# UNITED STATES REPORTS

VOLUME 278

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1928

FROM OCTOBER 1, 1928, TO AND PARTLY INCLUDING
THE DECISIONS OF FEBRUARY 18, 1929

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## CORRECTIONS.

276 U. S. 208. Change the third paragraph to read: "*Mr. John C. Prizer* filed a brief as *amicus curiae* on behalf of Jacob Telfair Smith and Catz American Shipping Company, by special leave of Court."

*Id.* 306. Change "79b" to "75b" in the statement following the syllabus.

*Id.* 509. *Messrs. Mahlon D. Kiefer* and *Sewall Key*, of the Department of Justice, were on a supplemental brief for the United States, which should have been summarized in the report, but which, through some oversight, did not come to the Reporter's attention until too late.

277 U. S. 590. Insert "Cuetara" before "Hermanos" in the fourth line.

# 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.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

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

## SUPREME COURT OF THE UNITED STATES

### 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.

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For next previous allotment, see 266 U. S., p. IX.

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

## OCTOBER TERM, 1928.

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## FOSTER-FOUNTAIN PACKING COMPANY ET AL *v.* HAYDEL.

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

No. 68. Argued April 18, 1928.—Decided October 15, 1928.

1. An order of the District Court refusing a temporary injunction will not be disturbed on appeal unless the refusal was contrary to some rule of equity, or was the result of improvident exercise of judicial discretion. P. 6.
2. The Louisiana "Shrimp Act" declares all shrimp and parts thereof in Louisiana waters to be the property of the State; forbids exportation of shrimp from which the heads and "hulls" or shells have not been removed; but grants the taker a qualified interest which may be sold within the State, and provides that the meat, when the hulls are removed within the State, shall belong to the taker or possessor and may be sold and shipped beyond the State without restriction. The raw shells, "as they are required to be manufactured into fertilizer or used for an element in chicken feed," are not to be exported, but, when "conserved for the purpose herein stated," the right of property therein is to pass to the taker or possessor. Upon an application for a temporary injunction to restrain enforcement of the Act, it was made to appear by allegations of the bill and affidavits, and the provisions of the Act, that conservation of the heads and hulls is a feigned purpose; that the conditions imposed upon the interstate movement of the meat and other parts of the shrimp are not intended, and do not operate, to conserve them

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for the use of the people of the State, and that the real purpose of the legislation is to prevent the raw shrimp from being moved, as heretofore, from Louisiana to a point in Mississippi, where they are packed or canned and sold in interstate commerce, and thus, through commercial necessity, to bring about the removal of these packing and canning industries from Mississippi to Louisiana, *Held:*

(1) One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause, is not necessarily bound by the legislative declarations of purpose, but may show that in their practical operation the provisions directly burden or destroy interstate commerce. P. 10.

(2) In determining what is interstate commerce, courts look to practical considerations and the established course of business. *Id.*

(3) Interstate commerce embraces all the components of commercial intercourse among States. A state statute that operates directly to burden any of its essential elements is invalid. *Id.*

(4) A State cannot prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State. *Id.*

(5) The statute (upon the facts alleged) is not sustainable as an exercise of the power of the State, as trustee for her people, to conserve the shrimp, as common property, for intrastate use. *Geer* v. *Connecticut,* 161 U. S. 519, distinguished. P. 11.

(6) Taking the shrimp, with authority from the State to ship and sell all the products thereof in interstate commerce, ends the trusts upon which the State is deemed to own and control the shrimp for the benefit of her people, and those so taking them necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause; they are not bound to comply with, or estopped from objecting to enforcement of, conditions that conflict with the Constitution. P. 13.

(7) From the record it clearly appears that refusal of a temporary injunction was an improvident exercise of judicial discretion. P. 14.

Reversed.

APPEAL from an order of the District Court, of three judges, refusing a temporary injunction in a suit to restrain the enforcement of the Louisiana "Shrimp Act." The case was argued with the one next following.

