continuing support, by advances from time to time in the plaintiff's discretion. There was some suggestion that there was only one business and therefore ought to be only one tax. But if the one business could not be carried on without two corporations taking part in it, each must pay, by the plain words of the Act. The case is not governed by *McCoach* v. *Minehill & Schuylkill Haven R. R. Co.*, 228 U. S. 295, and *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28. It is nearer to *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503.

Judgment reversed.

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

SMITH *v.* McCULLOUGH ET AL.

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

No. 22. Argued October 8, 1925.—Decided March 22, 1926.

1. Whatever is essential to federal jurisdiction must be alleged in the complaint; otherwise the suit must be dismissed, unless the defect in the complaint be cured by amendment. P. 459.
2. Where the jurisdiction depended on the existence of a dispute over the construction of federal statutes, which was not properly shown in the bill, but which was the principal controversy in several trials in which jurisdiction was assumed to exist by the courts and both parties, and this appeared by the record—*held* that the defect was amendable and would be treated as amended in this Court. P. 459.

3. A judgment of the Circuit Court of Appeals reversing the District Court and remanding the case for further proceedings is interlocutory, and a party against whom it was rendered and who did not acquiesce in it is not precluded by it from reopening the questions so decided when the case is again appealed after a second trial. P. 461.
4. Where a Quapaw Indian, whose general power to alienate or lease his allotment was restricted by Acts of Congress applying generally to his tribe, was permitted by a special Act to alienate, subject to the supervision and approval of the Secretary of the Interior, and made a mortgage, with such approval, and subsequently received a release and reconveyance—*held* that the transaction did not rid him of the restrictions on the land, and that the validity of a lease he afterwards made, without the Secretary's approval, was governed by the Acts first mentioned. P. 462.
5. A Quapaw Indian, permitted by the Act of June 7, 1897, to lease his allotment for mining purposes for ten years, made a lease for that term with an added provision that the term continue thereafter so long as minerals could be produced with profit. *Held* that the lease could not be sustained upon the ground that the addition was severable from the lawful term. P. 463.
6. Where the allotee undertakes to negotiate a lease for a forbidden term, he enters a field in which he must be regarded as without authority or capacity, and the resulting lease is void. P. 465.

285 Fed. 698, reversed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which, in a suit to determine adverse claims based on conflicting mining leases given by a Quapaw Indian, upheld the plaintiff's lease and cancelled the defendants' leases to the extent of the conflict. See also 243 Fed. 823.

Mr. Arthur S. Thompson for appellant.

Mr. Joseph C. Stone, with whom *Messrs. A. C. Towne, George J. Grayston, C. M. Grayston, Paul A. Ewert, James Davenport, W. M. Jackson,* and *W. R. King* were on the briefs, for appellees.

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

This appeal brings under review the proceedings in a much-litigated suit in equity brought to determine adverse claims based on conflicting mining leases given by a Quapaw Indian of land which was part of his allotment. The plaintiffs (appellees here) claimed under the first lease, and the defendant (appellant here) under two later leases, which taken together included the same land as the first. The relief sought by the plaintiffs was full recognition of their lease and cancelation of the others. On the original hearing the District Court, following its decisions in earlier cases, held that the plaintiffs' lease contravened restrictions imposed by laws of Congress, in that it was for a longer term than ten years, and therefore was void. Accordingly the bill was dismissed; but the Circuit Court of Appeals disapproved that ruling, reversed the decree and remanded the cause for further proceedings, 243 Fed. 823. On a subsequent hearing the District Court recognized the plaintiffs' lease as valid for a term of ten years and canceled the defendant's leases to the extent of the conflict. The Circuit Court of Appeals affirmed that decision, 285 Fed. 698; and the present appeal is from the decree of affirmance.

The plaintiffs insist that this appeal cannot be entertained, although taken prior to the Act of February 13, 1925, c. 229, 43 Stat. 936, changing federal appellate jurisdiction. But we think they misapprehend the situation.

The suit was not within any of the classes as to which an appeal was denied by § 128 of the Judicial Code, as existing before the change. Either the suit was one arising under the laws of Congress relating to the alienation and leasing of Quapaw allotments, or there was an entire absence of federal jurisdiction. In either event § 241 of

the Judicial Code, as existing before the change, permitted an appeal to this Court from the final decree of the Circuit Court of Appeals. The only difference was that if the suit was one arising under the laws of Congress relating to the alienation and leasing of such allotments the reëxamination by this Court would extend to the merits; while if there was an absence of federal jurisdiction this Court could not consider the merits, but would have to reverse the decrees of both courts below and remand the cause to the District Court with a direction to dismiss the bill for want of jurisdiction. *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505, 514; *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.,* 178 U. S. 239, 244. The Act of 1925 expressly left all appeals which were then pending in this Court to be disposed of under the old law.

It therefore is necessary at the outset to determine whether this suit was one arising under the legislation relating to Quapaw allotments or was one where there was an absence of federal jurisdiction. The established rule is that a plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction; and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment. *Norton* v. *Larney,* 266 U. S. 511.

Here the bill disclosed that the lease under which the plaintiffs were claiming, and which they sought to have recognized, was based on the laws of Congress relating to the right of Quapaw allottees to alienate and lease their lands, and that the defendant was claiming adversely under later leases from the same lessor. It apparently was intended to show that the suit was one arising under those laws; but it fell short of showing that a real dispute over their construction and application was involved.

See *Schulthis* v. *McDougal,* 225 U. S. 561, 569; *Barnett* v. *Kunkel,* 264 U. S. 16, 19–20. In fact, as appears elsewhere in the record, that was the principal matter in dispute, and the outcome depended on its solution. The defendant's first step in the suit was to challenge the plaintiffs' right to relief by a motion to dismiss on the ground that under those laws, rightly construed and applied, the plaintiffs' lease was invalid. That challenge was sustained by the District Court, but was overruled by the Circuit Court of Appeals on the first appeal. A simple amendment of the bill, conforming its jurisdictional allegations to the fact thus brought into the record, would have corrected the defect and put in affirmative and definite form what apparently was intended in the beginning. Had the defect been called to the court's attention, leave to make the amendment could and doubtless would have been granted. Both parties proceeded as if the jurisdictional showing was sufficient; and both courts below dealt with the suit as one arising under the laws before named and proceeded to its determination accordingly. The suit was begun in 1916; the parties had two hearings in each of the courts below; and the merits were exhaustively presented. In these circumstances to amend the bill now to conform to the jurisdictional fact indisputably shown elsewhere in the record will not subject either party to any prejudice or disadvantage, but will subserve the real interests of both. This Court has power to allow amendments of this character. Rev. Stat. § 954; *Norton* v. *Larney, supra; Realty Holding Co.* v. *Donaldson,* 268 U. S. 398, and the propriety of exercising it in this instance is obvious. We therefore shall treat the bill as amended, by our leave, to show the jurisdictional fact conformably to other parts of the record. With that fact brought into the bill, there can be no doubt that there was federal jurisdiction. *Hopkins* v. *Walker,* 244 U. S. 486; *Norton* v. *Larney, supra.*

The plaintiffs insist that, as the defendant did not appeal from the decree of the Circuit Court of Appeals on the first appeal, he is now precluded from questioning what was decided then. But the law and settled practice are otherwise. That decree was not final but only interlocutory, and so was not appealable. Nor did the defendant acquiesce in it. On the contrary, he sought to have it reconsidered by the Circuit Court of Appeals on a timely petition for rehearing, and again on the second appeal to that court. He therefore is entitled to ask, as he does in his assignments of error, that it be reëxamined on this appeal. *United States* v. *Beatty,* 232 U. S. 463, 466; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U. S. 251, 258.

We come then to the merits, which center about the validity of the plaintiffs' lease.

The lessor was a Quapaw Indian and under the guardianship of the United States. The land for which the conflicting mining leases were given was part of the allotment made to him in the distribution of the lands of his tribe. His title rested on a patent issued to him in 1896 pursuant to the Act of March 2, 1895, c. 188, 28 Stat. 907, which provided that the allotments should be inalienable for a period of 25 years from the date of the patents. The Act of June 7, 1897, c. 3, 30 Stat. 72, modified that restriction to the extent of authorizing the allottees "to lease their lands, or any part thereof, for a term not exceeding three years for farming or grazing purposes, or ten years for mining or business purposes"; and the Act of June 21, 1906, c. 3504, 34 Stat. 344, further modified the restriction to the extent of specially authorizing this allottee to alienate not exceeding 120 acres of his allotment, subject to the supervision and approval of the Secretary of the Interior.

On July 14, 1906, the allottee, with the approval of the Secretary of the Interior, conveyed 120 acres of his allot-

ment to E. V. Kellett by a deed which described itself as a "mortgage" and contained a declaration that it was made to secure the payment of a promissory note given to Kellett by the allottee and was to be null and void if the note was duly paid. In due course the note was paid, and on June 20, 1908, the land was reconveyed to the allottee by a deed which described itself as a "release of mortgage" and contained an acknowledgment of such payment.

The 120 acres thus conveyed to Kellett and reconveyed to the allottee is the land for which the allottee gave the mining leases in question here. They were given in 1912 and 1913, but were not approved by the Secretary of the Interior. The plaintiffs' lease was for a term exceeding ten years, while the defendant's leases were limited to a ten-year term.

The evidence at the final hearing took a wide range, but in no wise tended to show either that the defendant was precluded from assailing the plaintiffs' lease or that the plaintiffs were entitled to any equitable relief if their lease was originally invalid. The defendant took his leases with notice of the plaintiffs' lease, but had been proceeding with operations under his for a year or two before any effort was made to take possession or begin operations under the plaintiffs'.

The first question on the merits is, whether the Act of 1906 and the conveyance made to Kellett with the approval of the Secretary of the Interior took the land entirely out of the prior restrictions on its alienation, so that when that conveyance had served its purpose and the reconveyance to the allottee was made he was free to lease the land, and even to sell it, as he saw fit. The plaintiffs contend that the answer should be in the affirmative. Both courts below held the other way, and we think they were right. The Act of 1906 did not accord to the allottee an unqualified right of alienation,

but a right which was to be exercised only under the supervision and with the approval of the Secretary of the Interior. Nor was the conveyance to Kellett an absolute alienation. In terms and effect it was a conditional conveyance, called a mortgage, and the contingency which might have converted it into an absolute alienation never happened. The Secretary's approval was of that particular conveyance and of course was measured by its terms and purpose. When the condition on which the conveyance was to be null and void was performed and the reconveyance was made the situation was essentially the same as if there had been no conveyance. In substance a lien had been created with the Secretary's approval and then extinguished, thus leaving the land subject to the restrictions.

This brings us to the defendant's contention that the plaintiffs' lease was void because given for a term exceeding ten years. We have seen that the District Court originally so held, in keeping with its decisions in prior cases, and that the Circuit Court of Appeals, while regarding the lease as given for a term exceeding ten years, held it good for that period and invalid as to the excess. To determine this conflict involves a consideration of the purpose and effect of the restrictive provisions in the Acts of 1895 and 1897 and an examination of the terms of the lease.

The Act of 1895 declared broadly that the allotments should be inalienable for 25 years from the date of the patents, and the Act of 1897 relaxed that restriction to the extent only of permitting the allottees to lease not exceeding a term of three years for farming or grazing purposes, or ten years for mining or business purposes. Thus it was beyond the power of any allottee, on his own volition, to grant any interest in his allotment during the 25-year period otherwise than by a lease permitted

by the Act of 1897. *United States* v. *Noble,* 237 U. S. 74, 80. The plaintiffs' lease—it originally ran to one Hopper and was assigned by him to them—was given during that period and was for mining purposes. The consideration recited was one dollar in hand paid and the lessee's covenants to begin operations within 90 days or pay a stated rent, to conduct the operations with diligence and to pay royalties of five per cent. of the market value of the minerals removed. The term of the lease was stated to be " ten years " from its date, but with the qualification that, if minerals were found in paying quantities, " the privilege of operating " under the agreed terms should " continue so long as " minerals could be produced in such quantities after the expiration of the ten years, and that, if operations were not begun within 90 days, the lessee should pay, in lieu of such work, five cents an acre yearly for each acre in the lease " so long as " he desired " to operate and hold the same." The parties rightly agree, as the courts below did, that these provisions, if taken together, show that the lease was not limited to a term of ten years but was to continue after that period so long as minerals could be produced with profit.

The Circuit Court of Appeals concluded that the provisions just described were so far independent and severable that the one declaring that the term was to be ten years should be given effect and those declaring that it was to continue beyond that period should be rejected as invalid, and the lease sustained for a ten-year term. We think that conclusion overlooks the nature and purpose of the restrictions in the Acts of 1895 and 1897. In adopting the restrictions Congress was not imposing restraints on a class of persons who were *sui juris,* but on Indians who were being conducted from a state of dependent wardship to one of full emancipation and needed to be safeguarded against their own improvidence during the period of transition. The purpose of the restrictions

was to give the needed protection, and they should be construed in keeping with that purpose. The permission to give short leases was in the nature of an exception to the comprehensive restraint already imposed and hardly could have been intended to give any effect or recognition to leases negotiated and made in disregard of that limited permission. A lease not within that permission evidently was intended to be left where it was before—within the general prohibition and invalid. Otherwise the allottees would be exposed to much of the evil intended to be excluded; for of course many intending lessees would be disposed to obtain leases for long terms if no other risk was run than that of having their rights held down to the maximum admissible term, if the allottee or the United States should discover the situation and take proceedings to correct it. Such a view would almost certainly result in beclouding the title of the allottees and in bringing the land into needless litigation to their detriment. We think the better view is that where an allottee undertakes to negotiate a lease for a forbidden term he enters a field in which he must be regarded as without capacity or authority to negotiate or act and that the resulting lease is void. See *Taylor* v. *Parker,* 235 U. S. 42; *Sage* v. *Hampe,* 235 U. S. 99, 105.

This conclusion makes it unnecessary to consider other objections urged against the plaintiffs' lease. It follows that the first decree of the District Court was right and the subsequent decrees were wrong.

Decree reversed.

100569°—26——30

MISSOURI PACIFIC RAILROAD COMPANY *v.* BOONE.

CERTIORARI TO THE ST. LOUIS COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 203. Argued January 29, 1926.—Decided March 22, 1926.

1. A construction of a statute which makes its constitutionality doubtful is to be avoided if possible. P. 471.
2. Section 208(a) of the Transportation Act, 1920, provided (1) that all rates, fares and charges, and all classifications, regulations and practices, in any wise changing, affecting, or determining any part or the aggregate of rates, fares or charges, or the value of the service rendered, which, on February 29, 1920, were in effect on lines of carriers subject to the Interstate Commerce Act, should continue in force until "thereafter" changed by state or federal authority, or pursuant to authority of law; (2) that, prior to September 1, 1920, no such rate, fare or charge should be reduced, and no regulation, etc., should be changed in such manner as to reduce any such rate, etc., unless such reduction or change were approved by the Interstate Commerce Commission. *Held:*

(1) That a provision in a baggage tariff filed by the Director General of Railroads during federal control, limiting liability for misdelivery of baggage, is within the purview of this section. P. 468.

(2) The primary purpose of the second clause was, by safeguarding rates, to protect the United States from liability on its six months' guaranty of a "standard return" to carriers when released from federal control. P. 472.

(3) The purpose of the first clause was to remove doubts as to what tariffs were to be applicable after termination of federal control, by declaring that the existing tariffs, largely initiated by the Director General, should be deemed operative except in so far as changed after February 29, 1920, pursuant to law. Pp. 472, 475.

(4) Where a tariff of the Director General limiting liability for misdelivery of baggage had suspended the operation of a state statute making the carrier liable for the full value, the effect of the first clause of § 208(a) was that the statute became again applicable, without re-enactment, after February 29, 1920; so that the damages recoverable by an intrastate passenger for the loss

of a trunk after September 1, 1920, were governed by the state statute. P. 476.

263 S. W. (Mo.) 495, affirmed.

CERTIORARI to a judgment of the St. Louis Court of Appeals, affirming a judgment against the railroad for the full value of baggage which it failed to deliver to Boone, an intrastate passenger.

Mr. Merritt U. Hayden, with whom *Messrs. Edward J. White* and *James F. Green* were on the brief, for petitioner.

Mr. Frederick L. English, with whom *Mr. Morton Jourdan* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In 1922, Byrd J. Boone, a passenger on an intrastate journey in Missouri over the Missouri Pacific Railroad, checked a trunk which she took with her. It arrived safely at its destination but was not delivered to her because a thief obtained possession through the device of changing checks. She brought this suit against the carrier in a court of the State; and claimed that, under § 9941 of the Revised Statutes of Missouri, 1919, she was entitled to the full value. This law, first enacted in 1855, Mo. Rev. Stat., c. 39, § 45, had never been suspended or repealed by any law of the State. The defendant relied upon a baggage tariff which limited liability to $100 unless a greater value was declared and extra payment made. This tariff, applicable to both intrastate and interstate traffic, had been duly filed by the Director General of Railroads pursuant to the Federal Control Act, March 21, 1918, c. 25, § 10, 40 Stat. 451, 456, and was in force on the termination of federal control, February 29, 1920. The defendant contended that, by virtue of

§ 208(a) of Transportation Act, 1920, February 28, 1920, c. 91, 41 Stat. 456, 464, this limitation had remained in force as applied to intrastate commerce, because the provision for unlimited liability contained in § 9941 of the Missouri Revised Statutes had not been re-enacted after the termination of federal control.

Section 208(a) provides:

"All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission."

The trial court entered judgment for $1,000 and interest. The judgment was affirmed by the St. Louis Court of Appeals, the highest court of the State in which a decision in the suit could be had. 263 S. W. 495. The court held that, under the law of Missouri, misdelivery of the trunk was a conversion which rendered the carrier liable for its full value; and that the state law governed because the journey was intrastate. This Court granted a writ of certiorari. 266 U. S. 600. Under the federal law misdelivery is not deemed a conversion depriving a carrier of the benefit of the provision limiting liability. *American Railway Express Co.* v. *Levee,* 263 U. S. 19, 21. The sole question for decision is the construction and effect to be given § 208(a).

The provision in the baggage tariff limiting liability is within the purview of that section. There was no

legislation by the State on the subject after the termination of federal control. The State had confessedly power to restore the full statutory liability as applied to intrastate commerce unless the Interstate Commerce Commission should, for the purpose of preventing discrimination against interstate commerce, issue an order under Transportation Act, 1920, to the contrary. See *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *New York* v. *United States,* 257 U. S. 591. There was no such order. Compare *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Public Utilities Commission,* 242 U. S. 333. The precise question is whether the state provision, which had been suspended by the filing of the tariffs of the Director General, became operative on September 1, 1920, without re-enactment, or whether affirmative action by the State after February 29, 1920, was necessary to restore the full liability theretofore created by its statute and which it had not repealed. The analogy of state insolvent laws suspended by enactment of a bankruptcy act and again becoming operative upon its repeal, was relied upon. See *Tua* v. *Carriere,* 117 U. S. 201; *Butler* v. *Goreley,* 146 U. S. 303.

Most of the rates, fares and charges in effect on February 29, 1920, had been established without suspending any provision of any statute or the order of any regulatory body. They related to matters with which, both before and after federal control, carriers were, in the main, at liberty to deal in their discretion, without first securing the consent of either the federal or the state commission. For despite the enlarging sphere of regulation, the field in which the carrier may exercise initiative and discretion was and is still a wide one.[1] The existing right of the

[1] Even under Transportation Act, 1920, the power inheres in the carriers, to initiate increases or decreases of rates, fares and charges, subject, of course, to the control of the appropriate regulatory body. Increases or decreases of interstate rates may, without action by the Interstate Commerce Commission, become operative after 30

carriers to initiate rates was transferred by the second paragraph of § 10 of the Federal Control Act to the Director General, with three modifications.[2] The Interstate Commerce Commission for the time was made the regulatory body in respect to intrastate as well as interstate rates. The power of suspending tariffs involving increases (which had been first conferred upon the Commission by Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 552) was denied to it in respect to such as were filed by the Director General. And the power to fix the date when the new tariffs should take effect was vested in the Director General, instead of being fixed (as provided by § 6 of the Interstate Commerce Act) at not less than 30 days subject to the discretion of the Commission. It was by virtue of the ordinary corporate power of carriers to establish rates, so transferred to the Director General, that the rates, fares, charges, classifications, regulations and practices referred to in the first clause of § 208(a) had, in the main, been established.[3]

---

days' notice by the simple act of filing, unless the Commission suspends them. See Interstate Commerce Act, § 6 (3) and § 15 (7). The power of the carrier to initiate intrastate rates, fares and charges, is even broader in many States. See William E. McCurdy, "The Power of a Public Utility to Fix its Rates and Charges in the Absence of Regulatory Legislation." 38 Harv. Law Rev. 202.

[2] Compare *Willamette Valley Lumbermen's Asso.* v. *Southern Pacific Co.*, 51 I. C. C. 250; *Johnston* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 51 I. C. C. 356, 361; *California Canneries Co.* v. *Southern Pacific Co.*, 51 I. C. C. 738, 764–772; *Natches Chamber of Commerce* v. *Louisiana & Arkansas Ry. Co.*, 52 I. C. C. 105, 130; *Public Service Commission of Washington* v. *Alabama & Vicksburg Ry. Co.*, 53 I. C. C. 1; *Illinois Coal Traffic Bureau* v. *Director General*, 56 I. C. C. 426, 431; *Utilities Development Corporation* v. *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. et al.*, 56 I. C. C. 694; *American Wholesale Lumber Asso.* v. *Director General*, 66 I. C. C. 393, 396; *Alabama Co.* v. *Director General*, 78 I. C. C. 561.

[3] See General Order No. 28, issued May 25, 1918, U. S. Railroad Administration Bulletin No. 4 (Revised), p. 285; Reduced tariff rates on building materials, April 11, 1919, Supplement to Bulletin,

In support of the judgment below, it is contended that the section would be unconstitutional, if construed as providing that the Missouri statute, although applicable only to intrastate commerce, should not become operative unless and until re-enacted. The argument is this: If so construed, the Act of Congress would, in effect, repeal all such state laws affecting intrastate commerce existing at the termination of federal control, while granting to the States permission to legislate on the subject thereafter or recognizing their power to do so. The prohibition of reductions of intrastate rates during the six months' period of guaranteed return, was a proper exercise of power incident to federal operation and control during the war. Congress could, under that power, also make reasonable provision to ensure workable tariffs on the restoration of the railroads to their owners. But a repeal by Congress of all such existing state laws, affecting intrastate commerce, coupled with permission to enact new ones, would not be an appropriate means to that end, nor could such legislation be sustained under the commerce clause. Regulation by a State of intrastate rates is not a function exercised by permission of the Federal Government, *In re Rahrer,* 140 U. S. 545, 564, or because of its inaction. The power of Congress over intrastate rates conferred by the commerce clause is limited to action reasonably necessary for the protection of interstate commerce, *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563. No necessity is here shown. Such is the argument. The section, if so construed, would, at least, raise a grave and doubtful

p. 25. "The rates were made by filing the tariffs with the commission. The orders were directions of the Director General to his officials." Compare *Atlantic Coast Line Ry. Co.* v. *Railroad Commission of Georgia,* 281 Fed. 321, 325; *Anaconda Copper Mining Co.* v. *Director General,* 57 I. C. C. 723, 726; *Lehigh Valley Coal Co.* v. *Director General,* 69 I. C. C. 535, 539.

constitutional question. Under the settled practice, a construction which does so will not be adopted, where some other is open to us. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 307. An examination of the section in the light of the then existing federal and state law will make clear that another and reasonable construction is open to us, and that it should prevail.

Section 208(a) contains two clauses. Each was to take effect immediately. Each dealt with rates, fares, charges, classifications, regulations and practices. But in purpose, character, and scope the two clauses differ widely. The primary purpose of the second clause was to protect the United States from liability on its guaranty to the carriers of the standard return. It sought to do so by prohibiting any reduction of rates, fares or charges without the consent of the Interstate Commerce Commission. The prohibition applied alike to intrastate and to interstate rates. It extended to reductions made by the carriers, as well as to those made by the States. But the prohibition was limited to reductions. Increases might be made. The prohibition was confined to the first six months after the surrender of the railroads to their owners, because the Government guaranty was limited to that period.

The first clause of § 208(a) is legislation permanent in character. It relates alike to changes which increase rates and to those which reduce. It contains no prohibition. It explains. Its purpose was not to conserve revenues but to remove doubts and avoid confusion. A clarifying provision was needed. Comprehensive changes in the rates, fares, charges, classifications, regulations and practices had been made by the Director General by filing the same with the Interstate Commerce Commission, pursuant to power conferred by § 10 of the Federal Control

Act. It was important that carriers and the public should know whether, and to what extent, these changed rates, fares, charges, classifications, regulations and practices would continue in force after the return of the railroads to their owners. This information the first clause supplied by specifying what tariffs were applicable. To facilitate the conduct of business by this means was an appropriate exercise of the power of Congress. To have undertaken to do so by means of abrogating all rates, fares and charges established by the several States in respect to intrastate commerce, and all classifications and regulations affecting them, would not have been. It is not lightly to be assumed that Congress would have resorted to means so extraordinary for securing workable tariffs.

It is suggested that, although the primary purpose of the first clause of § 208(a) was to facilitate the conduct of business, Congress intended thereby also to protect the carrier's revenues; and that a requirement of an affirmative exercise of state power after termination of federal control would, by presenting an obstacle to change, make reductions of rates by the States difficult, and thus result in protecting the carrier's revenues. That Congress did not devise the first clause as a means of so protecting revenues appears from the character of the provision there made. The clause applies equally, whether the rate made by the Director General was a reduction or an increase of the rate in effect before federal control. The clause left the several States free to proceed at once to establish reductions, and to make them effective upon the expiration of the Government's guaranty. Whether a particular State could avail itself of that liberty would thus depend wholly upon its own constitution, legislation and practice. If at the time Transportation Act, 1920, was enacted the legislature either happened to be in session or could be promptly convened, the State might by a single statute

have restored, as of September 1, 1920, its rates, fares and charges and all classifications, regulations and practices affecting them, no matter what change the Director General had made. In those States where the rate-making power was vested in a regulatory body in continuous session a like result could have been attained through a single order. On the other hand, in those States where the local law did not permit such prompt action by the rate-making authority, the restoration of rates by state action would necessarily have been deferred. It is not to be assumed that Congress intended to adopt a means of protection which would have been indirect, fortuitous and largely futile, and which would obviously have produced such inequalities among the States, when direct, certain and better means of protection were available.

Moreover, there was no purpose in Congress to maintain in force, after the expiration of the six months' guaranty period, either the interstate or the intrastate rates which had been established by the Director General. It was recognized, when Transportation Act, 1920, was enacted, that these were not high enough to yield to the carriers adequate revenues. Means of increasing them were specifically provided by those sections of Transportation Act, 1920, which prescribe the essentials of a fair return and empower the Commission, upon notice to the States and with their cooperation, to prevent discrimination against interstate commerce resulting from unduly low intrastate rates, fares and charges. See §§ 415, 416 and 422. Proceedings were in contemplation by means of which it was proposed to establish largely increased rates on the expiration of the Government's guaranty, September 1, 1920. The order for such general increase made by *Ex parte 74, Increased Rates, 1920,* 58 I. C. C. 220, on July 29, 1920, followed extensive hearings in which commissions representing the States participated.

Proceedings were instituted in the States before September 1, 1920, to secure corresponding increases of the intrastate rates. And further proceedings were had before the federal Commission to remove obstacles to increases of the intrastate rates which existed in some of the States.[4] The six months' prohibition of reductions provided for by the second clause of § 208(a) afforded carriers and the Interstate Commerce Commission ample opportunity to take such action as might be deemed advisable for carrying out the new policy established by Transportation Act, 1920.

When the first clause of § 208(a) is examined in the light of these facts, the construction to be given it becomes clear. In order to remove doubts as to what tariffs were to be applicable after the termination of federal control, Congress declared that the existing tariffs, largely initiated by the Director General, should be deemed operative, except so far as changed thereafter—that is, after February 29, 1920—pursuant to law. Such modification of intrastate tariffs might result from action of the carriers taken on their own initiative. It might result from orders of the Interstate Commerce Commission. It might result from the making either of new state laws or of new orders of a state commission acting under old laws still in force and again becoming operative. Or such modification might result from the mere cessation of the suspension, which had been effected through federal control, of statutes or orders theretofore in force and still unaffected by any

[4] See Annual Report of the Interstate Commerce Commission, December 1, 1920, pp. 6-10; *Rates, Fares and Charges of New York Central R. R. Co.*, 59 I. C. C. 290; *Intrastate Rates Within Illinois*, 59 I. C. C. 350; *Wisconsin Passenger Fares*, 59 I. C. C. 391; *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591; *Re Steam Railroads*, P. U. R. 1920F 7; *Re Northern Pac. Ry. Co.*, P. U. R. 1920F 11; *Re Railroads*, P. U. R. 1920F 17; *Re Railroads*, P. U. R. 1920F 33; *Re Freight Rates of Carriers*, P. U. R. 1921A 399.

action of the authority which made them. In any of these cases, the change would be effected "thereafter;"—that is, after the termination of federal control. The statute of Missouri enforced by its courts was in effect in 1922. The judgment is

Affirmed.

CHEROKEE NATION *v.* UNITED STATES

APPEAL FROM THE COURT OF CLAIMS.

No. 198. Argued March 8, 1926.—Decided April 12, 1926.

1. The effect as *res judicata* of the judgment of the Court of Claims, as modified by this Court (202 U. S. 101), determining the claims of the Cherokee Nation against the United States, was waived in so far as concerns interest, by the Act of March 3, 1919, directing a re-examination of that question and specially conferring jurisdiction on the Court of Claims, with a right of appeal to this Court. P. 486.
2. Congress has power to waive the benefit of *res judicata* by allowing another trial of a claim against the United States. *Id.*
3. Interest can not be recovered from the United States in a suit on contract referred by special Act to the Court of Claims, unless the contract or the special Act expressly authorized interest. P. 487.
4. On the amounts of principal owing them by the United States, as determined in the case reported in 202 U. S. 101, the Cherokees were entitled, as by stipulation, to simple interest only, at five per cent. to date of payment. P. 487.
5. The fact that Congress failed to appropriate money, in accordance with its agreement, to pay principal amounts and accrued simple interest due to the Cherokees on an account stated and agreed to between them and the United States, is not a good reason for allowing interest on the interest from the time when the payments should have been made. P. 488.
6. The provision in the sixth article of the agreement with the Cherokees, of December 19, 1891, ratified by Act of March 3, 1893, providing for interest at five per cent. on money to be paid them "so long as the money . . . shall remain in the Treasury," refers to money payable for the land ceded by the Indians under

the agreement, and not to the principal sums and interest to be accounted as due under past treaties and laws. P. 491.

7. The provisions in the Treaty of June 19, 1866, and Rev. Stats. § 3659 for investing Cherokee funds in United States stocks and paying interest are not a basis for compounding interest on the amount expended from such funds for removal of Eastern Cherokees to Indian Territory, since, by agreement of the Cherokees and the United States under a Senate Resolution of 1850 and through ratification of the account stated under the agreement of December 19, 1891, the interest was to be at five per cent. until the debt was paid. P. 491.
8. Under the judgment rendered by this Court in 1906, 202 U. S. 101, interest thereafter should not have been calculated on the interest included in the judgment but only on the principal amounts, until paid. Pp. 492, 495.
9. The provision of the Act of September 30, 1890, for paying interest at four per cent. on judgments appealed to this Court by the United States from the Court of Claims, from the date of filing the transcript of judgment in the Treasury Department to the date of the mandate of affirmance, does not apply to a judgment which itself provides for a certain rate of interest after its entry. P. 493.

59 Ct. Cls. 862, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition in a suit by the Cherokee Nation.

Mr. Frank K. Nebeker, with whom *Messrs. Frank J. Boudinot, C. C. Calhoun, Wilfred Hearn,* and *Leslie C. Garnett* were on the brief, for appellant.

Assistant Attorney General Galloway, with whom *Solicitor General Mitchell* was on the brief, for the United States.

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

In 1906, this Court affirmed a judgment of the Court of Claims for the principal of and the interest on four amounts due from the United States to the Cherokee

Nation. *Cherokee Nation* v. *United States,* 202 U. S. 101; s. c. 40 Ct. Cls. 252. The interest allowed in the judgment was five per cent. on the four claims from the accruing of liability to their payment. Since that judgment, and its payment in full, the Cherokee Nation has presented to Congress the claim, that more than simple interest was due, that the principal and interest due in 1895 should have been regarded as a lump sum, and that, thereafter, interest on the total at five per cent. to the time of payment should have been allowed. This, if granted, would be an additional sum of $2,216,091.76, with five per cent. interest from the dates of previous credits till paid. A special Act of Congress, of March 3, 1919, 40 Stat. 1316, c. 113, provides in part as follows:

"That jurisdiction is hereby conferred upon the Court of Claims to hear, consider, and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five (Fortieth Court of Claims Reports, page two hundred and fifty-two) in favor of the Cherokee Nation. The said court is authorized, empowered, and directed to carefully examine all laws, treaties, or agreements, and especially the agreement between the United States and the Cherokee Nation of December nineteenth, eighteen hundred and ninety-one, ratified by the United States, March third, eighteen hundred and ninety-three (Twenty-seventh Statutes at Large, page six hundred and forty, section ten), in any manner affecting or relating to the question of interest on said funds, as the same shall be brought to the attention of the court by the Cherokee Nation under this act. And if it shall be found that under any of the said treaties, laws, or agreements interest on one or more of the said funds, either in whole or in part,

has not been paid and is rightfully owing from the United States to the Cherokee Nation, the court shall render final judgment therefor against the United States and in favor of the Cherokee Nation, either party to have the right to appeal to the Supreme Court of the United States as in other cases."

It is not necessary to recount the long and intricate history of the relations between the United States and the Cherokee Nation. It is complicated by the division between Cherokees into the Eastern Cherokees, who wished to become civilized and remain in the States east of the Mississippi, and those who preferred nomadic and hunting life in the West, and who first went to the Indian Territory and were called the Old Settlers. Ultimately the Eastern Cherokees were removed to the same place, and they and the Old Settlers were united in a common government again by the Treaty of 1846, 9 Stat. 871. The sale and purchase and transfer of lands east and west of the Mississippi, the distribution of these, the cost of removal of the various bands of the Nation to Indian Territory, and other transactions involving expense, were the subject of discussion and dispute between the Government and the Nation and its different bands. In avowed conformity with the Treaty of 1846, Congress appropriated, in 1852, the sum of $724,603, " in full satisfaction and final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States." 9 Stat. 573, c. 12. A full and final discharge was accordingly signed by the representatives of the Cherokee Nation, but under protest. Other claims, however, were thereafter made and paid, one of nearly $190,000 to the Old Settlers. Then, in a case of *The Old Settlers* v. *United States,* 27 Ct. Cls. 1, affirmed by this Court in 148 U. S. 427, a judgment for $212,376.94, with interest from 1838 and an additional $4,100 was given them.

In 1889, the United States desired to buy from the Cherokees what was known as the Cherokee Outlet, in Oklahoma, embracing 8,000,000 acres, for settlement as public land. Under the authority of § 14 of the Act of March 2, 1889, 25 Stat. 1005, an agreement was made December 19, 1891, by the United States with the Cherokee Nation, by the first article of which the Cherokee Nation agreed to convey to the United States, 8,144,682.91 acres between the 96th and 100th degrees of west longitude, south of the Kansas line, and commonly known as the "Cherokee outlet."

The fourth article of the agreement was as follows:

"Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835, 1836, 1846, 1866, and 1868, and any laws passed by Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve (12) months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her

favor; or, if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting."

The Sixth Article was in part as follows:

"Sixth. That in addition to the foregoing enumerated considerations for the cession and relinquishment of title to the lands hereinbefore provided the United States shall pay to the Cherokee Nation, at such time and in such manner as the Cherokee National Council shall determine, the sum of eight million five hundred and ninety-five thousand seven hundred and thirty-six and twelve one-hundredths ($8,595,736.12) dollars in excess of the sum of seven hundred and twenty-eight thousand three hundred and eighty-nine and forty-six one-hundredths ($728,389.46) dollars, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River, and also in excess of the amount heretofore paid by the Osage Indians for their reservation. So long as the money or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of five per centum per annum, payable semi-annually: Provided, That the United States may at any time pay to said Cherokee Nation the whole or any part of said sum and thereupon terminate the obligation of the United States in respect to so much thereof as shall be so paid and in respect to any further interest upon the same."

On January 4, 1892, the agreement of 1891 was approved by the Cherokee National Council. The agreement was ratified by Congress by § 10 of the Act of March

3, 1893, 27 Stat. 612, 640, which appropriated $295,736, to be immediately available and the remaining sum of $8,300,000, it was provided, should be "payable in five equal installments, commencing on the fourth day of March, eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually."

The Act further provided that the acceptance by the Cherokee Nation of Indians of any of the money appropriated as therein set forth should be considered and taken, and should operate, as a full and complete relinquishment and extinguishment of all the title, claim, and interest in and to said lands of the Cherokee Nation.

The sum of $5,000 was appropriated by the Act to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, "to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said Nation, as required in the fourth subdivision of Article II of said agreement."

On May 17, 1893, a deed of cession was executed and delivered by the proper authorities of the Cherokee Nation to the United States and the first installment of the purchase money was paid to and accepted by the Cherokee Nation; and the United States thereupon took possession of said lands, and thereafter disposed of the same. The other installments were duly and seasonably paid.

In pursuance of the Act of March 3, 1893, *supra*, the Secretary of the Interior promptly employed two expert accountants, Messrs. James A. Slade and Joseph T. Bender, to prepare an account between the United States and the Cherokee Nation, and, on April 28, 1894, they filed it with the Secretary. The amounts due the Cherokee Nation were summed up as follows:

"Under the treaty of 1819:

"Value of three tracts of land containing 1700 acres at $1.25 per acre, to be added to the principal of the 'school' fund..... $2,125.00

(With interest from Feb. 27, 1819, to date of payment.)

"Under treaty of 1835:

Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund..... $1,111,284.70

(With interest from June 12, 1838, to date of payment.)

"Under treaty of 1866:

Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation..... $432.28

(With interest from Jan. 1, 1874, to date of payment.)

"Under act of Congress March 3, 1893:

Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund..... $20,406.25

(With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.)"

This was transmitted by the Secretary of the Interior to the proper authorities of the Cherokee Nation, and it was accepted by Act of the National Council approved December 1, 1894. It was then transmitted by the Secretary to Congress, on January 7, 1895. The principal due on said account on March 4, 1895, was $1,134,248.23, and the interest was $3,162,279.34.

Instead of making an appropriation for this amount, Congress on March 2, 1895, referred the report of the Secretary of the Interior to the Attorney General, and authorized and directed him to review the conclusions of law reached by the Department of the Interior in the account and report his conclusions at the next regular

session. 28 Stat. 795, c. 177. The Attorney General made his report, December 2, 1895, which differed with the report of the Secretary of the Interior and the Slade and Bender report, holding that, under the Treaty of 1846 and the settlement of 1852 by appropriation of Congress, the Cherokees were properly charged with the expense of removal, and that the item 2 of $1,111,284.70 in the report was improperly charged to the United States. No action was taken in settlement of the matter by Congress until July 1, 1902, when, by § 68 of the Act of July 1, 1902, 32 Stat. 726, it referred the claims to the Court of Claims, as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with the right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee Tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against the said tribe, or any band thereof. . . ."

Under this Act, the Cherokee Nation brought suit against the United States, claiming the whole amount with interest, found due by the Slade and Bender account. Thereafter the Eastern Cherokees and the Eastern and Emigrant Cherokees each brought suit under the Act of July 1, 1902, as amended by the Act of March 3, 1903, against the United States, each claiming the removal fund of $1,111,284.70. The three suits were consolidated by order of the court, and were heard, considered, and decided together. The decree of the Court of Claims, in conformity with its opinion and conclusion of law entered March 20, 1905, was in part as follows:

"It is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1: The sum of..... $2,125.00
With interest thereon at the rate of 5 per cent. from Feb, 27, 1819, to date of payment.

Item 2: The sum of..... $1,111,284.70
With interest thereon at the rate of 5 per cent. from June 12, 1838, to date of payment.

Item 3: The sum of..... $432.28
With interest thereon at the rate of 5 per cent. from Jan. 1, 1874, to date of payment.

Item 4: The sum of..... $20,406.25
With interest thereon from July 1, 1893, to date of payment."

Then followed directions as to the payment and distribution of the different items of the judgment. 40 Ct. Cls. 252, 363, 364.

The case having come to this Court on appeal, the judgment was affirmed, on April 30, 1906, with a modification, consisting of a direction that item two, $1,111,284.70, with interest at 5 per cent. from June 12, 1838, to date of payment, should be distributed among 'the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, and exclusive of Old Settlers.' 202 U. S. 101, 130, 131. On May 28, 1906, the Court of Claims entered a decree modifying its original decree to conform to the mandate of the Supreme Court. In attempted satisfaction of the judgment of the Court of Claims, as modified by the Supreme Court, and as directed by subsequent appropriation acts, there has been paid to the Cherokee Nation the sum of $5,158,005.54.

The Court of Claims held in the case before us, that the plaintiff was not entitled to recover any more interest, and its petition was dismissed. Hence this appeal.

The first question for our consideration is the effect of the Act of 1919 in referring the issue in this case to the

Court of Claims. The judgment of this Court in the suit by the Cherokee Nation against the United States, in April, 1906 (202 U. S. 101), already referred to, awarded a large amount of interest. The question of interest was considered and decided, and it is quite clear that but for the special Act of 1919, above quoted, the question here mooted would have been foreclosed as *res judicata.* In passing the Act, Congress must have been well advised of this, and the only possible construction therefore to be put upon it is that Congress has therein expressed its desire, so far as the question of interest is concerned, to waive the effect of the judgment as *res judicata,* and to direct the Court of Claims to re-examine it and determine whether the interest therein allowed was all that should have been allowed, or whether it should be found to be as now claimed by the Cherokee Nation. The Solicitor General, representing the Government, properly concedes this to be the correct view. The power of Congress to waive such an adjudication of course is clear. See *Nock* v. *United States,* 2 Ct. Cls. 451; *Braden* v. *United States,* 16 Ct. Cls. 389, and *United States* v. *Grant,* 110 U. S. 225. Compare *United States* v. *Realty Company,* 163 U. S. 427; *Allen* v. *Smith,* 173 U. S. 389, 393, 402; *United States* v. *Cook,* 257 U. S. 523, 527; *Work* v. *United States ex rel. Rives,* 267 U. S. 175, 181; *Mitchell* v. *United States,* 267 U. S. 341, 346.

There is nothing before us which indicates that the present claim for a rest in the matter of interest in 1895, was presented either to the Court of Claims or to this Court. It is a new argument not before considered. The argument is that the consideration for the land to be conveyed under the agreement of 1891 was not only the eight and a half millions of dollars to be paid, but also the appropriation by Congress of money to pay the old accounts long due, and that the failure of Congress to make the appropriation at the time agreed required that interest

thereafter should be awarded upon the lump sum of principal and interest as of that date, in full payment of the purchase money for the land. The claim is that the failure of Congress to make the appropriation as stipulated in the contract became a new *terminus a quo* from which the calculation of interest on everything then due and owing must be calculated.

In taking up this argument, we should begin with the premise, well established by the authorities, that a recovery of interest against the United States is not authorized under a special Act referring to the Court of Claims a suit founded upon a contract with the United States unless the contract or the act expressly authorizes such interest. This is in accord with the general Congressional policy as shown in § 177 of the Judicial Code, providing that " no interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." *Tilson* v. *United States,* 100 U. S. 43, 46; *Harvey* v. *United States,* 113 U. S. 243, 249.

We have already held, in *The Old Settlers* case, *supra,* and in *United States* v. *The Cherokee Nation, supra,* that in the past financial dealings between the United States and the Cherokee Nation on debts due from the former to the latter, interest at five per cent. until payment was to be allowed as if stipulated. This result followed from a decision by the Senate of the United States acting as umpire between the two parties in 1850. In that capacity it adopted the following resolution:

" Resolved, That it is the sense of the Senate that interest at the rate of 5 per cent. per annum should be allowed upon the sums found to be due to the Eastern and Western Cherokees respectively, from the 12th day of June, 1838, until paid."

Thus it was that the accountants Slade and Bender reported that interest at five per cent. until paid should

be allowed the Cherokees, not only on the items which were due in 1850, but also on those which had accrued since; and, by the ratification of their report by both parties, interest thus calculated becomes a stipulated term in respect of the issue before us.

It is contended, however, by counsel for the Cherokee Nation, that the decision of this Court in 1906 so treats the breach of the contract by the Government in failing to make the appropriation in 1895 as to justify the claim that it was more than a mere continuance of the failure to pay,—that it was a new breach of a new contract, requiring interest as upon a new default in a new debt of the sum total of the original claim with interest added down to 1895.