1 Argument for Appellants.

*Messrs. William H. Watkins* and *W. Lee Guice,* with whom *Mr. Gustave Lemle* was on the brief, for appellants.

*Messrs. Michael M. Irwin* and *John Dymond, Jr.,* with whom *Messrs. Percy Saint,* Attorney General of Louisiana, *Peyton R. Sandoz,* Assistant Attorney General, *A. Giffen Levy,* and *Leander H. Perez* were on the brief, for appellees.

Participation by complainants in bringing about passage of the Act, and their acceptance of permits under it estopped them from objecting to its constitutionality. *Shepard* v. *Barron,* 194 U. S. 553; *Rand-McNally & Co.* v. *Kentucky,* 215 U. S. 583; *Wright* v. *Davidson,* 181 U. S. 371; 6 R. C. L., p. 94, § 95; *Andrus* v. *Police Jury,* 41 La. Ann. 697; Cooley on Taxation, p. 817; 6 Bigelow on Estoppel, 6th ed., p. 509; Burroughs on Taxation, § 38; *Moore* v. *City,* 32 La. Ann. 745; *Ferguson* v. *Landram,* 5 Bush (Ky.) 230; *Booth Fisheries Co.* v. *Industrial Comm'n,* 271 U. S. 208; *Daniels* v. *Tearney,* 102 U. S. 415; *Grand Rapids R. R. Co.* v. *Osborn,* 193 U. S. 17.

The primary purpose of the statutes is to increase the industries of the State, develop its resources, and add to its wealth and prosperity, by causing to be located within its borders the necessary plants for canning and packing oysters and drying and canning of shrimp, and for the manufacture of fertilizer from the hulls of the shrimp, to be used for the benefit of the State, and primarily to be sold within its borders.

It is established that the Fourteenth Amendment was not designed to interfere with the power of a State to prescribe regulations to promote the health, peace, morals, education and good order of its people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. Citing *Barbier* v. *Connolly,* 113 U. S. 27, and other familiar cases on the police power generally. See also *Lacoste* v. *De-*

*partment of Conservation,* 151 La. 909, aff'd, 263 U. S. 545.

No one has a right to complain that the provisions of the statute interfere with interstate commerce until he has first shown that he has reduced the shrimp and oysters to private possession.

A State has the absolute and unconditional right to prohibit the removal of fish or game from the State. *Geer* v. *Connecticut,* 161 U. S. 519; Lacy Act, 35 Stat. 1137. See *Organ* v. *State,* 56 Ark. 267, and *State* v. *Northern Pacific Express Co.,* 58 Minn. 403.

It would be legally impossible to deprive plaintiffs of their property without due process of law until they have acquired a property right in the shrimp and oysters, and this they can have only as and when the State permits. *McCready* v. *Virginia,* 94 U. S. 391; *Smith* v. *Maryland,* 18 How. 71; *Smith* v. *Levinus,* 8 N. Y. 472; 3 Kent Com., 415.

The State, in order to upbuild its industries and to conserve its natural resources, prohibits the removal of the hulls of shrimp and shell of the oysters from the State, and requires that these be retained within its jurisdiction to be converted into valuable fertilizer for the use and benefit of the inhabitants of the State. The State has power to enact such laws. See *State* v. *Harrub,* 95 Ala. 176, a case very similar to those at bar.

There is no discrimination between the plaintiffs and any other corporation or between plaintiffs and any citizen or resident of Louisiana. None can remove the shrimp from the State without first removing the hulls, nor the oysters without first removing the shells. *Turner* v. *Maryland,* 107 U. S. 38. Cf. *Manchester* v. *Massachusetts,* 139 U. S. 240.

The statutes impose no burden after the shrimp and oysters have become articles of commerce.

Having the unlimited authority to prohibit the shipment of shrimp beyond its limits, the State may permit such shipment under certain restrictions, particularly if the restrictions be reasonable and not violative of any constitutional right or authority. *State* v. *Harrub,* 95 Ala. 187.