We can not ascribe such an effect to the decision referred to. The chief controversy in that case was as to the liability of the Government at all for the removal expenses of the Eastern Cherokees. It was argued on its behalf, as the report of the case in the Court of Claims shows (40 Ct. Cls. 252, 307), that Slade and Bender were merely accountants employed by the Government to state the account and not to pass on the legal validity and effect of the Treaty of 1846 and the scope of the settlement evidenced by the appropriation and the signed releases of 1852; that the Cherokees were not bound by the report as an account stated or settled but were given full right by the agreement of 1891 to contest its correctness and to resort to court in respect of it; and that the Government could not be bound by such a report, in which the accountants exceeded their authority as mere accountants and exercised their functions as if authorized to act as arbitrators or umpires. This Court stated its adverse conclusion on this point by quoting and approving the language of Chief Justice Nott in the Court of Claims (202 U. S. 101 at pp. 122, 123) as follows:

"The court does not intend to imply that when the account of Slade and Bender came into the hands of the

Secretary of the Interior he was bound to transmit it to the Cherokee Nation. On the contrary, the Cherokee Nation had not agreed to be bound by the report of the accountants and could not claim that the United States should be. The accountants were but the instrumentality of the United States in making out an account. When it was placed in the Interior Department it was as much within the discretion of the Secretary to accept and adopt it or to remand it for alterations and corrections as a thing could be. He was the representative of the United States under whom the agreement had been made, and he was the authority under which the account had been made out, and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States. When the account was thus received by the Cherokee Nation (May 21, 1894), the 'twelve months' of the agreement, within which the Nation must consider it and enter suit against the other party in the Court of Claims, began to run, and with the Nation's acceptance of the account (December 1, 1894), the session of Congress at which an appropriation should be made became fixed and certain. The Secretary did not recall the account; the United States never rendered another, and the utmost authority which Congress could have exercised, if any, was, at the same session, or certainly within the prescribed 'twelve months,' to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary of the Interior, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time within which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament, and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement."

All this, however, was directed to the question of the liability of the United States to pay the principal debt. The Court then proceeded to find the interest due as directed in the Slade and Bender account without any suggestion of a rest for interest in 1895, or anything other than simple interest at five per cent. until paid.

When we consider the rule requiring an express provision of contract or statute to justify the imposition of interest in adjudicating any claim against the United States, we can find nothing in the circumstances of this case to increase the interest as adjudged. The additional interest now claimed is sought really as damages for the delay of Congress in appropriating the sum due in 1895 as the United States promised in the 1891 agreement. But the rule as to interest against the United States does not allow us to adjudge interest as damages at all. Congress must expressly provide for it or the contract must so provide. The only contractual obligation here is for simple five per cent. interest until payment.

What the appellant here seeks is compound interest, that is interest on interest from 1895 until now. The general rule even as between private persons is that in the absence of a contract therefor or some statute, compound interest is not allowed to be computed upon a debt. *Whitcomb* v. *Harris,* 90 Me. 206; *Bradley* v. *Merrill,* 91 Me. 340; *Ellis* v. *Sullivan,* 241 Mass. 60, 64; *Tisbury* v. *Vineyard Haven Water Company,* 193 Mass. 196; *Lewin* v. *Folsom,* 171 Mass. 188, 192; *Wallace* v. *Glaser,* 82 Mich. 190; *Blanchard* v. *Dominion National Bank,* 130 Va. 633, 637; *Finger* v. *McCaughey,* 114 Cal. 64, 66; *Cullen* v. *Whitham,* 33 Wash. 366, 368. In view of the care with which Congress, and this Court in interpretation of the legislative will, have limited the collection of simple interest against the Government, *a fortiori* must compound interest be denied to appellant unless provision therefor is made in the contract of 1891, or in the statute

of 1919 authorizing this suit, and it is to be found in neither.

Further support for the claim of the appellant is said to be found in the sixth article of the agreement, quoted above, in the language, " so long as the money or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sums so left in the Treasury of the United States shall bear interest at rate of 5 per cent. per annum, payable semi-annually." It is said that this should be construed to refer not only to the balance unpaid of the $8,595,736.12, but also to the money on the old claims found to be due under the agreement, because payment of the latter was part of the consideration for the land. A careful examination of the sixth article shows that this clause referred only to the new money consideration to be paid, and really only to the part of that which, after it fell due and was ready for payment, should be voluntarily left in the Treasury by the Cherokee Nation. It did not even refer to the originally deferred payments, because those payments were to bear only four per cent. interest. In any view, it did not and could not refer to amounts due on past account, because at the time the agreement of 1891 was made they were not fixed in amount and awaited a possible adjudication to determine them, and full treatment of them was given in article 4 of the agreement. The sixth article did not apply to them at all.

It is further argued that the payment of compound interest is to be supported here under the provisions of the Treaty of June 19, 1866, 14 Stat. 799, 805, which reads as follows:

" All funds now due the Nation, or that may hereafter accrue from the sale of their lands by the United States as hereinbefore provided for, shall be invested in United States registered stocks at their current value, and the interest on all such funds shall be paid semi-annually on the order of the Cherokee Nation."

And by § 3659 of the Revised Statutes, re-enacting § 2 of the Act of Congress of September 11, 1841, 5 Stat. 465, which provides:

"All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum."

It is urged that the largest item, of $1,111,284.70, was taken out of a $5,000,000 trust fund held by the United States for the benefit of the Cherokees, and therefore that it should be treated as if it were always in the Treasury of the United States, held in trust for the Indians, and as if the United States had collected the interest thereon out of the invested stocks and had refused to pay it over as annuities to the Indians. This claim proves too much. It would require compound interest brought about by annual or semi-annual rests for near a century, an amount that the Solicitor General suggests would be equal to the National debt. The argument is shown to be wholly without support in the circumstance that the Cherokees and the United States, by the resolution of the Senate in 1850, agreed upon the interest for such debts as that of five per cent. until paid. Moreover, the ratification by the Cherokees of the Slade and Bender Report foreclosed any such claim.

After the judgment was rendered, in 1906, by this Court affirming that of the Court of Claims, the Treasury had some difficulty in deciding how the interest was to be calculated on the amounts declared in the judgment. We have no doubt that the judgment should have been paid in accordance with its exact terms, namely with simple interest down to the time of actual payment, and that the intervention of the judgment of 1906 made no difference in the calculation of the interest. This is the necessary effect of the judgment.

The Treasury was troubled by the provision of September 30, 1890, 26 Stat. 504, 537, which provides as follows:

"That hereafter it shall be the duty of the Secretary of the Treasury to certify to Congress for appropriation only such judgments of the Court of Claims as are not to be appealed, or such appealed cases as shall have been decided by the Supreme Court to be due and payable. And on judgments in favor of claimants which have been appealed by the United States and affirmed by the Supreme Court, interest, at the rate of four per centum, shall be allowed and paid from the date of filing the transcript of judgment in the Treasury Department up to and including the date of the mandate of affirmance by the Supreme Court: Provided, That in no case shall interest be allowed after the term of the Supreme Court at which said judgment was affirmed."

It is quite clear that the statute applies where judgments against the United States bear no interest, and certainly not to one in which the judgment itself provides for a certain rate of interest after its entry. The above statute was framed in order to impose a penalty on the United States for its unsuccessful effort by appeal to defeat the judgment against it. It only allows interest pending the appeal from the date of filing the transcript in the Treasury Department to the date of the mandate of affirmance. The Treasury Department seems to have applied this statute with respect to all the four items of the judgment of 1906.

By the Act of June 30, 1906, 34 Stat. 634, 664, Congress made appropriation for the payment of the judgment of the Court of Claims, principal and interest, as follows:

"To pay the judgment rendered by the Court of Claims on May eighteenth, nineteen hundred and five, in consolidated causes numbered twenty-three thousand one hundred and ninety-nine, The Cherokee Nation versus

The United States; numbered twenty-three thousand two hundred and fourteen, The Eastern Cherokees versus The United States; and numbered twenty-three thousand two hundred and twelve, The Eastern and Emigrant Cherokees versus The United States, aggregating a principal sum of one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, as therein set forth, with interest upon the several items of judgment at five per centum, one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, together with such additional sum as may be necessary to pay interest, as authorized by law."

This Act was further amended by the Act of March 4, 1909, 35 Stat. 907, 938, 939, as follows:

" That the general deficiency appropriation act of June thirtieth, nineteen hundred and six, so far as the same provides for the payment of item two of the judgment of the Court of Claims of May eighteenth, nineteen hundred and five, in favor of the Eastern Cherokees, shall be construed as to carry interest on said item two up to such time as the roll of the individual beneficiaries entitled to share in said judgment shall be finally approved by the Court of Claims, and for the payment of said interest a sufficient sum is hereby appropriated."

Then by § 18 of the Act of June 30, 1919, 41 Stat. 3, 21, Congress provided for the payment of certain interest on items 1 and 4 of the judgment. The provision in this section as to item 1 seems to have been largely an overpayment. That as to item 4 seems also to have involved a considerable overpayment, though it also included ten years' interest due on the principal under the judgment which by the Government's error was not embraced in the payment under the Act of 1906.

The sum of all payments actually made under the judgment of 1905 was as follows:

On July 2, 1906, to the Secretary of the Interior on account of said item 1	$11,520.46
On the same date on account of item 3	1,140.49
On the same date on account of item 4	23,294.93
On July 14, 1906, to the attorneys for the Eastern Cherokees and the Eastern Emigrant Cherokees, fees amounting to	740,555.42
On Nov. 3, 1906, to the attorneys for the Cherokee Nation on account of item 2, fees amounting to	148,245.15
On various dates after July 2, 1906, and before final distribution of the fund arising from item 2, to Guion Miller for fees and expenses the sum of	103,749.74
On and after Mar. 15, 1910, to Guion Miller for per capita distribution among the Cherokees entitled to share in the fund the sum of	4,105,810.77
On or about Aug. 7, 1919, additional interest on item 4, pursuant to the act of June 30, 1919	21,502.86
On or about Aug. 7, 1919, to the Secretary of the Interior as additional interest on item 1, pursuant to the said act of June 30, 1919	2,185.72
Making a total sum, principals and interest, of.	$5,158,005.54

The delay in the payment of the largest item was due to the desire to comply with the ruling of the Court of Claims, concurred in by this Court, that the money of the large claim should be distributed to the individual members of the Eastern Cherokees according to rolls to be made up of those individuals. 40 Ct. Cls. 332, 202 U. S. 119, 130. This is what led to the amendment of 1909.

It is quite clear that the mistake made by the Treasury, and by Congress, too, in attempting to carry out the judgment of this Court, was in assuming, first, that 4 per cent. should be allowed on the total of all items and interest between the date of filing the transcript of the judgment in the Treasury Department and the date of the mandate of affirmance by the Supreme Court, as already pointed out. A further mistake was made in calculating interest at 5 per cent. after the date of affirmance by this Court on the total of the judgment and the interest until final

payment. It should have been confined to interest on the principal sums. The eighth finding of the Court of Claims shows in more or less detail how the interest was calculated. The methods adopted we have already criticised. The Solicitor General in his brief makes it evident that in the case of no one of the four items is the amount which has been actually paid less than that which should have been paid down to the day of payment, in accordance with the judgment, including the principal and 5 per cent. simple interest to the date of payment. There is no attempt on the part of the appellant to question the demonstration of this fact. The truth is that the errors in the calculation increased by a substantial sum the amounts which under the judgment should have been paid. As this was more favorable than it should have been to the Cherokees, they can not complain. On this appeal, under the Act of 1919, and in compliance with its requirement, we hold that there is no more interest due to the Cherokees beyond that which they have already received. The Government is not in a position, in view of the fact that the errors referred to have been embodied in legislation, and the overpayments have been made by direction of Congress, to seek to recover them back. Indeed it has not attempted to do so. The judgment of the Court of Claims is

Affirmed.

LUCKETT *v.* DELPARK, INC., ET AL

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

No. 220. Argued March 16, 1926.—Decided April 12, 1926.

1. A suit is within the jurisdiction of the District Court, as arising under the patent laws, where the bill seeks an injunction against infringement, with profits and damages, even though it contain averments in denial of an anticipated defense of license or authority

to use the patent. *Hartell* v. *Tilghman,* 99 U. S. 547, qualified. P. 510.

2. But where the main purpose of the bill is to recover royalties under a license or assignment, or damages for breach of covenants, or for specific performance thereof, or to declare a forfeiture of licenses or obtain a reconveyance of an assigned patent for breach of conditions, additional averments of danger that the patent will be infringed after the title has been so restored, coupled with a prayer for an injunction, do not bring the case within the federal jurisdiction. *Wilson* v. *Sandford,* 10 How. 99. Pp. 502, 510.

Affirmed.

APPEAL from a decree of the District Court dismissing the bill for want of jurisdiction in a suit by Luckett, a patent-owner, for an accounting and damages under license agreements, for cancellation of the agreements, injunction against future infringement of the patents, etc.

Mr. Thomas J. Johnston, with whom *Messrs. J. Granville Meyers* and *John Milton* were on the brief, for appellant.

Counsel for appellant cited: *White* v. *Rankin,* 144 U. S. 628; *Healy* v. *Sea Gull Mfg. Co.,* 237 U. S. 479; *Wilson* v. *Sanford,* 10 How. 99; *Hartell* v. *Tilghman,* 99 U. S. 547; *Albright* v. *Teas,* 106 U. S. 613; *Dale* v. *Hyatt,* 125 U. S. 46; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.,* 185 U. S. 282; *Littlefield* v. *Perry,* 21 Wall. 205; *Atherton Co.* v. *Atwood,* 102 Fed. 949; *The Fair* v. *Kohler,* 228 U. S. 22; *Healy* v. *Sea-Gull Specialty Co.,* 237 U. S. 479; *Geneva Furniture Co.* v. *Karpen,* 238 U. S. 254; *Briggs* v. *United Mch. Co.,* 239 U. S. 48. From these cases they deduced the following propositions:

I. Where the suit is based only on a contract concerning patent (or other) rights, whether to enforce the contract, to modify it, to cancel it, or to recover damages for its breach, the suit is not one "touching patent rights," under § 256, par. 5, Judicial Code, and jurisdiction must be maintained, if at all, by reason of diverse citizenship,

or otherwise, under § 24; subject to the usual restrictions as to residence, etc., of the concurrent jurisdiction found in § 51. That patent rights may or must be incidentally considered does not affect the principle.

II. Where the suit declares for infringement of letters-patent, the jurisdiction of the District Court is not only complete, but exclusive; subject to the residence limitation of § 48.

III. Jurisdiction once attaching is not divested by the fact that contract questions must be decided in the adjudication on the merits.

IV. The merits have nothing to do with jurisdiction. That depends exclusively upon the case stated by the plaintiff.

V. Where the plaintiff pleads jurisdictional facts, an answer interjecting a contractual defense does not divest the jurisdiction; the court must proceed to "hear and determine" all of the issues.

VI. Where the bill pleads patent infringement, an anticipatory negation of a contract defence will not divest jurisdiction.

Distinguishing or repelling *Standard Dental Co.* v. *Natl. Tooth Co.,* 95 Fed. 291; *Amer. Graphophone Co.* v. *Victor,* 188 Fed. 431.

On the authority of the *Excelsior Wooden Pipe Case,* 185 U. S. 282, and *Healy* v. *Sea Gull Mfg. Co.,* 237 U. S. 479, the decree below should be reversed, and the cause remanded to the court below to proceed upon the merits.

Mr. Archibald Cox for appellees.

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

Philip A. Luckett is a citizen of Connecticut. He brought this bill in equity in the District Court of the United States for the District of New Jersey against Del-

park, a corporation of New York, and against Parker, Ford & Dick, a corporation, formerly known as the Luckett Company, organized in the State of Maryland. Appearing for the purpose of the motion only, the defendants filed a motion to dismiss, because the court was without jurisdiction to entertain the bill. The certificate by the District Court shows its dismissal on that ground, September 17, 1924. This appeal was allowed, November 24, 1924, so that it is maintainable under § 238 of the Judicial Code, in accordance with the saving provision of § 14 of the Act of February 13, 1925, 43 Stat. 942.

Section 51 of the Judicial Code provides that where the jurisdiction is founded on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant. The requisite diverse citizenship between the plaintiff and the defendants exists in this suit, but the District of New Jersey is not the district of the residence of either the plaintiff or the defendants. And against defendants' objection, jurisdiction on that ground can not be sustained.

The plaintiff asserts that jurisdiction exists as of a suit under the patent laws under the Judicial Code, § 24, par. 7, § 48 and § 256. Section 48 provides that " in suits for the infringement of letters patent, the District Courts of the United States shall have jurisdiction in law or in equity in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business." The question in this case, then, is whether, it being averred that the defendants regularly do business in New Jersey, and have made and sold there the patented articles referred to in the bill, its allegations make the suit one arising under the patent laws.

The bill shows that two patents were issued to Luckett, one on November 12, 1918, No. 1284391, and the other on October 12, 1915, No. 1156301, for a method of making undergarments known as union suits. The later patent, No. 1284391, is averred to be the generic and the broader invention, while the earlier patent, No. 1156301, is a specific and narrower one. After the later patent was applied for, but before it was granted, Luckett gave a non-exclusive license for manufacture and sale of the garments under it to the Delpark corporation. This reserved to Luckett a royalty on all garments manufactured and sold under it, the licensee covenanting to give access to its books of account. A supplementary agreement made the license exclusive. Later, Luckett gave to the other defendant, Parker, Ford & Dick, an assignment of the Letters Patent No. 1156301, under which a particular union suit known as the "My Pal" suit is made, with conditions subsequent that the assignee should pay certain royalties, should keep the accounts open for inspection, and should push vigorously the sale of "My Pal" suits, and with a provision that, if any condition subsequent failed, the title to the letters patent assigned should revert to Luckett, on his giving the assignee thirty days' notice in writing of his election to resume title. All the contracts of license and assignment made by the plaintiff with each of the defendants are attached to the bill as exhibits.

The averments of the bill are that Delpark, Incorporated, has acquired control of the stock of the Parker, Ford & Dick corporation, and the defendants are acting together; that the Delpark corporation refuses to pay to Luckett any royalties due under its exclusive license of the generic patent; that the Parker, Ford & Dick corporation refuses to pay any royalties under plaintiff's assignment to it of the specific patent, and refuses to push the sale of "My Pal" suits; that this refusal is to prevent competition of the "My Pal" suits with the Delpark suits,

and thus deprives plaintiff of royalties on the "My Pal" suits. The plaintiff avers that on November 27, 1918, by notice in writing he cancelled his assignment to the Parker, Ford & Dick corporation, for failure of condition subsequent, and resumed his title to Letters Patent No. 1156301.

The seventeenth paragraph in the bill, and the only one which uses the word "infringement," is as follows:

"(XVII) And your orator further shows unto your Honors, that Delpark, Incorporated, is a large concern with substantial capital, and ever since the issue of Letters Patent No. 1,284,391 on November 12, 1918, has been actively engaged in the manufacture and sale of the Delpark garment so-called, which infringes the claims of the said Letters Patent and also the claims of Letters Patent No. 1,156,301; and that large numbers of the said garment have been made and sold upon which royalties are now due to your orator, the amount of which he is wholly unable to state with definiteness, but which is far larger than three thousand dollars, exclusive of interest and costs; and that though often requested as hereinbefore set out, no accounting has ever been had between your orator and Delpark, Incorporated, or Parker, Ford & Dick, Inc., either as to royalties due or as to damages for failure to observe the contract to exploit the 'My Pal' garment."

The plaintiff sets out thirteen prayers for equitable relief. He asks that the defendants file statements of the garments made and sold under both patents containing retail prices at which the garments were sold, in order to show the royalties due; also a statement of the orders received for the "My Pal" garments but not filled, with prices, to show the royalties lost; and that they be compelled to permit access to their books of account. He further prays that the Parker, Ford & Dick Corporation be required to execute a formal reassignment of Letters

Patent No. 1,156,301 to the complainant so as to remove the cloud from his title to that patent, and that an order issue cancelling the licenses and agreements made with both defendants. He prays for damages for suppressing the "My Pal" garment, and the failure properly to exploit it as agreed.

In prayer J, the plaintiff asks that a preliminary injunction issue against both defendants to prevent their making sale or delivery of the so-called Delpark garment or the so-called "My Pal" garment, or any other garment infringing the claims of the two letters patent of the plaintiff, until further order of court. By prayer K, a similar permanent injunction is asked. There is a prayer for an order sending the cause to a master to take and state the account of profits and damages both as to royalties due and accrued, and as to damages for suppression of the "My Pal" garment and to report the same to the court.

We do not think that this suit arises under the patent laws. Its main and declared purpose is to enforce the rights of the plaintiff under his contracts with defendants for royalties and for pushing the sales of "My Pal" garment. In addition he seeks the reconveyance of one patent, on forfeiture for failure of condition, to remove a cloud on his title and a cancellation of all agreements of license of the other, for their breach, in order presumably that, unembarrassed by his assignment and licenses, he may enjoin future infringement.

It is a general rule that a suit by a patentee for royalties under a license or assignment granted by him, or for any remedy in respect of a contract permitting use of the patent is not a suit under the patent laws of the United States, and can not be maintained in a federal court as such. *Wilson* v. *Sandford,* 10 How. 99; *Brown* v. *Shannon,* 20 How. 55; *Hartell* v. *Tilghman,* 99 U. S. 547; *Albright* v. *Teas,* 106 U. S. 613; *Dale Tile Manu-*

facturing Company v. *Hyatt,* 125 U. S. 46; *Marsh* v. *Nichols, Shepard & Company,* 140 U. S. 344; *Briggs* v. *United Shoe Machinery Company,* 239 U. S. 48.

In *Wilson* v. *Sandford, supra,* a bill in equity was filed in a federal circuit court setting forth complainant's ownership of a patent, an assignment to defendants of a license in consideration of five promissory notes, with a condition of reversion to complainant on failure to pay any note. The bill averred that the first two notes were not paid, insisted that the license was forfeited by the failure and the licensor was fully reinvested at law and in equity with all his original rights, that the defendants were using the patented machine and were infringing the patent, prayed an account of profits since forfeiture, a temporary and permanent injunction, and a reinvestiture of title in the complainant. On demurrer, the bill was dismissed for lack of jurisdiction as not arising under the patent laws. Chief Justice Taney, speaking for the Court, said:

"The rights of the parties depend altogether upon common law and equity principles. The object of the bill is to have the contract set aside and declared to be forfeited; and the prayer is, 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the Court,' and for an injunction. But the injunction he asks for is in consequence of the decree of the Court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, depended altogether upon rules and principles of equity, and in no degree whatever upon any act of Congress concerning patent rights."

The bill in the present case can not in any respect be distinguished from that in *Wilson* v. *Sandford,* as this

language of the opinion shows. But counsel for the appellant here insists that a new and more liberal rule has been adopted by this Court in later cases, and that the time has now come for recognizing it by taking what he calls the last step.

In the common feature of *Wilson* v. *Sandford* and the case before us, jurisdiction fails because the complainant in his bill seeks forfeiture of licensed rights in equity before he can rely on the patent laws to enjoin infringement of his patent rights and obtain damages therefor. There has been no variation from the authority and effect of the case cited on this point. *New Marshall Co.* v. *Marshall Engine Co.*, 223 U. S. 473, 480. *White* v. *Lee*, 3 Fed. 222; *Adams* v. *Meyrose*, 7 Fed. 208; *Standard Dental Mfg. Co.* v. *National Tooth Company*, 95 Fed. 291; *Atherton Machine Company* v. *Atwood-Morrison Company*, 102 Fed. 949, 955, approved in *Excelsior Wooden Pipe Company* v. *Pacific Bridge Company*, *infra*, at p. 294; *Victor Talking Machine Company* v. *The Fair*, 123 Fed. 424, 425; *Comptograph Co.* v. *Burroughs Adding Machine Co.*, 175 Fed. 787; *American Graphophone Co.* v. *Victor Talking Machine Co.*, 188 Fed. 431; *Lowry* v. *Hert*, 290 Fed. 876.

The cases cited as qualifying *Wilson* v. *Sandford* are *White* v. *Rankin*, 144 U. S. 628; *Excelsior Wooden Pipe Company* v. *Pacific Bridge Company*, 185 U. S. 282; *Henry* v. *Dick Co.*, 224 U. S. 1; *The Fair* v. *Kohler Die Company*, 228 U. S. 22; *Healy* v. *Sea Gull Specialty Company*, 237 U. S. 479, and *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254. We think that none of these cases shakes the authority of *Wilson* v. *Sandford* upon the point here in question, or can be used to sustain the present bill. The case which has been "blown upon" is that of *Hartell* v. *Tilghman*, *supra*, in which the opinion of the Court was delivered by Mr. Justice Miller, speaking for himself and three other Justices, and in which Mr. Justice Bradley

announced a dissenting opinion in which two others concurred. That case was a suit in equity in which the complainant set up a process patent and complained that defendants were infringing by using the process without license and prayed an injunction and a decree for profits and damages. The bill further averred that negotiations had been had between the parties looking to a license, beginning with a verbal agreement by complainant that he should put up machinery for use of defendants in their shop in using the patent, and that thereafter defendants should take a license on certain well understood conditions; that complainant under the verbal agreement put up the machinery and was paid for it, and received royalties under it for use of the patent for some months; that on tender of contract forms for the license defendants refused to sign, and that on such refusal complainant forbade defendants to use the process and brought the suit. The majority relied on *Wilson* v. *Sandford,* and held that the suit was not under patent laws; that complainant could not himself rescind the verbal contract, treat it as a nullity and charge the defendants as infringers, but must preliminarily seek rescission in a court of equity. Mr. Justice Bradley's view was that the plaintiff in his bill had chosen to place himself on the infringement of his patent as his sole ground and that by anticipation of the defense and his answer to it in his bill, as allowed by equity pleading, he did not change its nature.

In *White* v. *Rankin, supra,* it was held that a bill in equity for the infringement of letters patent for an invention, in the usual form, which did not mention or refer to any contract with the defendants for the use of the patent, could not be dismissed for lack of jurisdiction, because the defendants in a plea set up an agreement in writing between the plaintiffs and one of the defendants to assign to him an interest in the patent on certain conditions which he alleged he had performed, and certain other

matters which it was alleged had given the defendant the right to make, use and sell the patented invention. The plea being overruled and the answer filed, a stipulation in writing was entered into admitting that the defendants had made and sold the articles containing the patented inventions, and that a certain written agreement had been made to the purport before mentioned. The decision of the Court was that the jurisdiction was established by the averments of the bill and that the defense constituted a mere issue as to the title to the patent, but could not oust the jurisdiction which rested on the averments of the bill.

In *Excelsior Wooden Pipe Company* v. *Pacific Bridge Company, supra,* an exclusive licensee filed a bill against the patentee and another party to whom the patentee had granted a conflicting license. This Court held that the patent jurisdiction of the court was not ousted by reason of allegations in the answer that the plaintiff had forfeited all his rights under the license through his failure to comply with its terms and conditions, by reason of which the license had been revoked by the patentee. Complainant was an exclusive licensee which sought damages for infringement of its license and the patent against the patentee and one to whom he had granted a subsequent and conflicting license. In such a case the licensee had the right to sue the patentee on the patent. *Littlefield* v. *Perry,* 21 Wall. 205; *Independent Wireless Telegraph Company* v. *Radio Corporation of America,* 269 U. S. 459. The case was held to be a suit for infringement under the patent laws, jurisdiction in which was not ousted because the patentee had led a third person to infringe the patent and the first license.

In *Henry* v. *Dick Company, supra,* the patentee for a kind of ink filed a bill for infringement against the users of his patent, whom the bill showed to be using the ink in connection with unpatented supplies not made by the

patentee, in violation of a license from the patentee limited to its use with its supplies. The case has been since reversed on the merits, *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502, but not on the point of jurisdiction. It was objected that the suit was not a suit under the patent laws but a suit on the license contract. It was held that the patentee might waive the contract and sue on the tort of infringement; that jurisdiction must depend on the remedy it chose and sought in its bill, and that, as the patentee had neither sued on the broken contract of license nor asked to have it forfeited by the court, the jurisdiction under the patent laws was not ousted.

In *The Fair* v. *Kohler Die & Specialty Company, supra,* the Kohler Company brought a bill in equity to enjoin The Fair from making and vending certain devices and selling them at less than $1.50 each, and asked an account and triple damages. The bill alleged that plaintiff had the sole and exclusive right to make and sell devices, and that the defendant had full notice thereof and was selling the same without license from the plaintiff. It alleged that the plaintiff, when it sold, imposed the condition that the goods should not be sold at less than $1.50, and attached to the goods a notice to that effect, and that any sale in violation of that condition would be an infringement. It further averred that the defendant obtained a stock of the devices with notice of the conditions and sold them at $1.25 each, in infringement of the plaintiff's right under the patent. The defendant pleaded specially that it had purchased these devices from a jobber who had paid full price to the plaintiff, and that there was no question arising under the patent or other laws of the United States, and that the court had no jurisdiction of the case. The case came on for hearing on the plea. This Court held that on the bill the plaintiff made a case under the patent laws in that it set up the patent, charged

infringement, and sought triple damages, and that in showing later in the bill that the infringement consisted in a sale at a less price than that which it had authorized in an admitted license, it did not oust the court of jurisdiction, because it might appear upon further hearing of the cause on its merits that the restriction of the license upon which the claim of infringement was based was not valid.

In *Healy* v. *Sea Gull Specialty Company, supra,* the bill alleged ownership of the exclusive right to make and use box-making machines and sell boxes containing the patented improvements. It further alleged that the defendant was infringing the patents and would continue to do so unless restrained. Anticipating a defense, the plaintiff set out a license to the defendant, a breach of its conditions and a termination of the same. It added that the license contained a stipulation that, in case of any suit for infringement, the measure of recovery should be the same as the royalty agreed upon for the use of the inventions, and another for the return of the machines let to the defendant while the license was in force. The bill prayed for an injunction against making, using or selling the boxes or machines, for an account of profits received by reason of the infringement, for triple the damages measured as above stated, and for the surrender of the machines. In sustaining the jurisdiction as arising under the patent laws, the Court used these words:

"It may be that the reasoning of *The Fair* v. *Kohler Die & Specialty Company,* 228 U. S. 22, is more consistent with that of Mr. Justice Bradley's dissent in *Hartell* v. *Tilghman,* 99 U. S. 547, 556 (a decision since explained and limited, *White* v. *Rankin,* 144 U. S. 628), than with that of the majority, but it is the deliberate judgment of the court and governs this case. As stated there, the plaintiff is absolute master of what jurisdiction he will appeal to; and if he goes to the District Court for

infringement of a patent, unless the claim is frivolous or a pretence, the District Court will have jurisdiction on that ground, even though the course of the subsequent pleadings reveals other more serious disputes. *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.,* 185 U. S. 282. Jurisdiction generally depends upon the case made and relief demanded by the plaintiff, and as it can not be helped, so it can not be defeated by the replication to an actual or anticipated defence contained in what used to be the charging part of the bill. For the same reason it does not matter whether the validity of the patent is admitted or denied.

"As appears from the statement of it, the plaintiffs' case arose under the patent law. It was not affected by the fact that the plaintiffs relied upon a contract as fixing the mode of estimating damages or that they sought a return of patented machines to which if there was no license they were entitled. These were incidents. The essential features were the allegation of an infringement and prayers for an injunction, an account of profits and triple damages—the characteristic forms of relief granted by the patent law. The damages were grounded on the infringement, and the contract was relied upon only as furnishing the mode in which they should be ascertained."

In *Geneva Furniture Co.* v. *Karpen, supra,* the patentee charged the defendants in his bill in equity with contributing to the infringement by wrongfully persuading the licensees of the complainant to use the patent in circumstances not authorized by the license, second, with wrongfully procuring such licensees to violate their licenses in particulars not bearing on the charge of infringement, and third, with refusing to perform stipulations by which defendants agreed to assign other patents to plaintiff. Jurisdiction of the court under the patent laws which was the sole basis of jurisdiction was sustained for the first branch of the suit, because the claim of infringement

was not frivolous but substantial and there was jurisdiction whether the claim ultimately was held good or bad. The remainder of the bill was found not sustainable as arising under the patent laws because based on contract, and while, under the equity practice, the parts of the bill were properly joined, such practice must yield to a jurisdictional statute, and the bill was dismissed as to its second and third branches.

The result of these cases is, that a federal district court is held to have jurisdiction of a suit by a patentee for an injunction against infringement and for profits and damages, even though, in anticipation of a defense of a license or authority to use the patent, the complainant includes in his bill averments intended to defeat such a defense. If these averments do not defeat such defense, the patentee will lose his case on the merits, but the court's jurisdiction under the patent laws is not ousted. The error in *Hartell* v. *Tilghman, supra,* was in denying jurisdiction under the patent laws when the patentee based his action broadly on his patent and averment of infringement seeking injunction and damages. His averments intended to constitute a reply to the anticipated defense that the defendant was a licensee did not change the nature of his declared choice of a suit under the patent laws. This, under the principle now established by the later cases, and especially *The Fair* v. *Kohler Die & Specialty Company,* and *Healy* v. *Sea Gull Specialty Company,* is clear. But the present qualification of the *Hartell Case* does not affect the principle laid down in *Wilson* v. *Sandford,* that where a patentee complainant makes his suit one for recovery of royalties under a contract of license or assignment, or for damages for a breach of its covenants, or for a specific performance thereof, or asks the aid of the Court in declaring a forfeiture of the license or in restoring an unclouded title to the patent, he does not give the federal district court jurisdiction of the cause as one arising under the patent laws. Nor may he confer it in such a case by

adding to his bill an averment that after the forfeiture shall be declared, or the title to the patent shall be restored, he fears the defendant will infringe and therefore asks an injunction to prevent it. That was *Wilson* v. *Sandford*. If in that case the patentee complainant had based his action on his patent right and had sued for infringement, and by anticipation of a defense of the assignment had alleged a forfeiture by his own declaration without seeking aid of the court, jurisdiction under the patent laws would have attached, and he would have had to meet the claim by the defendant that forfeiture of the license or assignment and restoration of title could not be had except by a decree of a court, which if sustained, would have defeated his prayer for an injunction on the merits. But when the patentee exercises his choice and bases his action on the contract and seeks remedies thereunder, he may not give the case a double aspect, so to speak, and make it a patent case conditioned on his securing equitable relief as to the contract. That is the principle settled by *Wilson* v. *Sanford* and is still the law.

It is true that, in Mr. Justice Bradley's dissenting opinion in *Hartell* v. *Tilghman, supra,* p. 559, he says, in reference to *Wilson* v. *Sanford,* that if the question were a new one he would think that it would not oust the jurisdiction under the patent laws for the complainant to join in a bill for infringement as ancillary to the relief sought an application to avoid an inequitable license. But no subsequent case has gone so far, and we are not disposed to depart from the rule of *Wilson* v. *Sandford,* whatever might be our conclusion if it were a new question. Moreover, the bill in this case, as we have already fully pointed out, is really not based on threatened infringement but on the contracts; and its reference to infringements is inadequate even to present a bill in the form suggested by Mr. Justice Bradley.

The judgment of the District Court is

Affirmed.

UNITED STATES *v.* P. KOENIG COAL COMPANY.

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

No. 216. Argued March 16, 17, 1926.—Decided April 12, 1926.

1. Under § 1 of the Elkins Act, making it a misdemeanor for a shipper knowingly to accept or receive any concession or discrimination in respect of transportation whereby property shall be transported at less than the published rate "or whereby any other advantage is given or discrimination practiced," a shipper who obtains coal cars and transportation in violation of an emergency priority order of the Interstate Commerce Commission, through practice of deceit upon the carrier with respect to the use to which the coal is destined, is guilty of the offense. P. 517.
2. Guilty knowledge and collusion on the part of the carrier is not an essential to the guilt of the shipper. *Id.*

1 Fed. (2d) 738, reversed.

ERROR to a judgment of the District Court which sustained a demurrer to an indictment charging a shipper with fraudulently obtaining concessions and discriminations from a carrier in coal shipments.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Solicitor General Mitchell* and *Mr. William H. Bonneville,* Special Assistant to the Attorney General, were on the brief, for the United States.

The only question saved to defendant is the construction of the Elkins Act. The purpose of the act was "to cut up by the roots every form of discrimination, favoritism, and inequality" (*Louisville & Nashville* v. *Mottley,* 219 U. S. 467), and "to require equal treatment of all shippers and prohibit unjust discrimination in favor of any of them," and "to prevent favoritism by any means or device whatsoever." *United States* v. *Union Stock Yards,* 226 U. S. 286. "The Elkins Act proceeded upon broad lines . . ." *Armour Packing Co.* v. *United States,* 209 U. S. 56.

The deception practiced upon the carriers by the false and fraudulent device enabled the defendant to obtain the unlawful concessions. No fine distinctions sought to be drawn between acquisition of those concessions by trickery and deception on the part of the shipper, and the action of carriers in knowingly granting them, will save the defendant from the penalties of the statute. *United States* v. *Met. Lumber Co.*, 254 Fed. 335; *United States* v. *Vacuum Oil Co.*, 153 Fed. 598.

If the defendant may not be reached and punished under the Elkins Act, the statute which provides for relief in times of emergency, and all service orders issued in pursuance thereof, become practically useless, as there is no other statute under which the Government may proceed. *United States* v. *Met. Lumber Co.*, 254 Fed. 335.

Mr. Harold Goodman, with whom *Mr. Edwin R. Monning* was on the brief, for defendant in error.

The receipt of a concession or discrimination whereby an advantage is given or discrimination is practiced, necessarily involves the grant of a concession or the practice of a discrimination by the carrier. The question is primarily the meaning of the statutory language. The common and lexical meanings exclude those for which the Government contends, and confirm the construction by the court below. This is corroborated by the committee report and the congressional debate.

The Government seeks a strained and novel construction not contemplated in those important cases in which the Elkins Act was enforced. *New York, New Haven, etc.* v. *Commission,* 200 U. S. 361; *Armour Packing Co.* v. *United States,* 209 U. S. 56; *Lehigh Coal & Nav. Co.* v. *United States,* 250 U. S. 556; *United States* v. *Union Stockyards,* 226 U. S. 286; *Standard Oil Co.* v. *United States,* 164 Fed. 376; *North Cent. Ry. Co.* v. *United States,* 241 Fed. 25. Section 10 of the Act to Regulate

Commerce defines in clear language the offense of fraud upon the carriers, and, if it were the intention to include similar acts within the scope of the Elkins Act, it would have been simple to say so in apt language.

The district judge correctly considered *United States* v. *Met. Lumber Co.*, 254 Fed. 335, wrongly decided.

The gist of the offense here charged is a fraud upon the carriers and a violation of service order No. 23. It would have been competent for Congress to make violations of the Commission's rules a crime. *Avent* v. *United States*, 266 U. S. 127. Whatever omissions there may be in the penal sections of § 402, Transportation Act of 1920, or in the Emergency Coal Act (September 22, 1922, 42 Stat. 1025), cannot authorize this Court to assume legislative functions and to apply the Elkins Act beyond the scope indicated by its language.

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

The P. Koenig Coal Company was indicted in the District Court for the Eastern District of Michigan, under the Elkins Act, for knowingly receiving as a shipper concessions from a carrier under the Interstate Commerce Act in respect of transportation of property in interstate commerce obtained by deceitful representation made to the carriers on which the carriers innocently and in good faith relied. The District Court sustained a demurrer to the indictment, and the United States prosecutes a writ of error under the Criminal Appeals Act (Judicial Code, § 238, par. 2, as re-enacted by the Act of February 13, 1925, 43 Stat. 938, c. 229), which provides that a writ of error from the District Court may be taken directly to this Court from a judgment sustaining a demurrer to any indictment or any count thereof where such judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

The District Court held that § 1 of the Elkins Act of February 19, 1903, c. 708, 32 Stat. 847 (re-enacted in § 2 of the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 587), under which the indictment was found, applies only to a shipper who knowingly receives a concession from a carrier when such concession is knowingly granted by the carrier in equal guilt with the shipper. *United States* v. *The P. Koenig Coal Company,* 1 Fed. (2d) 738.

The Koenig Coal Company is a Michigan corporation doing business in Detroit. The defendant was indicted on eighteen counts applying respectively to eighteen carloads of coal. The shipments originated in West Virginia, and were moved to Detroit in August, 1922, over the Chesapeake & Ohio Railroad Company as the initial carrier for each car.

On July 25, 1922, the Interstate Commerce Commission, acting under the Transportation Act of February 28, 1920, c. 91, Title 4, § 402, (15), 41 Stat. 456, 476, issued its service order No. 23. Section 15 gives the Commission, when shortage of equipment, congestion of traffic or other emergency requires action in any section of the country, authority to suspend its rules as to car service, and to make such reasonable rules with regard to it as in the Commission's opinion will best promote the service in the interest of the public and the commerce of the people, and to give direction for performance or priority in transportation or movement of traffic. Service Order No. 23 declared that there was an emergency upon the railroad lines east of the Mississippi River, and directed that coal cars should be furnished to the mines according to a certain order of purposes, numbered in classes 1, 2, 3, 4 and 5, and that no coal embraced in classes 1, 2, 3 and 4 should be subject to reconsignment, or diversion except for some purpose in the same or a superior class. The order required that the carriers should give preference and priority in the placement and assignment of cars for

the loading of coal to those required for the current use of hospitals, which were placed in class 2, in priority to cars for the loading of coal required for the manufacture of automobiles or automobile parts, which were placed in class 5 and later in class 3. The order remained in force from July 25 to September 20, 1922. The first count of the indictment charged that the defendant, intending to obtain a preference and priority in transportation, which it was not then lawfully entitled to receive, and to procure the coal for the use of Dodge & Company, engaged in the manufacture of automobiles and parts thereof, sent a telegraphic order to the Monitor Coal & Coke Company of Huntington, West Virginia, asking the shipment of carloads of coal to the Koenig Coal Company at Detroit for the use of the Samaritan Hospital; that it thereby secured the furnishing by the C. & O. Company, on August 5, 1922, at the request of the Monitor Company, of one car suitable for the loading and transportation of coal on its line in West Virginia, which was billed and consigned in accordance with the telegraphic order; that, when it reached Detroit, the defendant diverted the car to Dodge Brothers, who used the coal, the Samaritan Hospital not needing or requiring the coal, and not having authorized or requested the defendant to send the order; that the concession and discrimination was thus obtained by a deceitful device of which the carriers had no knowledge. The other seventeen counts are similar and refer to different cars of coal, some of them to different mines and consignors and some to different beneficiaries of the trick as actual consumers of the coal.

The demurrer challenged the indictment on various grounds, 1st, that the facts charged did not constitute a concession given or a discrimination practiced as defined by the Elkins Act; 2d, that the restrictions imposed by the Interstate Commerce Commission's Service Order No. 23 were beyond the power of the Interstate Commerce

Commission in that they were an exercise of purely legislative power which could not be delegated; 3rd, that the service order exceeded the authority conferred upon the Interstate Commerce Commission; 4th, in that it was beyond the power of the Federal Government thus to affect the use, consumption, price and disposition of coal in what was the exercise of a local police power reserved to the States; 5th, that the order is so arbitrary and unreasonable as not to be within the power of the National Government and to be an encroachment on the powers of the several States; 6th, that the service order violated the Fifth Amendment in depriving defendant of liberty and property without due process of law, and, 7th, that it was invalid because it gave preference to the Lake Erie ports of Ohio and Pennsylvania over the ports of other States in respect of the transportation and shipment of coal.

All of these objections, except the first and third, are covered by the decision of this Court in *Avent* v. *United States,* 266 U. S. 127, where we held that Congress might consistently with the Fifth Amendment require a preference in the order of purposes for which coal might be carried in interstate commerce; that it did not trench upon the power reserved to the States; that the power might be delegated to the Interstate Commerce Commission for exercise under rules that were reasonable and in the interests of the public and of commerce; that the violation of such rules might be made a crime; and that the objection that the order unconstitutionally preferred the ports of one State over those of another could not avail a party whom the alleged preference did not concern.

Counsel for the defendant in his brief and argument supports the demurrer solely upon the same ground upon which the District Court sustained it, namely, that the offense under which the indictment is drawn can not be

committed without the guilty knowledge and collusion of both the shipper and the carrier. The relevant part of § 1 of the Elkins Act reads as follows:

"It shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant or give or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000, nor more than $20,000."

This makes it unlawful for anyone to receive any concession in respect of transportation of any property in interstate commerce by a common carrier whereby any advantage is given or any discrimination is practiced. The facts charged bring what was done exactly within this description. It was a priority or preference in securing the transportation of coal in an emergent congestion of the traffic. It was certainly a concession and one of value to one who under the law or the regulations having the force of law could not secure that priority. The words advantage, concession and discrimination in the statute must be construed to mean unlawful concession, unlawful advantage, unlawful discrimination. It certainly was not the intention of Congress to punish the granting or receiving of a lawful concession, a lawful ad-

vantage or a lawful discrimination. It is asked, if this was a concession, by whom was it conceded? The answer is by the carrier. He granted the priority and therefore he made the concession and gave the advantage and practiced the discrimination. But it was unlawful and he did not know the facts which made it so. The shipper knew them because he had secured it by his deceit, and received it. What is there in the statute that releases him from guilt, because the carrier who yielded to him the concession and gave him the advantage and made the discrimination thought it was lawful?

Reference is made to the debates in Congress and to decisions of this Court to show that, in the minds of the legislators in enacting the Elkins Act, the discrimination and inequality they sought to prevent had in the past arisen chiefly from collusion between the carrier and the shipper. As practical men of course they knew that this was the way in which violations of the law were most likely to occur. But this does not at all justify the conclusion that Congress in enacting the Elkins law intended to limit the offenses described in it to cases of collusion, if otherwise the acts charged came within the words of the statute.

We have often declared that the purpose of Congress in the Elkins law was to cut up by the roots every form of discrimination, favoritism and inequality. *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, 478; *New Haven R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, 391; *Armour Packing Co.* v. *United States,* 209 U. S. 56, 72; *United States* v. *The Union Stock Yards,* 226 U. S. 286, 309. It would be contrary, therefore, to the general intent of the law to restrain the effect of the language used so as not to include acts exactly described, when they clearly effect discrimination and inequality. Certainly no one would say that a shipper might not be convicted under the act of soliciting an un-

lawful concession or advantage or discrimination, even though the carrier refused to extend it to him. So, too, if a carrier offers an unlawful advantage to a shipper who declines it, clearly the carrier may be indicted and punished. Collusion is not necessary in such a case. Why in this? The act is plainly not confined to joint crimes. The general rule that criminal statutes are to be strictly construed has no application when the general purpose of the legislature is manifest and is subserved by giving the words used in the statute their ordinary meaning and thus covering the acts charged.

In *Dye* v. *United States,* 262 Fed. 6, a defendant in an indictment under the Elkins Act was the agent of a carrier and was in charge of the distribution of cars between coal mines during an emergency and car shortage. By a device, he violated the rule of distribution established by the Commission and secured an excessive number of cars for a particular mine, the operators of which were innocent of the inequality. He did this for his personal profit by sale of the excess. His conviction was sustained by the Circuit Court of Appeals for the Fourth Circuit.

In *Missouri, Kansas & Texas Pacific Ry. Co.* v. *Harriman,* 227 U. S. 657, the Court had to deal with the question whether a shipper who valued his goods for the purpose of obtaining the lower of two published rates based on valuation was, in an action for their loss, estopped from recovering a greater amount than his own valuation, the carrier having no knowledge of the value of the shipment. It was held that he was estopped. In reaching this conclusion, Mr. Justice Lurton, speaking for the Court, at page 671, said:

"If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903 (32 Stat. 847, c. 708)."

It is true that this was said *arguendo,* but it has persuasive weight, and, now that the point is before us for judgment, we reaffirm it. Compare also *Illinois Central Railroad Co.* v. *Messina,* 240 U. S. 395, 397.

Judgment reversed.

UNITED STATES *v.* MICHIGAN PORTLAND CEMENT COMPANY.

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

No. 217. Argued March 16, 17, 1926.—Decided April 12, 1926.

1. A shipper may be guilty of the offense of obtaining an unlawful concession, in violation of § 1 of the Elkins Act, without guilty knowledge or collusion on the part of the carrier. *United States* v. *P. Koenig Coal Co., ante,* p. 512. P. 523.
2. A preference consisting of an assignment and transportation of coal cars contrary to a priority order of the Interstate Commerce Commission violates § 1 of the Elkins Act, no publication of such an order in the carrier's tariff being necessary. P. 524.
3. The Transportation Act, § 402, par. 15, authorized the Commission to fix priorities with reference to transportation as well as the furnishing of cars. P. 525.
4. An order of the Commission affecting the furnishing, loading, and consignment of cars, construed and *held* applicable to transportation as well as car service. *Id.*

Reversed.

ERROR to a judgment of the District Court sustaining a demurrer to an indictment alleging that the shipper obtained priority in transportation of coal in violation of the Elkins Act.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Solicitor General Mitchell* and *Mr. William H. Bonneville,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. Hal H. Smith, with whom *Mr. Thomas B. Moore* was on the brief, for defendant in error.

This Court in passing upon the Elkins Act will not adopt a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy. *United States* v. *Harris,* 177 U. S. 305.

The Act does not make criminal the violation of an order of the Commission, only the violation of a published tariff. Except as the thing is only offered or solicited, the Act forbids only collusive dealings between carrier and shipper as to tariff rates, rules, practices and regulations.

The word "device" in § 1 does not qualify the second "whereby" clause, but relates only to published rates.

Under the express language of the Act, where granting or giving, accepting or receiving, is charged, there must be a co-transgressor.

The decisions of this Court do not support the contention that the taking of an advantage by a shipper, there being no collusion on the part of the carrier, is a crime punishable by the Elkins Act.

The Commission's service order No. 23, paragraph 7, prescribed "classes of purposes" and "order of classes" only with respect to car service, not transportation. Defendant in error was indicted for securing preferential treatment in transportation, when service order No. 23 did not deny it transportation. The Commission had no power to fix rules and regulations giving preferences and priorities in car service until the passage of the Emergency Fuel Act of September 22, 1922, c. 413, 42 Stat. 1025.

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

This case on its facts is similar to that of the *United States* v. *The P. Koenig Coal Company,* just decided,

ante, p. 512. The indictment against the Cement Company embraces fifteen counts, and each count shows that the Cement Company, with the assistance of the Bewley Darst Coal Company, while Service Order No. 23 of the Interstate Commerce Commission was in force, obtained a billing and consignment of cars of coal by the Louisville & Nashville Railroad Company from a mine in Kentucky to the Municipal Light and Power Company at Four Mile Lake in Michigan, where the coal was delivered in accordance with direction and was appropriated by the Cement Company for its use; that the billing and the preference were granted by the carrier company on the assumption that the coal was to be delivered and used by a public utility company which was in class No. 2 under Order No. 23, instead of class No. 5 in which coal for making cement was embraced. The District Court sustained the demurrer to this indictment on the same ground as in the *Koenig Case,*—that the Elkins Act requires the collusion of the carrier with the shipper and the carrier's conscious violation of law in the concession granted, and that, when this is negatived in the indictment, the indictment must fail. That ground we have held to be without weight in the *Koenig Case.* It was the only one pressed on us.

In this case the counsel for the defendant advances in his brief and argument two other grounds raised by the demurrer, on which he contends the indictment should have been held bad. One of them is that § 1 of the Elkins Act, under which the indictment is found, must be limited to a concession or discrimination which violates a tariff published and filed by a carrier; that, as a rebate without such tariff is not unlawful within that section, so a concession or discrimination is not. The contention is that the published tariff should have indicated that the order of distribution of cars should be as Order 23 requires.

The Elkins Act does not require such a tariff as to any other advantage or discrimination than a rebate. It declares to be an offense any device whereby transportation shall be given at any less rate than named in the published tariff "or whereby any other advantage is given or discrimination is practiced." Where the offense consists in a rebate, as that term is usually understood, to-wit, transportation at a less rate in dollars and cents than the published rate which the shipping public are charged, a published tariff is of course necessary to constitute the standard, departure from which is the crime. Where there is no pecuniary reduction of the rates as published, and the tariff is complied with but the law against favoritism and discrimination is infringed by the making of a concession or the granting of an advantage not specifically measured in dollars and cents, reference to a published tariff is unnecessary. There is nothing in the statute that indicates the necessity of a published tariff which should expressly recite the fact that no unfair or unequal concession or advantage in the distribution of coal cars to shippers, or in the priority of their shipment, should be afforded. The fact that the advantage or discrimination is unlawful is plain from the description of its character, as shown in this indictment, without reference to the rates fixed in the tariff. See *Lambert Run Coal Co.* v. *B. & O. R. R.*, 258 U. S. 377, 378. Such a published tariff seems not to have been present in *C. C. C. & St. L. Ry. Co.* v. *Hirsch*, 204 Fed. 849, and in *Central of Georgia Ry.* v. *Blount*, 238 Fed. 292, in which leases of property by carriers to shippers at inadequate rentals were held to be unlawful concessions; nor in *Vandalia Railway* v. *United States*, 226 Fed. 713, where a loan by a carrier to shipping interests at less than market rate, was held to be an unlawful concession; nor in *Northern Central Railway* v. *United States*, 241 Fed. 25, where the waiving of royalties for the use of coal lands leased to

shipping interests was held to be an unlawful concession; nor in *Dye* v. *United States,* 262 Fed. 6, in which the agent of a railway company who secured an excessive number of cars for one of a great number of mines between which, by order of the Interstate Commerce Commission, in an emergency, cars were to be distributed according to a rule, was convicted under the Elkins Act, and the Fourth Circuit Court of Appeals sustained the conviction.

Service Order No. 23 herein was issued under the Transportation Act and had the force of law. *Avent* v. *United States,* 266 U. S. 127, 131; *United States* v. *Grimaud,* 220 U. S. 506. In the absence of a specific requirement for its publication in a tariff, either in the Act authorizing the service order, or in the Elkins Act, we can find no reason for making it essential in the enforcement of the statute, and no case is cited to suggest one.

The other ground urged by counsel for the defendant is, as we understand it, that paragraph 15 of § 402 of the Transportation Act did not authorize and delegate to the Interstate Commerce Commission the fixing of preference and priorities in transportation; that paragraph 7 of the Commission's order prescribed classes of purposes and order of classes only with respect to car service, and made no rule applicable to the transportation of coal for different classes of purposes and different order of classes; that car service does not include transportation; and that the defendant here is indicted for securing a concession in transportation by which he obtained an improper class under a classification which the Commission therefore had no authority to make and which it did not in fact require. We think the argument does not give proper effect to paragraph 15 and the words and significance of the service order. By paragraph 15 the Commission is authorized, 1st, to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as may be determined

by the Commission; 2nd, to make such just and reasonable directions with respect to car service, without regard to the ownership as between the carriers of cars, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people; and, 3rd, to give directions for preference or priority in transportation, embargoes, or movement of traffic under permit, and for such periods as it may determine, and to modify, change, suspend or annul them. The service order, after reciting the emergency, directs each common carrier east of the Mississippi River, to the extent to which it is unable promptly to transport all freight traffic, to give preference and priority to coal; to give preference and priority to the movement, exchange and return of empty coal cars; to furnish coal mines with certain classes of cars; to require that non-coal-loading carriers deliver empty coal cars to the maximum ability of each, to enable the connecting coal-loading companies to receive and use the coal cars so delivered for the preferential purposes set forth in the order; to discontinue the use of coal cars for the transportation of commodities other than coal during the order; to place an embargo on the receipt by any consignee of coal in suitable cars who shall fail or refuse to unload the coal seasonably; and, finally, in the supply of cars to mines, to place, furnish and assign coal mines with cars suitable for the loading and transportation of coal for certain classes of consignees, and, in a certain order, forbidding reconsignment or diversion. It seems to us clear that the order of the Commission affects the furnishing of cars, their loading, their consignment, and thus necessarily their movement in transportation, and corresponds fully with the powers conferred by § 15; and that § 15 and Service Order No. 23 both apply not only to priority of car service but also to that of transportation. Certainly, one who secures reconsignment and diversion from a lower to a higher class of consignees for delivery violates the service order in terms.

In urging this objection to the indictment, reliance is had by defendant upon the opinion of this Court in the case of *Peoria & Pekin Union Ry. Co.* v. *United States,* 263 U. S. 528. There the Interstate Commerce Commission sought under § 15 to compel a terminal carrier to switch, by its own engines and over its own tracks, freight cars tendered by or for another connecting carrier. It was held that the exercise of the emergency power of the Commission in transferring car equipment from one carrier to the use of another under paragraph 15 was strictly to be construed, and that the provision as to car service did not authorize the Commission to impose upon the terminal carrier, without a hearing, the affirmative duty not only of turning over its cars and equipment to another carrier, as contemplated in paragraph 15, but also that of itself doing the work of the transportation of and for another carrier. It was in this connection that this Court used the expression that car service connotes the use to which vehicles of transportation are put, but not the transportation service rendered by means of them. The opinion expressly affirms the authority of the Commission under paragraph 15 to give regulatory directions for preference or priority in transportation. The language of this Court in the *Peoria Case* referred to is of no aid to the defendant here.

The judgment is

Reversed.

UNITED STATES *v.* NATIONAL EXCHANGE BANK OF BALTIMORE.

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

No. 222. Argued March 16, 1926.—Decided April 12, 1926.

1. A drawee of a check or draft who is also the drawer is held, in paying it, to a knowledge of the true amount, and if, by mistake,

he pay to a *bona fide* holder for value without notice a larger amount to which the paper has been fraudulently raised, he can not recover the difference from such holder. P. 533.

2. This rule is applicable to the United States.

So *held* where a check was drawn on the Treasurer of the United States by a disbursing clerk of the Veterans' Bureau; raised and negotiated by the payee; and in due course taken and paid for at its fraudulent face by the defendant bank, which collected the same amount from the United States.

1 Fed. (2d) 888, affirmed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment for the Bank in an action by the United States to recover the difference between the amount to which a check paid by it had been fraudulently raised and the amount for which it was drawn.

Mr. Gardner P. Lloyd, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

It is a general rule that a payment made under mistake of fact may be recovered. There is, it is true, an exception in the case of commercial paper. This exception is that where, from the situation of the parties, the person paying an instrument may be assumed to know certain facts concerning the instrument, he can not recover the payment because of a mistake as to those facts. Thus a drawee may be assumed to know his drawer's signature and can not recover a payment made upon an instrument to which the drawer's signature is a forgery. But ordinarily it can not be assumed that the drawee knows the amount of the instrument or anything more than the signature of the drawer, and he may therefore recover any amount paid on a raised instrument in excess of the amount originally called for. However, if the drawer and the drawee are the same person, he may be assumed to know the amount of the instrument as well as his own signature and can not recover a payment made on an

instrument the amount of which has been fraudulently raised. In the present case the drawer and the drawee were not the same. That both were agents of the United States is no basis for an assumption that the Treasurer knew, or should have known, all facts known to the disbursing clerk. The case is therefore within the general rule that a payment made under a mistake of fact may be recovered, and not within the exception. *Price* v. *Neal,* 3 Burr. 1354; 4 Harv. L. Rev. 297; *United States* v. *Natl. Exch. Bank,* 214 U. S. 302; *Espy* v. *Bank of Cincinnati,* 18 Wall. 604; *White* v. *Cont. Natl. Bank,* 64 N. Y. 316; *Parke* v. *Roser,* 67 Ind. 500; *City Bank* v. *Natl. Bank,* 45 Tex. 203; *Redington* v. *Woods,* 45 Cal. 406; *United States Bank* v. *Bank of Georgia,* 10 Wheat. 333; *Cooke* v. *United States,* 91 U. S. 389; *United States* v. *Chase Natl. Bank,* 252 U. S. 485; *United States* v. *Bank of New York,* 219 Fed. 648; §§ 62, 139, and 141, Negotiable Instruments Law; Brannan, Negotiable Instruments Law, 3d ed., 225; *McClendon* v. *Bank of Advance,* 188 Mo. App. 417; *Interstate Trust Co.* v. *United States Natl. Bank,* 67 Colo. 6; *Amer. Homing Co.* v. *Milliken Natl. Bank,* 273 Fed. 550; *First Natl. Bank* v. *United States Natl. Bank,* 100 Ore. 264; *Cherokee Natl. Bank* v. *Union Trust Co.,* 33 Okla. 342.

It is no doubt true, on general principles of agency, that where one holds commercial paper, not as the owner thereof, but merely for collection as agent for another, the drawee who pays the paper with knowledge or notice of the agency can not recover from the agent if he has paid the proceeds over to his principal before receiving notice of any defect in the paper. But in this case it appears from the declaration that the defendant received the check for value in the usual course of business and was not merely an agent to collect, and therefore the plaintiff can recover without alleging that the defendant, before paying over the proceeds to the bank from which

it received the check, had notice that the check has been fraudulently raised. *Schutz* v. *Jordan,* 141 U. S. 213; *Woods* v. *Colony Bank,* 114 Ga. 683; Negotiable Instruments Law, §§ 31–38.

It is apparent in the present case, first, that the indorsement placed on the check by the Bank of Commerce is, on its face, unrestricted; second, that regardless of what the defendant might prove on a trial, it does not appear from the pleadings that there is any custom among banks to use such an indorsement for collection only and not where it is the intention to transfer title to an instrument; and third, that even if there were such a custom it should not be permitted to vary the unrestricted language of the indorsement.

Messrs. G. Ridgely Sappington and *Charles G. Baldwin* for defendant in error.

This action is barred by the rule that as between two parties having equal equities, one of whom must suffer, the legal title will prevail, and the action for money had and received will not lie to compel the holder to surrender his legal advantage.

The doctrine of *Price* v. *Neal,* 3 Burr. 1354, has been generally approved in the United States. *Bank of United States* v. *Bank of Georgia,* 10 Wheat. 333; *Gloucester Bank* v. *Salem Bank,* 17 Mass. 32; *United States* v. *Chase Natl. Bank,* 252 U. S. 485; *United States* v. *Natl. Exch. Bank,* 214 U. S. 302; *Deposit Bank* v. *Fayette Natl. Bank,* 90 Ky. 10; *Dedham Natl. Bank* v. *Everett Natl. Bank,* 177 Mass. 392; *Comm. & Farmers Nat. Bank* v. *First Natl. Bank,* 30 Md. 11. Although there is no logical reason why the rule in *Price* v. *Neal* should not be applied in cases where the forgery consists in raising the amount of the check, as well as in cases where the drawer's signature is forged, yet this distinction has been made by many courts, including this Court. It is

to be attributed to the influence of the doctrine of negligence on the general rule as laid down by Lord Mansfield. This is shown by the fact that in drawing the distinction the statement is made that a bank is bound to know the signature of its depositor, the drawer, but is not bound to know the amount for which the check was drawn. *Espy* v. *Bank of Cincinnati,* 18 Wall. 604. There is a manifest distinction between *Bank of United States* v. *Bank of Georgia* and *Espy* v. *Bank of Cincinnati,* and that distinction is vital in the consideration of the case at bar. It is that in the former the drawer and drawee were the same person, while in the latter they were different persons.

Of course, the rule laid down in *Price* v. *Neal* as to the drawee applies with all the more force when the drawer and the drawee are the same. In such cases payment is an adoption of the paper by such drawer-drawee. *Bank of United States* v. *Bank of Georgia,* 10 Wheat. 333; *United States* v. *Bank of New York,* 219 Fed. 648; *Jones* v. *Miners & Merchants Bank,* 144 Mo. App. 428; *Johnston* v. *Commercial Bank,* 27 W. Va. 343; *Cooke* v. *United States,* 91 U. S. 389; *Leather Mfrs. Nat. Bank* v. *Morgan,* 117 U. S. 96; *Hoffman* v. *Bank of Milwaukee,* 10 Wall. 181.

The Uniform Negotiable Instruments Act adopts the doctrine in *Price* v. *Neal* as applicable to a "raised check," and puts an end to the distinction heretofore made between a "raised" check and one on which the drawer's name is forged, even in cases where the drawer and drawee are not the same.

The defendant in error, as a collecting bank, is not liable in this action, because the plaintiff in error failed to make demand for the return of the money before it was paid over by the defendant in error to its principal. The collecting bank which presents to the drawee a check purporting to have been drawn by that drawee on him-

self has a perfect right to assume that if it is paid, the drawee, who has knowledge of the facts, has used that knowledge, and, when the collecting bank then pays the money over to its principal, it would be most inequitable for a court to change the loss which has thus been occasioned from the one whose negligence has occasioned it to the one who has been without negligence. This rule has been invariably applied in cases involving a collecting bank, and is supported not only by the doctrine in *Price* v. *Neal*, but also by the qualification to the right to recover money paid under a mistake, that the recovery can only be had provided the recipient of the payment is not placed in a worse position.

It is true that the declaration in this case does not set forth the date when the plaintiff in error made demand upon the defendant in error for the return of the money, but as it is essential to recovery that such demand be made prior to the payment of the money by the defendant in error to its principal, the Court will construe this ambiguity against the pleader, and assume that the demand was not made until after the money had been so paid over.

That the defendant in error was a collecting bank is shown by the indorsements on the check. The indorsement "Pay to the order of any bank, banker or trust company," placed thereon by the Bank of Commerce constituted the defendant in error as agent for collection only, and was notice to the plaintiff in error of that fact.

Neither does the indorsement placed on the check by the defendant in error, "Received payments through the Baltimore Clearing House, Indorsements guaranteed," make it liable in this action. It is to be noted that there is no intention here to transfer the paper, the indorsement being nothing but a receipt for the payment of the money, and therefore the only part to be considered is the effect of the words "Indorsements guaranteed."

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the United States to recover the difference between the amount to which a check paid by it had been fraudulently raised and the amount for which the check was drawn. The case was heard upon a demurrer to the declaration and the judgment was for the defendant both in the District Court and in the Circuit Court of Appeals, 1 Fed. (2d) 888. The facts alleged are as follows: A disbursing clerk drew a United States Veterans' Bureau check upon the Treasurer of the United States in favor of one Beck, for $47.50. After it was issued the check was changed so as to call for $4750. Beck endorsed it to a bank of South Carolina and received the amount of the altered check. That bank endorsed it "Pay to the order of Any Bank, Banker, or Trust Company. All prior endorsements guaranteed, June 3, 1922," negotiated it to the defendant, and received the same amount. The defendant endorsed the check "Received Payment Through the Baltimore Clearing House, Endorsements Guaranteed, June 5th, 1922," delivered it to and received the same amount from the Baltimore Branch of the Federal Reserve Bank of Richmond, the agent of the plaintiff, which forwarded the check to the Treasurer of the United States and was given credit for $4750. The Baltimore Branch had no notice of the fraudulent change.

The Government argues that acceptance or payment of a draft or check although it vouches for the signature of the drawer does not vouch for the body of the instrument, *Espy* v. *First National Bank of Cincinnati,* 18 Wall. 604; that this rule is not changed by § 62 of the Uniform Negotiable Instruments Law, Article 13, § 81, Maryland Code of Public General Laws: "The acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance"; that the drawer and

drawee of the check were not the same in such sense as to charge the drawee with knowledge of the amount of the check, and that therefore the United States can recover as for money paid under a mistake of fact. The defendant urges several considerations on the other side, but it is enough to say that the last step in the Government's argument seems to us, as it did to the Circuit Court of Appeals, unsound. If the drawer and the drawee are the same the drawer cannot recover for an overpayment to an innocent payee because he is bound to know his own checks. *Bank of United States* v. *Bank of Georgia,* 10 Wheat. 333. In this case there is no doubt that in truth the check was drawn by the United States upon itself.

The Government attempts to escape from this conclusion by the fact that the hand that drew and the hand that was to pay were not the same, and some language of Chief Justice White as to what it is reasonable to require the Government to know in paying out millions of pension claims. The number of the present check was 48218587. *United States* v. *National Exchange Bank,* 214 U. S. 302, 317. But the Chief Justice used that language only to fortify his conclusion that the United States could recover money paid upon a forged endorsement of a pension check. He cannot be understood to mean that great business houses are held to less responsibility than small ones. The United States does business on business terms. *Cooke* v. *United States,* 91 U. S. 389. It has been suggested that the ground of recovery for a judgment under a mistake of fact is that the fact supposed was the conventional basis or tacit condition of the transaction. *Dedham National Bank* v. *Everett National Bank,* 177 Mass. 392, 395. If this be true, then when the United States issues an order upon itself it has notice of the amount and when it comes to pay to an innocent holder making a claim as of right it is at arm's length and takes the risk. We are of opinion that the United States is

not excepted from the general rule by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt.

Judgment affirmed.

LIBERATO ET AL. *v.* ROYER ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 214. Argued March 15, 1926.—Decided April 12, 1926.

That part of the elective Workmen's Compensation Act of Pennsylvania which denies compensation to alien parents not residents of the United States, is not, as applied to a case of death without negligence or fault, at variance with the Treaty with Italy, which guarantees that the citizens of each country shall receive in the States and Territories of the other the "protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs," etc. P. 538.

281 Pa. 227, affirmed.

ERROR to a judgment of the Supreme Court of Pennsylvania which sustained a judgment (81 Pa. Super. Ct. 403) denying a claim under the state Workmen's Compensation Law.

Messrs. William H. Neely and *Paul A Kunkel,* with whom *Mr. George R. Hull* was on the brief, for plaintiffs in error.

Under the Constitution of Pennsylvania, where there is a death resulting from injuries a right of action survives to such persons as shall be designated by the legislature. It has been held that this constitutional provision, and the various legislative enactments thereunder, created a new and independent property right in the persons

designated by the legislature. *Maiorano* v. *Balto. & Ohio Ry. Co.,* 216 Pa. 402; *Haggarty* v. *Pittston,* 17 Pa. Super. 151; *Books* v. *Danville,* 95 Pa. 158; *North Penna. Ry. Co.* v. *Robinson,* 44 Pa. 175; *Moe* v. *Smiley,* 125 Pa. 136; *Birch* v. *P. C. C. & St. L. Ry. Co.,* 165 Pa. 339; *Mayer* v. *Traction Co.,* 181 Pa. 391; *Michigan Ry. Co.* v. *Vreeland,* 227 U. S. 59. The Compensation Act is the last expression of the legislature regarding the right to recover the damage suffered through injury resulting in death. It is an amendment to previous acts fundamentally changing the rights of relatives and dependents of a person killed in the course of employment, and must be considered as vesting in the relatives of the deceased employee a new and independent property right, which they do not take by way of succession through the employee, but which first exists in themselves as a separate right.

The Treaty of 1871, between the United States and Italy, (17 Stat. 845,) guarantees to Italian citizens, whether residents or non-residents of this country, equal rights with United States citizens. The language of the amended Treaty of 1913, (38 Stat. 1669,) was intended to give to citizens of Italy who are not residents of the United States the same rights and protection in cases where there should be injury resulting in death, this right having been previously denied to Italian non-residents in *Maiorano* v. *Balto. & Ohio R. R. Co.,* 213 U. S. 268. The doctrine of the *Maiorano Case* was rejected in this Court in *McGovern* v. *Phila. & Reading Ry. Co.,* 235 U. S. 291.

A treaty should be construed so as to give effect to the objects designed to be accomplished,—should receive a liberal construction and, where admitting of two constructions, the one favorable to rights claimed under it should be preferred. *Hauenstein* v. *Lynham,* 100 U. S. 483; *Shanks* v. *Dupont,* 3 Pet. 243; *Geoffrey* v. *Riggs,* 133 U. S. 258.

Mr. Arthur H. Hull, with whom *Mr. E. E. Beidleman* was on the brief, for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a claim for compensation under the Workmen's Compensation Act of Pennsylvania. It is for the death of the claimants' son in the employment of the defendants, without negligence or fault on the part of the latter, so far as appears. The son died unmarried and without issue, and the claimants, the plaintiffs in error, were wholly dependent upon him for support; but they were Italians living in Italy. The Compensation Board in obedience to a decision of the Court of Common Pleas awarded $820, and the award was affirmed by that court. The judgment was reversed by the Superior Court on the ground that the statute expressly provided that 'alien parents . . . not residents of the United States shall not be entitled to any compensation,' § 310, and that the Treaty of 1913 with Italy did not cover the case. 81 Pa. Superior Court, 403. The judgment was affirmed by the Supreme Court on the opinion below. 281 Pa. 227. As the plaintiffs contended that the Treaty with Italy invalidated the above clause of the state law and gave them a right to recover, a writ of error was allowed.

Article 3 of the treaty as amended reads: " The citizens of each of the High Contracting Parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privi-

leges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter." 38 Stat. 1669, 1670. This amendment was suggested by the decision in *Maiorano* v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 208, that under the laws of Pennsylvania a non-resident alien widow could not recover for the death of her husband caused by the defendant's negligence, although citizens of the State were given a remedy. Following this suggestion, the words of the amendment, if taken literally, deal only with death caused by negligence or fault. It is natural that they should be limited in that way. Apart from those States, of which Pennsylvania is not one, that very recently have substituted for the common law a general system of quasi-insurance, liability without fault is exceptional and usually has not been imposed for death except as the result of a voluntary arrangement. The statutes of Pennsylvania accord with this view of the Treaty. They give to alien non-resident dependent parents the same right to recover damages for death due to fault that they give to citizens and residents. Then the Compensation Act offers a plan different from the common law and the workman is free not to come in under it. If he does, of course all benefits dependent on the new arrangement are matters of agreement and statutory consequences of agreement and cannot be carried further than the contract and statute go. One of those benefits is compensation irrespective of the cause of death, but it is confined to residents. Whether the workman's election to take advantage of the statute could be made a bar to a suit by his parents alleging a wrong is not before us here, but the right to recover without alleging fault depends on the terms of the Act.

We are of opinion that the Treaty was construed rightly by the Courts below. Were it otherwise, and if the excluding clause of the Compensation Act were held void, the question would arise whether the general grant to

parents in the plaintiffs' situation could be extended to cover those whom it excluded in terms or whether, notwithstanding a saving clause, § 502, the whole grant would fail, on the ground that it could not be maintained as made and could not be assumed to go farther. But treaties are not likely to intermeddle with the consequences of voluntary arrangements, if the right is given, as here it was given by other statutes, to sue for death wrongfully caused, at least unless those arrangements made by third persons take away that right. It looks somewhat as if in the first stages of this case that right was supposed to be taken away; but, if so, the question was not saved, and the only question before us is whether the plaintiffs can recover under the Compensation Act, not whether they could recover for a wrongful death, which was not proved or even alleged.

Judgment affirmed.

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

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 57. Submitted October 15, 1925.—Decided April 12, 1926.

1. The term "settlement" is used in the Homestead Law as comprehending acts done on the land by way of establishing, or preparing to establish, an actual personal residence—going thereon and, with reasonable diligence, arranging to occupy it as a home, to the exclusion of one elsewhere. P. 545.
2. One who actually settles on public lands in an honest effort to acquire a home, under the Homestead Law, should be dealt with leniently, and not subjected to the loss of his toil and efforts through any mistake or neglect of the officers or agents of the Government. P. 546.
3. But this rule does not excuse substantial failures to comply with the requirements respecting the initiation of such a claim or accord

to it a preference over other claims lawfully acquired and prior in time. P. 546.

4. A selection of unsurveyed land, duly made by a railroad company pursuant to an Act of Congress (Aug. 8, 1892, 27 Stat. 390,) giving it a legal right to select such lands, "to which no adverse right or claim shall have attached or have been initiated at the time of making such selection," in lieu of others relinquished to the United States, takes precedence over a later homestead claim. P. 547.

5. Before the filing of a railroad selection, under the Act of Aug. 8, 1892, *supra*, for part of the tract, a person with the qualifications prescribed by the homestead law, visited, for a few hours, an unsurveyed quarter section of unappropriated public land, blazed a trail around it and posted notices that he claimed it as a homestead; and visited it again, five months later, and devoted a day to blazing a trail from an adjacent stream to the nearest corner, and to cutting some poles and laying them in the semblance of a cabin foundation. After the filing of the selection, he visited the land once or twice a year, for several years thereafter, while on hunting trips, and renewed his notices; and thereafter sold his claim. From the time he first went on the land, and continuously to the time he sold, he was residing with his wife and children at a place a few miles distant maintaining a home there. His intention throughout was to "hold" the quarter section, expecting some day to go and live upon it. *Held* that he did not make a *bona fide* settlement, and that his acts did not amount to the initiation of a claim, within the meaning of the Homestead Law or the Act of Aug. 8, 1892, *supra*.

126 Wash. 312, reversed.

CERTIORARI to a judgment of the Supreme Court of Washington which affirmed a judgment for the plaintiff, Reed, in a suit to have the Railway Company declared trustee for him of land patented to it by the United States, and to compel a conveyance in discharge of the trust.

Messrs. F. G. Dorety, Thomas Balmer, and *Edwin C. Matthias* were on the brief, for petitioner.

Messrs. E. V. Kuykendall, E. S. McCord, and *Walter B. Whitcomb* were on the brief, for respondents.

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

This was a suit in a state court in Whatcom County, Washington, against the Great Northern Railway Company to have it declared a trustee for the plaintiff of the title to a quarter-quarter section of land, theretofore patented to it by the United States, and to compel a conveyance in discharge of the trust. The company in its answer denied much that was alleged in the complaint and sought a decree quieting the title. On the trial the plaintiff prevailed, and the Supreme Court of the State affirmed the decree. 126 Wash. 312.

The suit involved a conflict between a railroad lieu selection and an asserted homestead settlement. The evidence on the material issues was so direct and free from contradiction that the real controversy was over the application of federal statutes to facts conceded or definitely established.

The Great Northern Railway Company is the successor in interest of the St. Paul, Minneapolis and Manitoba Railway Company, which constructed and put in operation certain lines of railroad in the State of Minnesota and the Territory of Dakota and thereby became entitled under an early land grant by Congress to particular lands along those lines. The land officers of the United States denied the company's right to the lands along the lines in Dakota, and treated those lands as open to settlement, entry and disposal under the public land laws. In 1890 this Court pronounced the action of the land officers erroneous and sustained the right of the railway company to the Dakota lands. *St. Paul, Minneapolis and Manitoba Ry. Co.* v. *Phelps,* 137 U. S. 528. In the meantime many of the lands had come to be occupied and improved by persons who had made entries or purchases of them as public lands under the ruling of the

land officers. To correct the resulting wrong to both the company and the individual claimants, Congress by the Act of August 8, 1892, c. 382, 27 Stat. 390, requested the company to relinquish its right to such lands, to the end that the United States might invest the individual claimants with a good title, and declared that the company on executing the relinquishment should be entitled to select and receive other lands in equal quantity. The company complied with that request and thus became entitled as matter of legal right, and not of grace, to select and receive other lands conformably to the terms of the Act. Shortly described, the Act provided that the selections might be made within any of the States "into or through which the railway owned by the said railway company runs"—Washington being one—from the non-mineral, unreserved public lands therein "to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection"; that not exceeding 640 acres should be selected in a single body; that the mode of selection should be by filing descriptive lists in the land offices for the districts where the selected tracts lay and paying the usual fees of the local land officers; that selection might be made of tracts while yet unsurveyed, in which event they should be described in a list with a reasonable degree of certainty [1] and should be designated according to the survey in a supplemental list within three months after the plat of the survey was filed in the local office; and that on the approval of any list by the Secretary of the Interior [2] the tracts selected therein should be patented to the company.

---

[1] See *West* v. *Rutledge Timber Co.*, 244 U. S. 90, 98; *Rutledge Timber Co.* v. *Farrell*, 255 U. S. 268.

[2] See *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387; *Payne* v. *New Mexico*, 255 U. S. 367, 370; *Wyoming* v. *United States*, 255 U. S. 489, 496.

The railway company selected the quarter-quarter in question May 5, 1902, while it was unsurveyed, by filing a suitable list in the proper local land office and paying the officers' fees; and it duly supplemented that list by another, designating the tract according to the survey, within a few days after the plat of the survey was filed in the local office, which was on February 6, 1907. The lists were transmitted by the local officers to the General Land Office and laid before the Secretary of the Interior. He approved them, and on April 13, 1908, a patent was issued to the company.

The tract was open to selection and was duly selected and rightly patented, if at the time of the selection—May 5, 1902—a homestead claim to the land had not been initiated by the acts about to be stated. The plaintiff contended that such a claim had been initiated, and the courts below so held.

In September or October, 1901, W. J. Tincker, who possessed the qualifications named in the homestead law, went to the quarter section which includes this quarter-quarter, blazed a line around the larger tract, and posted notices at its four corners declaring that he claimed it as a homestead. He was there on that occasion two or three hours. In March,[3] 1902, he went to the quarter section again, blazed a trail from an adjacent stream to the nearest corner, cut a few poles and with these laid what appeared to be a cabin foundation two or three poles high. The trail did not touch the quarter-quarter here in question, nor was the pole foundation placed on it. Tincker was there on that occasion for a longer time than before, probably the greater part of a working day. That is all that was done by him prior to the company's selection. Thereafter he went to the quarter section once

[3] He testified: "It was about March as near as I can get at it—between February and May."

or twice a year, usually on hunting trips, but did nothing there beyond renewing his notices at the corners. In August, 1906, he sold his so-called possessory claim and improvements. When he first went to the land, and continuously to the time he sold, he was residing, with his wife and children, at Maple Falls, a few miles from the land, and was maintaining a home there. At the trial he was a witness for the plaintiff and testified that his intention throughout that period was "to hold" the quarter section, "expecting some day to go up there and live on it."

Tincker sold to W. M. Smithey, who three months later sold to the plaintiff. The last was the only one of the three who made any attempt at establishing a residence on the quarter section. In November, 1906, he did establish a residence on a part of it not here in question; and after the survey he sought and secured a homestead entry on that part at the local land office. He also sought to have the part here in question included in that entry, but failed. 41 L. D. 375. He had no right to have it included unless Tincker's acts prior to the company's selection amounted to the initiation of a homestead claim and thereby excepted the tract from the class of lands open to selection.

In the company's selection list and supporting affidavit nothing was said about Tincker's acts, not improbably because the selecting agent knew nothing about them and found nothing on or in the vicinity of the quarter-quarter indicative of a homestead settlement or occupancy. When the plaintiff, in 1907, applied to make his homestead entry and to include this quarter-quarter therein he based his application on his own settlement in November, 1906, and said nothing about a prior claim by Tincker. That was the situation when the patent issued to the company. Afterwards the plaintiff requested that a suit be brought by the United States to cancel the

patent on the grounds that the company in making its selection had not disclosed Tincker's acts and that the land officers issued the patent without knowledge of those acts; but the Secretary of the Interior declined to recommend such a suit. The plaintiff brought the present suit in his own right in 1919—eleven years after the issue of the patent, during all of which the company had been regularly paying state and county taxes on the tract.

The homestead law—putting aside special provisions without bearing here—accords to every person of stated qualifications the privilege of acquiring title to a quarter section, or less, of "unappropriated public lands" by settling thereon and continuously residing on, improving and cultivating the same for a prescribed period. The original law was confined to surveyed lands and required that the claims be initiated by an entry made at the local land office, which was to be followed within a reasonable time by actual settlement, residence, etc. Act May 20, 1862, c. 75, §§ 1, 2, 12 Stat. 392; Rev. Stat. §§ 2289, 2290; Act March 3, 1891, c. 561, 26 Stat. 1098. Afterwards a provision was added permitting claims to be initiated, as respects either surveyed or unsurveyed lands, by settlement and providing, where that was done, that record entry should be sought within three months after settlement if the land was surveyed, or, if unsurveyed, within a like period after the survey was made and the plat was filed in the local office. Act of May 14, 1880, c. 89, § 3, 21 Stat. 140. The term "settlement" is used as comprehending acts done on the land by way of establishing or preparing to establish an actual personal residence—going thereon and, with reasonable diligence, arranging to occupy it as a home to the exclusion of one elsewhere. The law makes it plain that there must be a definite purpose "in good faith to obtain a home" by proceeding "faithfully and honestly" to comply with "all the requirements." And the decisions made and in-

structions issued by the officers charged with its administration show that they uniformly have taken the position that a claim cannot be initiated by asserted acts of settlement which are only colorable and done with a purpose to hold the land for speculation or while maintaining an actual residence elsewhere.[4] The instructions say: "Settlement is initiated through the personal act of a settler placing improvements on the land or establishing a residence thereon. . . . When settlement is made on unsurveyed lands the settler must plainly mark the boundaries of all land claimed. Within a reasonable time after settlement actual residence must be established on the land and continuously maintained."

The decisions of this Court have established the principle that one who, in response to the invitation in the homestead law, actually settles on the public lands in an honest effort to acquire a home should be dealt with leniently and not subjected to the loss of his toil and efforts through any mistake or neglect of the officers or agents of the Government. *Ard* v. *Brandon,* 156 U. S. 537, 543; *Northern Pacific R. R. Co.* v. *Amacker,* 175 U. S. 564, 567; *Tarpey* v. *Madsen,* 178 U. S. 215, 220; *Nelson* v. *Northern Pacific Ry. Co.,* 188 U. S. 108, 123;

[4] *Amley* v. *Sando,* 2 L. D. 142; *McLean* v. *Foster,* 2 L. D. 175; *Seacord* v. *Talbert,* 2 L. D. 184; *Howden* v. *Piper,* 3 L. D. 162; *Witter* v. *Rowe,* 3 L. D. 449; *Atterbery's Case,* 8 L. D. 173; *Fuller* v. *Clibon,* 15 L. D. 231, 233; *Northern Pacific R. R. Co.* v. *Grimes,* 24 L. D. 452; *Hastings and Dakota Ry. Co.* v. *Grinden,* 27 L. D. 137; *O'Brien* v. *Chamberlin,* 29 L. D. 218; *Meyer* v. *Northern Pacific Ry. Co.,* 31 L. D. 196; *Chainey's Case,* 42 L. D. 510; *Lias* v. *Henderson,* 44 L. D. 542; Instructions of May 25, 1880, 2 Copp's P. L. L. 510; General Circular of March 1, 1884, pp. 11 et seq.; General Circular of January 1, 1889, pp. 13 et seq.; General Circular of January 25, 1904, p. 14; Suggestions to Homesteaders, 37 L. D. 639–640; 40 L. D. 42; 43 L. D. 3; 44 L. D. 93; 48 L. D. 391. And see *United States* v. *Mills,* 190 Fed. 513, 516; *Bratton* v. *Cross,* 22 Kan. 673; *Mosely* v. *Torrence,* 71 Cal. 318; *Small* v. *Rakestraw,* 196 U. S. 403.

Oregon and California R. R. Co. v. *United States (No. 1)*, 189 U. S. 103, 114; *St. Paul, Minneapolis and Manitoba Ry. Co.* v. *Donohue*, 210 U. S. 21, 33. But its decisions also show that this salutary rule does not excuse substantial failures to comply with the requirements respecting the initiation of such a claim or accord to it a preference over other claims lawfully acquired and prior in time. *Maddox* v. *Burnham*, 156 U. S. 544, 548; *Northern Pacific R. R. Co.* v. *Amacker, supra; Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387, *et seq.; Northern Pacific Ry. Co.* v. *Wass*, 219 U. S. 426; *Svor* v. *Morris*, 227 U. S. 524, 527; *Northern Pacific Ry. Co.* v. *Houston*, 231 U. S. 181.

The Supreme Court of the State rightly recognized that the plaintiff's claim was initiated long after the company's selection at the local land office, and therefore that the real question was whether Tincker's asserted acts prior to that selection amounted to the initiation of a homestead claim. If they did, the tract in dispute was not subject to selection under the Act of 1892; otherwise it was. The important words of the Act are, public lands "to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection." The Supreme Court of the State held that Tincker's acts "were not sufficient to initiate a bona fide settlement," but concluded with some hesitation that they nevertheless took the tract out of the class of lands subject to selection.

We agree that Tincker did not make a *bona fide* settlement, and we are further of opinion that his acts fell so far short of such a settlement that they did not amount to the initiation of a claim in any admissible view of the homestead law or the Act of 1892. He did nothing indicative of a present purpose to establish a home on the quarter section. He started no real improvements, made no preparations for living there, did not attempt to reside there and did not take his family there, but confined himself to minor acts calculated merely to deter others from

initiating claims. In the seven or eight months preceding the company's selection, he was on the land but twice—less than a day each time. His subsequent conduct, if we turn to it, is equally persuasive that he was without a present purpose to make the place a home. He merely visited it once or twice a year, usually on hunting trips, and on those visits only renewed the notices intended to deter others. Considering what he did and his testimony that he was expecting from his first trip in 1901 to his sale in 1906 that "some day" he would go there to live, we think it apparent that his asserted settlement, even if not a myth in his own mind, fell pronouncedly short of satisfying the requirements of the homestead law in respect of the initiation of a claim, and so did not except the quarter-quarter in question from the company's right of selection under the Act of 1892. He endeavored in his testimony to attribute his omissions to a temporary withdrawal of the land and the surrounding area pending an inquiry as to whether they should be included in an existing forest reserve. But that withdrawal—it later was revoked—could not have been a factor in the matter, because the withdrawal order when produced in evidence disclosed that it was made more than a year after his asserted settlement and more than six months after the company's selection, and that it contained a provision declaring that *bona fide* settlements and valid claims were not affected by it.