The Oyster and Shrimp Laws were adopted by the Legislature in pursuance of express authority delegated by the Constitution of Louisiana, Art. VI, § 1.

The sale and export of shrimp in the hulls and of oysters in the shell, are a wasteful use of these resources.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellants, plaintiffs below, are engaged in the business of catching and canning shrimp for shipment and sale in interstate commerce. Appellees, defendants below, are public officers in Louisiana charged with the duty of enforcing Act No. 103, known as the "Shrimp Act," passed in July, 1926; so far as material here, it is printed in the margin.* Plaintiffs sued to enjoin enforcement of certain

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*"AN ACT

"To declare all shrimp and parts thereof in the waters of the State to be the property of the State of Louisiana, and to provide the manner and extent of their reduction to private ownership; to encourage, protect, conserve, regulate and develop the shrimp industry of the State of Louisiana. . . .

"Section 1. . . . That all salt water shrimp existing in the waters of this State, and the hulls and all parts of said salt water shrimp shall be and are hereby declared to be the property of the State; until the title thereto shall be divested in the manner and form herein authorized and shall be under the exclusive control of the Department of Conservation of the State of Louisiana, until the right of private ownership shall vest therein as herein provided, and that no person, firm or corporation shall catch or have in their possession, living or dead, any salt water shrimp, or parts thereof, or purchase, sell or offer for sale, any such shrimp or parts thereof, after the same have been caught except as otherwise permitted herein.

of its provisions on the ground, among others, that they violate the commerce clause of the Federal Constitution. The district judge granted a restraining order pending application for a temporary injunction. There was a hearing before the court, consisting of three judges, organized as required by § 266 of the Judicial Code, U. S. C., Tit. 28 § 380; it set aside the restraining order and denied the injunction. Then the court allowed this appeal, found that the plaintiffs will sustain irreparable harm and damage, and stayed the enforcement of the Act pending determination here.

The case has not been tried and the sole question is whether, having regard to the particular facts and circumstances, the lower court's refusal to grant a temporary injunction was contrary to some rule of equity or the re-

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"Section 4. That the right to take salt water shrimp from the waters of this State and the right to can, pack or dry the said shrimp when caught are hereby granted to any resident of this State, to any firm or association composed of residents of this State, or to any corporation domiciled in or organized under the laws of this State, operating a canning or packing factory or drying platform in this State. These rights shall be confined to such persons and corporations and are granted subject to the further conditions hereinafter stipulated. . . .

"Section 13. All salt water shrimp and the shells or hulls and heads of all salt water shrimp are hereby declared to be the property of the State, and the shells or hulls and heads to be valuable for use as a natural resource of the State as a fertilizer in the State; and it shall therefore and hereafter be unlawful to export from the State of Louisiana any salt water shrimp from which the shell or hull and head shall not have been removed.

"In order that all of the inhabitants of the State of Louisiana may enjoy the State's natural food product, it shall be lawful to ship unshelled shrimp from any point in the State of Louisiana to any other point in the State of Louisiana for edible consumption, subject to such regulations and restrictions as may be imposed by the Department of Conservation. Any person, firm or corporation of this State who shall lawfully take any shrimp from any waters of the State, or lawfully acquire the same, shall have a qualified interest or property

sult of improvident exercise of judicial discretion. *Meccano, Ltd.*, v. *John Wanamaker*, 253 U. S. 136, 141.