If, while maintaining a home at Maple Falls, Tincker could initiate a homestead claim by acts such as are disclosed here, and thus hold the land against others desiring to initiate claims, the way was open for him similarly to make a colorable appropriation of many tracts in that timber region and thus to exact tribute from intending settlers and claimants. His acts, if effective against the company's right of selection, would be equally an obstacle to the initiation of homestead settlement claims,

which is admissible only in respect of unappropriated public lands.

The state court regarded its conclusion as deriving some support from cases in this Court; but we think the cases cited are not susceptible of that interpretation. All are cases where the individual claim which operated to defeat the railroad claim or selection was prior in time and had been initiated either by an entry at the land office or by an actual *bona fide* settlement. *Kansas Pacific Railway Co.* v. *Dunmeyer,* 113 U. S. 629, and *St. Paul, Minneapolis and Manitoba Ry. Co.* v. *Donohue,* 210 U. S. 21, are typical of all. In both a homestead claim prior in time was involved. In the first it had been initiated by an entry at the land office, and in the second by actual settlement and occupancy in good faith. In both it was in existence when the right of the railroad company became fixed, if fixed at all; and the ruling was that such a claim existing at that time excepted the land—from the company's grant in one case and from its right of lieu selection in the other—and that a subsequent abandonment, relinquishment or failure to comply with the law on the part of the homestead claimant neither obviated the exception nor entitled the company to the land—under the grant in one case and the selection in the other. We perceive nothing in either case which makes for the view that acts which fall far short of initiating a claim, in either mode, work such an exception.

The selection in *St. Paul, Minneapolis and Manitoba Ry. Co.* v. *Donohue* was under the Act of 1892, now before us, and was of unsurveyed land. When it was made a qualified claimant, who had settled theretofore and given notice of the extent of his claim, was residing on, occupying and improving the land and in good faith conforming to the homestead requirements. Subsequently he died, and his mother as sole heir sold his possessory claim and improvements to Donohue, who made a timber

and stone entry of the land after the survey. This Court, after carefully pointing out that the homestead claim was lawfully initiated, held that the land was excepted from the right of selection and therefore that the selection was of no avail. Most of the discussion in the opinion was to no purpose if, as is contended here, it was immaterial whether the homestead claim was initiated in substantial conformity to the homestead requirements.

A selection of unsurveyed land under the same Act was involved in *Great Northern Ry. Co.* v. *Hower,* 236 U. S. 702, and was sustained against an asserted prior homestead claim on the ground that, while the claimant had put a small barn on the tract and had cut a trail across it prior to the selection, he had never resided thereon or shown any purpose to do so, but had been maintaining a home on other land not even contiguous to it.

The *Donohue Case* and the *Hower Case* taken together illustrate the principle of prior cases and show how it should be applied here.

Decree reversed.

PEOPLES NATURAL GAS COMPANY *v.* PUBLIC SERVICE COMMISSION OF PENNSYLVANIA ET AL.

THE SAME *v.* THE SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Nos. 70, 71. Argued October 21, 22, 1925.—Decided April 12, 1926.

1. The transportation of gas in a pipe line from one State to another and its prompt delivery to purchasers at local destinations, is interstate commerce. P. 554.
2. The passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business. *Id.*

3. Where local gas, destined for local consumption, is added to a pipe line carrying gas from another State, after it has crossed the state line, the gas to the extent so added is in intrastate commerce and subject to local regulation. P. 554.

279 Pa. 252, affirmed.

ERROR to two judgments of the Supreme Court of Pennsylvania sustaining an order of the Public Service Commission requiring the Gas Company to furnish gas to another company for sale to consumers in a city. See also s. c. 79 Pa. Super. Ct. 560.

Mr. George B. Gordon, with whom *Messrs. William W. Smith, Arthur E. Young, Allen T. C. Gordon,* and *S. G. Nolin* were on the brief, for plaintiffs in error.

Mr. Frank M. Hunter for defendant in error Public Service Commission of Pennsylvania.

Mr. J. E. B. Cunningham, with whom *Messrs. Tillman K. Saylor* and *Spencer G. Nauman* were on the brief, for defendant in error Joseph Cauffield.

Messrs. David I. McCahill and *Edward O. Tabor* were on the brief, for defendant in error Johnstown Fuel Supply Company.

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

These two cases are practically but one. The matter in controversy is the constitutional validity of an order of the Public Service Commission of Pennsylvania requiring the Peoples Natural Gas Company to continue its prior practice of supplying natural gas to another company at Johnstown for sale to consumers in that city. On successive appeals to the Superior Court and the Supreme Court of the State the Peoples Company challenged the order as directly regulating and burdening interstate commerce and depriving the company of property without

due process of law in violation of constitutional restraints on state action; but both contentions were overruled and the order was sustained. 79 Pa. Superior Ct. 560; 279 Pa. 252. On these writs of error the company relies only on the contention that the order is a forbidden interference with interstate commerce.

The Peoples Company is a public service corporation created under the laws of Pennsylvania and engaged in producing, purchasing, transporting by pipe line, and selling natural gas. It purchases about two-thirds of the gas which it transports and sells from a producing company in West Virginia having pipe lines leading from wells in that State to the boundary between the two States; and it produces the other one-third from its own wells in the southwestern counties of Pennsylvania. It has a system of pipe lines in Pennsylvania which is connected at the state boundary with the lines of the West Virginia company and leads thence to Pittsburgh, Johnstown and other Pennsylvania cities and boroughs where it sells the gas. The gas coming from West Virginia is transported, through the pipe lines as connected at the state boundary, in a continuous stream from the places of production in one State to those of consumption in the other. At the state boundary that gas passes through a registering meter and that point is treated as the place of delivery to the Peoples Company; but the transportation is not interrupted there. The gas from the company's wells in Pennsylvania is fed into the moving stream at different points after it crosses the state boundary. The movement of the stream towards the points of destination is accelerated by means of pumps in Pennsylvania—one near the state line and one remote from it.

The Peoples Company sells directly to consumers at the several places of consumption, other than Johnstown, and there it sells to an independent company, having a local franchise and distributing plant, which sells to con-

sumers. For upwards of ten years the gas sold to that company was supplied under a contract, but when the order in question was made the Peoples Company had exercised a reserved privilege of terminating the contract; and the Commission in making the order proceeded on the theory that the Peoples Company is a public service corporation and may be required, irrespective of the terms of the contract, to continue supplying gas to the local company and thus to continue its indirect service to Johnstown consumers. The order does not fix the rate for this service, but contemplates that it shall be fixed primarily by a schedule to be filed by the Peoples Company and shall be subject to supervision by the Commission as respects its reasonableness.

In the state courts the cases had many features which are immaterial here and need not be noticed.

The Supreme Court of the State in overruling the contention that the order is a forbidden interference with interstate commerce put its decision on two grounds: first, that no interstate commerce is involved, and, secondly, that if such commerce is involved the order is not a forbidden interference but an admissible exertion of power which exists in the State in the absence of regulation by Congress under its paramount power. The first ground of decision was based on two conclusions: one that, as the West Virginia gas is delivered at the state boundary and the title passes there, interstate commerce therein ends at that boundary and the further transportation and sale in Pennsylvania are in intrastate commerce; and the other that the gas produced in Pennsylvania and there fed into the pipe lines is more than sufficient to enable the company to comply with the order, and that when the order is construed in the light of this situation it does not require that any West Virginia gas be used in complying with it. Both conclusions are earnestly challenged by the Peoples Company—the former as de-

parting from the decisions of this Court respecting the nature of transactions in natural gas transported from one State to another, and the other as without an adequate basis in the evidence and treating the Pennsylvania gas, after it is unavoidably commingled with that from West Virginia, as being separable and having a distinct status.

As respects the West Virginia gas we are of opinion, in view of its continuous transportation from the places of production in one State to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 112–113; *Public Utilities Commission* v. *Landon,* 249 U. S. 236, 245; *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23, 28; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277, 280–281; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 309; *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298; *Ohio Railroad Commission* v. *Worthington,* 225 U. S. 101; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189.

As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical pur-

poses the two are separable, and neither affects the character of the business as to the other. *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277, 281. And see *Hallanan* v. *Eureka Pipe Line Co.,* 261 U. S. 393; *Hallanan* v. *United Fuel Gas Co.,* 261 U. S. 398. The Supreme Court of the State has found that more than enough Pennsylvania gas goes into the mixture to meet the requirements of the order, and on this basis has construed the order as leaving the company free to deal in usual course with so much of the mixture as represents the gas from West Virginia. We think the finding has ample support in the evidence, and we accept of course that court's construction of the order. In these circumstances the conclusion is unavoidable, we think, that the order does not interfere with or affect the interstate commerce in which the company is engaged.

Whether the order, if it did apply to gas in such commerce, could be sustained becomes immaterial in view of the conclusion just stated, and therefore need not be considered.

Judgments affirmed.

CHILDERS, STATE AUDITOR, *v.* BEAVER ET AL.

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

No. 202. Argued March 9, 1926.—Decided April 12, 1926.

1. Transfer by descent from one tribal Indian to another of land allotted and patented by the United States to the ancestor with a prohibition against alienation, is not taxable by the State where the land lies, during the restriction on the title. P. 558.
2. Inheritance in such cases is under the acts of Congress, by which heirs are determined by the Secretary of the Interior, the State law being adopted as the expression of the will of Congress. P. 559. 300 Fed. 113, affirmed.

APPEAL from a decree of the District Court restraining the appellant, Auditor of the State of Oklahoma, from attempting to collect state inheritance taxes by recourse to appellees' lands.

Mr. J. Berry King, Assistant Attorney General of Oklahoma, with whom *Messrs. George F. Short,* Attorney General, *Leon S. Hirsh,* Assistant Attorney General, and *C. H. Nicholas* were on the brief, for appellant.

Members of the Quapaw Tribe, residing in Oklahoma, are citizens of the State, and, as such, their right to transfer and receive property after death has its inception in, and is regulated by, the laws of Oklahoma governing decedents' estates. By the Act of April 28, 1904, c. 1824, 33 Stat. 573, the laws of descent of Arkansas were specifically "extended in their operation, so as to embrace all persons and estates" in Indian Territory. By the Enabling Act, the Arkansas law was superseded, and the courts of Oklahoma succeeded to the jurisdiction over Indian estates. *Jefferson* v. *Fink,* 247 U. S. 288; *In re Pigeon's Estate,* 81 Okla. 180; *Teague* v. *Smith,* 85 Okla. 12; *Harrison* v. *Harrison,* 87 Okla. 91; *Graves* v. *Jacobs,* 92 Okla. 62.

The Federal Government is without authority to control the devolution of estates in Oklahoma. *United States* v. *Harris,* 106 U. S. 629; *McCulloch* v. *Maryland,* 4 Wheat. 316; *Grafton* v. *United States,* 206 U. S. 333; *United States* v. *Ohio Oil Co.,* 234 U. S. 548; *Hammer* v. *Dagenhart,* 247 U. S. 241; *Slaughterhouse Cases,* 16 Wall. 36. Section 1 of the Oklahoma Enabling Act, specifying that the Government should have plenary authority over the Indians, did not operate to confer upon the Federal Government the power to exempt from state charges the property of Indians in this State. *Coyle* v. *Oklahoma,* 221 U. S. 559; *McNulty* v. *Beatty,* 10 How. 71; *Hawkins* v. *Bleakley,* 243 U. S. 210; *Kansas* v. *Colorado,* 206 U. S. 95. Though Congress has some authority over the Indians,

such power may not be extended by act of Congress in the form of an enabling act, nor may the delegated power of Congress be increased by consent of a State. In *United States* v. *Fox,* 94 U. S. 315, it was said that "the title and modes of disposition of real property, within a State, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority." The admission of Oklahoma as a State terminated all federal laws of descent and distribution theretofore in force in Indian Territory, irrespective of the provisions of the Enabling Act. The State is sovereign in all those particulars wherein it has not joined in the general delegation to the Federal Government. See *McCormick* v. *Sullivant,* 10 Wheat. 192; *Segley* v. *Car Co.,* 120 U. S. 580; *United States* v. *Perkins,* 163 U. S. 625; *Snyder* v. *Bettman,* 190 U. S. 249; *Wilcox* v. *Jackson,* 13 Pet. 498; *Langdon* v. *Sherwood,* 124 U. S. 74; *O'Callighan* v. *O'Brien,* 199 U. S. 99; *Ellis* v. *Davis,* 109 U. S. 485; *Knowlton* v. *Moore,* 178 U. S. 43; *Plummer* v. *Coler,* 178 U. S. 115; *Sunderland* v. *United States,* 266 U. S. 226.

That the property is exempt from taxation does not prevent the operation of the succession tax law upon the devolution of the estate. *Plummer* v. *Coler,* 178 U. S. 115; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 537; *Wallace* v. *Myers,* 38 Fed. 184; *Estate of Sherman,* 153 N. Y. 1; *Strode* v. *Commonwealth,* 52 Pa. 181; *United States* v. *Perkins,* 163 U. S. 625.

The lands were allotted to the Indians while Congress had plenary authority over the territory, and Congress contracted an exemption from taxation on the land which could not be impaired by the Enabling Act. *Choate* v. *Trapp,* 224 U. S. 665. Such restriction, no doubt, confers upon the Federal Government an interest in the land during the lifetime of the allottee, but not thereafter, because the Federal Government has no more right to entail lands in a State than any individual. *Van Brocklin* v. *Anderson,* 117 U. S. 151.

The necessary conflict between the right of the States to collect revenue for state purposes and the right of the Federal Government to exempt for its purposes requires that the right to exemption be recognized only on those cases where the subject matter is a proper, vital, and necessary governmental function, such as the holding of lands for postoffices, forts, arsenals, and the like. But the power residing in the Federal Government to assume control over, and withdraw from taxation, the rights or property of citizens of a State, when exercised or located within the State, must necessarily be limited. See *South Carolina* v. *United States,* 199 U. S. 437. The conflict between the right of the Federal Government to tax and the right of the State to exempt, likewise exists between the right of the State to tax and the right of the Government to exempt. Madison, Annals of Congress, Vol. 1, p. 455; Hamilton, State Control of Local Taxation; The Federalist, No. 31; *Western Union* v. *Attorney General of Massachusetts,* 125 U. S. 530.

Mr. Joseph W. Howell for appellees.

Mr. Justice McReynolds delivered the opinion of the Court.

See-Sah Quapaw, a full-blood Quapaw Indian woman, died March 4, 1920. She owned certain duly allotted lands in Oklahoma, patented by the Secretary of the Interior September 26, 1896, and declared to be "inalienable for a period of twenty-five years" thereafter—all as provided by the Act of March 2, 1895, c. 188, § 1, 28 Stat. 876, 907. Following the state statute of descent, the Secretary declared that the only heirs were her husband, and brother—John Beaver and Benjamin Quapaw—full-blood Quapaws. Act June 25, 1910, c. 431, § 1, 36 Stat. 855. *Henrietta First Moon* v. *Starling White Tail,* 270 U. S. 243. Restrictions upon the land were continued

for another twenty-five years by the Act of March 3, 1921, c. 119, § 26, 41 Stat. 1225, 1248.

Apparently appellant supposed that the lands passed to the heirs by virtue of the laws of the State and were subject to the inheritance taxes which she laid. He accordingly demanded their payment of appellees and threatened enforcement by summary process and sale of the lands. The court below held that the State had no right to demand the taxes and restrained appellant from attempting to collect them.

The duty of the Secretary of the Interior to determine the heirs according to the State law of descent, is not questioned. Congress provided that the lands should descend and directed how the heirs should be ascertained. It adopted the provisions of the Oklahoma statute as an expression of its own will—the laws of Missouri or Kansas, or any other State, might have been accepted. The lands really passed under a law of the United States, and not by Oklahoma's permission.

It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a State which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the State without assent of the federal government. *The Kansas Indians,* 5 Wall. 737; *Tiger* v. *Western Investment Co.,* 221 U. S. 286; *Choctaw, etc., R. R.* v. *Harrison,* 235 U. S. 292; *Hallowell* v. *Commons,* 239 U. S. 506; *Lane* v. *Mickadiet,* 241 U. S. 201; *Jefferson* v. *Fink,* 247 U. S. 288; *Blanset* v. *Cardin,* 256 U. S. 319; *United States* v. *Bowling,* 256 U. S. 484; *McCurdy* v. *United States,* 264 U. S. 484; *Sperry Oil Co.* v. *Chisholm,* 264 U. S. 488.

The decree below must be

Affirmed.

HARRIGAN, TRUSTEE, ETC. *v.* BERGDOLL, ALSO KNOWN AS BERGSON.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 181. Argued November 23, 24, 1925.—Decided April 12, 1926.

1. The state statute of limitations prescribing the time within which a suit may be brought against a shareholder of a local corporation to collect unpaid stock subscriptions for defrayal of the corporation's debts applies when the suit is brought by a trustee of a bankrupt corporation pursuant to an order of the bankruptcy court assessing its shareholders. P. 564.
2. The nature, extent, and condition of the liability of a stockholder on account of the stock not full-paid, depend primarily on the law of the State or country by which the corporation was created. *Id.*
3. That law determines whether the liability is to the corporation or to creditors; if to the corporation, the right passes to its trustee in bankruptcy; but the Bankrupt Law does not modify the right or create a new one. *Id.*
4. By the law of Pennsylvania this liability of shareholders of a Pennsylvania business corporation becomes fixed, so that the statute of limitations begins to run, as soon as it is definitely ascertained that a company is insolvent and will be obliged to call unpaid stock subscriptions in order to satisfy its obligations. *Scovill* v. *Thayer*, 105 U. S. 143, distinguished. *Id.*

281 Pa. 186, affirmed.

CERTIORARI to a judgment of the Supreme Court of Pennsylvania which affirmed a judgment for the defendant Bergdoll, based on the statute of limitations, in a suit to collect unpaid stock subscriptions.

Mr. F. A. Harrigan, with whom *Mr. Joseph W. Catharine* was on the brief, for petitioner.

The state court was without power, where the suit had been brought upon the decree of the United States court, to go behind that decree and say that the cause of action antedated the date of the decree sued upon and that there-

fore the statute of limitations was applicable from the earlier date. *Swearingen* v. *Dairy Co.,* 198 Pa. 68, distinguished.

The case is controlled by *Scovill* v. *Thayer,* 105 U. S. 143. There is a conflict in the opinions on this subject. *Kaye* v. *Metz,* 47 A. B. R. 163. Before suit could be brought against the respondent, there had to be some order of a court of competent jurisdiction. As laid down in *Scovill* v. *Thayer, supra,* and *Harrigan* v. *Bergdoll,* 263 Fed. 279, it was the duty of the trustee-petitioner, in dealing with assets, to proceed under the direction of the bankruptcy court. The trustee-petitioner could not have maintained a plenary action against the respondent until he had obtained the order for assessment, as he did. Being a trustee in a federal bankruptcy proceeding, the proceedings he took and the order he obtained were a right given to, and exercised by, him under the authority of a federal statute. *Great Western Tel. Co.* v. *Purdy,* 162 U. S. 329; *Scovill* v. *Thayer,* 105 U. S. 143; *Parsons* v. *Hayes,* 14 Abb. N. C. 419.

Mr. Walter B. Gibbons, with whom *Mr. Harry C. Kohlhas, Jr.,* was on the brief, for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

Harrigan, trustee in bankruptcy of the Louis J. Bergdoll Motor Company, brought this suit in a state court of Pennsylvania, on July 13, 1921, to recover $155,571.79 and interest from Bergdoll, a stockholder in the company. The defendant, a resident of the State, pleaded the general six-year statute of limitations. The claim sued on is the assessment, ordered by the bankruptcy court, of 51.85% of the par value on shares in the company held by the defendant, the amount being found by that court to be unpaid on the stock and required to satisfy the liabilities.

The corporation had been organized under the laws of Pennsylvania about April 1, 1912; had its place of business there; and was adjudged bankrupt in the federal court for the eastern district of the State in April, 1913. It was then insolvent. In May, 1913, it had become apparent that the company's liabilities largely exceeded its assets other than the amounts unpaid on its capital stock. The petition of the trustee to the bankruptcy court praying that the assessment be made, and that he be authorized to proceed to collect the same, was not filed until October, 1917.

The application then made was strenuously opposed by Bergdoll. The order for the assessment was entered by the referee in February, 1918, but was not confirmed by the District Court until July, 1919, 260 Fed. 234. That was more than six years after the deficiency had become apparent. The judgment of the District Court, besides making the assessment, ordered Bergdoll to pay the same. On this ground, among others, Bergdoll appealed to the United States Circuit Court of Appeals. In March, 1920, that court affirmed the judgment insofar as it adjudicated the necessity for an assessment, fixed the rate and levied the same upon those who appeared *prima facie* to be subject thereto, but reversed the judgment insofar as it had adjudged the personal liability of Bergdoll and the amount thereof. 263 Fed. 279, 281, 283. Thereafter this suit was brought in the state court. The trial court ruled that the statute of limitations had run before the suit was instituted. Its judgment was affirmed by the highest court of the State, 281 Pa. 186. This Court granted a writ of certiorari. 266 U. S. 598.

The reversal by the Circuit Court of Appeals of the judgment of the District Court insofar as it adjudged the liability of Bergdoll was in accord with the rule, settled in the third circuit and elsewhere, that the order of assessment and levy is a purely administrative proceeding pre-

liminary to the institution of a suit; that in the absence of consent there is no jurisdiction in the bankruptcy court to fix the personal liability of a stockholder; and that any person whose stock is assessed may when sued in a plenary action on such assessment in any court of competent jurisdiction make any defence thereto affecting his individual liability, but may not attack the administrative order of the District Court in determining the need of an assessment, or in levying the same. *Great Western Telegraph Co.* v. *Purdy,* 162 U. S. 329, 336–7; *In re Remington Automobile & Motor Co.,* 153 Fed. 345; *In re Munger Vehicle Tire Co.,* 168 Fed. 910; *In re M. Stipp Construction Co.,* 221 Fed. 372. The District Court recognized this rule. It erred, as the Court of Appeals held, in concluding that Bergdoll had consented to the exercise by the bankruptcy court of jurisdiction to determine whether he was personally liable.

The decision of the Supreme Court of the State holding that the statute of limitations had run was said to be an application of the state law, settled at least since *Swearingen* v. *Sewickley Dairy Co.,* 198 Pa. 68, decided in 1901, that the liability of a shareholder in a Pennsylvania business corporation to creditors of the company on account of stock not full-paid becomes fixed at the time it is definitely ascertained that the company is insolvent and will be obliged to call unpaid stock subscriptions in order to satisfy its obligations; that as soon as the deficiency of assets becomes apparent, it becomes the duty of creditors, if they desire to obtain payment of their claims, to take the necessary steps to bring about a formal determination of the extent of the assessment on unpaid stock subscriptions necessary to liquidate the indebtedness and also to begin proper action to collect such amount from the respective stockholders within the time limited by the general statute of limitations. The sole question for decision is whether the state law governs in view of the proceedings had in bankruptcy.

The trustee contends that the statute of limitations did not begin to run until March 27, 1920, the date of the judgment of the Circuit Court of Appeals which confirmed the order making the assessment and authorized suit to collect it. This contention rests upon the assumption that Bergdoll's liability remained contingent until the entry of that judgment and, hence, that the cause of action arose then. The highest court of Pennsylvania has held that assessment was not a condition precedent to the existence of the cause of action; and that the liability became absolute without an assessment, either by the corporation or by any court, as soon as the need of this asset for paying debts became apparent. Compare *Potts* v. *Wallace,* 146 U. S. 689; *Kelley* v. *Gill,* 245 U. S. 116, 121. The nature, the extent, and the conditions of the liability of a stockholder on account of stock not full-paid depend primarily upon the law of the State or country by which the corporation was created. *Glenn* v. *Liggett,* 135 U. S. 533, 548. Compare *Benedict* v. *Ratner,* 268 U. S. 353, 359.[1] That law determines whether the liability is to the corporation or is to creditors.[2] Compare *Converse* v. *Hamilton,* 224 U. S. 243, 253; *Selig* v. *Hamilton,* 234 U. S. 652, 658. If the liability is to the corporation, it passes like other choses in action to the trustee in bankruptcy. The Bankrupt Law does not modify this right of action against the stockholder or create a new one. It merely provides that the right created by the state law shall pass to the trustee and be enforced by him for the benefit of creditors. The order

[1] See *Maryland Rail Co.* v. *Taylor,* 231 Fed. 119, 120; *Enright* v. *Hecksher,* 240 Fed. 863, 878; *In re Manufacturers' Box & Lumber Co.,* 251 Fed. 957; *Wallace* v. *Weinstein,* 257 Fed. 625; *Johnson* v. *Louisville Trust Co.,* 293 Fed. 857.

[2] See *In re Jassoy Co.,* 178 Fed. 515; *Babbit* v. *Read,* 215 Fed. 395; 236 Fed. 42, 49, 50; *Courtney* v. *Georger,* 228 Fed. 859; *Courtney* v. *Croxton,* 239 Fed. 247; *Petition of Stuart,* 272 Fed. 938; *In re Pipe Line Oil Co.,* 289 Fed. 698.

of assessment and the direction that the trustee sue to recover were appropriate administrative proceedings in bankruptcy. See *In re Miller Electrical Maintenance Co.*, 111 Fed. 515. But it was for the court of Pennsylvania to say whether they were indispensable to the enforcement of the stockholder's liability.

Scovill v. *Thayer*, 105 U. S. 143, upon which the trustee relied, is not inconsistent with the conclusion stated. That was a suit brought in the federal court for Massachusetts to enforce the liability of a stockholder in a Kansas corporation. The courts of Kansas had not settled when the cause of action created by its law arose. The trial court and this Court were, therefore, obliged to decide that question of state law. See *Burgess* v. *Seligman*, 107 U. S. 20, 33.

Affirmed.

MELLON, AGENT, ETC. *v.* WEISS, ADMINISTRATOR, ETC.

CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, MASSACHUSETTS.

No. 223. Argued March 19, 1926.—Decided April 12, 1926.

1. Substitution of the federal Agent as defendant in a suit erroneously brought against a railroad company on a cause of action for non-delivery of goods that arose during federal control, is in effect the commencement of a new and independent proceeding. *Davis* v. *Cohen Co.*, 268 U. S. 638. P. 567.
2. Therefore the suit will be barred by a time limit in the bill of lading if the substitution be not made within that limit, dating from the arising of the cause of action. *Id.*

250 Mass. 12, reversed.

CERTIORARI to a judgment, entered upon direction of the Supreme Judicial Court of Massachusetts, adjudging damages to the plaintiff Weiss, as administrator, in a suit brought originally against the New York, New

Haven & Hartford Railroad Company for non-delivery of a bale of rags. Davis, Director General of Railroads and Agent under the Transportation Act, was substituted as defendant below, and in this court was succeeded by the petitioner Mellon.

Mr. Arthur W. Blackman for petitioner.

Mr. John W. Keith, with whom *Mr. Benjamin Rabalsky* was on brief, for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

In November, 1918, while the New York, New Haven & Hartford Railroad was under federal control, a bale of rags was received for shipment to Louis Cutler, the owner. The reasonable time for delivery expired in December, 1918. The rags were never delivered. Cutler assigned his claim for damages to Nominsky. In May, 1919, the latter commenced this action thereon in a state court of Massachusetts. Because he named the Railroad Company as sole defendant, the action was dismissed by the trial court. In June, 1921, that judgment was affirmed by the Supreme Judicial Court. *Nominsky* v. *New York, New Haven & Hartford R. R. Co.,* 239 Mass. 254. See *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554. In January, 1922, the writ and declaration were, by leave of the trial court, amended under § 206(a), Transportation Act, 1920, c. 91, 41 Stat. 456, 461, by substituting as defendant Davis, Agent and Director General. The summons was immediately served upon him. Later, Nominsky died. Weiss, his administrator, was substituted as plaintiff.

Davis, appearing specially to object to the jurisdiction of the court over him, asked that the suit be dismissed. Without waiving that objection, he asked for judgment upon the following among other grounds. The shipment

had been made on an order bill of lading which provided that: "Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." Davis claimed that, although the substitution of him as defendant was made within two years from the termination of federal control, the action was barred by the bill of lading, because the substitution was not made until after two years and one day from the lapse of the reasonable time for delivery. The objection was overruled by the trial court; and it entered judgment for the plaintiff. The Appellate Division ordered judgment for the defendant. The Supreme Judicial Court reversed that order and directed the trial court to enter judgment for the plaintiff. *Weiss* v. *Director General of Railroads,* 250 Mass. 12. This Court granted a writ of certiorari, 267 U. S. 588, on January 26, 1925.

Since then, *Davis* v. *L. L. Cohen & Co., Inc.,* 268 U. S. 638, 640, 642, has settled that a suit against a railroad company is not a suit against the Director General; that § 206(d) of Transportation Act, 1920, authorized substitution of the designated Agent as defendant only in a suit which had been brought during federal control against the Director General; and that in a suit against a railroad company pending at the termination of federal control an amendment of the writ and declaration by substituting as defendant the designated Agent is to be deemed the commencement of a new and independent proceeding to enforce the liability of the Government. Applying that rule, there was in the case at bar no suit to enforce the Government's liability pending at the termination of federal control. The order substituting the Agent was not made until more than two years and a day after the cause of action arose; and as such an order of substitution is held to be the commencement of a new and independent

proceeding, it follows that the suit is barred by the terms of the bill of lading.

Other objections made by the defendant to the action of the state court need not be considered.

Reversed.

TUTUN *v.* UNITED STATES.

NEUBERGER *v.* UNITED STATES.

ON CERTIFICATE FROM THE CIRCUIT COURTS OF APPEALS FOR THE FIRST AND SECOND CIRCUITS.

Nos. 762, 824. Argued March 3, 1926.—Decided April 12, 1926.

1. An order of the District Court granting or denying a petition for naturalization is a final decision within the meaning of Jud. Code § 128. P. 575.
2. Whenever the law provides a remedy enforceable in the federal courts according to the regular course of legal procedure, and that remedy is pursued, there arises a "case" within the meaning of the Constitution, Art. III, § 2, whether the subject of the litigation be property or status. P. 576.
3. A petition for naturalization is a "case" within the meaning of Jud. Code § 128, and an order of the District Court denying the petition is reviewable by the Circuit Court of Appeals. Pp. 577, 578.

RESPONSE to questions certified by Circuit Courts of Appeals in naturalization proceedings.

Mr. Louis Marshall, with whom *Messrs. William H. Lewis, Matthew M. Levy,* and *Eugene Untermyer* were on the brief, for petitioners.

A final decision of a United States district court rendered in a naturalization proceeding is appealable because such a proceeding is a "case" within the meaning of the Judicial Code. Such a proceeding must be regarded as a "case" in the constitutional and statutory sense of the term; otherwise our courts, from the lowest to the highest, in passing upon hundreds of thousands of

such proceedings would have acted extrajudicially. That would be in direct contravention of the rule laid down in *Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 40; *Gordon* v. *United States,* 117 U. S. 697; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Comm.,* 215 U. S. 216; *Muskrat* v. *United States,* 219 U. S. 346; *Smith* v. *Adams,* 130 U. S. 167; *In re Pacific Ry. Comm.,* 32 Fed. 241.

The power to naturalize is judicial and not ministerial or clerical and cannot be delegated. That naturalization is a judicial proceeding is well settled. *Spratt* v. *Spratt,* 4 Pet. 393; *Dolan* v. *United States,* 133 Fed. 440; *Re Symanowsski,* 168 Fed. 978; *McCarthy* v. *Marsh,* 5 N. Y. 263; *Matter of Clark,* 18 Barb. 444.

An order admitting an alien to citizenship has been repeatedly declared to be a judgment of the same dignity as any other judgment of a court having jurisdiction. It is an adjudication on personal status. *Spratt* v. *Spratt,* 4 Pet. 393; *Campbell* v. *Gordon,* 6 Cr. 176; *Stark* v. *Chesapeake Ins. Co.,* 7 Cr. 420; *Chas. Green's Son* v. *Salas,* 31 Fed. 106; *United States* v. *Norsch,* 42 Fed. 417; *United States* v. *Aakervik,* 180 Fed. 137; *Tinn* v. *District Attorney,* 148 Cal. 773; *Scott* v. *Strobach,* 49 Ala. 477; *In re An Alien,* 7 Hill 137; *United States* v. *Gleason,* 78 Fed. 396, af. 90 Fed. 778; *In re Bodek,* 63 Fed. 813.

Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy within the meaning of these terms as used in the Constitution. *Smith* v. *Adams,* 130 U. S. 167; *United States* v. *Lenore,* 207 Fed. 865; *Osborn* v. *Bank of United States,* 9 Wheat. 738; *Cohens* v. *Virginia,* 6 Wheat. 264. The judicial power of the United States extends to all cases arising under the Constitution or laws of the United States and the treaties made by their authority. *Chisholm* v. *Georgia,*

2 Dall. 419. A case arises under the Constitution or laws of the United States whenever its correct decision depends upon the right construction of either. *Nashville* v. *Cooper,* 6 Wall. 247. A controversy as to rights claimed under an Act of Congress falls within the third clause of Rev. Stats., § 709, as a case wherein a title or right is claimed under a statute of the United States. *Telluride Power Co.* v. *Rio Grande Ry.,* 175 U. S. 639. See also *Cooke* v. *Avery,* 147 U. S. 375; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447.

We call attention to a large number of instances in which various of the circuit courts of appeals, as well as this Court, have entertained appellate jurisdiction with respect to judgments in naturalization proceedings where cases have been brought up either by the petitioner or the United States on writ of error or by appeal. See *United States* v. *Lenore,* 207 Fed. 865.

It was not necessary for Congress to provide in the Naturalization Law for a direct review in order that final decisions of a district court in naturalization proceedings may be appealable. *United States* v. *Ness,* 245 U. S. 319, is not authority for such a proposition.

Section 15 of the Naturalization Act of 1906 provides for a method, at the suit of the Government, of cancellation of naturalization certificates illegally obtained. As shown above, numerous appeals have been taken in such proceedings. There is nothing in this section which expressly authorizes such appeals. Yet the right of either party to appeal from a final decision in such a proceeding does not seem to be questioned. It is submitted that there is no difference in substance between such a proceeding and the original proceeding for naturalization, and if an appeal is proper in one case, it must be proper in the other.

The right to become a citizen is a matter of the utmost moment to the petitioner in naturalization proceedings.

Upon the granting or denial of his petition depend his status and the most important civil and political rights. If denied, he continues to be an alien; he cannot exercise the rights of citizenship; he is deprived of the protection incident to citizenship. In most States he cannot vote or participate in the affairs of government, and in many States he is debarred from becoming an incorporator or director of companies or the owner of real property. In many parts of the country he cannot be employed on public works; he is not permitted to practice law, however qualified he may be, or to engage in various kinds of business as to which by statutory enactment citizenship is made an essential qualification. He is subjected to a multitude of inconveniences and discriminatory regulations. If, therefore, he has shown himself entitled to naturalization, and that right is denied to him, he certainly would be deprived of the most precious right that an inhabitant of the United States can possibly possess; and if such right can be withheld from him by the determination of a single judge, his further deprivation of his right to review such determination would result not only in grave injustice to the individual but in a distinct injury to the public. Moreover, it might occasion, in some sections of the country, a wholesale denial of the right of naturalization. The only safeguard against such a course resides in the right of appeal. *In re Fordiani,* 98 Conn. 435.

That it was not considered necessary to have a specific provision in the Act of 1906 authorizing appeals becomes evident from a consideration of the debate in the Committee of the Whole referred to in the note on page 326 of the opinion in *United States* v. *Ness,* 245 U. S. 319. Subsequent to the decision in that case, this Court, in effect, entertained jurisdiction of an appeal like that taken in the present cases. *Ozawa* v. *United States,* 260 U. S. 178.

If the requirements of the statute are met, then naturalization is a right and not a favor. *United States* v. *Shanahan,* 232 Fed. 169; *United States* v. *Jorgenson,* 241 Fed. 412; *Spratt* v. *Spratt,* 4 Pet. 393.

In a petition or proceeding for naturalization of aliens, the court is vested with a legal, but not a personal discretion to determine whether an alien is qualified for admission to citizenship. *United States* v. *Hrasky,* 240 Ill. 560; *United States* v. *Kichin,* 276 Fed. 818; *In re Fordiani,* 98 Conn. 435; *United States* v. *Vogel,* 262 Fed. 262. See also, *Spratt* v. *Spratt,* 4 Pet. 393; *Re Symanowsski,* 168 Fed. 978; *Re Clark,* 18 Barb. 444; *Davis* v. *Boston Ry.,* 235 Mass. 482.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Mr. Franklin G. Wixon* were on the brief, for the United States.

The preponderance of decisions in state and lower federal courts is adverse to the right of appeal.

Section 128 of the Judicial Code does not extend to the cases at bar. *United States* v. *Dolla,* 177 Fed. 101; *Muskrat* v. *United States,* 219 U. S. 346.

Doubts certainly exist as to the "finality" of such a decision as that here involved. Whether a decision favorable to the alien, admitting him to citizenship, is or is not "final" is not the question in these cases. Presumably such a decision is final. But with regard to a decision unfavorable to the alien, (which is the question here involved,) different considerations arise. His application may have been denied, or consideration of it may have been postponed, for some temporary reason, not going to the merits. He may be debarred because he has not "behaved as a man of good moral character" during the five years preceding his application. In that event, it would seem that the action of the court in denying his application will not prevent him from applying again after the lapse of another five years. *In re Guliano,* 156 Fed. 420;

In re Argento, 159 Fed. 498; *In re Centi,* 217 Fed. 833; *Gassola* v. *Commanding Officer,* 248 Fed. 1001; *In re Pollock,* 257 Fed. 350. There is a conflict of opinion as to the power of a court to add to its denial of an application a clause providing that the applicant shall be " forever debarred " from again applying for citizenship. *In re Kornstein,* 268 Fed. 172; *State ex rel. Weisz* v. *District Court,* 61 Mont. 427; *Marx* v. *United States,* 276 Fed. 295.

Naturalization proceedings, it is true, have been entrusted to the courts (both state and federal) since the beginning; and this grant of power to the judiciary is clearly constitutional. *Holmgren* v. *United States,* 217 U. S. 509. The control of naturalization proceedings is therefore within the legitimate scope of the judicial power; and such proceedings may be classed as " cases and controversies " within the meaning of the Constitution. But the word " case," like any other word, may have one meaning when used in the Constitution and quite another when used in a statute. *Lamar* v. *United States,* 240 U. S. 60. A hearing on a petition for naturalization may be a " case " to which the constitutional power of the courts may extend; and it may still not constitute a " case " which is appealable under § 128 of the Judicial Code. In many naturalization cases, it may happen that no appearance is entered against the applicant. *In re Mudarri,* 176 Fed. 465. In nearly all such cases, the decision of the district court is based largely upon a personal scrutiny of the applicant and his witnesses, upon the manner in which they answer the questions put to them, upon their frankness and intelligence, and upon many other such elements, none of which can be crystallized in a bill of exceptions or adequately weighed by any appellate tribunal.

The decisions of this Court, and the legislative history of the Act of 1906, show that no right of appeal exists. *Johannessen* v. *United States,* 225 U. S. 227; *United States* v. *Ness,* 245 U. S. 319; *Luria* v. *United States,* 231

U. S. 9; 40 Cong. Rec. part 8, pp. 7786–7787. Congress not merely failed to provide a remedy by appeal in naturalization cases, but, having specifically considered the very point, deliberately refused to make such a provision.

It is urged by opposing counsel that if there is a right of appeal under § 15, there must also be a right of appeal in the cases at bar. Proceedings for cancellation under § 15, however, are materially different from original petitions for naturalization. *Luria* v. *United States,* 231 U. S. 9; *United States* v. *Ness,* 245 U. S. 319. In *Ozawa* v. *United States,* 260 U. S. 178, the question as to jurisdiction was not raised at any stage of the case. See *Webster* v. *Fall,* 266 U. S. 507.

The courts enumerated in § 13 of the Act of 1906 have "exclusive jurisdiction" to naturalize aliens. The terms of the Act are mandatory. No court save those enumerated may naturalize any aliens. Even judges of those courts may not exercise the power at chambers or in any place save in open court. *United States* v. *Ginsberg,* 243 U. S. 472.

Mr. Justice Brandeis delivered the opinion of the Court.

These cases present, by certificate, the question whether the circuit courts of appeals have jurisdiction to review a decree or order of a federal district court denying the petition of an alien to be admitted to citizenship in the United States.

The existence of the jurisdiction was assumed by this court, without discussion, in *Ozawa* v. *United States,* 260 U. S. 178. It has been exercised by the courts of appeals in most of the circuits.[1] In the Fifth Circuit,

[1] In the following cases appellate courts entertained jurisdiction over petitions for naturalization without expressly considering the existence of a right of appeal. First Circuit: *Harmon* v. *United*

jurisdiction was denied in *United States* v. *Dolla,* 177 Fed. 101. Although the correctness of that decision was questioned by Judge Amidon in *United States* v. *Lenore,* 207 Fed. 865, 869, and by Judge Hough in *United States* v. *Mulvey,* 232 Fed. 513, 521–2, it has been followed in the Third Circuit and in the Eighth.[2] In the state courts judgments granting or denying petitions for naturalization have generally been held to be reviewable on appeal, like other cases.[3]

The "jurisdiction to naturalize aliens as citizens of the United States" is conferred by Act of June 29, 1906, c. 3592, § 3, 34 Stat. 596, upon the district courts, among others. Jurisdiction to review the "final decision in the

States, 223 Fed. 425. Second Circuit: *United States* v. *George,* 164 Fed. 45; *United States* v. *Poslusny,* 179 Fed. 836; *United States* v. *Cohen,* 179 Fed. 834; *United States* v. *Balsara,* 180 Fed. 694; *United States* v. *Fokschauer,* 184 Fed. 990; *Yunghauss* v. *United States,* 218 Fed. 168; *United States* v. *Meyer,* 241 Fed. 305; *United States* v. *Vogel,* 262 Fed. 262. Third Circuit: *United States* v. *Martorana,* 171 Fed. 397. Fourth Circuit: *Bessho* v. *United States,* 178 Fed. 245; *Dow* v. *United States,* 226 Fed. 145. Seventh Circuit: *United States* v. *Doyle,* 179 Fed. 687. Eighth Circuit: *United States* v. *Brelin,* 166 Fed. 104; *United States* v. *Ojala,* 182 Fed. 51; *United States* v. *Peterson,* 182 Fed. 289. Ninth Circuit: *United States* v. *Rodiek,* 162 Fed. 469. District of Columbia: *United States* v. *Daly,* 32 App. D. C. 525. See *In re Centi,* 217 Fed. 833.

[2] *United States* v. *Neugebauer,* 221 Fed. 938; *Appeal of Cook,* 242 Fed. 932; *Marx* v. *United States,* 276 Fed. 295. See *United States* v. *Nopoulos,* 225 Fed. 656, 659; *United States* v. *Koopmans,* 290 Fed. 545, 547; *United States* v. *Wexler,* 8 Fed. (2d) 880, 881.

[3] *In re Fordiani,* 98 Conn. 435; *United States* v. *Hrasky,* 240 Ill. 560; *United States* v. *Gerstein,* 284 Ill. 174; *Ex parte Smith,* 8 Blackf. 395; *Dean, Petitioner,* 83 Me. 489; *State* v. *District Court,* 107 Minn. 444; *Ex parte Johnson,* 79 Miss. 637; *State* v. *District Court,* 61 Mont. 427; *State* v. *Judges of Inferior Court,* 58 N. J. L. 97; *United States* v. *Breen,* 135 App. Div. 824; *In re Karasick,* 208 App. Div. 844; *In re Vura,* 5 Ohio App. 334; *Ex parte Granstein,* 1 Hill (S. C.) 141. The right of appellate review was denied in *In re Wilkie,* 58 Cal. App. 22; *State* v. *Superior Court,* 75 Wash. 239.

district courts . . . in all cases," except as otherwise provided, was conferred by Act of March 3, 1891, c. 517, § 6, 26 Stat. 826, 828, upon circuit courts of appeals. This provision was re-enacted in Judicial Code, § 128, and by Act of February 13, 1925, c. 229, 43 Stat. 936, in § 128(a). The order granting or denying a petition for naturalization is clearly a final decision within the meaning of that section. *Ex parte Tiffany,* 252 U. S. 32. This is true, although a certificate granted may be cancelled under § 15 of the Naturalization Act, *United States* v. *Ness,* 245 U. S. 319, and a denial of the petition may not preclude another application for naturalization. *In re Pollock,* 257 Fed. 350. Compare *Salinger* v. *Loisel,* 265 U. S. 224, 230. The substantial question is whether a petition for naturalization is a case within the meaning of the Courts of Appeals Act.