A brief statement of the allegations of the complaint follows:

The Foster Company is a Louisiana corporation and operates a shrimp hulling plant in that State. It gets shrimp from the tidal waters in the "Louisiana Marshes." The Sea Food Company is a Mississippi corporation and cans and packs shrimp in its plant at Biloxi in that State. Its product is shipped and sold in interstate commerce. The Foster Company and the Sea Food Company have a contract by which the former agrees to catch in Louisiana waters and deliver to the latter in Biloxi a carload of raw shrimp per month during specified periods. The sup-

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in the shrimp so taken or acquired in the shells, which qualified interest may be sold or transferred to any other person, firm or corporation within the limits of the State; and after the edible portions of the abdomen popularly called the tail meat of said shrimp shall have been removed from the shell, within the State of Louisiana, such lawful taker or possessor, his heirs or assigns, as the case may be, shall be vested with all of the rights and property of the State in and to said shrimp tail meat and shall have the right to sell such shrimp tail meat or ship the same beyond the limit of the State, without restriction or reservation.

"It shall be the duty of all licensees operating under the Department of Conservation in the shrimp industry in this State to conserve for fertilizer purposes all shells or hulls and heads of salt water shrimp and to report monthly, on blanks to be furnished by the Department of Conservation, the quantity thereof on hand, to the Department of Conservation. It shall be unlawful to export from the State of Louisiana any raw shells or hulls and heads of salt water shrimp as they are required to be manufactured into fertilizer or used for an element in chicken feed. When the shrimp hulls or shells and heads shall have been conserved for the purposes herein stated, the right of property therein theretofore existing in the State shall pass to the lawful taker or the possessor thereof. Any person, firm or corporation violating the provisions of this section shall be liable to the penalties hereinafter imposed."

ply is intended for the interstate and foreign business of the Sea Food Company; and, if prevented from obtaining such shrimp, the business of that company will be destroyed and its plant will be of no value.

There are located at Biloxi plants comprising about one-fourth of the shrimp canning industry in the United States. The waters of Mississippi do not contain an adequate supply of shrimp and practically all that are packed there come from the Louisiana Marshes. Shrimp are taken by nets dragged by power boats, and are then put on larger vessels and transported to Biloxi. To prepare the meat for canning, the heads and hulls are picked off; most of them are thrown into the water where they are consumed by scavengers of the sea. But some are made into "shrimp bran," which is used to a small extent in the manufacture of commercial fertilizer.

The Act declares all shrimp and parts thereof in Louisiana waters to be the property of the State, and regulates their taking and reduction to private ownership. It grants the right to take, can, pack and dry shrimp to residents and also to corporations, domiciled or organized in the State, operating a canning or packing factory or drying platform therein. § 4. It is made unlawful to export from the State any shrimp from which the heads and hulls have not been removed. But, in order that all its inhabitants "may enjoy the State's natural food product," the Act declares it lawful to ship unshelled shrimp to any point within the State. Whoever shall lawfully take shrimp from the waters is granted a qualified interest which may be sold within the State. And, when the tail meat is removed within the State, the taker or possessor has title and the right to sell and ship the same "beyond the limit[s] of the State, without restriction or reservation." It is declared unlawful to export from the State any raw shells or hulls and heads "as they are required to be manufactured into fertilizer or used for an element

in chicken feed." But, when they have been "conserved for the purpose herein stated, the right of property therein theretofore existing in the State shall pass to the lawful taker or the possessor thereof." § 13. Penalties are prescribed for violations. § 19.

And the complaint alleges that for years shrimp taken from Louisiana waters have been shipped out of the State unshelled; that only a negligible amount of hulls and heads of such shrimp as are consumed within the State has ever been used as fertilizer; that the declared purpose to conserve them is a subterfuge. And plaintiffs state that, notwithstanding their willingness to pay all charges, licenses and taxes imposed and to comply with all the valid requirements, defendants, if not enjoined, will prevent plaintiffs from taking or acquiring shrimp from Louisiana waters to their great and irreparable loss.