The function of admitting to citizenship has been conferred exclusively upon courts continuously since the foundation of our Government. See Act of March 26, 1790, c. 3, 1 Stat. 103. The federal district courts, among others, have performed that function since the Act of January 29, 1795, c. 20, 1 Stat. 414. The constitutionality of this exercise of jurisdiction has never been questioned. If the proceeding were not a case or controversy within the meaning of Art. III, § 2, this delegation of power upon the courts would have been invalid. *Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 40; *Muskrat* v. *United States,* 219 U. S. 346. Whether a proceeding which results in a grant is a judicial one, does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself and provide only an administrative remedy. *United States* v. *Babcock,* 250 U. S. 328, 331. It may provide a legal remedy, but make resort to the courts available

only after all administrative remedies have been exhausted. Compare *New Orleans* v. *Paine,* 147 U. S. 261; *United States* v. *Sing Tuck,* 194 U. S. 161; *American Steel Foundries* v. *Robertson,* 262 U. S. 209. It may give to the individual the option of either an administrative or a legal remedy. Compare *Clyde* v. *United States,* 13 Wall. 38; *Chorpenning* v. *United States,* 94 U. S. 397, 399. Or it may provide only a legal remedy. Compare *Turner* v. *United States,* 248 U. S. 354. Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status. A petition for naturalization is clearly a proceeding of that character.

The petitioner's claim is one arising under the Constitution and laws of the United States. The claim is presented to the court in such a form that the judicial power is capable of acting upon it. The proceeding is instituted and is conducted throughout according to the regular course of judicial procedure. The United States is always a possible adverse party. By § 11 of the Naturalization Act the full rights of a litigant are expressly reserved to it. See *In re Mudarri,* 176 Fed. 465. Its contentions are submitted to the court for adjudication. See *Smith* v. *Adams,* 130 U. S. 167, 173–174. Section 9 provides that every final hearing must be held in open court; that upon such hearing the applicant and witnesses shall be examined under oath before the court and in its presence; and that every final order must be made under the hand of the court and shall be entered in full upon the record. The judgment entered, like other judgments of a court of record, is accepted as complete evidence of its own validity unless set aside. *Campbell* v. *Gordon,* 6 Cranch 176; *Spratt* v. *Spratt,* 4 Pet. 393, 408. It may not be collaterally attacked. *Pintsch Compressing Co.*

v. *Bergin,* 84 Fed. 140. If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit. "It is in this respect," as stated in *Johannessen* v. *United States,* 225 U. S. 227, 238, "closely analogous to a public grant of land (Rev. Stat., § 2289, etc.,) or of the exclusive right to make, use and vend a new and useful invention (Rev. Stat., § 4883, etc.)."

The opportunity to become a citizen of the United States is said to be merely a privilege and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. Art. I, § 8, cl. 4. The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate. See *United States* v. *Shanahan,* 232 Fed. 169, 171. There is, of course, no "right to naturalization unless all statutory requirements are compiled with." *United States* v. *Ginsberg,* 243 U. S. 472, 475; *Luria* v. *United States,* 231 U. S. 9, 22. The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfilment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the court. *In re Bodek,* 63 Fed. 813, 814, 815; *In re an Alien,* 7 Hill (N. Y.) 137. In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor.

The Government contends that, at all events, a naturalization proceeding is not a case within the meaning of the Court of Appeals Act. The same phrase may, of course, have different meanings when used in different

connections. *Lamar* v. *United States,* 240 U. S. 60, 65. The Constitution does not require that a litigant be afforded the opportunity of having every judicial decision reviewed by an appellate court. Compare *Rogers* v. *Peck,* 199 U. S. 425, 435. But the Court of Appeals Act conferred upon that court appellate jurisdiction of final decisions of the district courts " in all cases " except those for which it provided a direct review by this Court. See *Lou Ow Bew* v. *United States,* 144 U. S. 47, 57; *The Paquete Habana,* 175 U. S. 677, 683–686. A denial of a review in naturalization cases would engraft an exception upon an otherwise universal rule. Compare *Craig* v. *Hecht,* 263 U. S. 255, 274–276; *In re Graves,* 270 Fed. 181. There is nothing in that Act, which should limit the application of the all-embracing language used.

It is argued that the Naturalization Act denies appellate jurisdiction, since § 3 declares that "exclusive jurisdiction to naturalize aliens as citizens " is conferred upon the federal and state courts there specified, and these do not include the circuit courts of appeals. The term " exclusive " was used in § 3 in order to withdraw the jurisdiction which minor state courts, being courts of record, had exercised under the authority conferred by earlier naturalization statutes. See House Doc. No. 46, 59th Cong., 1st sess., Ser. No. 4984, pp. 18-24. The section makes no reference to appellate proceedings. It is also argued that Congress manifested the intention of denying the usual method of appellate review by providing in § 15 for a bill in equity to cancel certificates of citizenship. The remedy afforded to the Government by § 15 is narrower in scope than the review commonly afforded by appellate courts. Moreover, there is no corresponding provision which would afford to the applicant for citizenship an independent remedy for correcting errors committed in the district court.

Since the adoption of the Constitution, Congress has by its legislation sought to promote the naturalization of

qualified resident aliens. The Act of 1906 did not introduce any change in policy. It did change, in some respects, the qualifications. And to carry out the established policy through more effective application of the law, it made changes in administrative and judicial machinery. That end is subserved by the correction of errors of the trial court through appellate review. Neither *United States* v. *Ness,* 245 U. S. 319, 326, nor the history of the legislation there referred to, leads to a denial of appellate review. In that case attention was called to the fact that Congress had not provided in the Act of 1906 for an appeal from judgments of the state courts admitting aliens to citizenship. The question under discussion was whether a judgment of naturalization entered by a state court barred as *res judicata* a proceeding brought in a federal court under § 15 to cancel the certificate of naturalization.

To the questions asked in the two cases, we answer that the Circuit Court of Appeals has jurisdiction to review by appeal the order or decree of the District Court denying the petition to be admitted to citizenship in the United States.

Questions answered in the affirmative.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY ET AL. *v.* PEORIA & PEKIN UNION RAILWAY COMPANY.

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

No. 767. Argued March 17, 1926.—Decided April 12, 1926.

1. An order of the Interstate Commerce Commission dismissing, without reservation, a complaint, necessarily operates to rescind an earlier order which rested upon that complaint alone. P. 584.

2. Such an order operates according to its terms until modified by formal action of the Commission, and can not be affected by an opinion of what was intended by it, expressed by a Commissioner in a telegram. P. 585.
3. An order of the Commission reopening a case for further hearing had not the effect of reviving a former order, granting relief, which had been rescinded by an order dismissing the original complaint. *Id.*
4. Jurisdiction of the District Court over a suit to enforce an order of the Commission depends on the state of things existing when the suit was brought. P. 586.

Affirmed.

APPEAL from a decree of the District Court dismissing the bill in a suit to enforce an alleged order of the Interstate Commerce Commission.

Mr. Donald Evans, with whom *Mr. M. M. Joyce* was on the brief, for appellants.

Mr. Eugene E. Horton, with whom *Mr. Robert V. Fletcher* was on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit by the Minneapolis & St. Louis Railroad Company and its receiver against the Peoria & Pekin Union Railway Company was brought on August 6, 1925, in the federal court of southern Iowa. Its purpose is to enjoin the defendant from refusing to switch cars for the plaintiffs, the claim being that the defendant is directed to perform this service by an order of the Interstate Commerce Commission dated April 13, 1922. The controversy between the parties has been repeatedly before the Commission. One phase was considered by this Court in *Peoria & Pekin Union Ry. Co.* v. *United States,* 263 U. S. 528. The case at bar presents only questions of jurisdiction and procedure.

The defendant is an Illinois corporation with its principal place of business in that State. The only service upon it was made there. Appearing specially, it objected both to the service and to the jurisdiction of the court, and moved that the service be quashed and the bill be dismissed. The plaintiffs contended that, under the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, the federal court for southern Iowa had jurisdiction and the service was good, because the suit is one to enforce an order of the Commission made on petition of the plaintiff company, a resident of that district. The court held, upon final hearing, that the order was no longer in effect when this suit was begun, and that, for this reason, it was without jurisdiction over the defendant. The decree entered set aside the service of process and dismissed the bill for want of jurisdiction. The case is here on direct appeal under paragraph 4 of § 238 of the Judicial Code as amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938. The Peoria Company concedes that the order was duly entered April 13, 1922. *Minneapolis & St. Louis R. R. Co.* v. *Peoria & Pekin Union Ry. Co.*, 68 I. C. C. 412. The Minneapolis & St. Louis concedes that, unless the order was still in force when the bill was filed, the service was a nullity and the court without jurisdiction over the defendants. Compare *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 622; *Blumenstock Bros.* v. *Curtis Publishing Co.*, 252 U. S. 436. The main question for decision is whether, on the facts to be stated, the order was in force at the time the bill was filed.

The Commission had found that the Peoria Company discriminated against the Minneapolis & St. Louis by imposing upon it a switching charge while certain other carriers were not required to pay any charge. By the order of April 13, 1922, the Commission directed that the discrimination be removed. That order left the Peoria Company free to remove the discrimination either by discontinuing

the charge complained of or by making a like charge to the other lines. Compare *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 521. It elected to remove the discrimination by making a charge to the other carriers and filed tariffs to that end. The other carriers protested. The new tariffs were suspended for consideration by the Commission in a new proceeding known as Investigation and Suspension Docket No. 1596. At the request of the Minneapolis & St. Louis, the proceeding which it had brought was, by order of July 10, 1922, reopened for further hearing in this connection. On December 22, 1922, the Commission concluded that the new tariffs were not justified; and that a still broader investigation involving additional parties must be had before just rates could be established. *Intermediate Switching Charges at Peoria, Ill.*, 77 I. C. C. 43. On that day, it entered an order in the original proceeding brought by the Minneapolis & St. Louis: "That the complaint in this proceeding be, and it is hereby, dismissed." On the same day, it entered in the later proceeding in order that the new tariffs be cancelled.

The Peoria Company concluded that the order dismissing the complaint in the proceeding instituted by the Minneapolis & St. Louis had the effect of rescinding the order of April 13, 1922, based thereon, and that its original tariff of charges against the Minneapolis & St. Louis, which had never been cancelled, remained in full force. On January 4, 1923, it notified the Commission that it would act accordingly. On January 5, 1923, the Chairman of Division 5 of the Commission [1] telegraphed the Peoria

[1] Pursuant to paragraph 4 of § 17 of the Interstate Commerce Act as amended, matters relating to common use of terminals and kindred subjects are referred to Division 5. The Commissioner in each division, senior in service, is its chairman. See Annual Report of Interstate Commerce Commission for 1920, pp. 4, 5; *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 281.

Company that the order of April 13, 1922, "still stands unrescinded." On January 8, 1923, the Commission entered, of its own motion, pursuant to paragraph 2 of § 13 of the Interstate Commerce Act as amended, an order for a general investigation into switching charges at Peoria. With the proceeding so ordered, it reopened and consolidated the earlier ones. On January 18, 1923, the Commission issued the emergency service-order requiring the Peoria Company to continue switching which this Court held to be void in *Peoria & Pekin Union Ry. Co. v. United States,* 263 U. S. 528, decided January 7, 1924.

The Minneapolis & St. Louis contends that the dismissal of its complaint on December 22, 1922, did not operate as a rescission of the order which had been entered thereon April 13, 1922. The argument is that the order by its terms provided that it "shall continue in force until the further order of the commission"; that, moreover, paragraph 2 of § 15 of the Interstate Commerce Act as amended provides that all orders of the Commission "shall continue in force until its further order . . . unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction"; that no order issued in terms rescinding the order of April 13, 1922, had ever been entered; that by § 16a the mere reopening of the case by the Commission did not so operate; and that, as the Commission in ordering dismissal of the complaint did not refer to the order of April 13, 1922, the latter remained in full force. The contention is unsound. The order of December 22, 1922, dismissed the complaint without making any reservation. It operated, therefore, to rescind the order of April 13, 1922, which rested on that complaint alone. Compare *Greenleaf* v. *Queen,* 1 Pet. 138, 148–149; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 451; *Coleman* v. *Hudson River Bridge Co.,* 5 Blatchf. 56, 58.

The Minneapolis & St. Louis contends, also, that if the dismissal of the complaint operated as a rescission of the

order of April 13, 1922, later action of the Commission restored it. The argument is that the telegram of January 5, 1923, and subsequent action of the Commission show that it was not its intention, when dismissing the complaint, to rescind the order; that paragraph 6 of § 16 of the Act as amended authorized the Commission to modify "its orders upon such notice and in such manner as it shall deem proper"; that the order of January 8, 1923, besides providing for the general investigation, provided that the original proceeding of the Minneapolis & St. Louis be "reopened, consolidated with and made a part of this investigation"; and that thereby the Commission restored the order of April 13, 1922. This contention, also, is unsound. The Commission did not at any time before the bringing of this suit make any order which purported either to rescind the order of dismissal of December 22, 1922, or to restore the order of April 13, 1922, or which made any reference either to such dismissal or to a restoration. The opinion of a commissioner, expressed in the telegram of January 5, 1923, that the order of April 13, 1922, was in full force despite the dismissal of the complaint was without legal significance. The effect of the order of dismissal entered December 22, 1922, must be determined by the terms of the order, unless and until modified by formal action of the Commission. It cannot be affected by what a member of the Commission may declare informally was intended. The order of January 8, 1923, had the effect of restoring to the docket the original proceeding instituted by the Minneapolis & St. Louis; but by reopening the case for further hearing, the Commission did not indicate a purpose to restore the order of April 13, 1922. Compare *Knox County* v. *Harshman,* 132 U. S. 14, 16, 17.

The Minneapolis & St. Louis seeks, through a motion to remand, to avoid affirmance of the decree which must otherwise result from overruling these contentions. This

motion, which was filed on January 7, 1926, prayed that the case be remanded to the District Court with instructions to allow it to file a supplemental bill in the nature of a bill of review, because of matters arising since the filing of the record in this Court. It prayed in the alternative that this Court treat the record here as supplemented by incorporating a statement of these later occurrences. They are as follows: On November 2, 1925, the Minneapolis & St. Louis filed in the federal court for southern Iowa a suit against the United States in which it prayed that the order of December 22, 1922, be annulled insofar as it operated to revoke the order of April 13, 1922. On November 10, 1925, the Commission, on its own motion, ordered that its order of December 22, 1922, dismissing the complaint of the Minneapolis & St. Louis "be, and it is hereby, vacated and set aside." Still later, following the proceeding before the Commission known as *Rates, Regulations and Practices of Peoria & Pekin Union Railway Company at Peoria, Ill., and Nearby Points,* 93 I. C. C. 3, the examiner recommended that the original tariff of the Peoria Company complained of by the Minneapolis & St. Louis be cancelled. The later facts alleged could not conceivably affect the result of the case before us. The jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought. *Mollan* v. *Torrance,* 9 Wheat. 537; *Anderson* v. *Watt,* 138 U. S. 694. The situation is wholly unlike that in *Ballard* v. *Searls,* 130 U. S. 50, upon which the Minneapolis & St. Louis relies. The motion to remand is denied.

The Peoria Company makes this further objection. The order of April 13, 1922, directed the removal of the discrimination to which the Minneapolis & St. Louis was subjected, but left the Peoria Company free to select the method of doing so. It elected to impose like switching charges upon the other carriers and to that end filed new tariffs. These were cancelled by the order of December

22, 1922. Thus the method to be pursued in removing the discrimination was left at large. The Peoria Company contends that, even if the order of April 13, 1922, be deemed to have been in force, selection and approval of the method to be pursued in the removal of discrimination present administrative problems, and that further action by the Commission would be required before any court could be called upon to enforce that order. As the District Court for southern Iowa was without jurisdiction of this suit because that order was not in force, we need not consider this objection.

Affirmed.

SMITH ET AL. *v.* ILLINOIS BELL TELEPHONE COMPANY.

THE SAME *v.* THE SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Nos. 193, 670. Argued March 5, 1926.—Decided April 12, 1926.

1. An order granting an interlocutory injunction is merged in a decree of permanent injunction, and, when both are appealed from, the appeal from the former will be dismissed. P. 588.
2. A suit against a state commission to enjoin enforcement of confiscatory rates will not be defeated by the objection that the plaintiff should first have exhausted its legislative remedy by filing a new application for increases, when the plaintiff's application for that purpose had been uniformly recognized by the commission as pending before it and the objection was purely technical. P. 590.
3. A public service company, suffering from confiscatory rates, is not required to await indefinitely a decision by the rate-making tribunal on a pending application before applying to a federal court for equitable relief. P. 591.
4. In a suit to restrain a state commission from enforcing confiscatory telephone rates, the telephone subscribers are represented by the commission and bound by the decree. P. 592.

Affirmed.

APPEALS from an interlocutory order and a final decree of the District Court, enjoining members of a state commission and the state Attorney General from enforcing confiscatory telephone rates.

Messrs. Harry C. Heyl and *R. H. Radley,* with whom *Messrs. Oscar E. Carlstrom* and *S. F. McGrath* were on the brief, for appellants.

Mr. William D. Bangs, with whom *Messrs. Philip B. Warren* and *Charles M. Bracelen* were on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The telephone company, an Illinois corporation, owns and operates a telephone system in the City of Peoria and vicinity. It brought suit on June 18, 1924, against appellants (members of the state Commerce Commission and Attorney General of the State of Illinois) to enjoin them from enforcing or attempting to enforce a schedule of rates alleged to be confiscatory, and from taking any steps or proceedings against the company by reason of the collection by it of rates and charges under another and higher schedule. A motion to dismiss the bill was overruled; and, upon the bill and attached exhibits and affidavits, appellants refusing to plead further, a permanent injunction in accordance with the prayer was granted by the lower court. The appeal in No. 670 is from that decree.

The appeal in No. 193 is from an order, previously entered, granting an interlocutory injunction. A motion to dismiss that appeal on the ground that the order for the interlocutory injunction had become merged in the final decree, was submitted but consideration postponed to the hearing on the merits. The motion is now granted

and the appeal in No. 193 dismissed. *Shaffer* v. *Carter,* 252 U. S. 37, 44; *Pacific Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 205. In the cases cited, both interlocutory and permanent injunctions had been denied; here they were granted; but the record discloses no reason which prevents the same principle from being applicable.

The averments of the bill, which, upon this record, must be taken as true, disclose the following facts: The operations of the company were conducted with reasonable economy. For the year 1921, the net revenues, after payment of operating expenses and taxes, were, in round figures, $46,000; for the year 1922 there was a deficit of over $48,000; for 1923, a deficit of nearly $65,000; and a deficit for each month of the year 1924 preceding the filing of the bill. The fair value of the property, including working capital, material and supplies, and going value, was at least $3,800,000.

In July, 1919, the predecessor in ownership of the company filed with the commission a schedule of rates covering the telephone service in question, which the commission, by final order after a hearing, approved. Prior to that order, however, the predecessor of the company had filed with the commission a second schedule of increased rates, to become effective May 1, 1920. The commission first suspended the effective date of this schedule until August 29, 1920; and then, by successive orders, until February 26, 1921, August 26, 1921, and February 23, 1922. The present company, in December, 1920, succeeded to the property and rights of its predecessor.

During 1920, hearings were had before the commission in respect of the justice and reasonableness of the rates proposed by the second schedule, but no determination of the matter was reached. The commission, although often requested by the company to do so, thereafter failed and refused to hold further hearings, but on October 31, 1921, entered an order purporting permanently to sus-

pend, cancel and annul the second schedule. A rehearing was applied for and denied.

Thereupon, an appeal was prosecuted to the Circuit Court of Peoria County; and that court, on April 6, 1922, reversed the commission's order and remanded the cause for further proceedings. The commission redocketed the cause and had hearings in June, July and September, 1922, after which the company filed its written motion requesting the commission to make effective a temporary schedule of rates pending a final determination. This motion was denied on September 28, 1922. On July 5, 1923, the company called attention to the delay in the determination of the cause, and to the fact that the revenues derived from the operation of the Peoria exchange fell short of meeting its operating expenses, and requested the commission to set the cause for an early hearing. This request was ignored; and the commission ever since has failed and refused to determine the issues in the cause or to determine whether the rates and charges provided in the second schedule are just and reasonable; but has continued in effect the rates and charges contained in the first schedule approved by it. These rates not only do not yield a fair return, but are insufficient to pay the operating cost of rendering telephone service to the subscribers and patrons of the exchange. Finally, it is alleged that the company is deprived of its property without due process of law and is denied the equal protection of the law, in violation of the Fourteenth Amendment to the federal Constitution.

This conclusion, which necessarily results from the facts, is not seriously challenged, but a reversal of the decree below is sought on the ground that the company, prior to filing its bill, had not exhausted its legislative remedies. The argument seems to be that the second proposed schedule of rates, filed while the first was pending, purported to cancel the first schedule; that the order putting into

force the rates in the first schedule was in effect a finding against the second and put an end to it; that no legal application for an increase of rates has since been made: therefore, when the suit was brought, nothing was before the commission upon which that body could lawfully act. The short answer is that the commission, after disposing of the first schedule, had uniformly treated the second as pending; had held hearings and made interlocutory orders in respect of it; had entered an order for its permanent suspension; after reversal by the state court on appeal, by which tribunal it was regarded as properly pending, had restored it to the docket for further proceedings; and had held further hearings. To say now that all this shall go for naught and that the company must institute another and distinct proceeding, would be to put aside substance for needless ceremony.

It thus appears that, following the decree of the state court reversing the permanent order in respect of the second schedule and directing further proceedings, the commission, for a period of two years, remained practically dormant; and nothing in the circumstances suggests that it had any intention of going further with the matter. For this apparent neglect on the part of the commission, no reason or excuse has been given; and it is just to say that, without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before apply-

ing to a federal court for equitable relief. The facts, which the motion to dismiss conceded, present a far stronger case for such relief than any of the cases with which this court dealt in *Okla. Gas Co.* v. *Russell,* 261 U. S. 290, 293; *Prendergast* v. *N. Y. Tel. Co.,* 262 U. S. 43, 49; *Pacific Tel. Co.* v. *Kuykendall, supra,* p. 204; and *Banton* v. *Belt Line Ry.,* 268 U. S. 413, 415.

Some complaint is made to the effect that the decree attempts to bind persons not parties to the suit, including thousands of subscribers, and to prohibit appellants from enforcing in the future any legislative remedy for excessive charges, hereafter imposed, however unreasonable they may be. As to the first branch of the complaint, it is only necessary to say that the commission represents the public and especially the subscribers, and they are properly bound by the decree. *In re Engelhard,* 231 U. S. 646, 651. As to the other objection, there is nothing in the decree, rightly construed, which attempts to curtail or could curtail the legislative or rate-making powers of appellants to proceed hereafter under the state law, subject to such limitations, if any, as may be required by the doctrines of *res judicata,* ordinarily applicable in such cases.

Decree affirmed.

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

Syllabus.

MOORE, PRESIDENT OF THE ODD-LOT COTTON EXCHANGE OF NEW YORK, *v.* NEW YORK COTTON EXCHANGE ET AL.

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

No. 200. Argued March 9, 1926.—Decided April 12, 1926.

1. Relief, under the Trade Commission Act, against unfair competition, must be afforded in the first instance by the Commission. P. 603.
2. A decree of the Circuit Court of Appeals affirming orders which denied an interlocutory injunction to the plaintiff and granted one to the defendant, and remanding the cause with direction to dismiss the bill and make the injunction permanent, is final for purposes of appeal. *Id.*
3. Transactions between the members of the New York Cotton Exchange, consisting of agreements made on the spot for purchase and sale of cotton for future delivery, the cotton to be represented by warehouse receipts issued by a licensed warehouse in the Port of New York and to be deliverable from such warehouse, are local transactions not involving interestate commerce. *Id.*
4. The fact that such agreements are likely to give rise to interstate shipments does not make the agreements interstate commerce, such shipments being merely incidental. *Id.*
5. A contract between the cotton exchange and a telegraph company, under which the exchange at its own expense collects its quotations of such sales and delivers them to the telegraph company, which transmits them like other messages, at the charges of the recipients, to such persons only as the exchange approves, the telegraph paying the exchange for the privilege of having the business,—is not a violation of the Sherman Anti-Trust Act. P. 604.
6. In thus furnishing quotations to some and refusing them to others, the exchange is but exercising the ordinary right of a vendor of news; the telegraph company, as carrier, can not deliver the messages to others than those designated by the seller; and the contract between exchange and telegraph does not, in purpose or effect, operate directly or unreasonably to restrain interstate commerce, or to create a monopoly. P. 605.
7. A bill setting up a claim under a federal statute which, though unjustified, is not devoid of all color of merit, invokes the federal

100569°—26——38

jurisdiction to decide the claim, and a decision dismissing the bill upon rejection of the claim is not a dismissal for want of jurisdiction. P. 608.

8. Under Equity Rule 30, requiring that the answer state any counterclaim "arising out of the transaction which is the subject matter of the suit," a cotton exchange, in a suit against it and a telegraph company to cancel a contract between them respecting the sending out of exchange quotations and for a mandatory injunction to compel delivery of quotations to plaintiff, was entitled to seek by counterclaim an injunction restraining the plaintiff from wrongfully obtaining its quotations. P. 609.

296 Fed. 61, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which on interlocutory appeal sustained orders of the District Court (291 Fed. 681) refusing an interlocutory injunction to the plaintiff and granting one for a defendant on a counter claim, and which directed a final decree dismissing the bill and making the injunction permanent. The suit was based on the Sherman Law and primarily concerned the validity of a contract between the New York Cotton Exchange and the Western Union Telegraph Company for the distribution of quotations of that exchange to such persons only as received its approval.

Mr. John M. Coleman, with whom *Mr. Oscar B. Bergstrom* was on the brief, for appellant.

Under the circumstances, the continuous cotton quotations, as made and issued by the New York Cotton Exchange, are an instrumentality of interstate commerce—as much so as a railroad car or telegraph wire. It is true that the cotton sought to be bought and sold is not yet in transit in interstate commerce, but its initiation into interstate commerce depends upon the use of these quotations, which the appellees furnish to appellant's competitors, but deny to appellants, and hence restrain the appellant from competing in such interstate commerce.

The question here is not whether the quotations arise out of local transactions or otherwise, but the nature and functions of the quotations themselves, after they have been created, and become a distinct property or instrumentality. The fact that the quotations arise out of local transactions can have no greater bearing upon the question as to whether they constitute interstate commerce, than the fact that cotton shipped in interstate commerce has been grown on a plantation within the State as a local production.

The gravamen of the bill is, that the New York Cotton Exchange, in formulating quotations of actual transactions and selling the quotations to individuals and other exchanges in the State of New York, and in other States, for use in purchase, sale, and transportation of cotton, is engaged in interstate commerce as to these particular quotations,—which is an entirely different question from transactions taking place on the board of the exchange.

The Western Union Telegraph Company, having acquired the exclusive right to such quotations, is engaged in selling the same in all States of the United States where there are dealings in and transportation of cotton, and in transmitting such quotations over its wires, and so is engaged in interstate commerce with reference to these particular quotations.

The cases of *Hopkins* v. *United States,* 171 U. S. 578, and *Anderson* v. *United States,* 171 U. S. 604, have often been considered by this Court, and have been narrowly limited to their facts. *Stafford* v. *Wallace,* 259 U. S. 44; *Swift* v. *United States,* 196 U. S. 375. The case at bar is much stronger than *Ramsay & Co.* v. *Associated Bill Posters,* 260 U. S. 501, and comes within the decisions quoted above, and *Binderup* v. *Pathe Exchange,* 263 U. S. 491.

The allegations of the bill show that the continuous quotations constitute an absolute monopoly of the sale

and transportation of cotton in interstate commerce, and that, by confining such quotations to its members and its selected customers, the Exchange restrains and prevents all competition in the cotton industry. It is conceded that no person can conduct such a business without the use of such quotations. The Exchange, being engaged in the business of selling its quotations, cannot lawfully discriminate in such a manner as to produce a monopoly in the cotton industry. *United States* v. *Patten,* 226 U. S. 525.

Assuming that the continuous cotton quotations are instrumentalities of interstate commerce, and have been dedicated to that service by the voluntary act of the owner, appellant contends that any act of the owner, tending to create a monopoly in the cotton industry, or imposing a burden upon, or restriction in, the free flow of commerce in such industry among the States, constitutes a violation of the Sherman Anti-Trust Law, and may be enjoined under the Clayton Act. Under the contract, the Exchange has sold the continuous cotton quotations to the Telegraph Company for $27,500 per annum. The Telegraph Company is authorized to resell the quotations at any price it sees fit, excepting, however, the members of the Cotton Exchange, to whom the resale price is fixed. The Cotton Exchange has no pecuniary interest in such resale. It has parted with its title to the quotations. It has, however, reserved the right to select the persons to whom the Telegraph Company may resell such quotations. The reservation is arbitrary and not in anywise conditional. See *Strauss* v. *Victor Co.,* 243 U. S. 490; *Bauer* v. *O'Donnell,* 229 U. S. 1.

The Telegraph Company was not the agent of the Exchange, but by the purchase of the quotations became and was the owner of them. The Telegraph Company is a *quasi* public service corporation, and when it engaged in the business of selling cotton quotations, and

transmitting the same over its wires, became bound, as a condition of its corporate existence, to furnish such quotations to all persons on equal basis. As a public service corporation, it was bound to serve all to the extent of its capacity or none. *Doty* v. *American Tel. & Tel. Co.,* 123 Tenn. 320; *Western Union Tel. Co.* v. *Foster,* 224 Mass. 365; *Thomas* v. *Railway Co.,* 101 U. S. 83, and other cases.

The court had no jurisdiction of the counterclaim because, first, it does not arise out of any transaction between the parties which is the subject matter of the suit, second, the counterclaim is not one which might be the subject of an independent suit in equity against the appellant in a federal court. *Standard Paint Co.* v. *Trinidad Asphalt Co.,* 220 U. S. 446; *Ayers* v. *Wiswall,* 112 U. S. 190; *Merchants Co.* v. *Clow,* 204 U. S. 290; *U. S. Boat Co.* v. *Kronche Hardware Co.,* 234 Fed. 868; *Engineering Co.* v. *Gallion Truck Co.,* 243 Fed. 407; *Geneva Furniture Co.* v. *Karpen,* 238 U. S. 254; *Cushman* v. *Atlantis Pen Co.,* 164 Fed. 94; *National Casket Co.* v. *Brooklyn Casket Co.,* 185 Fed. 533; *Electric Boat Co.* v. *Lake Torpedo Boat Co.,* 215 Fed. 377; *Johnston* v. *Brass Goods Mfg. Co.,* 201 Fed. 368; *Keasby Co.,* v. *Phillip Carey Co.,* 113 Fed. 43; *King & Co.* v. *Englander,* 133 Fed. 416; *Mecky* v. *Grabowski,* 177 Fed. 591; *Burt* v. *Smith,* 71 Fed. 161.

Mr. George W. Wickersham, with whom *Messrs. Henry W. Taft* and *George Coggill* were on the brief, for New York Cotton Exchange, appellee.

This suit is not sustainable under the federal Anti-Trust Laws. *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *Amer. Tobacco Co.,* 221 U. S. 106; *United States* v. *Union Pacific R. R. Co.,* 226 U. S. 61; *United States* v. *Reading Co.,* 226 U. S. 324; *Nash* v. *United States,* 229 U. S. 373; *Eastern States Lumber Assn.* v.

United States, 234 U. S. 600; *United States* v. *Joint Traffic Assn.,* 171 U. S. 505; *Hopkins* v. *United States,* 171 U. S. 578; *Anderson* v. *United States,* 171 U. S. 604; *Board of Trade* v. *United States,* 246 U. S. 231.

In determining whether the contract is within the statute, all the facts and circumstances existing at the time of its enactment, as well as its effect, are to be taken into consideration. *Anderson* v. *United States,* 171 U. S. 604; *Cont. Wall Paper Co.* v. *Voight & Sons Co.,* 212 U. S. 227; *United States* v. *St. Louis Terminal,* 224 U. S. 383; *United States* v. *Union Pacific R. R. Co.,* 226 U. S. 61; *United States* v. *Reading Co.,* 226 U. S. 324; *Swift* v. *United States,* 196 U. S. 375.

The contract does not undertake to fix the prices which the Telegraph Company must exact from those desiring the continuous or other quotations. It does fix the maximum price to be charged members of the Exchange, but does not prescribe minimum prices to anybody. *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339; *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373; *Bauer & Cie* v. *O'Donnell,* 229 U. S. 1; *Straus* v. *Am. Publishers Assn.,* 231 U. S. 222; *Straus* v. *Victor Co.,* 243 U. S. 490; *Boston Store* v. *Am. Graphophone Co.,* 246 U. S. 8; *United States* v. *Schrader's Sons, Inc.,* 252 U. S. 85. The contract is but a normal method of accomplishing a highly beneficial purpose—the prevention of the use of quotations in bucket shops. As such the contract is not within § 1 of the Sherman Act as construed by decisions of this Court already cited. Nor can the contract be construed as an attempt to monopolize interstate commerce within § 2 of the Sherman Anti-Trust Act. The quotations of the Cotton Exchange, when collected and distributed under the restrictions prescribed by this contract, are property and belong exclusively to that Exchange. *Board of Trade* v. *Christie,* 198 U. S. 236; *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322.

In legal effect, this is a contract by which the Telegraph Company, as the carrier, agrees to transmit this news for the Exchange to certain persons to be designated by it, and to accept from the Exchange as compensation for the service all that can be realized from the quotations in excess of $27,500 per year, the Telegraph Company guaranteeing that the distribution shall net the Exchange that sum. In other words the Exchange is the real distributor of the quotations, and the Telegraph Company is an agency employed by the Exchange to facilitate such distributions. A similar contract was thus construed in *Matter of Renville,* 46 App. Div. 37. See also *Wilson* v. *Commercial Telegram Co.,* 3 N. Y. Supp. 633, and *Bryant* v. *Western Union Tel. Co.,* 17 Fed. 825.

As the owner of the quotations, the Exchange is under no legal duty to sell to any particular person nor to sell to all because it sells to some. *Whitwell* v. *Cont. Tobacco Co.,* 125 Fed. 454; *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290; *Lumber Assn.* v. *United States,* 234 U. S. 600; *United States* v. *Colgate & Co.,* 250 U. S. 300; *United States* v. *Schrader's Son, Inc.,* 252 U. S. 85; *Bitterman* v. *L. & N. R. R. Co.,* 207 U. S. 205; *Federal Trade Comm.* v. *Curtis Pub. Co.,* 260 U. S. 568; *Board of Trade* v. *Christie Co.,* 198 U. S. 236; *Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373; *New York, etc., Exchange* v. *Board of Trade,* 127 Ill. 153.

The following cases uphold the right of an Exchange—at least in the absence of affirmative legislation—to say to whom its quotations shall go, especially where, as in the case at bar, they are collected by the Exchange itself. *Board of Trade* v. *Christie,* 116 Fed. 944; *Matter of Renville,* 46 App. Div. 37; *Met. Grain & Stock Exch.* v. *Board of Trade,* 15 Fed. 847; *Bryant* v. *Western Union Co.,* 17 Fed. 825; *Marine Grain & Stock Exch.* v. *Western Union Co.,* 22 Fed. 23; *Wilson* v. *Comm. Tel. Co.,* 3 N. Y. Supp. 633.

That private property may be impressed with a public use only by legislative act has also been decided. *Express Cases,* 117 U. S. 1; *A. T. & S. F. R. Co.* v. *D. & N. O. R. Co.,* 110 U. S. 667; *State* v. *Associated Press,* 159 Mo. 410; *Ladd* v. *S. C. P. & M. Co.,* 53 Tex. 172; *Del. L. & W. R. R.* v. *Central Stock Yards Co.,* 45 N. J. Eq. 50; *Heim* v. *N. Y. Stock Exchange,* 118 N. Y. Supp. 591.

Compare *New York, etc., Exchange* v. *Board of Trade,* 127 Ill. 153, and *Amer. Live Stock Commission Co.* v. *Chicago Live Stock Exchange,* 143 Ill. 210.

The quotations, not being impressed with a public use while in the possession of the Exchange, do not become thus open to all when given to the Telegraph Company. The Exchange is the distributor through the agency of the Telegraph Company. *Matthews* v. *Associated Press,* 136 N. Y. 333; *State* v. *Associated Press,* 159 Mo. 410. The Telegraph Company under this contract acquires, if any interest, only a restricted one—a right to sell to certain designated persons; and when it has done this its entire interest in the quotations is gone. *Bitterman* v. *L. & N. R. R. Co.,* 207 U. S. 205. Furthermore, if the Telegraph Company be adjudged the seller of the quotations, it is not, in delivering them to the designated persons, acting in its public capacity as a common carrier, but merely as a dealer in news, and it should not be required to give to others what it has not itself legally acquired. Again, there are certain things a carrier may do, which are not subject to the rule that all persons must be treated by it alike. *Missouri Pacific R. R.* v. *Nebraska,* 164 U. S. 403; *Express Cases,* 117 U. S. 1; *Donovan* v. *Penn. Co.,* 199 U. S. 279; *Old Colony R. R.* v. *Tripp,* 147 Mass. 35; *Sargent* v. *Boston & Lowell R. R.,* 115 Mass. 416. A telegraph company, although a common carrier, as respects the transmission of messages for hire, is not such in its purchase and sale of news. *Brad-*

ley v. *Western Union Co.,* 8 Ohio Dec. 707; *Sterrett* v. *Telegraph Co.,* 18 Weekly Notes of Cas. 77. See also *Ches. & Pot. Tel. Co.* v. *Manning,* 186 U. S. 238.

The transactions on which the amended bill is based do not involve interstate commerce. *Hopkins* v. *United States,* 171 U. S. 578; *Anderson* v. *United States,* 171 U. S. 604; *Ware & Leland* v. *Mobile County,* 209 U. S. 405; *Hill* v. *Wallace,* 259 U. S. 44; *Board of Trade* v. *Christie Co.,* 198 U. S. 236.

The Circuit Court of Appeals had jurisdiction to entertain appellees' counterclaim and to grant a final injunction thereon.

Mr. Francis R. Stark filed a brief for the Western Union and the Gold Stock Telegraph Companies, appellees.

Mr. Justice Sutherland delivered the opinion of the Court.

The Odd-Lot Cotton Exchange is an organization whose members make contracts for themselves and for customers for the future delivery of cotton in lots of not more than 100 nor less than 10 bales. The members of the New York Cotton Exchange, which is organized under a special act of the New York Legislature, c. 365, Laws 1871, p. 724, also make contracts for the purchase and sale of cotton for future delivery, either for themselves or for customers; such contracts being made only upon open *viva voce* bidding, between certain hours of the day and in the rooms of the exchange in New York City. Quotations of prices thus established are collected by the New York exchange, and, under the terms of a written agreement with that exchange, the Western Union company pays $27,500 annually for the privilege of receiving and distributing them throughout the United States, to such persons as the exchange approves. Applicants for such quotations must sign an application and agree not to

use them in connection with a bucket shop or to give them out to other persons. The Gold & Stock Telegraph Company, a New York corporation and a subsidiary of, and controlled by, the Western Union, is engaged in disseminating quotations of cotton prices by means of ticker service, owned and operated by it, tickers being located in exchanges, brokerage houses and elsewhere in the several states. The Odd-Lot exchange made application to the two telegraph companies for this service in the form required by the contract with the New York exchange. It was refused, the New York exchange having declined to give its consent to the installation on the ground, among others, that, after investigation, it had ascertained that the Odd-Lot had succeeded another exchange which had been convicted of conducting a bucket shop and that the Odd-Lot had in its membership many members of the convicted exchange and was organized as a cover to enable its members to engage in the same unlawful business.

Federal jurisdiction is invoked under the anti-trust laws of the United States. The bill avers that the contracts between members of the Odd-Lot are chiefly for producers of cotton and others located, resident and in business in other states than New York, and are made and effectuated by communications through the Western Union by wire; that such contracts concern and include deliveries of cotton from cotton-growing states to and into the State of New York, involving actual interstate shipment and transportation; that the New York exchange has a monopoly upon the receipt and dissemination of cotton price quotations, through which quotations and prices of cotton, both spot and for future delivery, are influenced, guided and fixed in the exchanges and markets throughout the United States; that the contract with the Western Union is in restraint of interstate trade and commerce in cotton and was entered into for

the purpose of monopolizing and restraining that commerce. There is an attempt to allege unfair methods of competition, which may be put aside at once, since relief in such cases under the Trade Commission Act must be afforded in the first instance by the commission.

The prayer is for a decree cancelling the Western Union contract, adjudging the New York Cotton Exchange to be a monopoly, restraining appellees from refusing to install a ticker and furnish the Odd-Lot and its members, as they do others, with continuous cotton quotations, and for other relief.

The answer, in addition to denials and affirmative defensive matter, sets up a counterclaim to the effect that the Odd-Lot, though it had been refused permission to use the quotations of the New York exchange, was purloining them, or receiving them from some person who was purloining them, and giving them out to its members, who were distributing them to bucket ships, with the consequent impairment of the value of appellees' property therein. An injunction against the continuance of this practice was asked.

Both parties moved for interlocutory injunctions. The district court denied appellant's motion and granted that of appellees. 291 Fed. 681. Upon appeal, both orders were affirmed by the court of appeals. 296 Fed. 61. By stipulation of the parties authorizing such action, the court of appeals remanded the cause with directions to the district court to enter a final decree dismissing the bill and making permanent the injunction granted appellees. Since this left to the district court only the ministerial duty of complying with the mandate, the decree below, for purposes of appeal, is final. *Gulf Refining Co.* v. *United States,* 269 U. S. 125, 136.

First. We are of opinion that upon the allegations of the bill no case is made under the federal anti-trust laws.

The only possible ground on which the suit can be maintained rests in the claim that there is a violation of §§ 1 and 2 of the Sherman Anti-Trust Act, c. 647, 26 Stat. 209, for which appellant is entitled to sue under § 16 of the Clayton Act, c. 323, 38 Stat. 737. And whether this claim is tenable turns alone upon the effect of the contract between the New York exchange and the Western Union. Independent of that contract, there is no averment of fact in the bill upon which a violation of the Anti-Trust Act can be predicated. The New York exchange is engaged in a local business. Transactions between its members are purely local in their inception and in their execution. They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the Port of New York and be deliverable from such warehouse. Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another. If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. *Ware & Leland* v. *Mobile County,* 209 U. S. 405, 412–413. The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough. *Engel* v. *O'Malley,* 219 U. S. 128, 139. See also *Hopkins* v. *United States,* 171 U. S. 578, 588, 590; *Anderson* v. *United States,* 171 U. S. 604, 615–616.

It is equally clear that the contract with the Western Union for the distribution of the quotations to such persons as the New York exchange shall approve does not fall within the reach of the Anti-Trust Act. Under that contract, the exchange at its own expense collects the quo-

tations and delivers them to the telegraph company for distribution to such approved persons. The real distributor is the exchange; the telegraph company is an agency through which the distribution is made. In effect, the exchange hands over the quotations, as it might any other message, to the telegraph company for transmission, charges to be collected from the receivers. The payment which the telegraph company makes to the exchange is for the privilege of having the business. It does not alter the character of the service rendered.

In furnishing the quotations to one and refusing to furnish them to another, the exchange is but exercising the ordinary right of a private vendor of news or other property. As a common carrier of messages for hire, the telegraph company, of course, is bound to carry for all alike. But it cannot be required—indeed, it is not permitted—to deliver messages to others than those designated by the sender. We fully agree with what is said upon similar facts by Judge Ingraham in *Matter of Renville,* 46 App. Div. 37, 43–44:

"I cannot see that it makes any difference whether a despatch is given to a telegraph company to be communicated to a single individual, or to be communicated to ten, a hundred or a thousand individuals. Under this agreement between the stock exchange and the respondents, certain information is given to the telegraph company to be communicated to individuals or corporations designated by the stock exchange. Whether we call this information a special despatch or general information which the stock exchange desires to communicate, seems to me to be entirely immaterial. The fact that the telegraph company pays to the stock exchange a certain sum of money for the information which it receives to transmit is also immaterial. The substance is that those to whom this information is directed to be given by the stock exchange are willing to pay the stock exchange for such

information, and are also willing to pay the telegraph company the expense of transmitting the information. The information delivered to the respondents for transmission is a communication which the stock exchange wishes to transmit to the persons it designates and to no one else. I can see no reason why the stock exchange should be required to furnish the appellant with this information, which relates solely to its own business upon its own property, or why the respondents should be required to violate their agreement with the stock exchange and the law of this State, and furnish to the appellant information which had been communicated to the respondents by the stock exchange for a specific purpose and none other."