At the hearing on their motion for a temporary injunction, plaintiffs presented affidavits which tend to show the facts following. By reason of favorable topographical, climatic, labor and other conditions, shrimp taken from the Louisiana Marshes may be more conveniently and economically canned at Biloxi than in Louisiana near to the source of supply. The Biloxi plants have long constituted an important center of the industry, and they are largely dependent upon the Louisiana Marshes for their supply. The enforcement of the Act would injure or destroy the shrimp business of plaintiffs and the industry at Biloxi. About 95 per cent. of the shrimp obtained from the waters of Louisiana, when taken, is intended for consumption outside the State. Some shrimp bran is made from the hulls and heads in Louisiana; but all of it is shipped to Biloxi where it is used to make fertilizer. It is worth less than one per cent. of the value of the shrimp. Not more than half the hulls and heads removed in Louisiana is used for any purpose. They have no market value, cannot be sold or given away, and often constitute a nuisance.

The facts alleged in the complaint, the details set forth in plaintiffs' affidavits and the provisions of the Act to be restrained show that the conservation of hulls and heads is a feigned and not the real purpose. They support plaintiffs' contention that the purpose of the enactment is to prevent the interstate movement of raw shrimp from the Louisiana Marshes to the plants at Biloxi in order through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The conditions imposed by the Act upon the interstate movement of the meat and other products of shrimp are not intended, and do not operate, to conserve them for the use of the people of the State.

One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce. *Minnesota* v. *Barber,* 136 U. S. 313, 319. *Brimmer* v. *Rebman,* 138 U. S. 78, 81. In determining what is interstate commerce, courts look to practical considerations and the established course of business. *Swift and Co.* v. *United States,* 196 U. S. 375, 398. *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 59. *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 309. *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, 198, 200. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States. And a state statute that operates directly to burden any of its essential elements is invalid. *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 290. *Shafer* v. *Farmers Grain Co., supra,* 199. A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State. *Penna.* v. *West Vir-*

*ginia,* 262 U. S. 553, 596. *Oklahoma* v. *Kansas Nat. Gas Co.,* 221 U. S. 229, 255.

The authority of the State to regulate and control the common property in game is well established. *Geer* v. *Connecticut,* 161 U. S. 519, and cases cited at p. 528. These and many other cases show that the State owns, or has power to control, the game and fish within its borders not absolutely or as proprietor or for its own use or benefit but in its sovereign capacity as representative of the people. In *Geer* v. *Connecticut* the Court, speaking through Mr. Justice White, said (p. 529): "Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, as held by this Court in *Martin* v. *Waddell,* 16 Pet. [367] 410, represents its people, and the ownership is that of the people in their united sovereignty." In *Lacoste* v. *Dept. of Conservation, La.,* 263 U. S. 545, we said (p. 549): "The wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power, the State may regulate and control the taking, subsequent use and property rights that may be acquired therein."

Defendants rely on *Geer* v. *Connecticut* to sustain their contention that the Act forbidding the shipping of raw and unshelled shrimp out of the State was not in conflict with the commerce clause. The statute of Connecticut

declared it unlawful to kill or possess any woodcock, ruffled grouse, or quail for transportation, or to transport them, beyond the limits of the State. The question was whether the State had power to regulate the killing of game so as wholly to confine its use within the limits of the State. No part of the game was permitted by the statute to become an article of interstate commerce. The Court said (p. 529) that the sole consequence of the provision was "to confine the use of such game to those who own it, the people of that State" and that (p. 530) "in view of the authority of the State to affix conditions to the killing and sale of game . . . it may well be doubted whether commerce is created by an authority given by a State to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the State. . . . Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the State . . . created internal State commerce, it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the control of the Constitution of the United States. . . . (p. 532). The fact that internal commerce may be distinct from interstate commerce, destroys the whole theory upon which the argument of the plaintiff in error proceeds."

But that case is essentially unlike this one. The purpose of the Louisiana enactment differs radically from the Connecticut law there upheld. It authorizes the shrimp meat and bran, canned and manufactured within the State, freely to be shipped and sold in interstate commerce. The State does not require any part of the shrimp to be retained for consumption or use therein. Indeed only a small part is consumed or needed within the State. Consistently with the Act all may be, and in fact nearly all is, caught for transportation and sale in interstate

commerce. As to such shrimp the protection of the commerce clause attaches at the time of the taking. *Dahnke-Walker Co.* v. *Bondurant, supra. Penna* v. *West Virginia, supra* 596, *et seq.* As the representative of its people, the State might have retained the shrimp for consumption and use therein. But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the State. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control. Clearly such authorization and the taking in pursuance thereof put an end to the trust upon which the State is deemed to own or control the shrimp for the benefit of its people. And those taking the shrimp under the authority of the Act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause. They are not bound to comply with, or estopped from objecting to the enforcement of, conditions that conflict with the Constitution of the United States. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389. *Power Co.* v. *Saunders,* 274 U. S. 490, 493, 497. *Hanover Insurance Co.* v. *Harding,* 272 U. S. 494, 507.

If the facts are substantially as claimed by plaintiffs, the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce. *Penna* v. *West Virginia, supra. Oklahoma* v. *Kansas Nat. Gas Co., supra.* The affidavits give substantial and persuasive support to the facts alleged. And as, pending the trial and determination of the case,

plaintiffs will suffer great and irremediable loss if the challenged provisions shall be enforced, their right to have a temporary injunction is plain. From the record it quite clearly appears that the lower court's refusal was an improvident exercise of judicial discretion.

*Decree reversed.*

Separate opinion of Mr. Justice McReynolds.

I think the court below properly applied the correct doctrine and that the challenged decree should be affirmed.

In *Geer* v. *Connecticut,* 161 U. S. 519, 529, 534, this Court upheld legislation by the State which permitted woodcock, ruffled grouse and quail to be killed for transportation and sale within her borders, but forbade the killing or possession of such birds when dead for transportation to other States. It accepted the rule relative to dominion over animals *ferae naturae* as stated in *Ex parte Maier,* 103 Calif. 476, [483]—

"The wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good."

And commenting upon certain opinions which denied the validity of statutes whereby shipments of game beyond the State were prohibited, it said—" . . . but the reasoning which controlled the decision of these cases is, we think, inconclusive, from the fact that it did not consider the fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property, and thus overlooked the authority of the State over property in game killed within its con-

fines, and the consequent power of the State to follow such property into whatever hands it might pass with the conditions and restrictions deemed necessary for the public interest."

Manifestly, Louisiana has full power absolutely to forbid interstate shipments of shrimp taken within her territory. These crustaceans belong to her and she may appropriate them for the exclusive use and benefit of citizens. If the State should conclude that the best interests of her people require all shrimp to be canned or manufactured therein before becoming part of interstate commerce, nothing in the Federal Constitution would prevent appropriate action to that end. This would not interfere with any right guaranteed to an outsider. How wild life may be utilized in order to advantage her own citizens is for the producing State to determine. To enlarge opportunity for employment is one way, and often the most effective way, to promote their welfare.

Certainly, I cannot accept the notion that the record discloses any subterfuge—something resorted to for concealment—by Louisiana. And I think no weight should be given to the gratuitous allegation of such purpose by non-residents who are seeking to defeat control by the State in order that they may secure benefits for themselves from wild life found therein.

Any profitable discussion of this controversy must take into consideration the marked distinction between game and property subject to absolute ownership. Cases like *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, which concern property of the latter kind are not persuasive here. A State may regulate the sale and transportation of wild things in ways not permissible where wheat is the subject matter. *Geer* v. *Connecticut, supra*; *Silz* v. *Hesterberg,* 211 U. S. 31, 41; *Clark Distilling Co.* v. *Western Maryland Ry.,* 242 U. S. 311.

## JOHNSON, JR., ET AL. *v.* HAYDEL ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

No. 69. Argued April 18, 1928.—Decided October 15, 1928.

Denial of a temporary injunction to restrain enforcement of certain provisions of the Louisiana "Oyster Act," *held* erroneous, upon the authority of *Foster-Fountain Packing Co.* v. *Haydel, ante,* p. 1. Reversed.