So far as the exchange is concerned, the evident purpose of the contract was to further and protect its business. The terms are entirely appropriate and legitimate to that end. The effect of the making and execution of the contract upon interstate trade or commerce, if any, is indirect and incidental. Neither in purpose nor effect does it directly or unreasonably restrain such commerce or operate to create a monopoly. It has long been settled by this court that under such circumstances a trader or manufacturer engaged in a purely private business may freely exercise his independent discretion in respect of the persons with whom he will deal and to whom he will sell and refuse to sell. Cases to this effect are cited in the opinion of the court below. It is unnecessary to repeat, or add to, those citations here. It is enough to refer to the decision of this court in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250, 252, where, in all essential particulars, the question now under review was presented and determined. There a suit was brought by the Board of Trade to enjoin the defendants from getting and distributing price quotations on sales of grain and provisions for future delivery. They were

obtained in some way not disclosed, but not from either of the telegraph companies authorized by contract to distribute them, as the Western Union was authorized here. This court held that the collection of quotations belonged to the Board and was entitled to protection; that the Board did not lose its rights by communicating the information to others in confidential relations to it and under contract not to make it public; and that defendants should be enjoined. Holding the contracts with the telegraph companies not to be in conflict with the Anti-Trust Act, it was said (p. 252):

"But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law. *Bement* v. *National Harrow Co.,* 186 U. S. 70; *Fowle* v. *Park,* 131 U. S. 88; *Elliman* v. *Carrington,* [1901] 2 Ch. 275. It is argued that the true purpose is to exclude all persons who do not deal through members of the Board of Trade. Whether there is anything in the law to hinder these regulations being made with that intent we shall not consider, as we do not regard such a general scheme as shown by the contracts or proved. A scheme to exclude bucket shops is shown and proclaimed, no doubt—and the defendants, with their contention as to the plaintiff, call this an attempt at a monopoly in bucket shops. But it is simply a restraint on the acquisition for illegal purposes of the fruits of the plaintiff's work. *Central Stock & Grain Exchange* v. *Board of Trade,* 196 Illinois, 396. We are of opinion that the plaintiff is entitled to an injunction as prayed."

Second. The decree granting an injunction upon the counterclaim is challenged on the grounds, shortly stated: (1) that the court, having dismissed the bill for lack of jurisdictional facts, should have dismissed the counter-

claim also, there being no independent basis of jurisdiction; (2) that the counterclaim does not arise out of any transaction which is the subject-matter of the suit; and (3) that the decree is not justified by the allegations of the counterclaim or the proof.

1. We do not understand that the dismissal was for the reason that there was an absence of jurisdiction to entertain the bill. What the court held was that the facts alleged were insufficient to establish a case under the Anti-Trust Act. Whether the objection that a bill of complaint does not state a case within the terms of a federal statute challenges the jurisdiction or goes only to the merits, is not always easy to determine. The question has been recently reviewed at some length by this court in *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305, and the distinction pointed out as follows:

"Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit. [Citing cases.] In that event the claim of federal right under the statute, is a mere pretence and, in effect, is no claim at all."

Here, facts are set forth in a serious attempt to justify the claim that the federal statute has been violated; and, while we hold them to be insufficient to sustain the claim,

we are not prepared to say that they are so obviously insufficient as to cause it to be without color of merit and, in effect, no claim at all. We think there is enough in the bill to call for the exercise of the jurisdiction of a federal court to decide, upon the merits, the issue of the legal sufficiency of the allegations to make out the claim of federal right. This was evidently the view of the court below, and we construe its mandate as a direction to dismiss the bill on the merits and not for want of jurisdiction.

2. Equity rule 30 in part provides:

"The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set up any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims."

Two classes of counterclaims thus are provided for: (a) one "arising out of the transaction which is the subject matter of the suit," which must be pleaded, and (b) another "which might be the subject of an independent suit in equity" and which may be brought forward at the option of the defendant. We are of opinion that this counterclaim comes within the first branch of the rule; and we need not consider the point that, under the second branch, federal jurisdiction independent of the original bill must appear, as was held in *Cleveland Engineering Co.* v. *Galion D. M. Truck Co.*, 243 Fed. 405, 407.

The bill sets forth the contract with the Western Union and the refusal of the New York exchange to allow appellant to receive the continuous cotton quotations, and asks a mandatory injunction to compel appellees to furnish them. The answer admits the refusal and justifies it. The counterclaim sets up that, nevertheless, appellant is

purloining or otherwise illegally obtaining them, and asks that this practice be enjoined. "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim. Compare *The Xenia Branch Bank* v. *Lee,* 7 Abb. Pr. 372, 390-394. And see generally, *Cleveland Engineering Co.* v. *Galion D. M. Truck Co., supra,* p. 408; *Champion Spark Plug Co.* v. *Champion Ignition Co.,* 247 Fed. 200, 203-205.

So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter; but the relief afforded by the dismissal of the bill is not complete without an injunction restraining appellant from continuing to obtain by stealthy appropriation what the court had held it could not have by judicial compulsion.

3. Finally, the point is made that the court of appeals erred in directing the district court to enter a final decree making permanent the interlocutory injunction granted

on the counterclaim because not warranted by the allegations or proof. Evidently for the purpose of facilitating an appeal to this court, appellant, by stipulation, consented that the affidavits filed in support of the preliminary application should be treated as testimony in support of the counterclaim and, on this, that the court of appeals might direct the entry of a final decree. The district court thought the pleadings and affidavits sufficient to warrant a preliminary injunction and the court of appeals thought them sufficient to sustain a decree making that injunction permanent. We see no reason to differ with their conclusions.

Decree affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* SCHENDEL, ADMINISTRATOR.

THE SAME *v.* ELDER.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Nos. 683, 684. Argued March 17, 18, 1926.—Decided April 12, 1926.

1. The effect of a judgment as *res judicata* between adverse parties is not dependent on the arrangement of the parties in the record or on which of them was the *actor*. P. 615.
2. A judgment on the same cause of action may be availed of as a bar in an action pending in another jurisdiction which began before the one in which the judgment was recovered. *Id.*
3. A judgment fixing the compensation recoverable on account of the death of a railroad employee, due to an accident in Iowa, was rendered by an Iowa court in proceedings under the Iowa compensation act brought by the railroad, and was pleaded by the railroad in an action brought against it for the same cause in Minnesota under the Federal Employers' Liability Act. *Held* that both courts had jurisdiction to decide whether the deceased was engaged in intrastate or interstate commerce, and that the Iowa judgment, being the earlier one rendered, was *res judicata* in the other action, although the other was brought first. P. 616.

4. Whenever an action may be properly maintained or defended by a trustee in his representative capacity without joining the beneficiary, the latter is bound by the judgment. P. 620.
5. The question of identity of parties in two actions is of substance; parties nominally the same may be in legal effect different, and parties nominally different may be in legal effect the same. *Id.*
6. Identity of parties exists between two proceedings to fix compensation or damages against a railroad for the accidental death of an employee, in one of which the state compensation law was invoked against the widow upon the ground that the deceased's employment was intrastate, while in the other the administrator sued under the Federal Employers' Liability Act upon the ground that it was interstate, the widow being the sole beneficiary in both cases. *Troxell* v. *Delaware, etc. R. R.*, 227 U. S. 434, distinguished. P. 617.
7. A decision fixing compensation, under the Iowa statute, made by the Deputy Industrial Commissioner, acting by stipulation in lieu of a board of arbitration, but pending on appeal to the Commissioner, is not final, and could not be invoked as an estoppel in another action. P. 623.

163 Minn. 460, reversed. *Ibid.* 457, affirmed.

CERTIORARI to judgments of the Supreme Court of Minnesota affirming judgments for damages in actions brought under the Federal Employers' Liability Act.

Mr. Edward S. Stringer, with whom *Messrs. M. L. Bell, W. F. Dickinson, Daniel Taylor, Thomas D. O'Brien,* and *Alexander E. Horn* were on the briefs, for petitioner.

Mr. Ernest A. Michel, with whom *Mr. Tom Davis* was on the briefs, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases grow out of an accident on the line of the railway company in Iowa, in which Hope was killed and Elder was injured under circumstances establishing the negligence of the railway company and its consequent liability for damages. The defense in each case was that the controlling issue had become *res judicata.* In the *Hope* case, petitioner pleaded a final judgment, entered,

under the Iowa Workmen's Compensation Law, by an Iowa state court of record possessing general jurisdiction, and, in the *Elder* case, a decision made by a deputy industrial commissioner appointed under the same law. In both cases, the full faith and credit clause of the federal Constitution was invoked. At the trials in the Minnesota district court, the judgment in the one case and the decision in the other, together with a copy of the Iowa Workmen's Compensation Law, all properly authenticated, were offered in evidence in support of the plea, but, upon objection, excluded. Verdicts against the railway company were rendered and judgments entered accordingly. Appeals to the state supreme court followed. The action of the Minnesota district court in refusing to give effect to the Iowa judgment and decision was assigned as error and duly challenged as denying them the full faith and credit enjoined by the federal Constitution; but the Minnesota supreme court, upon full consideration, sustained the trial court in that respect and affirmed both judgments. 163 Minn. 457, 460.

The Iowa Workmen's Compensation Law is elective in form. Hope and Elder were residents of Iowa and employees of the railway company, and it is not in dispute that they and the company had elected to be bound by its provisions. The statute will be found in the Code of Iowa, 1924, § 1361, *et seq.* It adopts a schedule of compensation; creates the office of industrial commissioner, and authorizes him to appoint a deputy, make rules and regulations not inconsistent with the act, summon witnesses, administer oaths, etc.; and contains other provisions, not necessary to be stated, for its administration and enforcement. If the parties fail to reach an agreement in regard to the compensation, the commissioner, at the request of either party, is directed to form a committee of arbitration to consist of three persons, one of whom shall be the commissioner, the others to be named

by the parties, respectively. The arbitrators are directed to hear the case and decide the matter. Their decision, together with a statement of the evidence, findings of fact, rulings of law and other pertinent matters, must then be filed with the commissioner. At the end of five days after such filing, unless a review is sought in the meantime, the decision becomes enforceable. Upon the application of any party in interest, the commissioner may review the decision; and, if any party be aggrieved by reason of his order or decree thereon, such party may appeal to the state district court having jurisdiction, in the manner and upon the grounds set forth in the act. The judgment of that court is given the same effect as though rendered in a suit duly heard and determined therein; and an appeal from it lies to the supreme court of the state.

No. 683.

In the *Hope* case, the action was brought in the Minnesota district court on February 21, 1923, under the Federal Employers' Liability Law for the sole benefit of the surviving widow. Thereafter, on March 2, 1923, the railway company instituted a proceeding before the Iowa Industrial Commissioner under the Iowa Workmen's Compensation Act. To this proceeding the decedent's widow was made a party, as the sole beneficiary under the act. The railway company asked for an arbitration. The widow answered, asserting that the compensation act did not apply because the company and the deceased were both engaged in interstate commerce at the time of the accident. Arbitrators were appointed, though the widow did not join in their appointment. The arbitrators found that deceased was engaged in intrastate commerce and that the case was governed by the compensation act, and awarded compensation to the widow. Thereupon, the widow filed an application in review with the commissioner. That officer reviewed the facts, specifically found

that the deceased was engaged in intrastate commerce, and approved the award. The widow then appealed to the district court of Lucas County, Iowa, and that court, on June 2, 1923, specifically held that the deceased was engaged in intrastate commerce and entered final judgment affirming the award. Thereafter, on March 4, 1924, the present action was heard in the Minnesota district court and verdict and judgment rendered for respondent.

The Minnesota supreme court held that the plea of *res judicata* was bad for two reasons: (1) that "the substantive right given the employe or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right; and that when he or his representative has chosen the forum to which to submit his cause, he cannot, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act;" and (2) that there was a lack of identity of parties, since under the Iowa statute the right of recovery is in the beneficiary while under the federal act the right is in the personal representative.

1. It is evident from the opinion, that the court formulated the first reason with some hesitation. It is elementary, of course, that, in any judicial proceeding, the arrangement of the parties on the record, so long as they are adverse, or the fact that the party against whom the estoppel is pleaded was an objecting party, is of no consequence. A judgment is as binding upon an unwilling defendant as it is upon a willing plaintiff. Nor is it material that the action or proceeding, in which the judgment, set up as an estoppel, is rendered, was brought after the commencement of the action or proceeding in which it is pleaded. Where both are *in personam,* the second action or proceeding "does not tend to impair or defeat the jurisdiction of the court in which a prior action for

the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res judicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 230.

It is urged in behalf of respondent, that the federal act is supreme and supersedes all state laws in respect of employers' liability in interstate commerce. That is quite true; but it does not advance the solution of the point in dispute, since it is equally true that, in respect of such liability arising in intrastate commerce, the state law is supreme. Judicial power to determine the question in a case brought under a state statute is in no way inferior or subordinate to the same power in a case brought under the federal act.

The Iowa proceeding was brought and determined upon the theory that Hope was engaged in intrastate commerce; the Minnesota action was brought and determined upon the opposite theory that he was engaged in interstate commerce. The point at issue was the same. That the Iowa court had jurisdiction to entertain the proceeding and decide the question under the state statute, cannot be doubted. Under the federal act, the Minnesota court had equal authority; but the Iowa judgment was first rendered. And, upon familiar principles, irrespective of which action or proceeding was first brought, it is the first final judgment rendered in one

of the courts which becomes conclusive in the other as *res judicata*. *Boatmen's Bank* v. *Fritzlen,* 135 Fed. 650, 667; *Merritt* v. *American Steel-Barge Co.,* 79 Fed. 228, 234; *Williams* v. *Southern Pac. Co.,* 54 Cal. App. 571, 575. And see *Insurance Co.* v. *Harris,* 97 U. S. 331, 336, where the rule as stated was recognized.

The Iowa court, under the compensation law, in the due exercise of its jurisdiction, having adjudicated the character of the commerce in which the deceased was engaged, that matter, whether rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified. *United States* v. *Moser,* 266 U. S. 236, 241, and cases cited. And, putting aside for the moment the question in respect of identity of parties, the judgment upon the point was none the less conclusive as *res judicata* because it was rendered under the state compensation law, while the action in which it was pleaded arose under the federal liability law. *Dennison* v. *Payne,* 293 Fed. 333, 341–342; *Williams* v. *Southern Pac. Co., supra,* pp. 174–175.

2. In the Iowa proceeding, the widow of the deceased was a party in her own right and clearly was bound by the judgment. The action in Minnesota, however, was brought by the administrator, and the state supreme court, on the authority of *Dennison* v. *Payne, supra,* pp. 342–343, held that there was a want of identity of parties. The decision in the *Dennison* case rests entirely on *Troxell* v. *Del., Lack. & West. R. R.,* 227 U. S. 434. The effect of the last named case we pass for later consideration.

Hope's death as the result of the negligence of the railroad company gave rise to a single cause of action, to be enforced directly by the widow, under the state law, or in the name of the personal representative, for the sole benefit of the widow, under the federal law, depending upon the character of the commerce in which the deceased and the company were engaged at the time of the acci-

dent. In either case, the controlling question is precisely the same, namely, Was the deceased engaged in intrastate or interstate commerce? and the right to be enforced is precisely the same, namely, the right of the widow, as sole beneficiary, to be compensated in damages for her loss. The fact that the party impleaded, under the state law, was the widow, and, under the federal law, was the personal representative, does not settle the question of identity of parties. That must be determined as a matter of substance and not of mere form. The essential consideration is that it is the right of the widow, and of no one else, which was presented and adjudicated in both courts. If a judgment in the Minnesota action in favor of the administrator had been first rendered, it does not admit of doubt that it would have been conclusive against the right of the widow to recover under the Iowa compensation law. And it follows, as a necessary corollary, that the Iowa judgment, being first, is equally conclusive against the administrator in the Minnesota action; for, if, in legal contemplation, there is identity of parties in the one situation, there must be like identity in the other.

The first proposition finds support in *Heckman* v. *United States,* 224 U. S. 413, 445–446, where this court held that the United States had capacity to maintain a suit to set aside conveyances made by Indian allottees of allotted lands and that the allottees need not be joined. The defendant in that case insisted that, unless the allottees who had executed the conveyances were brought in as parties, he was in danger of being subjected to a second suit by the allottees. Answering that contention, this court said:

"But if the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the rep-

resentation. *Kerrison* v. *Stewart,* 93 U. S. 155, 160; *Shaw* v. *Railroad Co.,* 100 U. S. 605, 611; *Beals* v. *Ill. &c. R. R. Co.,* 133 U. S. 290, 295. And it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question."

And, conversely, in *United States* v. *Des Moines Valley R. Co.,* 84 Fed. 40, where a suit in the name of the government was brought to enforce the right of a private party, it was held that a prior adverse adjudication by a state court in a suit against him personally, determining the same issues, was available as an estoppel against the government. The ground of the decision was thus stated (pp. 44–45):

"Inasmuch, then, as the government sues for the sole benefit of Fairchild, and for the professed purpose of reinvesting him with a title which he has lost, we are of opinion that, whether the present action be regarded as brought under the act of March 3, 1887 (24 Stat. 556, c. 376), or as brought in pursuance of its general right to sue, the government should be held estopped by the previous adjudications against the real party in interest in the state court. The subject-matter and the issue to be tried being the same in this proceeding as in the former actions, the losing party on the former trials ought not to be permitted to renew the controversy in the name of a merely nominal plaintiff, and thereby avoid the effect of the former adjudications. *Southern Minnesota Railway Extension Co.* v. *St. Paul & S. C. R. Co.,* 12 U. S. App. 320, 325, 5 C. C. A. 249, and 55 Fed. 690. This doctrine was applied by this court in the case of *Union Pac. Ry. Co.* v. *U. S.,* 32 U. S. App. 311, 319, 15 C. C. A. 123, and 67 Fed. 975, which was a suit brought by the United States under the act of March 3, 1887, wherein we

held that the United States was bound by an estoppel which might have been invoked against the real party in interest if the suit had been brought in his name, because it appeared that the United States had no substantial interest in the controversy, and was merely a nominal plaintiff."

Since the statutory authority of the administrator is to sue, not in his own right or for his own benefit or that of the estate, but in the right and for the sole benefit of the widow, the same principles are applicable, in accordance with the general rule that "whenever an action may properly be maintained or defended by a trustee in his representative capacity without joining the beneficiary, the latter is necessarily bound by the judgment." 1 Freeman on Judgments, 5th ed., § 500. Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, Bigelow on Estoppel, 6th ed., 145; and parties nominally different may be, in legal effect, the same. *Calhoun's Lessee* v. *Dunning,* 4 Dall. 120, 121; *Follansbee* v. *Walker,* 74 Pa. St. 306, 309; *In re Estate of Parks,* 166 Iowa 403.

In the *Follansbee* case, a judgment against Joshua Follansbee alone was held available as an estoppel in another action brought by Walker & Follansbee for the use of Joshua. Justice Sharswood, speaking for the court, said:

"The parties in that suit and in the action tried below were substantially the same. In the former, Joshua Follansbee was the legal, in the latter, he is the equitable plaintiff. The subject-matter of the two suits appeared by the record to be identical. The presumption would be upon the issues, that the merits had been passed upon in the former proceeding. Such being the case, if no technical objection appeared to have been raised upon the record to the right of Joshua Follansbee to maintain the action as legal plaintiff, the judgment in that action would be a bar to a subsequent action by him as equitable plain-

tiff. If it appeared that only the equitable, not the legal right, was in Joshua Follansbee, it would be presumed that the defendant had waived that purely technical objection. It would be very unreasonable and contrary to the settled rules upon the subject, to permit the plaintiff having once been defeated on the merits, to try the same question over again in a different form."

In the *Parks* case, a judgment against the sole beneficiary of an estate in her individual capacity, was held conclusive in a subsequent action by the same plaintiff against the same defendant as administratrix, on the ground that, while theoretically the former suit was not against the same defendant as administratrix, nevertheless she was the sole beneficiary of the estate and represented only herself in each case.

In *Corcoran* v. *Chesapeake, etc. Canal Co.*, 94 U. S. 741, 745, this court, holding that a judgment against a trustee for bondholders was conclusive in a suit involving the same subject-matter, brought by him in his individual character, said: "It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed." See also, *Kerrison, Assignee,* v. *Stewart et al.*, 93 U. S. 155, 160; *Spokane Inland R. R.* v. *Whitley,* 237 U. S. 487, 496; *Estate of Bell,* 153 Cal. 331, 344; *Chandler* v. *Lumber Co.*, 131 Tenn. 47, 51.

Upon facts almost identical with those now under review, it was held in *Williams* v. *Southern Pac. Co., supra,* pp. 571, 576, that there was a substantial identity of parties and that a judgment for the widow under the California compensation act was available as an estoppel in a prior action brought by her as administratrix under the federal act.

It remains only to consider the bearing of the *Troxell* case, *supra,* upon this point. Mrs. Troxell, the widow of

a deceased employee, sued the railroad company under a state statute, for the benefit of herself and minor children, to recover for the death of her husband resulting from a negligent failure to provide safe instrumentalities. There was a judgment against her. She then brought suit under the Federal Employers' Liability Act, as administratrix, averring the negligence of a fellow-servant, a ground of recovery which was not available to her in the action under the state statute. It was held, following the general rule, that, the cause of action in the two cases being different and the issue determined in the first not being involved in the second, there was no estoppel. This was decisive of the case, but the court proceeded to say that, furthermore, there was not an identity of parties in the two actions. Two former decisions of this court are cited,—*Brown* v. *Fletcher's Estate,* 210 U. S. 82, and *Ingersoll* v. *Coram,* 211 U. S. 335. Both cases, following the well-established rule, simply decide that there is no privity between administrators appointed in different states, since the authority of an executor or administrator appointed in one state does not extend to the property or administration in another state.

Whether, in the light of the foregoing views, we now should hold that where, as in the *Troxell* case, the rights of additional beneficiaries, not actual parties to the first judgment, are involved, the requirement of identity of parties is unsatisfied, is a question we do not feel called upon here to reexamine; since we are clear that such requirement is fully met in the situation now under consideration, where the sole beneficiary was an actual party to the proceeding under the state law, and present by her statutory representative in the action under the federal law, and no other rights were involved.

No. 684.

In the *Elder* case, as in the case just considered, the railway company began a proceeding before the indus-

trial commissioner. Elder answered, averring that he was engaged in interstate commerce at the time of the injury. The parties stipulated that the commissioner or his deputy should take the place of the arbitration committee; and the deputy commissioner, pursuant to the stipulation, heard the matter and filed his decision. Thereupon, Elder applied for a review by the commissioner, under the statute, but no action had been taken upon that application by the commissioner at the time the judgment was rendered in the Minnesota court. Under the Iowa statute, therefore, the decision had not ripened into an enforceable award; and we are not called upon to determine what, in that event, would have been its effect as an estoppel. The proceeding being still *in fieri* when the Minnesota case was tried and determined, the doctrine of *res judicata* is not applicable. There must be a final judgment. Bigelow on Estoppel, 6th ed., p. 64; *Webb* v. *Buckelew et al.*, 82 N. Y. 555, 559–560.

It follows that the judgment in the *Hope* case must be reversed and that in the *Elder* case affirmed.

No. 683. Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

No. 684. Judgment affirmed.

DECISIONS PER CURIAM, FROM JANUARY 12, 1926, TO AND INCLUDING APRIL 12, 1926, OTHER THAN DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI.

No. 387. ARTHUR VANDERBILT AND GEORGE WILSON, RECEIVERS OF THE SOUTHERN COTTON OIL COMPANY, *v.* ATLANTIC COAST LINE RAILROAD COMPANY. Error to the Supreme Court of the State of North Carolina. Motion to dismiss submitted January 11, 1926. Decided January 18, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code as amended by the Act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Fullerton-Krueger Lumber Co.* v. *Northern Pac. Ry. Co.*, 266 U. S. 435, 436, *Mr. Thomas W. Davis* for the defendant in error, in support of the motion. *Mr. Harry W. Van Dyke* for plaintiffs in error, in opposition thereto.

No. 729. NORTHERN CEDAR COMPANY *v.* FRANK H. GLOYD, AS DIRECTOR OF AGRICULTURE OF THE STATE OF WASHINGTON ET AL.;

No. 730. YAKIMA COUNTY HORTICULTURAL UNION *v.* FRANK H. GLOYD, AS DIRECTOR OF AGRICULTURE OF THE STATE OF WASHINGTON, ET AL.; and

No. 731. C. W. CHAMBERLAIN & COMPANY ET AL. *v.* FRANK H. GLOYD, AS DIRECTOR OF AGRICULTURE OF THE STATE OF WASHINGTON, ET AL. Error to the Supreme Court of the State of Washington. Submitted January 13, 1926. Decided January 18, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Louisiana Navigation Co.* v. *Oyster Commission*, 226 U. S. 99, 101; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 418, 419; *Gray's Harbor Logging Co.* v. *Coats-Ford-*

ney Logging Co., 243 U. S. 251, 255; *Bruce* v. *Tobin*, 245 U. S. 18, 19. *Mr. Dallas V. Halverstadt* for plaintiffs in error. *Mr. John H. Dunbar* for defendants in error.

No. 574. Chicago and Eastern Illinois Railway Company *v.* Chicago Heights Terminal Transfer Railroad Company. Error to the Supreme Court of the State of Illinois. Motion to dismiss or affirm submitted January 18, 1926. Decided January 25, 1926. *Per Curiam.* Dismissed for want of jurisdiction, upon the authority of section 237 of the Judicial Code as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrolton*, 252 U. S. 1, 5, 6. Petition for certiorari denied. *Messrs. Luther M. Walter, James G. Condon,* and *William E. Lamb* for defendant in error, in support of the motion. *Messrs. Homer T. Dick, M. F. Gallagher,* and *T. P. Littlepage* for plaintiff in error, in opposition thereto.

No. 141. Wisconsin Lime and Cement Company, Inc. *v.* City of Chicago. Error to the Supreme Court of the State of Illinois. Argued January 15, 18, 1926. Decided January 25, 1926. *Per Curiam.* Dismissed for want of jurisdiction, upon the authority of *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 63, 69; *Dewey* v. *Des Moines*, 173 U. S. 193, 200; *Henkel* v. *Cincinnati*, 177 U. S. 170, 171; *Home for Incurables* v. *New York*, 187 U. S. 155, 158; *Fullerton* v. *Texas*, 196 U. S. 192, 194; *Marvin* v. *Trout*, 199 U. S. 212, 223; *Consolidated Turnpike Co.* v. *Norfolk Ry. Co.*, 228 U. S. 596. *Messrs. James W. Good, Robert W. Childs, Dwight L. Bobb, James B. Wescott, Delbert A. Clithero,* and *F. M. Hartman* for plaintiff in error, submitted. *Mr. Louis G. Caldwell,* with whom *Messrs. Leon Hornstein* and *Joseph B. Fleming* were on the brief, for defendant in error.

No. 143. JOSEPH B. MARSINO *v.* UNITED STATES AND JAMES HIGGINS. Appeal from the District Court of the United States for the District of Massachusetts. Argued January 18, 1926. Decided January 25, 1926. *Per Curiam.* Affirmed, upon the authority of *Ponzi* v. *Fessenden,* 258 U. S. 254. *Messrs. Asa P. French* and *Leo A. Rogers* for appellant, submitted. *Assistant to the Attorney General Donovan,* with whom *Solicitor General Mitchell* and *Mr. Jay R. Benton* were on the brief, for the United States.

No. 147. ISAAC WOLFGANG *v.* THE PEOPLE OF THE STATE OF CALIFORNIA ET AL. Error to the Supreme Court of the State of California. Argued January 18, 1926. Decided January 25, 1926. *Per Curiam.* Affirmed with costs, upon the authority of *Schwab* v. *Berggren,* 143 U. S. 442, 451; *Beazell* v. *State of Ohio et al.,* 269 U. S. 167, and cases cited. *Mr. Ernest B. D. Spagnoli* for plaintiff in error. *Mr. U. S. Webb* for defendants in error.

No. 151. CITY OF FORT SMITH, ARKANSAS, ET AL. *v.* SOUTHWESTERN BELL TELEPHONE COMPANY. Appeal from the District Court of the United States for the Western District of Arkansas. Argued January 19, 20, 1926. Decided January 25, 1926. *Per Curiam.* Affirmed with costs, upon the authority of *Newton* v. *Consolidated Gas Co.,* 258 U. S. 165, 175; *Galveston Electric Co.* v. *City of Galveston,* 258 U. S. 388, 395; *State of Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri,* 262 U. S. 276, 287; *Georgia Ry. & Power Co.* v. *Railroad Commission of Georgia,* 262 U. S. 625, 631; *Bluefield Water Works & Improvement Co.* v. *Public Service Commission of West Virginia,* 263 U. S. 679, 690. *Mr. Vincent M. Miles,* with whom *Mr. Thomas B. Pryor* was on the brief, for appellants. *Mr. E. W.*

Clausen, with whom *Messrs. J. W. Jamison* and *C. M. Bracelen* were on the brief, for appellee.

No. 160. NATIONAL CONTRACTING COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. Argued January 21, 1926. Decided January 25, 1926. *Per Curiam.* Affirmed, without opinion, for lack of any substantial reason for appeal; *Louisville Bedding Co. et al.,* v. *United States,* 269 U. S. 533. *Mr. Raymond M. Hudson* for appellant. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 462. HARMAN W. MCMAHON *v.* MONTOUR RAILROAD COMPANY. On writ of certiorari to the Supreme Court of the State of Pennsylvania. Argued January 19, 1926. Decided January 25, 1926. *Per Curiam.* Reversed with costs, upon the authority of *Southern Ry. Co.* v. *United States,* 222 U. S. 20; *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33, 37. *Mr. J. Thomas Hoffman,* with whom *Mr. C. D. Scully* was on the brief, for petitioner. *Mr. Don Rose* for respondent.

No. 164. SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD *v.* ALICE C. SHELTON. On writ of certiorari to the County Court of Frio County, State of Texas. Argued January 22, 1926. Decided January 25, 1926. *Per Curiam.* Reversed with costs, upon the authority of *Royal Arcanum* v. *Green,* 237 U. S. 531; *Supreme Lodge, Knights of Pythias* v. *Meyer,* 265 U. S. 30; *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544. *Mr. John H. Bickett, Jr.,* with whom *Messrs. Rufus S. Day, Harry J. Gerrity, Charles H. Bates,* and *L. M. Bickett* were on the brief, for petitioner. No appearance for respondent.

No. 161. D. J. BURKE *v.* MONUMENTAL DIVISION NO. 52, BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. Appeal from the Circuit Court of Appeals for the Fourth Circuit. Argued January 21, 1926. Decided January 25, 1926. *Per Curiam.* Reversed with costs, with directions to dismiss the bill for lack of allegation disclosing any ground for Federal jurisdiction. *Mr. Cyrus G. Derr,* with whom *Mr. F. D. McKenney* was on the brief, for appellant. *Messrs. Oscar J. Horn* and *Arthur L. Jackson* for appellees.

No. 211. UNITED STATES, ON THE RELATION OF CHARLIE NEWMAN, *v.* WILLIAM C. HECHT, UNITED STATES MARSHAL, ETC. Error to the District Court of the United States for the Southern District of New York. Motion to transfer submitted January 27, 1926. Transferred February 1, 1926, to the Circuit Court of Appeals for the Second Circuit. *Mr. Louis J. Vorhaus* for plaintiff in error. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for defendant in error.

No. 212. UNITED STATES, ON THE RELATION OF LEWIS FISHLANDER ALIAS LEWIS WILSON, *v.* WILLIAM C. HECHT, UNITED STATES MARSHAL. Error to the District Court of the United States for the Southern District of New York. Motion to transfer submitted January 27, 1926. Transferred February 1, 1926, to the Circuit Court of Appeals for the Second Circuit. *Mr. Louis J. Vorhaus* for plaintiff in error. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for defendant in error.

No. 873. ROSARIO MACCIENO *v.* UNITED STATES. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. March 1, 1926. *Per Curiam.*

Petition for certiorari granted and the judgment of the Circuit Court of Appeals reversed on confession of error by the Government, with directions to remand the case to the United States District Court for the Northern District of Ohio for a new trial. *Mr. Rufus S. Day* for petitioner. *Solicitor General Mitchell* and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, for the United States.

No. 172. UNITED STATES *v.* KHLEBER MILLER VAN ZANDT ET AL. Appeal from the District Court of the United States for the Northern District of Texas. Argued January 25, 1926. Decided March 1, 1926. *Per Curiam.* Dismissed for failure to file appeal in time as required by § 6 of the Act of September 6, 1916, c. 448, 39 Stat. 727. *Messers. W. D. Smith* and *Alfred A. Wheat,* Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for the United States. *Mr. Ellis Douthit* for appellees.

No. 175. NATIONAL PAPER & TYPE COMPANY *v.* FRANK K. BOWERS, COLLECTOR, ETC. Error to the District Court of the United States for the Southern District of New York. Argued January 26, 1926. Decided March 1, 1926. *Per Curiam.* Affirmed upon the authority of *W. E. Peck & Company, Inc.,* v. *Lowe, Collector,* 247 U. S. 165; *United States Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321; *Cornell* v. *Coyne,* 192 U. S. 418; *Turpin* v. *Burgess, Collector,* 117 U. S. 504; *Pace* v. *Burgess, Collector,* 92 U. S. 372. *Mr. Cornelius W. Wickersham,* with whom *Messrs. Franklin Grady* and *George W. Wickersham* were on the brief, for plaintiff in error. *Solicitor General Mitchell,* with whom *Mr. Richard P. Reeder* was on the brief, for defendant in error.

No. 180. D. D. ROBERTS AND G. A. COLLINS *v.* TOWN OF PERRY, FLORIDA, ET AL. Error to the Supreme Court of the State of Florida. Argued January 28, 1926. Decided March 1, 1926. *Per Curiam.* Dismissed for want of any ground for federal jurisdiction, there having been no lack of opportunity for a hearing on the merits of the assessment, upon the authority of *Hetrick* v. *Village of Lindsay,* 265 U. S. 384; and there having been no contract within the meaning of Art. I, § 10 of the Constitution, upon the authority of *Hunter* v. *City of Pittsburgh,* 207 U. S. 161, 176–177; (2) *New Orleans* v. *New Orleans Water Works Company,* 142 U. S. 79, 87–88; *Gulf & Ship Island R. R. Co.* v. *Hewes,* 183 U. S. 66, 75. *Mr. Thomas B. Adams,* with whom *Messrs. William E. Kay* and *Henry C. Clark* were on the brief, for plaintiffs in error. *Mr. Giles J. Patterson* for defendants in error.

No. —, original. EX PARTE IN THE MATTER OF BENJAMIN CATCHINGS. March 8, 1926. Motion for leave to file motion for rule to show cause on the Secretary of State denied. *Mr. Benjamin Catchings,* pro se.

No. —, original. THE STATE OF MICHIGAN *v.* THE STATE OF ILLINOIS. March 8, 1926. The motion for leave to file a bill of complaint in this cause is granted and process is ordered to issue returnable on Monday, October 4, next. *Mr. Andrew B. Dougherty,* Attorney General of Michigan, for complainant.

No. 204. SOUTH FORK BREWING COMPANY, M. F. MURPHY, GEORGE J. BREISINGER ET AL. *v.* UNITED STATES. Appeal from the Circuit Court of Appeals for the Third Circuit. Argued March 9, 1926. Decided March 15, 1926. *Per Curiam.* Affirmed upon the authority of

Washington Securities Co. v. *United States,* 234 U. S. 76, 78; *Baker* v. *Schofield,* 243 U. S. 114, 118; *Southern Ry. Co.* v. *Puckett,* 244 U. S. 571, 574; *Piedmont & G. C. Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1, 13. *Mr. David V. Cahill,* with whom *Mr. Joseph A. Burdeau* was on the brief, for appellants. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Arthur W. Henderson* for the United States.

No. 610. DWIGHT HARRISON *v.* STATE OF OHIO. Error to the Supreme Court of the State of Ohio. Argued March 10, 1926. Decided March 15, 1926. *Per Curiam.* Affirmed upon the authority of *West* v. *Louisiana,* 194 U. S. 258; *Twining* v. *New Jersey,* 211 U. S. 78. *Messrs. Smith W. Bennett* and *Robert R. Nevin* for plaintiff in error. *Mr. John R. King,* with whom *Messrs. L. R. Pugh* and *J. A. Godown* were on the brief, for defendant in error.

No. 206. JAMES PATTERSON, ALIAS "BOSSY" PATTERSON *v.* COMMONWEALTH OF VIRGINIA. Error to the Supreme Court of Appeals of the State of Virginia. Submitted March 11, 1926. Decided March 15, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code as amended by the Act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. William F. Denny* for plaintiff in error. *Messrs. John R. Saunders* and *Lewis H. Machen* for defendant in error.

No. 911. RED BALL TRANSIT COMPANY *v.* CHARLES C. MARSHALL ET AL., CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF OHIO ET AL. March 22, 1926. Motion for temporary injunction is denied. *Mr. John J. Shea,* for

appellant. *Messrs. Nathan A. Gibson, Joseph S. Hall, Thomas J. Flannelly,* and *Thomas S. Gibson* for appellees.

No. 650. DORA E. ROOKER AND WILLIAM V. ROOKER *v.* FIDELITY TRUST COMPANY AND FIDELITY TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER. Error to the Supreme Court of the State of Indiana. Motion to dismiss or affirm submitted March 15, 1926. Decided March 22, 1926. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1(a), 43 Stat. 937, *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114; *Rooker* v. *Fidelity Trust Co.,* 263 U. S. 413. Petition for certiorari denied. *Mr. Charles W. Cox* for defendant in error, in support of the motion. *Mr. William V. Rooker* for plaintiff in error, in opposition thereto.

No. 225. EVANSVILLE OIL AND GREASE COMPANY ET AL. *v.* IVY L. MILLER, AS STATE FOOD AND DRUG COMMISSIONER OF THE STATE OF INDIANA. Appeal from the District Court of the United States for the District of Indiana. Argued March 19, 1926. Decided March 22, 1926. *Per Curiam.* Affirmed upon the authority of *Texas Company* v. *Brown,* 258 U. S. 466. *Mr. Hubert B. Fuller,* with whom *Messrs. Charles D. Chamberlain, Charles O. Roemler,* and *George B. Morty* were on the brief, for appellants. *Messrs. Arthur L. Gilliam* and *Edward M. White* for appellee.

No. 997. DOROTHY FERGUSON *v.* DISTRICT OF COLUMBIA. Petition for writ of certiorari to the Court of Appeals of the District of Columbia. March 22, 1926. *Per Curiam.* Denied for want of jurisdiction in this court under § 240 of the Judicial Code as amended by the Act

of February 13, 1925, c. 229, § 1(a), 43 Stat. 938, to issue a certiorari to review a refusal of a Justice of the Court of Appeals of the District of Columbia to allow a writ of error to the Police Court of the District of Columbia under the authority of the District of Columbia Code, § 227, 29 Stat. 607. *Mr. Harry A. Hegarty* for petitioner. No appearance for respondent.

No. 16, original. STATE OF WISCONSIN *v.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO. Argued on motion to dismiss, March 10, 1926. Decided March 22, 1926. *Per Curiam.* In view of the difficult questions arising on the record, we delay stating our conclusion until the case is made and all the facts are before us on the pleadings and the evidence. The motion to dismiss the bill is therefore overruled without prejudice to any question and with leave to proceed in due course. *Kansas* v. *Colorado,* 185 U. S. 125, 147. *Mr. James M. Beck* for defendant, the Sanitary District of Chicago, and *Mr. Hugh S. Johnson* for defendant, the State of Illinois, in support of the motion. *Mr. Herman L. Ekern* for complainant, the State of Wisconsin, and *Mr. Newton D. Baker* for the State of Ohio and the Great Lakes Carriers Association, in opposition thereto.

No. 267. PATRICK J. O'SHAUGHNESSY ET AL. *v.* UNITED STATES. Error to the District Court of the United States for the Southern District of Alabama. Motion submitted March 22, 1926, granted April 12, 1926, to transfer this case to the Circuit Court of Appeals for the Fifth Circuit. *Messrs. Harry H. Smith, William H. Armbrecht, W. J. Young,* and *Gregory L. Smith* for plaintiffs in error. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 1060. CHARLES BARR *v.* A. A. MCCORKLE, WARDEN AND KEEPER OF THE TENNESSEE STATE PENITENTIARY. Appeal from the District Court of the United States for the Middle District of Tennessee. Motion to transfer cause submitted March 22, 1926. Decided April 12, 1926. *Per Curiam.* Motion to transfer the appeal to the United States Circuit Court of Appeals for the Sixth Circuit denied upon the authority of the act of February 13, 1925, c. 229, sec. 13, 43 Stat. 942, and appeal dismissed for want of jurisdiction upon the authority of the act of February 13, 1925, c. 229, sec. 6 (a), 43 Stat. 940, and sec. 13, *supra*. *Mr. Grover McCormick* for appellant. *Mr. William H. Swiggart* for appellee.

No. 871. A. J. BOYD *v.* HON. JAMES D. SMYTHE, JUDGE OF HENRY COUNTY DISTRICT COURT, STATE OF IOWA. Error to the Supreme Court of the State of Iowa. Motion for supersedeas submitted March 22, 1926. Decided April 12, 1926. *Per Curiam.* Application for a writ of supersedeas and for leave to file a bond denied; motion for leave to amend the petition in error denied, and the writ of error dismissed, for want of jurisdiction, upon the authority of *Iowa C. R. Co.* v. *Iowa,* 160 U. S. 389, 393; *Castillo* v. *McConnico,* 168 U. S. 674, 683; *Rawlins* v. *Georgia,* 201 U. S. 638; *Burt* v. *Smith,* 203 U. S. 129; *Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 281; *DeBearn* v. *Safe Deposit & Trust Company,* 233 U. S. 24, 34; *McDonald* v. *Oregon R. R. & Nav. Co.,* 233 U. S. 665, 669, 670; *Gasquet* v. *Lapeyre,* 242 U. S. 367, 369, 370; (2) *McCain* v. *Des Moines,* 174 U. S. 168, 181; *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.,* 178 U. S. 239, 243; *Spencer* v. *Duplan Silk Co.,* 191 U. S. 526, 530; *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144,

147. *Mr. Lloyd L. Duke* for plaintiff in error. *Messrs. Benjamin J. Gibson* and *Neill Garrett* for defendant in error.

No. 158. RANDOLPH HENRY, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF FREE SERVICE PHARMACY, INC., BANKRUPT, *v.* W. A. IRWIN AND THOMAS E. PAYNE. Error to the Supreme Court of Appeals of the State of Virginia. Submitted March 22, 1926. Decided April 12, 1926. *Per Curiam.* Dismissed upon the authority of *McCain* v. *Des Moines,* 174 U. S. 168, 181; *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.,* 178 U. S. 239, 243; *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; (2) *California Powder Works* v. *Davis & Co.,* 151 U. S. 389, 393; *Gaar, Scott & Co.* v. *Shannon,* 223 U. S. 468, 470; *Consol. Turnpike Co.* v. *Norfolk & Ocean View R. R. Co.,* 228 U. S. 596, 599; *Yazoo & Miss. Valley R. R. Co.* v. *Brewer,* 231 U. S. 245, 249; *Cuyahoga River Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 303; *Municipal Securities Corp.* v. *Kansas City,* 246 U. S. 63; *Bilby* v. *Stewart,* 246 U. S. 255, 257; *Farson, Son & Co.* v. *Bird,* 248 U. S. 268, 271. *Mr. Randolph Henry* for plaintiff in error. *Messrs. Harvey B. Apperson* and *Charles D. Fox, Jr.,* for defendants in error.

PETITIONS FOR CERTIORARI GRANTED, FROM JANUARY 12, 1926, TO AND INCLUDING APRIL 12, 1926.

No. 847. UNITED STATES, EX REL. SKINNER & EDDY CORPORATION, *v.* J. R. MCCARL, COMPTROLLER GENERAL OF THE UNITED STATES. January 18, 1926. Petition for writ of certiorari to the Court of Appeals of the District

of Columbia granted. *Messrs. Louis Titus* and *J. Barrett Carter* for petitioner. *Solicitor General Mitchell* for respondent.

No. 836. YANKTON SIOUX TRIBE OF INDIANS *v.* UNITED STATES. January 18, 1926. Petition for writ of certiorari to the Court of Claims granted. *Mr. Jennings C. Wise* for petitioner. *Solicitor General Mitchell* for the United States.

No. 839. PORTNEUF MARSH VALLEY CANAL COMPANY *v.* HOWARD W. BROWN AND JOHN R. CHAPIN, AS TRUSTEES. January 18, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. J. H. Peterson, T. C. Coffin,* and *D. C. McDougall* for petitioner. No appearance for respondents.

No. 873. ROSARIO MACCIENO *v.* UNITED STATES. See *ante,* p. 629.

No. 846. ATLANTIC COAST LINE RAILROAD COMPANY *v.* GEORGE L. WIMBERLEY, JR., ADMINISTRATOR, ETC. March 8, 1926. Petition for writ of certiorari to the Supreme Court of the State of North Carolina granted. *Mr. Thomas W. Davis* for petitoner. *Mr. Joseph B. Ramsey* for respondent.

No. 860. TOXAWAY MILLS *v.* UNITED STATES. March 3, 1926. Petition for writ of certiorari to the Court of Claims granted. *Messrs. James Craig Peacock* and *John W. Townsend* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 901. BALTIMORE STEAMSHIP COMPANY ET AL. *v.* VERNON PHILLIPS, AN INFANT, BY VERNON PHILLIPS, HIS GUARDIAN AD LITEM. March 3, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Mitchell* and *Mr. Chauncey G. Parker* for petitioners. *Mr. Vernon S. Jones* for respondent.

No. 921. FEDERAL TRADE COMMISSION *v.* AMERICAN TOBACCO COMPANY. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Mitchell* and *Messrs. Bayard T. Hainer* and *Adrien F. Busick* for petitioner. *Messrs. Junius Parker* and *Jonathan H. Holmes* for respondent.

No. 923. ANDREW W. MELLON, AS DIRECTOR GENERAL OF RAILROADS, *v.* LEAH M. GRAY, ADMINISTRATRIX OF THE ESTATE OF GLEN E. GRAY. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Merrill Shurtleff* for petitioner. *Mr. Hollis R. Bailey* for respondent.

No. 909. E. A. EDENFIELD *v.* UNITED STATES. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Frank H. Saffold* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 928. GOULD-MERSEREAU COMPANY *v.* WILLIAMS BROS. AIRCRAFT CORPORATION. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for

the Second Circuit granted. *Mr. Ernest G. Metcalfe* for petitioner. *Messrs. Harvey S. Knight* and *George L. Wilkinson* for respondent.

No. 972. DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE FOR THE TWELFTH PENNSYLVANIA DISTRICT, *v.* INTERNATIONAL SALT COMPANY. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Mitchell* for petitioner. *Mr. Henry B. Twombly* for respondent.

No. 981. U. SHERMAN JOINES *v.* WILLIAM M. PATTERSON, DOROTHY A. MCFARLAND, NÉE PATTERSON, SHELBY A. PATTERSON ET AL. March 15, 1926. Petition for writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Mr. William G. Davisson* for petitioner. No appearance for respondents.

No. 984. INDEPENDENT COAL AND COKE COMPANY AND CARBON COUNTY LAND COMPANY *v.* UNITED STATES AND CARBON COUNTY. March 22, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. William D. Riter* and *Frank K. Nebeker* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Parmenter,* and *Mr. Harry S. Underwood* for the United States.

No. 985. EDWARD C. TWIST *v.* PRAIRIE OIL & GAS COMPANY. March 22, 1926. Petition for writ of certiorari to the Court of Appeals for the Eighth Circuit granted. *Mr. D. Hayden Linebaugh* for petitioner. No appearance for respondent.

No. 986. EDWARD C. TWIST, ALBERT T. TWIST, AND JESSIE L. PAYNE, NÉE TWIST *v.* PRAIRIE OIL & GAS COMPANY. March 22, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. D. Hayden Linebaugh* for petitioner. No appearance for respondent.

No. 999. PAN AMERICAN PETROLEUM & TRANSPORT COMPANY AND PAN AMERICAN PETROLEUM COMPANY *v.* UNITED STATES. March 22, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Frank J. Hogan, Frederic R. Kellogg, Henry W. O'Melveney,* and *Walter K. Fuller* for petitioners. *Messrs. Atlee Pomerene* and *Owen J. Roberts* for the United States.

No. 887. NEW YORK CENTRAL RAILROAD COMPANY *v.* WHEELING CAN COMPANY. April 12, 1926. On petition for writ of certiorari to the Supreme Court of Appeals of the State of West Virginia. *Mr. John C. Palmer, Jr.,* for petitioner. No appearance for respondents. See *post,* p. 645. Order denying the petition for certiorari in this case of the date of March 1, 1926, is hereby vacated and it is ordered that a writ of certiorari shall issue thereby making consideration of the petition for rehearing herein unnecessary.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED, FROM JANUARY 12, 1926, TO AND INCLUDING APRIL 12, 1926.

No. 842. OTTO L. MORRIS *v.* UNITED STATES. January 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr.*

Frank J. Looney for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 849. LEHIGH VALLEY RAILROAD COMPANY *v.* ANNA HUBEN, AS ADMINISTRATRIX, ETC. January 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clifton P. Williamson* for petitioner. *Mr. Humphrey J. Lynch* for respondent.

No. 850. LEHIGH VALLEY RAILROAD COMPANY *v.* ANNIE BELTZ, AS ADMINISTRATRIX, ETC. January 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clifton P. Williamson* for petitioner. *Mr. Humphrey J. Lynch* for respondent.

No. 854. CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* AUGUSTUS H. BEWSHER. January 18, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Wymer Dressler* and *R. N. Van Doren* for petitioner. No appearance for respondent.

No. 167. CONVOY STEAMSHIP COMPANY, LIMITED, OWNER OF THE STEAMSHIP WILLDOMINO, HER ENGINES, BOILERS, ETC. *v.* CHARLES PFIZER & COMPANY, INC. On writ of certiorari to the Circuit Court of Appeals for the Third Circuit. January 22, 1926. Writ of certiorari dismissed on authority of counsel for the petitioner. *Messrs. Francis Rawle, Joseph W. Henderson, George Whitefield Betts., Jr.,* and *George C. Sprague* for petitioner. *Messrs. D. Roger Englar* and *James D. Carpenter, Jr.,* for respondent.

No. 852. ALEXANDER C. SHAW, ATTORNEY IN FACT FOR N. R. WATERMAN, *v.* HUBERT WORK, SECRETARY OF THE INTERIOR. January 25, 1926. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. F. W. Clements* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Parmenter* for respondent.

No. 853. ARIZONA COMMERCIAL MINING COMPANY *v.* IRON CAP COPPER COMPANY. January 25, 1926. Petition for a writ of certiorari to the Superior Court of Gila County, Arizona, denied. *Mr. Edward F. McClennan* for petitioner. *Messrs. John P. Gray* and *Burton E. Eames* for respondent.

No. 855. MILDRED D. HOLT, EDGAR DANIEL, DOLLIE DANIEL WALKER ET AL. *v.* DANIEL SONS AND PALMER COMPANY AND DANIEL SONS & PALMER COMPANY ET AL., ETC. January 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Benjamin E. Pierce* for petitioners. *Mr. Archibald B. Lovett* for respondents.

No. 856. CHARLES E. SCHAFF, AS RECEIVER, ETC., *v.* ELLA DAUGHERTY, ADMINISTRATRIX. January 25, 1926. Petition for a writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. Joseph M. Bryson, Charles S. Burg,* and *Maurice D. Green* for petitioner. *Mr. F. M. Miner* for respondent.

No. 857. STRAESSER-ARNOLD COMPANY *v.* FRANKLIN SUGAR REFINING COMPANY. January 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for

the Seventh Circuit denied. *Mr. Claude U. Stone* for petitioner. *Mr. Robert W. Childs* for respondent.

No. 858. JOHN MAZUKIEWICZ *v.* HANOVER NATIONAL BANK OF THE CITY OF NEW YORK. January 25, 1926. Petition for a writ of certiorari to the Court of Appeals of the State of New York denied. *Mr. Charles A. Frueouff* for petitioner. *Mr. Percy S. Dudley* for respondent.

No. 859. AMERICAN REFRIGERATOR TRANSIT COMPANY ET AL. *v.* WABASH RAILWAY COMPANY. January 25, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. The motions for leave to intervene on behalf of the States of New Jersey, Missouri, and Texas are also denied. *Messrs. C. A. DeGersdorff, T. H. Devine, M. W. Hayden,* and *Edward J. White* for petitioner. *Messrs. Winslow S. Pierce* and *Homer Hall* for respondent.

No. 844. DONNER STEEL COMPANY, INC., *v.* UNITED STATES. February 1, 1926. Petition for writ of certiorari to the Court of Claims denied. *Mr. Henry H. Dinneen* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 861. EMILY BEAUCHAMP, ADMINISTRATRIX OF THE ESTATE OF RALPH BEAUCHAMP, DECEASED, *v.* MICHIGAN CENTRAL RAILROAD COMPANY. February 1, 1926. Petition for writ of certiorari to the Supreme Court of the State of Michigan denied. *Messrs. Thomas J. Bresnahan* and *Elmer H. Groefsema* for petitioner. *Messrs. J. Walter Dohany* and *Frank E. Robson* for respondent.

No. 866. JAMES F. TODD *v.* UNITED STATES. February 1, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Moses Cohen* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 874. MORTON HOWARD MARR, SOMETIMES CALLED PAT MARR, v. UNITED STATES. February 1, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. K. Mahoney* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 875. ROSANNAH BROWN ET AL. *v.* UNITED STATES. February 1, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Nathan A. Gibson, Joseph L. Hull,* and *Frank Montgomery* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Parmenter* for the United States.

No. 716. UNITED STATES *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY. On writ of certiorari to the Court of Claims. February 1, 1926. Dismissed, and mandate granted, on motion of *Solicitor General Mitchell* for the petitioner. *Mr. Alexander H. Elder* for respondent.

No. 862. C. W. BRITTON, AS RECEIVER OF THE MIDLAND PACKING COMPANY, *v.* ADAM ANDREWS ET AL. March 1, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. C. M. Stilwil* and *H. H. Stipp* for petitioner. *Mr. Robert Healy* for respondents.

No. 878. MISSOURI PACIFIC RAILROAD COMPANY *v.* M. S. BALDWIN, SUING BY NEXT FRIEND OF MARCUS BALDWIN. March 1, 1926. Petition for writ of certiorari to the Supreme Court of the State of Texas denied. *Messrs. Joseph D. Frank* and *F. W. Wozencraft* for petitioner. *Mr. S. P. Jones* for respondent.

No. 879. YIP WAH AND HARRY TOM *v.* UNITED STATES. March 1, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frank J. Hennessy* and *Marshall B. Woodworth* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 887. NEW YORK CENTRAL RAILROAD COMPANY *v.* WHEELING CAN COMPANY. March 1, 1926. Petition for writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied. *Mr. John C. Palmer, Jr.* for petitioner. No appearance for respondent.

[Note. This order was vacated and the writ granted by order of April 12, 1926. See *ante,* p. 640.]

No. 908. UNITED STATES *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY. March 4, 1926. On petition for writ of certiorari to the Court of Claims. Dismissed on motion of petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, for the United States. No appearance for respondent.

No. 867. NORTH GERMAN LLOYD *v.* UNITED STATES. March 8, 1926. Petition for writ of certiorari to the Court of Claims denied. *Mr. Edgar W. Hunt* for peti-

tioner. *Solicitor General Mitchell* and *Assistant Attorney General Letts* for the United States.

No. 869. DUNKLEY COMPANY *v.* CENTRAL CALIFORNIA CANNERIES ET AL. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Fred L. Chappell* and *William S. Hodges* for petitioner. *Messrs. Kemper Campbell* and *Fred K. S. Lyon* for respondents.

No. 880. FEDERAL RESERVE BANK OF SAN FRANCISCO *v.* IDAHO GRIMM ALFALFA SEED GROWERS' ASSOCIATION. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Newton D. Baker* for petitioner. *Mr. Solon B. Clark* for respondent.

No. 881. RILEY FRY AND ERNEST BROWN *v.* UNITED STATES. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John F. Dore* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 882. ERNEST BROWN *v.* UNITED STATES. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John F. Dore* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 889. SCOTT DILLINGHAM *v.* UNITED STATES. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

Mr. T. Pope Shepherd for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 891. UNITED STATES EX REL. JACOB MARKIN *v.* HENRY H. CURRAN, UNITED STATES COMMISSIONER, ETC. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph M. Hill* and *Henry L. Fitzhugh* for petitioner. *Mr. John P. Woods* for respondent.

No. 893. MATT COLLINS *v.* UNITED STATES. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James D. Simms* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 895. CORNELL STEAMBOAT COMPANY *v.* GEORGE SLAYNE ET AL. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John M. Woolsey* and *Robert S. Erskine* for petitioner. *Mr. Chauncey I. Clark* for respondents.

No. 896. CORNELL STEAMBOAT COMPANY *v.* LONG ISLAND RAILROAD COMPANY. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John M. Woolsey* and *Robert S. Erskine* for petitioner. No appearance for respondent.

No. 897. CHRISTIE-MYERS FEED COMPANY *v.* CLEVELAND GRAIN & MILLING COMPANY. March 8, 1926. Peti-

tion for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Edward G. Smith* for petitioner. *Mr. George M. Hoffheimer* for respondent.

No. 899. Con M. Sullivan *v.* United States. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. G. Wilson* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 900. William Mann *v.* United States. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. G. Wilson* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 905. Thomas B. Felder *v.* United States. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank P. Walsh* for petitioner. *Solicitor General Mitchell, Assistant to the Attorney General Donovan,* and *Mr. Clifford H. Byrnes* for the United States.

No. 907. Samuel Marcusson *v.* United States. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. M. Michael Edelstein* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 910. Mary Harrell, by her Next Friend, Zora C. Lannon, *v.* Prairie Oil & Gas Company. March 8,

1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John J. Shea* for petitioner. *Messrs. Nathan A. Gibson, Joseph S. Hull, Thomas J. Flannelly,* and *Thomas S. Gibson* for respondent.

No. 919. GRAYSON C. POWELL, TRUSTEE, *v.* U. R. ANDERSON, BANKRUPT. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Fred T. Saussy* and *I. W. Rountree* for petitioner. No appearance for respondent.

No. 922. SOUTHERN PACIFIC COMPANY *v.* D. P. TRENHOLM, AS ADMINISTRATOR, ETC. March 8, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ben C. Dey* for petitioner. *Mr. Walter L. Tooze, Jr.* for respondent.

No. 926. PENNSYLVANIA RAILROAD COMPANY *v.* ANNA PATTERSON, ADMINISTRATRIX, ETC. March 8, 1926. Petition for writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Messrs. Frederic D. McKenney* and *Robert D. Dalzell* for petitioner. *Mr. J. Thomas Hoffman* for respondent.

No. 888. EDWARD A. NOLL *v.* UNITED STATES. March 15, 1926. Petition for writ of certiorari to the Court of Claims denied. *Mr. L. L. Hamby* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. W. W. Dyar,* Special Assistant to the Attorney General, for the United States.

No. 918. UNITED STATES *v.* EDWARD P. BUCKENMEYER. March 15, 1926. Petition for writ of certiorari to the

Court of Claims denied. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. John G. Ewing* for the United States. No appearance for respondent.

No. 929. NORTHERN OHIO TRACTION AND LIGHT COMPANY *v.* ERIE RAILROAD COMPANY. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. Ellis Moore* for petitioner. *Messrs. Edward A. Foote* and *Benjamin D. Holt* for respondent.

No. 931. CHESAPEAKE & OHIO CANAL COMPANY, GEORGE A. COLSTON AND HERBERT R. PRESTON, ETC. *v.* GREAT FALLS POWER COMPANY. March 15, 1926. Petition for writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Mr. James R. Caton* for petitioners. *Mr. John S. Barbour* for respondent.

No. 933. ROGER B. WOOD, TRUSTEE OF FEDERAL LINE, INC., *v.* UNITED STATES. March 15, 1926. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Roscoe Fertich* and *Jennings C. Wise* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Arthur Cobb* for the United States.

No. 934. UNITED STATES EX REL. ABILENE & SOUTHERN RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION. March 15, 1926. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Alfred P. Thom, C. C. Carlin, Alfred P. Thom, Jr.,* and *M. Carter Hall* for petitioner. *Mr. P. J. Farrell* for respondent.

No. 935. THE PEOPLE OF THE STATE OF NEW YORK AND FRANK H. WARDER, AS SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK *v.* M. BRIGHT WILSON, BENJAMIN B. MITTLER, AND WALTER D. WILE, AS TRUSTEES, ETC. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Albert Ottinger* and *Robert P. Beyer* for petitioners. *Mr. David W. Kahn* for respondents.

No. 936. DONNER STEEL CO., INC. *v.* INTERSTATE COMMERCE COMMISSION. March 15, 1926. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. John Lord O'Brien* for petitioner. *Mr. P. J. Farrell* for respondent.

No. 939. JAMES C. WATERS, JR. *v.* PULLMAN COMPANY. March 15, 1926. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. James C. Waters, Jr.* for petitioner. *Messrs. Benjamin S. Minor, H. Prescott Gatley, Hugh B. Rowland,* and *Arthur P. Drury* for respondent.

No. 940. MISSOURI PACIFIC RAILROAD COMPANY *v.* CHARLES HENDRIX. March 15, 1926. Petition for writ of certiorari to the Supreme Court of the State of Arkansas denied. *Messrs. Thomas B. Pryor, Edward J. White,* and *Harry L. Ponder* for petitioner. No appearance for respondent.

No. 941. EDWARD WUICHET *v.* UNITED STATES. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lee*

W. James for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 942. BANK OF HAWAII, LTD. *v.* CHARLES T. WILDER, TAX ASSESSOR FOR THE FIRST TAXATION DIVISION OF THE TERRITORY OF HAWAII. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Warren Gregory, Louis J. Warren,* and *Walter F. Frear* for petitioner. No appearance for respondent.

No. 943. JOSEPH M. JONES, TRUSTEE IN BANKRUPTCY, *v.* JOHN T. READY, BANKRUPT, EDWIN A. HARRISON, AND FLOYD G. VAN ORSDELL, TRUSTEES ET AL. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Justin D. Bowersock* for petitioner. No appearance for respondents.

No. 944. MARYLAND CASUALTY COMPANY *v.* COMMUNITY BUILDING COMPANY. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. James A. Williams* and *William C. Prentiss* for petitioner. *Mr. F. T. Post* for respondent.

No. 945. J. RAYMOND MCCARL, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. *v.* JOHN F. COX. March 15, 1926. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. R. L. Golze* for petitioners. *Messrs. Henry C. Lank, John W. Price,* and *Joseph W. Cox* for respondent.

No. 946. TOWN OF BRIDGEWATER, VIRGINIA, CHESAPEAKE WESTERN RAILWAY AND THE NORTH RIVER ELECTRIC COMPANY *v.* W. M. JARDINE, SECRETARY OF AGRICULTURE OF THE UNITED STATES. March 15, 1926. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Raymond M. Hudson* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Parmenter,* and *Mr. Harry S. Underwood,* Special Assistant to the Attorney General, for respondent.

No. 947. UNITED STATES EX REL. HELEN RAUCH *v.* JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS AND AGENT OF THE PRESIDENT. March 15, 1926. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Raymond M. Hudson* for petitioner. *Mr. A. A. McLaughlin* for respondent.

No. 948. RICHARD J. WHITTAKER, AS ADMINISTRATOR OF THE ESTATE OF THOMAS COMMERFORD, DECEASED, *v.* UNITED STATES FIDELITY & GUARANTY COMPANY. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Joseph W. Cox* and *G. Carroll Todd* for petitioner. *Mr. M. S. Gunn* for respondent.

No. 950. CHRISTIAN J. RASMUSSEN *v.* UNITED STATES. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Lane Summers* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 951. GLOBE AND RUTGERS FIRE INSURANCE COMPANY *v.* WINTER GARDEN COMPANY. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph S. Auerbach* and *Martin A. Schenck* for petitioner. *Messrs. Pierre M. Brown* and *William J. Hughes* for respondent.

No. 952. JOHN W. THOMPSON *v.* UNITED STATES. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. James Hamilton Lewis, T. M. Pierce, A. M. Frumberg,* and *Randolph Laughlin* for petitioner. *Solicitor General Mitchell* and *Messrs. Ralph F. Potter* and *Harry S. Ridgely* for the United States.

No. 954. PICKANDS, MATHER & COMPANY *v.* H. A. AND D. W. KUHN. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Horace Andrews* for petitioner. *Mr. George H. Eichelberger* for respondents.

No. 956. WILLIAM F. PURSGLOVE *v.* MONONGAHELA RAILWAY COMPANY. March 15, 1926. Petition for writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. David F. Anderson* for petitioner. No appearance for respondent.

No. 960. LEHIGH VALLEY RAILROAD COMPANY *v.* BARBARA CIECHOWSKI. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas R. Wheeler* for petitioner. *Mr. Hamilton Ward* for respondent.

No. 961. STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK AND LOUIS ANDERSON *v.* JOHNSON LIGHTERAGE COMPANY AND EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD. March 15, 1926. Petition for writ of certiorari to the Supreme Court of the State of New York denied. *Messrs. Albert Ottinger* and *E. Clarence Aiken* for petitioners. *Messrs. Bertrand L. Pettigrew* and *Walter L. Glenney* for respondents.

No. 963. SOUTHERN SURETY COMPANY OF OKLAHOMA AND SOUTHERN SURETY COMPANY OF IOWA *v.* NINA H. CRAWFORD, ROY H. CRAWFORD, MARIE CRAWFORD CLAY ET AL. March 15, 1926. Petition for writ of certiorari to the Court of Civil Appeals, First Supreme Judicial District, State of Texas, denied. *Messrs. Frank L. Anderson* and *H. C. Hughes* for petitioners. *Messrs. Maco Stewart* and *Brantly Harris* for respondents.

No. 966. UNITED STATES EX REL. A. H. JARMAN *v.* HUBERT WORK, SECRETARY OF THE INTERIOR. March 15, 1926. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. A. H. Jarman* for petitioner. *Solicitor General Mitchell* and *Mr. O. H. Graves* for respondent.

No. 968. CHARLES R. FORBES *v.* UNITED STATES. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. James S. Easby Smith* and *Elwood G. Godman* for petitioner. *Solicitor General Mitchell* and *Mr. Ralph F. Potter* for the United States.

No. 969. HENRY A. WISE, AS TRUSTEE IN BANKRUPTCY OF CHRISTOFFER HANNEVIG, *v.* RUSSELL KETTLE, AS

LIQUIDATOR OF THE BRITISH AMERICAN CONTINENTAL BANK, LTD., OF LONDON, ENGLAND. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Saul S. Myers* and *William J. Hughes, Jr.* for petitioner. *Mr. William St. John Tozer* for respondent.

No. 970. ARCHIE LOUIS HADSELL AND CLINTON C. COGHLAN *v.* UNITED STATES. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Archie L. Hadsell* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 973. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A. J. ANSON, AND R. AARON *v.* R. L. CAUTHEN. March 15, 1926. Petition for writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Messrs. E. T. Miller, T. P. Littlepage, C. B. Stuart, J. F. Sharp, M. K. Cruce,* and *Ben Franklin* for petitioners. *Messrs. P. C. Simons* and *L. W. Simons* for respondent.

No. 978. SAMUEL ROSS *v.* EDWARD B. MCLEAN. March 15, 1926. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Daniel T. Wright* and *Philip Ershler* for petitioner. *Messrs. Wilton J. Lambert* and *Rudolph Yeatman* for respondent.

No. 982. CENTRAL STATE BANK OF CORSICANA, TEXAS, *v.* UNITED STATES FIDELITY AND GUARANTY COMPANY. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied.

Messrs. J. M. McCormick and *Paul Carrington* for petitioner. *Mr. Walter F. Seay* for respondent.

No. 987. JOHN DEFORE *v.* THE PEOPLE OF THE STATE OF NEW YORK. March 15, 1926. Petition for writ of certiorari to the Court of General Sessions, New York County, State of New York, denied. *Mr. James Marshall* for petitioner. *Messrs. Felix C. Benvenga* and *Joab H. Banton* for respondent.

No. 1020. GERALD CHAPMAN *v.* H. K. W. SCOTT. March 15, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ray M. Wiley* for petitioner. *Mr. Hugh M. Alcorn* for respondent.

No. 238. DUREZ COMPANY, INC. *v.* BAKELITE CORPORATION. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. March 15, 1926. Dismissed with costs, per stipulation of counsel. *Messrs. George E. Cruse* and *Alan L. Lane* for petitioner. *Messrs. Charles Neave* and *Charles H. Potter* for respondent.

No. 650. DORA E. ROOKER AND WILLIAM V. ROOKER *v.* FIDELITY TRUST COMPANY AND FIDELITY TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF DORA E. ROOKER. See *ante*, p. 633.

No. 997. DOROTHY FERGUSON *v.* DISTRICT OF COLUMBIA. See *ante*, p. 633.

No. 971. MARCELLA DE CASTRO, LAWFUL WIFE AND HEIR, *v.* ANTONIA FERNANDEZ, AS ADMINISTRATRIX AND AS

CLAIMANT GOOD FAITH WIFE AND HEIR, AMADA DE LOS REYES, AS CLAIMANT HEIR, ET AL. March 22, 1926. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. C. L. Bouve* and *A. Warren Parker* for petitioner. No appearance for respondents.

No. 976. GANO LEE, AN INCOMPETENT PERSON, BY HIS GUARDIAN AND NEXT FRIEND, JOHN F. EGAN *v.* MARCH OIL COMPANY. March 22, 1926. Petition for writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Messrs. Tom D. McKeown, Joseph C. Stone,* and *Charles A. Moon* for petitioner. *Mr. Thomas D. Lyons* for respondent.

No. 977. SALINA LAND *v.* MARCH OIL COMPANY. March 22, 1926. Petition for writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Tom D. McKeown* for petitioner. *Mr. Thomas D. Lyons* for respondent.

No. 979. ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS AND AGENT APPOINTED BY THE PRESIDENT UNDER SECTION 206(A) OF THE TRANSPORTATION ACT 1920, *v.* OSWALD & TAUBE, A PARTNERSHIP COMPOSED OF HENRY OSWALD AND ARTHUR G. TAUBE. March 22, 1926. Petition for writ of certiorari to the Supreme Court of the State of Ohio denied. *Messrs. George Hoadly* and *Edward Colston* for petitioner. *Mr. Alfred Bettman* for respondent.

No. 980. MARY C. BOLAND, ROSE M. MCAULIFFE, EMMA PAIRO, ET AL. *v.* ELIZABETH C. HILL, MARY A. MCCARTHY, ELIZABETH DOLAN, ET AL. March 22, 1926. Petition for writ of certiorari to the Court of Appeals of the District

of Columbia denied. *Messrs. Joseph D. Sullivan, Daniel W. O'Donoghue,* and *Arthur A. Alexander* for petitioners. *Mr. Leo P. Harlow* for respondents.

No. 988. MISSOURI-KANSAS-TEXAS RAILWAY COMPANY *v.* J. L. TARTER. March 22, 1926. Petition for writ of certiorari to the Supreme Court of the State of Kansas denied. *Messrs. W. W. Brown* and *Joseph M. Bryson* for petitioner. *Mr. Charles Stephens* for respondent.

No. 989. DENNIS B. CHAPIN *v.* D. A. WALKER, UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF TEXAS. March 22, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. M. Chambers* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 990. ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND AS AGENT THEREOF UNDER THE LAWS OF THE UNITED STATES, *v.* JOHN HUSSEY. March 22, 1926. Petition for writ of certiorari to the Court of Appeals of Hamilton County, State of Ohio, denied. *Messrs. George Hoadly, Benton S. Oppenheimer,* and *Edward Colston* for petitioner. *Mr. John C. Herrmann* for respondent.

No. 991. S. J. FAIRCLOTH *v.* J. A. LOVETT, TRUSTEE IN BANKRUPTCY OF H. F. LILLY, TRADING AS H. F. LILLY & COMPANY. March 22, 1926. Petition for writ of certiorari to the Circuit Court of Appeals of the Fifth Circuit denied. *Mr. Daniel McDougald* for petitioner. *Mr. Omer W. Franklin* for respondent.

No. 998. DIANA N. WEIL *v.* TRUSTEE IN BANKRUPTCY OF THE RAMBLER CAFETERIA, INC., BANKRUPT. March 22, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jerome C. Jackson* for petitioner. No appearance for respondent.

No. 1000. GREEN RIVER GAS COMPANY *v.* R. A. WHITE AND VERTIE W. WHITE. March 22, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William M. Bullitt* for petitioner. *Mr. Augustus E. Willson* for respondents.

No. 1002. AMERICAN MANUFACTURING COMPANY *v.* CITY OF ST. LOUIS. March 22, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. S. Mayner Wallace* for petitioner. *Mr. Oliver Smith* for respondent.

No. 1008. MARY M. DOWLING *v.* SAM COLLINS, PROHIBITION DIRECTOR OF THE STATE OF KENTUCKY. March 22, 1926. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Edward C. O'Rear, William T. Fowler,* and *Wallace Muir* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for respondent.

No. 1014. FORT WORTH & DENVER CITY RAILWAY COMPANY *v.* MRS. D. J. STOVALL, ADMINISTRATRIX. March 22, 1926. Petition for writ of certiorari to the Court of Civil Appeals, Second Supreme Judicial District, State of Texas, denied. *Mr. Ellis Douthit* for petitioner. *Mr. S. P. Jones* for respondent.

No. 1015. FORT WORTH & DENVER CITY RAILWAY COMPANY *v.* J. W. WILLIAMS. March 22, 1926. Petition for writ of certiorari to the Court of Civil Appeals, Second Supreme Judicial District, State of Texas, denied. *Mr. Ellis Douthit* for petitioner. *Mr. S. P. Jones* for respondent.

No. 894. WINCHESTER REPEATING ARMS COMPANY *v.* UNITED STATES. April 12, 1926. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Frank S. Bright* and *H. Stanley Hinrichs* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 992. J. B. NIME *v.* FIRE ASSOCIATION OF PHILADELPHIA. April 12, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. M. McCormick* and *Paul Carrington* for petitioner. No appearance for respondent.

No. 994. MERCHANTS BANK AND TRUST COMPANY *v.* C. L. THURMAN MOTOR COMPANY AND C. L. THURMAN. April 12, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. E. Alexander* for petitioner. *Mr. W. T. Kennerly* for respondent.

No. 995. LAKEWOOD ENGINEERING COMPANY *v.* CALVIN H. STEIN, HENRY A. GEISEL, AND FRED D. STEIN, DOING BUSINESS, ETC. April 12, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank E. Dennett* for petitioner. *Mr. Rudolph W. Lotz* for respondent.

No. 1001. PETER MADJORUS *v.* STATE OF OHIO. April 12, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. Jonathan Taylor* for petitioner. No appearance for respondent.

No. 1003. BENJAMIN T. GOLDMAN *v.* JOHN W. CHRISTY, JAMES P. THOMSON, HATTIE S. BARBER, ET AL. April 12, 1926. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. George S. Grimes* for petitioner. *Mr. Charles R. Fowler* for respondents.

No. 1004. HILLS BROTHERS *v.* FEDERAL TRADE COMMISSION. April 12, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frank P. Deering* and *Dana T. Ackerly* for petitioner. *Solicitor General Mitchell* and *Messrs. Bayard T. Hainer,* and *Adrien S. Busick* for respondent.

No. 1005. LUCKENBACH STEAMSHIP COMPANY, INC., AS OWNERS OF THE STEAMSHIP PLEIADES, HER ENGINES, ETC., *v.* UNITED STATES. April 12, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Peter S. Carter* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Letts,* and *Mr. Dean Hill Stanley* for the United States.

No. 1006. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY *v.* LOMA FRUIT COMPANY AND INTERNATIONAL NAVAGATION COMPANY, LTD. April 12, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. A. S. H. Bristow, William Mann, E. E. McInnis,* and *Homer W. Davis* for petitioner. *Messrs. Irving Miller* and *Roscoe H. Hupper* for respondents.

No. 1007. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY *v.* LOMA FRUIT COMPANY AND G. WARREN AND COMPANY, LTD. April 12, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. A. S. H. Bristow* and *William Mann* for petitioner. No appearance for respondents.

No. 1011. DE FOREST RADIO TELEPHONE AND TELEGRAPH COMPANY *v.* EDWIN H. ARMSTRONG AND WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY. April 12, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas G. Haight* for petitioner. *Mr. Charles Neave* for respondents.

No. 1021. MOSES E. SHIRE AND FANNIE S. BLOCK, AS TRUSTEES, ETC., *v.* FRED E. HUMMEL, AS TRUSTEE OF THE ESTATE OF GUSTAVE C. STRAUSS AND SIEGFRIED STRAUSS, BANKRUPTS. April 12, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Charles Leviton* and *Joseph Slottow* for petitioners. *Messrs. Brode B. Davis* and *Charles R. Sercombe* for respondents.

No. 1024. FRANK HACKETHAL *v.* UNITED STATES. April 12, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Harold J. Bandy* and *Edmund Burke* for petitioner, *Solicitor General Mitchell, Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely* for the United States.

No. 1028. LLOYDS, A CORPORATION AS TREASURER OF LLOYDS UNDERWRITERS SYNDICATE No. 670 AND LLOYDS UNDERWRITERS SYNDICATE No. 671, ETC., *v.* EDITH BOBE. April 12, 1926. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Second Circuit denied. *Messrs. Herbert Barry, A. G. Thacher,* and *J. K. Summers* for petitioners. *Mr. William O. Badger, Jr.,* for respondent.

No. 1036. BENJAMIN GRATZ *v.* JAMES S. MCKEE, NELLIE CANON BLIVEN, EXECUTRIX OF WILLIAM E. BLIVEN, DECEASED, ET AL. April 12, 1926. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. S. Mayner Wallace* for petitioner. No appearance for respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 12, 1926, TO AND INCLUDING APRIL 12, 1926.

No. 133. R. GLAVIN AND LAURA M. GLAVIN *v.* COMMONWEALTH TRUST COMPANY OF PITTSBURGH. Appeal from the Circuit Court of Appeals for the Ninth Circuit. January 13, 1926. Dismissed with costs, on motion of appellants. *Messrs. W. P. Guthrie* and *Charles J. Williams* for appellants. *Messrs. James H. Richards* and *Oliver O. Haga* for appellee.

No. 128. CHARLES MARX, EXECUTOR, *v.* ELIZABETH REINECKE. Error to the Court of Appeals of the State of Maryland. January 13, 1926. Dismissed with costs, on motion of plaintiff in error. *Messrs. John S. Strahorn* and *B. Harris Henderson* for plaintiff in error. *Messrs. William P. Cole, Jr.* and *Lawrence E. Ensor* for defendant. in error.

No. 456. CONSOLIDATED COAL COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. January 15, 1926. Dismissed, on motion of appellant; and mandate

granted. *Messrs. J. Harry Covington, Ralph Crews,* and *Spencer Gordon* for appellant. *The Attorney General* for the United States.

No. 739. Mrs. Ida Hughes *v.* State of Georgia. Error to the Supreme Court of the State of Georgia. January 18, 1926. Dismissed with costs, on motion of plaintiff in error. *Messrs. Charles Clark* and *R. R. Jackson* for plaintiff in error. No appearance for defendant in error.

No. 167. Convoy Steamship Company, Limited, Owner of the Steamship Willdomino, Her Engines, Boilers, etc. *v.* Charles Pfizer & Company, Inc. See *ante,* p. 641.

No. 322. Cities Service Oil Company *v.* City of Marysville, Kansas, et al. Error to the Supreme Court of the State of Kansas. January 25, 1926. Dismissed with costs, on motion of plaintiff in error. *Messrs. Theodore F. Garver* and *W. W. Redmond* for plaintiff in error. *Mr. Edgar C. Bennett* for defendants in error.

No. 646. Everett Flint Damon, Next Friend of Lew Goon Wong, *v.* John T. Johnson, United States Immigration Commissioner at Boston, Massachusetts. Appeal from the District Court of the United States for the District of Massachusetts. January 25, 1926. Dismissed with costs, on motion of appellant. *Mr. E. F. Damon* for appellant. No appearance for appellee.

No. 927. Ben C. Jones and Company *v.* West Publishing Company. Error to the Circuit Court of Appeals for the Fifth Circuit. January 27, 1926. Docketed

and dismissed on motion of *Mr. Tench T. Marye* in behalf of counsel for the defendant in error.

No. 296. UNITED STATES *v.* ARTHUR L. BACKMAN, MASTER OF THE SCHOONER FRANCES LOUISE, ETC. Appeal from the District Court of the United States for the District of Massachusetts. February 1, 1926. Dismissed, and mandate granted, on motion of appellant. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States. *Messrs. William H. Lewis* and *Matthew L. McGrath* for appellee.

No. 297. UNITED STATES *v.* ARTHUR L. BACKMAN, MASTER OF THE SCHOONER FRANCES LOUISE, ETC. Appeal from the District Court of the United States for the District of Massachusetts. February 1, 1926. Dismissed, and mandate granted, on motion of appellant. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States. *Messrs. William H. Lewis* and *Matthew L. McGrath* for appellee.

No. 298. UNITED STATES *v.* ARTHUR L. BACKMAN, MASTER OF THE SCHOONER FRANCIS LOUISE, ETC. Appeal from the District Court of the United States for the District of Massachusetts. February 1, 1926. Dismissed, and mandate granted, on motion of appellant. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States. *Messrs. William H. Lewis* and *Matthew L. McGrath* for appellee.

No. 339. UNITED STATES *v.* HARRY RITCEY, MASTER OF THE BRITISH SCHOONER MARJORIE E. BACHMAN, ETC., ET AL. Appeal from the District Court of the United States for the District of Massachusetts. February 1, 1926.

Dismissed, and mandate granted, on motion of appellant. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States. *Messrs. William H. Lewis* and *Matthew L. McGrath* for appellee.

No. 340. UNITED STATES *v.* HARRY RITCEY, MASTER OF THE BRITISH SCHOONER MARJORIE E. BACHMAN, ETC., ET AL. Appeal from the District Court of the United States for the District of Massachusetts. February 1, 1926. Dismissed, and mandate granted, on motion of appellant. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States. *Messrs. William H. Lewis* and *Matthew L. McGrath* for appellee.

No. 341. UNITED STATES *v.* HARRY RITCEY, MASTER OF THE BRITISH SCHOONER MARJORIE E. BACHMAN, ETC., ET AL. Appeal from the District Court of the United States for the District of Massachusetts. February 1, 1926. Dismissed, and mandate granted, on motion of appellant. *Solicitor General Mitchell* for the United States. *Messrs. William H. Lewis* and *Matthew L. McGrath* for appellees.

No. 501. UNITED STATES *v.* SOUTHERN RAILWAY COMPANY. Appeal from the Court of Claims. February 1, 1926. Dismissed, and mandate granted, on motion of appellant. *Solicitor General Mitchell* for the United States. No appearance for appellee.

No. 716. UNITED STATES *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY. See *ante*, p. 644.

No. 85. GEORGE H. KELLY ET AL., COPARTNERS, ETC., *v.* DWIGHT F. DAVIS, SECRETARY OF WAR, ET AL. Appeal from the District Court of the United States for the Northern District of California. February 1, 1926. Dismissed with costs, and mandate granted, on motion of *Mr. Eugene West* in behalf of *Mr. William F. Humphrey* for the appellants. *Solicitor General Mitchell* and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, for the appellees.

No. 873. ROSARIO MACCIENO *v.* UNITED STATES. See *ante,* p. 629.

No. 261. HUBERT WORK, SECRETARY OF THE INTERIOR, *v.* W. H. MASON. Appeal from the Court of Appeals of the District of Columbia. March 1, 1926. Dismissed and mandate granted on motion of appellant. *Solicitor General Mitchell* for appellant. *Messrs. F. W. Clements* and *Alexander Britton* for appellee.

No. 831. UNITED STATES *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY. Appeal from the Court of Claims. March 1, 1926. Dismissed and mandate granted on motion of appellant. *Solicitor General Mitchell* for the United States. *Mr. Alexander H. Elder* for appellee.

No. 235. FLORIDA EAST COAST RAILWAY COMPANY *v.* BAKER & HOLMES COMPANY ET AL. Appeal from the District Court of the United States for the Southern District of Florida. March 1, 1926. Dismissed with costs on motion of appellants. *Messrs. Frank W. Gwathmey* and *Scott M. Loftin* for appellant. No appearance for appellee.

No. 283. CHARLES H. GRAVES *v.* STATE OF MINNESOTA. Error to the Supreme Court of the State of Minnesota. March 1, 1926. Dismissed with costs on motion of plaintiff in error. *Messrs. George S. Grimes* and *Russell C. Rosenquest* for plaintiff in error. *Messrs. Clifford L. Hilton* and *James E. Markham* for defendant in error.

No. 356. OSCAR T. RULLMAN *v.* WILLIAM W. WHEELOCK ET AL., RECEIVERS, ETC., ET AL. March 1, 1926. Dismissed pursuant to the Eleventh Rule. *Mr. L. C. Boyle* for plaintiff in error. No appearance for defendants in error.

No. 908. UNITED STATES *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY. See *ante*, p. 645.

No. 663. EDWARD B. GRAVES ET AL. *v.* CAMBRIA STEEL COMPANY ET AL. Appeal from the District Court of the United States for the Southern District of New York. March 8, 1926. The motion to transfer this case to the United States Circuit Court of Appeals for the Second Circuit is denied and the case is dismissed for failure of the appellants to comply with sections 2 and 9 of Rule 11. *Mr. Harmon S. Graves* for appellants. *Mr. Fred H. Wood* for appellees.

No. 343. FRED L. WOODWORTH, COLLECTOR OF INTERNAL REVENUE, *v.* JACOB FREY. Error to the District Court of the United States for the Eastern District of Michigan. March 8, 1926. Dismissed with costs and mandate granted on motion of plaintiff in error. *Solicitor General Mitchell* for the plaintiff in error. No appearance for defendant in error.

No. 215. ATCHISON, TOPEKA & SANTA FE RY. CO. *v.* F. G. BUTTON. Error to the Circuit Court of Appeals for the Eighth Circuit. March 12, 1926. Dismissed with costs on motion of plaintiff in error. *Messrs. J. R. Cottingham, Robert M. Rainey,* and *Streeter B. Flynn* for plaintiff in error. *Messrs. Charles J. Kappler* and *Charles H. Merrillat* for defendant in error.

No. 238. DUREZ COMPANY, INC. *v.* BAKELITE CORPORATION. See *ante,* p. 657.

No. 418. DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, AND BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, *v.* JOE DUKICH. Appeal from the District Court of the United States for the Eastern District of Washington. April 12, 1926. Dismissed with costs and mandate granted on motion of appellants. *Solicitor General Mitchell* for appellants. *Mr. E. W. Robertson* for appellee.

No. 687. UNITED STATES *v.* METAL PRODUCTS COMPANY. Appeal from the Court of Claims. April 12, 1926. Dismissed and mandate granted on motion of appellant. *Solicitor General Mitchell* for the United States. *Messrs. Frederic D. McKenney* and *John S. Flannery* for appellee.

No. 467. MRS. ELIZABETH HUFF AND R. E. HUFF *v.* IRVING PAGE, RECEIVER OF THE FIRST NATIONAL BANK OF LAWTON, OKLAHOMA. Error to the Circuit Court of Appeals for the Fifth Circuit. April 12, 1926. Dismissed per stipulation of counsel. *Mr. W. F. Weeks* for plaintiffs in error. *Messrs. B. H. Shear, E. E. Blake,* and *F. W. Fischer* for defendant in error.

No. 468. R. E. HUFF *v.* IRVING PAGE, RECEIVER OF THE FIRST NATIONAL BANK OF LAWTON, OKLAHOMA. Error to the Circuit Court of Appeals for the Fifth Circuit. April 12, 1926. Dismissed per stipulation of counsel. *Mr. W. F. Weeks* for plaintiff in error. *Messrs. B. H. Shear, E. E. Blake,* and *F. W. Fischer* for defendant in error.

No. 884. LESLIE ALBERT PORTER *v.* CITY OF LEWISTON, WILLIAM THOMPSON, CHARLES AUGUSTUS PARKER, ET AL. Error to the Supreme Court of the State of Idaho. April 12, 1926. Dismissed pursuant to § 2 of rule 11. *Mr. Robert D. Leeper* for plaintiff in error. *Mr. James E. Babb* for defendants in error.

INDEX

ACCEPTANCE. See **Contracts**, 2. Page.

ACCOUNT STATED. See **Federal Control Act**, 6.

ACQUIESCENCE. See **Boundaries**, 1; **Claims**, 1; **Jurisdiction**, II, (3), 1.

ADEQUATE REMEDY AT LAW. See **Equity**, 2.

ADMIRALTY:

1. *Maritime Tort.* Death of diver from floating barge removing obstructions to navigation. *Millers' Underwriters* v. *Braud* 59

2. *Id.* Local Workmen's Compensation Law applicable. *Id.*

3. *Collision.* Damages not recoverable from United States under Suits in Admiralty Act, for collision by government ship transporting troops and supplies. *Littlejohn* v. *U. S.*. 215

4. *Seizure and Confiscation.* Power of government as respects enemy ships in harbors at outbreak of war. *Id.*

5. *Unseaworthiness*—liability of chartered ship for as surety. *Armour & Co.* v. *S. S. Co* 253

6. *Id. Release* of liability through compromise between shipper and charterer. *Id.*

7. *Id.* Where charterer and shipper convert ship to use unauthorized by charter. *Id.*

8. *Admiralty Jurisdiction.* Not determined on facts alleged in libel alone. *Id.*

9. *Id.* Extends to non-maritime contracts brought in as defense. *Id.*

ADVERSE POSSESSION. See **Boundaries**, 2.

AGENCY. See **Claims**, 5, 7; **Contracts**, 5.

ALIENS. See **Jurisdiction**, III, 3.

ALLOTMENTS. See **Indians**, 10–11, 13.

Page.

AMENDMENTS. See **Jurisdiction**, IV, 19; **Materialmen's Act**, 3; **Substitution.**

ANCILLARY JURISDICTION. See **Jurisdiction**, II, (3), 1; IV, 24.

ANTI-TRUST ACTS. See **Trade Commission Act.**

Exchange Quotations. A contract between cotton exchange and telegraph company, under which the exchange at its own expense collects its quotations of sales and delivers them to the telegraph company, which transmits them like other messages, at the charges of the recipients, to such persons only as the exchange approves, the telegraph paying the exchange for the privilege of having the business,—is not a violation of the Sherman Anti-Trust Act. *Moore* v. *Cotton Exch*..... 593

APPEAL:

Time for. See **Jurisdiction**, V, 2.

ARMY. See **Admiralty**, 3; **Contracts**, 1–9.

1. *Reorganization Act, 1920,* liberally construed to avoid interference with military agencies. *Rogers* v. *U. S*..... 154

2. *Id. Court of Inquiry.* Records to be furnished officer. *Id.*

3. *Id. Irregularities,* acquiesced in before Court of Inquiry, in excluding evidence, which was not in record sent to Final Classification Board, do not invalidate adverse classification by latter. *Id.*

ASSESSMENT. See **Bankruptcy**; **Corporations**; **Taxation**, II, 7–10.

ATTORNEYS. See **Mandamus**, 2; **Taxation**, I, 5.

AWARD. See **Claims**, 2–4.

BANKRUPTCY:

1. *Assessment on Stock,* of bankrupt corporation. Time and condition of liability determined by state law, though assessment ordered by bankruptcy court and suit to collect brought by the trustee. *Harrigan* v. *Bergdoll*..... 560

2. *Id. Limitations,* on suit to collect determined by state law. *Id.*

Page.

BILL OF EXCEPTIONS. See **Exceptions.**

BILL OF LADING. See **Substitution.**

BOARD OF TAX APPEALS. See **Mandamus**, 2; **Taxation**, I, 5–6.

BOND. See **Claims**, 11; **Materialmen's Act.**

BOUNDARIES:

1. *Acquiescence,* long continued, in possession of and exercise of jurisdiction over territory, determinative of boundary between States. *Michigan* v. *Wisconsin*..... 295

2. *Color of Title,* under Enabling Act, to river with islands extends adverse possession, etc., from part of the islands to entire land and water area described. *Id.*

3. *Costs,* in boundary cases. *Id.*

CANCELLATION. See **Claims**, 2, 4.

CARRIERS. See **Admiralty**; **Claims**, 1; **Employers' Liability Act**; **Federal Control Act**; **Interstate Commerce Acts**; **Substitution**; **Taxation**, II, 2; **Workmen's Compensation Act.**

CHARTER. See **Admiralty**, 5–7.

CITIZENS. See **Jurisdiction**, IV, 9.
Naturalization. See *Tutun* v. *U. S.*..... 568

CLAIMS. See **Contracts**; **Criminal Law**, 1; **Federal Control Act**; **Fraud.**

1. *Acquiescence.* Acceptance by railroad of land grant rates bars suit in Court of Claims for difference between them and higher lawful rates. *U. S.* v. *Reading Co*..... 320

2. *Award; Abstract Question,* of validity of award by Secretary of War accepted by claimant, not considered where findings of Court of Claims fail to show damage resulting from cancellation of contract. *Towar Mills* v. *U. S*..... 375

3. *Id. Counterclaim.* Right of government to counterclaim amount due it on claimant's note against award on earlier contract. *Id.*

4. *Id. Application; Interest.* Award applied against note as of date of award rather than earlier date of cancellation of contract for which it was made. *Id.*

CLAIMS—Continued.

Page.

5. *Contract Subject to Ratification,* by superior officer, does not bind government expressly, nor does service rendered under it create implied obligation. *Interocean Co.* v. *U. S.*. 65

6. *Delays,* by government, not ground for damages to contractor. *Crook Co.* v. *U. S.* 4

7. *Findings of Court of Claims*—conclusiveness of as to authority of army officer to sign contract for purchase of supplies. *U. S.* v. *Swift & Co* 124

8. *Interest,* on tax refunds, recoverable separately when allowed by statute. *Girard Trust Co.* v. *U. S.* 163

9. *Reletting,* of contract, and application of retained percentages, when contractor abandons work. *Midland Co.* v. *U. S.* 251

10. *Res Judicata.* Effect of judgment of Court of Claims, adjudicating title to land as between United States and Indian tribe, as estoppel on United States in subsequent suit to recover lands from State in behalf of Indians. *U. S.* v. *Minnesota* 181

11. *War Savings Certificates,* not payable if unregistered, even with indemnity bond. *Mandelbaum* v. *U. S.* 7

COERCION. See **Fraud.**

COLLISION. See **Admiralty,** 3.

COLOR OF TITLE. See **Boundaries,** 2.

COMPENSATION. See **Federal Control Act,** 1–3.

COMPROMISE. See **Admiralty,** 6; **Federal Control Act,** 6.

CONFISCATION. See **Admiralty,** 4.

CONSPIRACY. See **Criminal Law,** 4.

CONSTITUTIONAL LAW:

I. In General, p. 677.
II. Judiciary, p. 677.
III. Federal Instrumentalities, p. 677.
IV. State Equality, p. 677.
V. Treaty Making Power, p. 677.
VI. War Power, p. 677.
VII. Commerce Clause, p. 677.
VIII. Fifth Amendment, p. 677.
IX. Fourteenth Amendment, p. 678.

I. **In General.** Page.

Unconstitutionality. Burden of proving facts showing. *Tank Car Corp.* v. *Day* 367
Weaver v. *Palmer Co* 402

II. **Judiciary.** See **Jurisdiction.**

Meaning of a "case," Const. Art. III, § 2. *Tutun* v. *U. S.*. 568

III. **Federal Instrumentalities.**

Indian Allotment, transfer of not taxable by State. *Childers* v. *Beaver* 555

IV. **State Equality.**

Navigable Waters. Title to lake bed in State; subject to dispositions made before her admission by United States. *U. S.* v. *Holt Bank* 49

V. **Treaty Making Power.**

1. *Scope.* Treaty not to be construed as divesting property rights which could not be divested by Act of Congress. *U. S.* v. *Minnesota* 181

2. *Judicial Power.* Cannot annul Indian treaty on ground that Indians' representatives were prevented from exercising free judgment in negotiations. *Id.*

VI. **War Power.**

Seizure and Confiscation of enemy ships in harbors at outbreak of war. *Littlejohn* v. *U. S.* 215

VII. **Commerce Clause.** See **Anti-Trust Acts.**

1. *Insect Quarantine.* Power of States to impose suspended by Act of Congress reposing full authority in Secretary of Agriculture. *Oregon-Wash. R. R. Co.* v. *Washington* 87

2. *Tax on Rolling Stock* of non-resident corporations valid when not discriminatory. *Tank Car Corp.* v. *Day* 367

3. *Sales on Exchange,* of cotton for future delivery, not interstate commerce. *Moore* v. *Cotton Exch* 593

VIII. **Fifth Amendment.**

1. *Order of Interstate Commerce Commission,* requiring carriers to remove discrimination in switching does not deprive of property without due process, though practical effect may be to require admission of complaining carrier to part of their business. *Chicago, &c. Ry. Co.* v. *U. S.* 287

VIII. **Fifth Amendment**—Continued. Page.

2. *War Risk Insurance.* Right of beneficiary named in certificate not vested against substitution by soldier's will. *White* v. *U. S.* 175

IX. **Fourteenth Amendment.**

1. *Legislative determinations,* weight of in deciding constitutionality. *Weaver* v. *Palmer Co* 402

2. *Facts,* determining constitutionality, ascertainable by proof and judicial notice. *Id.*

3. *Burden of Proof* on attacking party. *Id.*

4. *Arbitrary Prohibition* of use of shoddy in comfortables not sustainable either as health measure or to prevent fraud. *Id.*

5. *Id.* Prohibition objectionable where regulation would suffice. *Id.*

6. *Id.* Unreasonable and arbitrary character of prohibition shown by comparison between what statute forbids and what it permits, without deciding whether the discrimination violates equal protection clause. *Id.*

7. *Convenience,* can not control constitutional guaranties. *Id.*

8. *Drainage Assessments.* Addition through court proceedings, of new land to drainage district, without allowing owners right to decide by vote as allowed those owning lands of original district, does not deny equal protection. *Cole* v. *Drainage Dist* 45

9. *Municipal Corporations,* not protected by Amendment from special drainage assessments, without benefit, levied by State. *Risty* v. *Ry. Co* 378

10. *Confiscatory Rates.* Right to enjoin not defeated by indefinite delay of public service commission in affording relief, or by technicalities of its procedure. *Smith* v. *Tel. Co.* 587

11. *Tax on Rolling Stock* of non-resident corporation, valid when not discriminatory. *Tank Car Corp.* v. *Day* 367

12. *Inheritance Tax,* on inheritance by non-resident of shares of foreign corporation doing business and owning property, locally, but not locally domesticated, is beyond power of State. *R. I. Trust Co.* v. *Doughton* 69

13. *Inheritance Tax. Conclusive Statutory Presumption* that gifts within 6 years of death were in contemplation of it, is arbitrary, and resulting tax void under due process and equal protection clauses. *Schlesinger* v. *Wisconsin* 230

IX. **Fourteenth Amendment**—Continued. Page.

14. *Convenience. Legislative Discretion,* in choosing means deemed necessary to avoid evasions of legitimate inheritance taxes, can not justify such provisions. *Id.*

CONTRACTS. See **Claims,** 2–7, 9; **Jurisdiction,** IV, 2; **Materialmen's Act,** 1.

1. *Army Supplies.* Authority of representatives of Quartermaster General, Depot Quartermaster, and Food Administration, to purchase during the War. *U. S.* v. *Swift & Co.*... 124

2. *Id. Offer and Acceptance* of contract, through correspondence. *Id.*

3. *Writing,* binding the government, may consist of exchange of letters. *Id.*

4. *Id.* Single instrument, signed at foot, unnecessary. *Id.*

5. *Execution* by subordinate, in name of superior officer. *Id.*

6. *Price*—need not be specified. *Id.*

7. *Damages,* due to government's refusal to take goods, how measured in absence of market value. *Id.*

8. *Id.* Duty of vendor in reselling on account of vendee. *Id.*

9. *Meeting of Minds.* Agreement for delivery of goods in specified quantities in successive months, *held* not preliminary negotiations merely, though price not named but fixed later in more formal agreements. *Id.*

10. *Exchange Quotations.* Contract between cotton exchange and telegraph company, for dissemination of quotations to those only whom exchange approves—not a violation of Anti-Trust Act. *Moore* v. *Cotton Exch*..... 593

11. *Implied Contract,* does not arise to pay for service under agreement invalid for want of ratification. *Interocean Co.* v. *U. S*..... 65

CORPORATIONS. See **Bankruptcy; Constitutional Law,** VII, 2; IX, 9, 11; **Jurisdiction,** IV, 10; **Taxation,** II, 4.

1. *Stock Assessment,* governed by state law. *Harrigan* v. *Bergdoll*..... 560

2. *Id. Limitations,* on suit to collect determined by state statute. *Id.*

COTTON EXCHANGE. See **Anti-Trust Acts; Constitutional Law,** VII, 3.

Page.

COUNTERCLAIM. See **Claims**, 3; **Equity**, 3; **Jurisdiction**, II, (2), 2.

COURT OF CLAIMS. See **Jurisdiction**, II, (4); V.

COURT OPINIONS. See **Procedure**, II, 4.

COSTS. See **Procedure**, I, 2.

CRIMINAL LAW. See **Jurisdiction**, II, (1), 1; IV, 6–8.

1. *Claim Against Government; Cr. Code § 65.* Obtaining possession of non-dutiable goods from a Collector not obtaining approval of such a claim. *U. S.* v. *Cohn*..... 339

2. *"Defrauding" Government; Cr. Code § 65*—means cheating out of money or property, and not obstruction of governmental functions by fraudulent means. *Id.*

3. *Murder.* Removal of prosecution of prohibition agents from state court under Jud. Code § 33. *Maryland* v. *Soper*, (No. 1)..... 9

4. *Conspiracy*—when not so removable. *Maryland* v. *Soper*, (No. 2)..... 36

CUSTOMS. See **Criminal Law**, 1.

DAMAGES. See **Admiralty**, 3; **Claims**, 2, 6; **Contracts**, 7; **Federal Control Act**, 2–3; **Indians**, 5.

DEATH. See **Admiralty**, 1.

DEFRAUDING. See **Criminal Law**, 2.

DISCRIMINATION. See **Constitutional Law**, IX, 6, 8, 11, 13; **Interstate Commerce Acts**, I, 3–5.

DRAINAGE. See **Constitutional Law**, IX, 9; **Taxation**, II, 7–10.

ELECTION. See **Jurisdiction**, IV, 24.

EMINENT DOMAIN. See **Federal Control Act.**

EMPLOYERS' LIABILITY ACT:

1. *Parties and Representatives. C. R. I. & P. Ry. Co.* v. *Schendel*..... 611

2. *Character of Commerce.* Judgment of state court, holding employment intrastate in suit under Workmen's Compensation Act by railroad against widow, bars suit by administrator in court of another State under federal Act. *Id.*

EQUITY. See **Jurisdiction**, II, (3), 1. Page.

1. *Injunction,* of special drainage assessments, under state law. *Risty* v. *Ry. Co*..... 378

2. *Id.* Compliance with conditions precedent and absence of adequate legal remedy. *Id.*

3. *Counterclaim; Rule 30.* Right to seek counter injunction on counterclaim "arising out of the transaction which is the subject matter of the suit." *Moore* v. *Cotton Exch*.. 593

ESTOPPEL. See **Claims**, 1, 10; **Judgments**, 1–4; **Taxation**, II, 8.

EVIDENCE. See **Army**; **Constitutional Law**, I; IX, 13; **Federal Control Act**, 2–3.

EXCEPTIONS:

1. *Nunc Pro Tunc* exceptions invalid. *Fleischman Co.* v. *U. S*..... 349

2. *Trial Without Jury,* under R. S. §§ 649, 700, necessity for exceptions. *Id.*

EXCHANGES. See **Anti-Trust Acts**; **Constitutional Law**, VII, 3.

EXTENSIONS. See **Interstate Commerce Acts**, II, 3–6.

FEDERAL CONTROL ACT:

1. *Compensation.* Not recoverable in Court of Claims for taking railroad where taking purely technical and without loss to carrier. *Marion &c., Ry. Co.* v. *U. S*..... 280

2. *Id.* Burden on carrier to prove value of use taken, or damage suffered, where taking was without agreement with President. *Id.*

3. *Id. Findings of Referees,* appointed by Interstate Commerce Commission, not *prima facie* evidence of just compensation if based on mere assumption without evidence of loss or damage. *Id.*

4. *Federal Agent,* substitution of for carrier begins new proceeding. *Mellon* v. *Weiss*..... 565

5. *Id. Limitation,* in bill of lading, of time for suit not suspended by prior pendency of suit against carrier. *Id.*

6. *Settlements,* of all demands as between United States and railroads "growing out of federal control," do not cover

FEDERAL CONTROL ACT—Continued. Page.

claims of carriers for government transportation antedating federal control, which, having been paid, were erroneously recharged against the Director General of Railroads by the Treasury Department and were credited to him in his final accounts with the railroads. *U. S.* v. *Reading Co*..... 320

FEDERAL EMPLOYERS' LIABILITY ACT. See **Employers' Liability Act.**

FEDERAL QUESTION. See **Jurisdiction.**

FINAL JUDGMENT. See **Jurisdiction.**

FINDINGS. See **Claims**, 2, 7; **Interstate Commerce Acts**, II, 1–2; **Jurisdiction**, II, (4); III, 1; IV, 17.

FORECLOSURE. See **Jurisdiction**, IV, 24.

FOREIGN CORPORATIONS. See **Taxation**, II, 2, 4.

FRAUD. See **Constitutional Law**, IX, 4; **Criminal Law**, 2.

Fraud and Coercion, as ground of overcoming a release of claim sued on,—facts to be distinctly and specifically pleaded. *Chamberlin Mach. Works* v. *U. S*..... 347

HEALTH. See **Constitutional Law**, IX, 4.

INDEMNITY. See **Claims**, 11.

INDIANS. See **Public Lands.**

1. *Guardianship.* Status of United States as sole plaintiff in suit in this Court to regain title to lands in Indian reservations erroneously patented to State. *U. S.* v. *Minnesota*... 181

2. *Statutes of Limitations*, inapplicable to suit to regain land on behalf of Indians. *Id.*

3. *Chippewa Lands.* Effect of patents to Minnesota under Swamp Land Act of tracts located in reservations established before and after admission of State. *Id.*

4. *Id.* Effect of judgment of Court of Claims determining title adversely to Indians and in favor of United States. *Id.*

5. *Id.* Rights of Chippewas in lands ceded to be sold under Act, January 14, 1889, and damages recoverable for those wrongfully patented to and disposed of by State. *Id.*

6. *Reservations*, impliedly remove land from subsequent disposal as public land. *Id.*

INDIANS—Continued. Page.

7. *Id.* Swamp land to which State had prior inchoate title impliedly excepted from larger tract reserved for Indians. *Id.*

8. *Treaties.* Courts powerless to annul on ground that Indians were prevented from exercising their free judgment. *Id.*

9. *Id.* Not to be construed as divesting rights which could not constitutionally be divested by act of Congress. *Id.*

10. *Heirs of Allottee,* by trust or restricted patent, conclusively determined by Secretary of Interior. *First Moon* v. *White Tail* 243

11. *Allotment Act of 1911,* applies to suits claiming original allotments only. *Id.*

12. *Navigable Lake in Chippewa Reservation.* Title to bottom passed to State on her admission. *U. S.* v. *Holt Bank* .. 49

13. *Allotments.* Inheritance of not subject to state transfer tax. *Childers* v. *Beaver* 555

14. *Id. Heirs* determined by Secretary of Interior, state law being adopted as federal rule. *Id.*

INHERITANCE. See **Indians,** 10, 13–14; **Taxation,** II, 4–6; **War Risk Insurance.**

INJUNCTION. See **Jurisdiction,** IV, 21–22; **Trade Commission Act.**

On Counterclaim, See **Equity.**

1. *Merger,* of preliminary in final decree. *Smith* v. *Tel. Co.* 587

2. *Confiscatory Rates.* Remedy of public service corporation by injunction. *Id.*

3. *Id.* When further application for administrative relief not condition precedent. *Id.*

4. *Final Decree,* on appeal from interlocutory orders. *Moore* v. *Cotton Exch* 593

INSECTS. See **Constitutional Law,** VII, 1.

INSURANCE. See **War Risk Insurance.**

INTEREST. See **Claims,** 4, 8; **Taxation,** I, 1–4.

INTERNATIONAL LAW. See **Boundaries; Treaties.**

Power to seize and confiscate enemy ships. *Littlejohn* v. *U. S* 215

Page.

INTERSTATE COMMERCE ACTS. See **Federal Control Act.**

I. **Carrier and Shipper.**

1. *Limitations. Transportation Act,* and amendment, fixing three year limitation on actions to recover charges from carriers, not retroactive, and inapplicable to pending cases. *U. S.* v. *St. Louis &c. Ry. Co*..... 1

2. *Preference. Extra Service,* by assigning special engine and crew to shipper for spotting cars, can not be charged for where spotting included in line-haul tariff. *C. & O. Ry. Co.* v. *Westinghouse Co*..... 260

3. *Discrimination in Switching*—order to remove does not require participating carriers to admit complainant into existing arrangement. *C. I. & L. Ry. Co.* v. *U. S*..... 287

4. *Id.* May exist though complainant's line physically connected with but one of several lines of defendants. *Id.*

5. *Id. Electric Railroad,* may have relief from discrimination in switching arrangement between steam railroads. *Id.*

II. **Powers and Proceedings of Commission.**

1. *Discrimination.* Similarity of circumstances determined by Commission and not courts. *Chicago &c. Ry. Co.* v. *U. S*..... 287

2. *Conclusive Effect of Finding* that electric railroad was engaged in general transportation of freight, where evidence before Commission was not introduced in court. *Id.*

3. *Unauthorized Extensions.* Right of another carrier to enjoin under Transportation Act without prior determination by Commission. *Tex. & Pac. Ry. Co.* v. *Gulf Ry. Co*..... 266

4. *Id.* Function of Commission in determining whether it is extension or industrial track, and right of carrier to invoke decision, without waiver, and of other interested parties to appear and resist. *Id.*

5. *Id.* Distinctions between extensions and spur or industrial trackage. *Id.*

6. *Id. Laches,* in applying for injunction. *Id.*

7. *Dismissal of Complaint,* revokes order dependent on it. *Minneapolis R. R. Co.* v. *Peoria Ry. Co*..... 580

8. *Reopening of Case Dismissed,* does not revive former orders. *Id.*

9. *Modification of Order.* Formal action of Commission required; opinion of individual Commissioner immaterial. *Id.*

INTERVENTION. See **Materialmen's Act**, 4. Page.

JOINDER. See **Equity**, 3.

JUDGMENTS. See **Claims**, 10; **Interstate Commerce Acts**, II; **Jurisdiction**, II, (2), 2; II, (4), 1–2; III, 3; IV, 18, 20.

1. *Estoppel.* Effect between adverse parties independent of arrangement on record or which was *actor*. *C. R. I. & P. Ry. Co.* v. *Schendel*..... 611

2. *Id. Pending Suit*, barred by judgment recovered in suit begun later in other jurisdiction. *Id.*

3. *Id. Representation.* Judgment against trustee binds beneficiaries. *Id.*

4. *Id. Identity of Parties*, how tested. *Id.*

5. *Finality of Judgment. Id.*

JUDICIAL SALE. See **Jurisdiction**, IV, 24.

JURISDICTION:

I. Generally, p. 685.

II. Jurisdiction of this Court:
- (1) Original, p. 686.
- (2) Over Circuit Court of Appeals, p. 686.
- (3) Over District Court, p. 686.
- (4) Over Court of Claims, p. 687.

III. Jurisdiction of Circuit Court of Appeals, p. 687.

IV. Jurisdiction of District Court, p. 687.

V. Jurisdiction of Court of Claims, p. 689.

VI. Jurisdiction of Courts of District of Columbia, p. 689.

Admiralty Jurisdiction. See IV, 1–3.
Ancillary Jurisdiction. See IV, 24.
Certiorari. See II, (4), 1.
Diverse Citizenship. See IV, 9–11.
Equity Jurisdiction. See IV, 13.
Federal and Local Questions. See I, 1–2, 10; IV, 9, 12, 16.
Finality for Purposes of Review. See II, (2), 2; II, (4), 2; III, 3; V.
Jurisdiction or Merits. See I, 4; IV, 25.
Removal. See II, (1), 1; IV, 6, 11–12.

I. Generally.

1. *Local Question.* Construction by state court of state constitution as to uniformity of taxation, binding. *Tank Car Corp.* v. *Day*..... 367

I. **Generally.**—Continued.

Page.

2. *Id.* Exposition of state statutes in cases removed to District Courts. *Risty* v. *Ry Co*..... 378

3. *Federal Equity Jurisdiction,* tested by inadequacy of legal remedy in law side of federal court and not inadequacy of remedy afforded by state courts. *Id.*

4. *Jurisdiction or Merits.* Dismissal of bill because claim (not frivolous) set up under federal statute is unsound, is not dismissal for want of jurisdiction. *Moore* v. *Cotton Exch*.. 593

5. *Injunction.* Preliminary merged in final decree and appeal from former dismissed. *Smith* v. *Tel. Co*..... 587

6. *"Case,"* meaning of within Const. Art. III, §2. *Tutun* v. *U. S*..... 568

7. *Naturalization Proceeding,* a case. *Id.*

8. *Treaty,* with Indians, can not be annulled on ground that Indians' representatives were prevented from exercising free judgment in negotiations. *U. S.* v. *Minnesota*..... 181

9. *Swamp Land Acts.* Duty of State to apply proceeds to reclamation not enforceable by courts. *Id.*

10. *Navigability,* of waters claimed by States in virtue of sovereign equality, a federal question. *U. S.* v. *Holt Bank*.. 49

II. **Jurisdiction of this Court.**

(1) *Original.*

1. *Mandamus,* to test legality of removal of state criminal prosecution to District Court. *Maryland* v. *Soper* (*No. 1*). 9
Maryland v. *Soper* (*No. 2*)..... 36

2. *Parties; Suit by United States,* as guardian of Indians, maintainable against State without joining Indians. *U. S.* v. *Minnesota*..... 181

(2) *Over Circuit Court of Appeals.*

1. *War Risk Insurance* cases, pending in Supreme Court on appeal, not affected by Act of 1925 giving appellate jurisdiction as to such suits "pending," to Circuit Court of Appeals. *White* v. *U. S*..... 175

2. *Final Decree.* Where court affirms interlocutory orders granting and denying injunctions, with directions to dismiss bill and make injunction permanent on counterclaim. *Moore* v. *Cotton Exch*..... 593

(3) *Over District Court.*

1. *Jurisdictional Appeal,* from decree dismissing ancillary petition for want of ancillary jurisdiction. Equity of petition

II. **Jurisdiction of this Court**—Continued. Page.

and question of laches and acquiescence not open. *Cincinnati R. R. Co.* v. *Indianapolis Ry. Co*..... 107

2. *War Risk Insurance* cases, pending in Supreme Court on appeal, not affected by Act of 1925 giving appellate jurisdiction to such suits "pending," to Circuit Court of Appeals. *White* v. *U. S*..... 175

(4) *Over Court of Claims.* See **Claims.**

1. *Act of Feb. 13, 1925. Certiorari* only method of reviewing judgment becoming final after Act took effect. *Sou. Pac. Co.* v. *U. S*..... 103

2. *Id. Finality.* Judgment entered before but suspended by motion for new trial until after effective date of Act. *Id.*

3. *Findings,* as to authority of Army officer to make contract, when conclusive. *U. S.* v. *Swift & Co*..... 124

4. *Findings,* conclusive on this court as to contents of record of military tribunal affecting claimant's status and pay as officer. *Rogers* v. *U. S*..... 154

5. *Limitation* of 90 days for appeal, runs from denial of motion for new trial, and not suspended by renewal of motion. *Morse* v. *U. S*..... 151

III. **Jurisdiction of Circuit Court of Appeals.**

1. *Law Case Without Jury.* Scope of review in absence of exceptions and special findings. *Fleischmann Co.* v. *U. S*..... 349

2. *Id.* Rulings on pleadings, reviewable. *Id.*

3. *Naturalization.* Order denying is final judgment reviewable by Circuit Court of Appeals. *Tutun* v. *U. S*..... 568

4. *"Suits Pending."* Act transferring appellate jurisdiction to Circuit Court of Appeals, not construed as embracing appeals pending in this Court. *White* v. *U. S*..... 175

IV. **Jurisdiction of District Court.**

1. *Admiralty.* Allegations of libel do not conclusively determine jurisdiction. *Armour & Co.* v. *S. S. Co*..... 253

2 *Id.* Extends to non-maritime contracts injected as defense. *Id.*

3. *Id. Damages for Death.* Remedy of state workmen's compensation law exclusive in case of local concern. *Millers' Underwriters* v. *Braud*..... 59

IV. **Jurisdiction of District Court**—Continued. Page.

4. *Confiscatory Rates.* Right to enjoin not defeated by indefinite delay of public service commission in affording relief, or by technicalities of its procedure. *Smith* v. *Tel. Co.*. 587

5. *Indian Allotments.* No jurisdiction to determine heirs of an allotment made, as distinguished from suit claiming original allotment. *First Moon* v. *White Tail*..... 243

6. *Removal of Criminal Prosecutions* from State court, under Jud. Code, § 33. *Maryland* v. *Soper, (No. 1)*..... 9
Maryland v. *Soper, (No. 2)*..... 36

7. *Id.* Prohibition Officers, when entitled to. *Id.*

8. *Id. Pleadings. Id.*

9. *Venue, Jud. Code,* § 51. Suit dependent on diverse citizenship or federal question, to be dismissed on motion of non-resident defendant. *Seaboard Co.* v. *C. R. I. & Pac. Ry*.... 363

10. *Id. Corporation* of another state a non-resident, though in local business. *Id.*

11. *Id. Removal. Jud. Code,* § 28, allowing removal of suits of which District Courts "are given original jurisdiction" relates to general jurisdiction of those courts and not to local jurisdiction over defendants person dealt with in § 51. *Id.*

12. *Local Question; Removal.* Exposition of state statutes in removal cases. *Risty* v. *Ry. Co*..... 378

13. *Equity Jurisdiction,* extent of, and how tested, in suit to enjoin state drainage assessment. *Id.*

14. *Inadequacy* of *Legal Remedy. Id.*

15. *Jurisdictional Amount, held* involved in suits to enjoin drainage assessments. *Id.*

16. *Federal Question,* must be substantial to sustain jurisdiction. *Id.*

17. *Trial Without Jury,* at law, necessity for exceptions or special findings. *Fleischmann Co.* v. *U. S*..... 349

18. *Id.* Reviewability of judgment. *Id.*

19. *Id. Amendments,* of petitions. *Id.*

20. *Entry of Judgment,* valid at term following that at which case heard and taken under advisement. *Id.*

21. *Transportation Act.* Injunction against unauthorized railway extension without awaiting determination by Interstate Commerce Commission. *Tex. & Pac. Ry. Co.* v. *Gulf Ry. Co*..... 266

IV. **Jurisdiction of District Court**—Continued. Page.

22. *Unfair Competition.* Application to Federal Trade Commission condition precedent to injunction suit. *Moore* v. *Cotton Exch* 593

23. *Order of Interstate Commerce Commission.* Jurisdiction to enforce depends on situation when suit brought and not conferred by subsequent events. *Minneapolis R. R. Co.* v. *Peoria Ry. Co* 580

24. *Ancillary Jurisdiction,* to afford relief to purchaser in foreclosure procedings, at foot of decree on ground of mistake in exercising option with regard to rejection of leases affecting property purchased. *Cincinnati R. R. Co.* v. *Indianapolis Ry. Co* 107

25. *Id. Laches.* Delay of two years not ground for dismissing petition for want of jurisdiction. *Id.*

V. **Jurisdiction of Court of Claims.**

1. *New Trial,* renewed motion for after denial requires leave of court. *Morse* v. *U. S* 151

2. *Id. Time for Appeal,* runs from denial of motion. *Id.*

VI. **Jurisdiction of Courts of District of Columbia.**

Mandamus, to Board of Tax Appeals to require admission of attorney. *Goldsmith* v. *Bd. of Tax App* 117

LACHES. See **Jurisdiction,** II, (3), 1.

1. *Confirmed Grant.* Laches in asserting title to against adverse claimants. *Sanchez* v. *Deering* 227

2. *Suit to Enjoin* unauthorized railway extension. *Tex. & Pac. Ry. Co.* v. *Gulf Ry. Co* 266

LAND GRANT RATES. See **Claims,** 1.

LEASE. See **Jurisdiction,** IV, 24.

LIMITATIONS. See **Bankruptcy,** 2; **Corporations,** 2; **Interstate Commerce Acts,** I, 1; **Jurisdiction,** II, (4), 5; **Materialmen's Act,** 4; **Public Lands,** 6; **Substitution.**

MANDAMUS:

1. *Original Petition,* in Supreme Court, by State, to test legality of removal of state criminal prosecution to District Court. *Maryland* v. *Soper, (No. 1)* 9

Maryland v. *Soper, (No. 2)* 36

MANDAMUS—Continued.

Page

2. *To Board of Tax Appeals,* to give hearing to rejected attorney, but not to compel Board summarily to admit him to practice. *Goldsmith* v. *Bd. of Tax App*..... 117

MATERIALMEN'S ACT:

1. *Allegations,* in declaration and intervening petition, that contract was "completed and final settlement had" at date specified, *held* allegations of fact. *Fleischmann Co.* v. *U. S.*. 349

2. *Liberal Construction,* of Act. *Id.*

3. *Amendments of Pleadings,* allowable after year from final settlement and relate back. *Id.*

4. *Limitations; Intervening Claimants,* like original use plaintiffs, have one year from completion of "work," i. e., from "performance and final settlement of contract." *Id.*

MICHIGAN:

See *Michigan* v. *Wisconsin*..... 295

MISTAKE. See **Jurisdiction,** IV, 24.

MUNICIPAL CORPORATIONS. See **Constitutional Law,** IX, 9.

MURDER. See **Criminal Law,** 3.

NATURALIZATION. See **Jurisdiction,** I, 7; III, 3.

NEWS:

Vending of, See *Moore* v. *Cotton Exch*..... 593

NEW TRIAL. See **Jurisdiction,** II, (4), 2, 5; V, 1.

NON-RESIDENTS. See **Jurisdiction.**

Taxation of, See **Constitutional Law,** VII, 2.

NOTICE. See **Taxation,** I, 6.

OFFER. See **Contracts,** 2.

OFFICERS. See **Army; Claims.**

OPINIONS. See **Procedure,** 6.

PARTIES. See **Interstate Commerce Acts,** II, 4; **Judgments,** 1, 4.

1. *Parties in Interest.* United States real party in interest in original suit against State on behalf of Indians. *U. S.* v. *Minnesota*..... 181

PARTIES—Continued.

Page.

2. *Representation.* Telephone subscribers represented by state commission in suit by company to enjoin confiscatory rates. *Smith* v. *Tel. Co*..... 587

PATENTS FOR INVENTIONS:

Patent Application, effect of as publication or "reduction to practice" of invention disclosed but not claimed, preventing later applicant from being "first inventor." *Milburn Co.* v. *Davis Co*..... 390

PAYMENT. See **Federal Control Act,** 6.
Application of, See **Claims,** 4.

PENDING SUIT. See **Judgments,** 2; **Jurisdiction,** II, (2).

PLEADING. See **Equity,** 3; **Fraud; Materialmen's Act,** 1, 3; **Jurisdiction.**

Removal of Criminal Prosecution, averments of petition. *Maryland* v. *Soper, (No. 1)*..... 9

PRESUMPTIONS. See **Constitutional Law,** IX, 13.

PRIVATE LAND CLAIMS:

1. *Spanish Grant*—Passing of title on confirmation and survey. *Sanchez* v. *Deering*..... 227

2. *Laches,* in asserting title against adverse claimants. *Id.*

PROCEDURE OF THIS COURT. See **Jurisdiction.**

For other matters related to Procedure, see: **Admiralty; Army; Bankruptcy; Boundaries; Claims; Corporations; Criminal Law; Employers' Liability Act; Equity; Exceptions; Federal Control Act; Injunction; Interstate Commerce Acts; Judgments; Laches; Limitations; Mandamus; Materialmen's Act; Parties; Pleading; Substitution; Taxation; Trade Commission Act.**

1. *Boundary Determination.* See *Michigan* v. *Wisconsin*... 295

2. *Id. Costs,* divided. *Id.*

3. *Abstract Questions,* made so by findings below, not considered. *Towar Mills* v. *U. S*..... 375

4. *Rehearing.* No examination of points not previously raised. *Wireless Co.* v. *Radio Corp*..... 84

5. *Scope of Review. Concurrent Findings* of fact by District Court and Circuit Court of Appeals. *Risty* v. *Ry. Co.* 378

6. *Opinions,* to be read with regard to facts of case and questions actually decided. *Weaver* v. *Palmer Co*..... 402

PROHIBITION:

Page.

Removal of state prosecutions against federal prohibition officers. *Maryland* v. *Soper* (*No. 1*)..... 9

Maryland v. *Soper* (*No. 2*)..... 36

PROTEST. See **Taxation**, I, 3.

PUBLIC CONTRACTS. See **Materialmen's Act**, 1.

PUBLIC LANDS. See **Private Land Claims; Indians.**

1. *Indian Reservation.* Withdraws land from subsequent disposition as public. *U. S.* v. *Minnesota*..... 181

2. *Swamp Land Acts.* Construction and effect of as applied to lands in Minnesota embraced in Indian reservations created before and after admission of State. *Id.*

3. *Id.* Methods of selection under. *Id.*

4. *Id.* Duty of State to apply proceeds in reclamation, not enforceable by courts. *Id.*

5. *Id.* Minnesota Constitution, directing sale, and devotion of proceeds to education, did not disable State from reclaiming or evince such purpose. *Id.*

6. *Limitations.* Six year limit on suits to annul patents, and state statutes of limitations, inapplicable to suit by United States to annul patents in behalf of Indians. *Id.*

7. *Construction of Land Laws.* Effect of executive practice. *Id.*

PUBLIC WORKS. See **Materialmen's Act.**

PURCHASERS. See **Jurisdiction**, IV, 24.

QUARANTINE. See **Constitutional Law**, VII, 1.

QUARTERMASTER. See **Contracts**, 1.

RAILROADS. See references under **Carriers.**

RATES. See **Claims**, 1; **Const. Law**, IX, 10; **Interstate Commerce Acts.**

RATIFICATION. See **Claims**, 5.

REHEARING.. See **Procedure**, 4.

RELEASE. See **Admiralty**, 6; **Fraud.**

REMOVAL. See **Criminal Law**, 3–4; **Jurisdiction**, IV, 11–12; **Mandamus**, 1.

Page.

RESIDENTS. See **Constitutional Law, VII, 2.**

RES JUDICATA. See **Judgments.**

REVENUE OFFICERS:

Removal of State prosecutions to District Court, *Maryland* v. *Soper, (No. 1)* 9

Maryland v. *Soper, (No. 2)* 36

RULES. See **Equity, 3.**

SALES. See **Anti-Trust Acts; Constitutional Law,** VII, 3; **Contracts; Jurisdiction,** IV, 23.

SECRETARY OF AGRICULTURE. See **Constitutional Law,** VII, 1.

SECRETARY OF INTERIOR. See **Indians, 10, 14.**

SECRETARY OF WAR. See **Claims, 2.**

SEIZURE. See **Admiralty, 4.**

SOUTH DAKOTA. See **Taxation,** II, 9.

STARE DECISIS. See **Procedure, 6.**

STATES. See **Boundaries; Constitutional Law; Jurisdiction,** I, 8–9.

Removal of state prosecutions against federal prohibition officers. *Maryland* v. *Soper, (No. 1)* 9

Maryland v. *Soper, (No. 2)* 36

STATUTES:

Consult titles indicative of subject matter, and table at beginning of volume.

1. *"Suits Pending."* Act transferring appellate jurisdiction to Circuit Court of Appeals not construed as embracing appeals pending in this Court. *White* v. *U. S.* 175

2. *Casus Omissus.* Not supplied by inference where statute clear and particular. *Iselin* v. *U. S.* 245

3. *Administrative Practice, and Legislative Interpretation* by reenactment. *Id.*

STOCK. See **Bankruptcy; Corporations; Taxation,** II, 4.

STOCK EXCHANGE. See **Anti-Trust Acts; Constitutional Law,** VII, 3.

SUBSTITUTION: Page.

Substitution of Federal Agent for carrier began new suit and time limit in bill of lading not suspended by prior pendency of suit against carrier. *Mellon* v. *Weiss*..... 565

SUITS IN ADMIRALTY ACT. See **Admiralty**, 3.

SURETY. See **Admiralty**, 5; **Materialmen's Act.**

SURVEY. See **Private Land Claims.**

TAXATION:

I. **Federal Taxation.**

1. *Interest*, on tax refunds, when recoverable separately in Court of Claims. *Girard Trust Co.* v. *U. S.*..... 163

2. *Id.* Under Rev. Act, 1921. Meaning of "date of allowance," to which interest runs. *Id.*

3. *Id. Protest*, preceding payment of tax, must have been valid, to date interest from time of payment rather than six months later. *Id.*

4. *Id. Discount*, deducted in anticipatory payment of tax, not included in amount and interest refunded. *Id.*

5. *Board of Tax Appeals.* Power to regulate admission of attorneys, under Rev. Act, 1924. *Goldsmith* v. *Bd. of Tax App*..... 117

6. *Id. Notice* requisite to rejection of applicant on charges. *Id.*

7. *Opera Tickets.* Tax on under Rev. Act, 1918, inapplicable to stockholders' tickets. *Iselin* v. *U. S.*..... 245

II. **State Taxation.**

1. *Apportionment* among political divisions, determinable by state legislature. *Tank Car Corp.* v. *Day*..... 367

2. *Property Tax; Non-Residents.* Special tax on rolling stock of non-resident corporations, not violative of commerce or equal protection clauses, when in lieu of other taxes, and not discriminatory. *Id.*

3. *Uniformity.* Construction of state constitution. *Id.*

4. *Transfer Tax*, on inheritance by non-resident of shares of foreign corporation doing business and owning property, locally, but not locally domesticated, is beyond power of State. *R. I. Trust Co.* v. *Doughton*..... 69

II. **State Taxation**—Continued. Page.

5. *Inheritance Tax.* Conclusive statutory presumption that gifts within six years of death were in contemplation of it, is unconstitutional. *Schlesinger* v. *Wisconsin*..... 230

6. *Inheritance of Indian Allotment,* not taxable by State. *Childers* v. *Beaver*..... 555

7. *Drainage Assessments.* Addition, through court proceedings, of new land, to drainage district, without allowing owners right to decide by vote as allowed those owning lands of original district, does not deny equal protection. *Cole* v. *Drainage Dist*..... 45

8. *Id. Estoppel to Question,* unlawful extension of, does not arise from earlier participation in lawful proceedings. *Risty* v. *Ry. Co*..... 378

9. *Id. So. Dak. Statutes. Cost* of reconstructing or maintaining existing works not assessable on lands outside project as originally established. *Id.*

10. *Illegal Drainage Assessments,* enjoining of in federal court, when legal remedy exhausted or inadequate. *Id.*

TERM. See **Jurisdiction,** IV, 20.

TRADE COMMISSION ACT:

Unfair Competition. Application to Commission condition precedent to relief by injunction. *Moore* v. *Cotton Exch*... 593

TRANSFERS. See **Taxation,** II, 4.

TRANSPORTATION ACT. See **Interstate Commerce Acts,** I, 1; II, 3.

TREATIES. See **Indians.**

1. *Scope of Treaty Power,* as respects divestiture of property rights. See *U. S.* v. *Minnesota*..... 181

2. *Power to Seize* and confiscate enemy ships at outbreak of war, in absence of treaty or convention. *Littlejohn* v. *U. S.* 215

TRIAL. See **Exceptions,** 2.

TRUSTEE. See **Bankruptcy,** 1; **Judgments,** 3.

UNFAIR COMPETITION. See **Trade Commission Act.**

UNITED STATES. See **Admiralty,** 3–4; **Claims; Contracts; Criminal Law,** 1–2; **Jurisdiction,** II, 2.

UNSEAWORTHINESS. See **Admiralty,** 5.

VENUE. See **Jurisdiction**, IV, 9. Page.

WAIVER. See **Federal Control Act**, 6; **Interstate Commerce Acts**, II, 4.

WAR RISK INSURANCE:

1. *Suits to Enforce*, appellate jurisdiction in. *White* v. *U. S.* 175
2. *Regulations.* Power of Director to adopt, incorporating in certificates any future amendment of Act. *Id.*
3. *Beneficiary.* No vested right of one named in certificate, as against right of soldier to substitute by his will another made eligible only by statute subsequent to his death. *Id.*

WAR SAVINGS CERTIFICATES. See **Claims**, 11.

WATERS:

1. *Navigable Lake.* Title to bottom passed to State though included in reservation unless previous disposition by United States plainly appears. *U. S.* v. *Holt Bank*..... 49
2. *Navigability*—test of stated. *Id.*
3. *Id.* Uniform federal rule governs. *Id.*

WILLS. See **War Risk Insurance**, 3.

WISCONSIN:

See *Michigan* v. *Wisconsin*..... 295

WORKMEN'S COMPENSATION LAWS. See **Admiralty**, 2.

1. *Judgment*, effect of as determining intrastate character of deceased workman's employment, when pleaded in action under Federal Employer's Liability Act. *C. R. I. & P. Ry. Co.* v. *Schendel*..... 611
2. *Iowa Act.* Decision of Deputy Industrial Commissioner not final. *Id.*

WRITINGS. See **Contracts**, 3–4.

○