APPEAL from an order of the District Court of three judges, refusing a temporary injunction in a suit to restrain enforcement of a statute of Louisiana concerning the taking of oysters. The case was argued with the one preceding, by the same counsel.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellants, plaintiffs below, are engaged in the business of catching and canning oysters for shipment and sale in interstate commerce. Appellees, defendants below, are public officers in Louisiana charged with the duty of enforcing Act No. 258, known as the "Oyster Act," passed in July, 1926, entitled: "An Act To declare all oysters and parts thereof in the waters of the State to be the property of the State of Louisiana, and to provide the manner and extent of their reduction to private ownership; to encourage, protect, conserve, regulate and develop the Oyster industry of the State of Louisiana . . ." Plaintiffs sued to enjoin enforcement of certain of its provisions on the ground, among others, that they violate the commerce clause of the Federal Constitution. The district judge granted a restraining order pending application for a temporary injunction. There was a hearing before the court, consisting of three judges, organized as required by § 266 of the Judicial Code, U. S. C. Tit. 28, § 380; it set

aside the restraining order and denied the injunction. Then, the court allowed this appeal, found that the plaintiffs will sustain irreparable harm and damage, and stayed the enforcement of the Act pending determination here.

The purpose of this Act is the same in respect of oysters as that of Act. No. 103 in respect of shrimp, considered in *Foster-Fountain Packing Co.* v. *Haydel, ante,* p. 1. The challenged provisions of the one closely correspond to those of the other. The two cases present similar issues of law and fact. The showing made by plaintiffs in support of their motion for temporary injunction is substantially the same as was made in that case. Our decision there controls this case.

*Decree reversed.*

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## MANEY *v.* UNITED STATES.

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

No. 27. Argued October 11, 1928.—Decided October 22, 1928.

1. A certificate of citizenship which was granted by the District Court without authority and contrary to law, is a certificate "illegally procured" within the meaning of § 15, Naturalization Act of 1906, directing district attorneys to institute proceedings for cancellation. P. 22.
2. Under the Act of 1906, a certificate from the Department of Labor stating the date, place and manner of the applicant's arrival in the United States must be filed with the petition for naturalization. This requirement is jurisdictional, and failure to comply with it cannot be cured by a subsequent filing allowed *nunc pro tunc*. So *held* where the decree was made within ninety days after the actual filing of the certificate. P. 23.
3. A decree of the District Court admitting an applicant to citizenship against the objection of the United States that the court had no jurisdiction because a certificate of arrival was not filed until after the filing of the petition for naturalization, is not *res judicata* barring a suit by the United States under § 15 of the Naturalization

Act to cancel the certificate of naturalization because of such jurisdictional defect. P. 23.

21 F. (2d) 28, affirmed.

CERTIORARI, 276 U. S. 609, to a decree of the Circuit Court of Appeals, which reversed a decree of the District Court, 13 F. (2d) 662, dismissing a petition to cancel a certificate of naturalization.

*Messrs. Bruno V. Bitker* and *Louis Marshall,* with whom *Mr. Edwin S. Mack* was on the brief, for petitioner.

The petition, having set forth a substantial claim under a federal statute, was a case within the jurisdiction of the District Court. *Binderup* v. *Pathe Exchange,* 263 U. S. 291; *General Investment Co.* v. *New York Central R. R. Co.,* 271 U. S. 228; *Swafford* v. *Templeton,* 185 U. S. 487.

The duty of passing upon the merits of a petition, presupposes jurisdiction. *Tutun* v. *United States,* 270 U. S. 568.

Since the trial court had jurisdiction, it possessed the inherent power to cure defects. *In re Denny,* 240 Fed. 845; *Tutun* v. *United States, supra;* Rev. Stats. § 954; Equity Rule 19, 1912; Jud. Code, § 274a.

The power to cure defects and amend pleadings is one of the fundamental discretionary rights of the courts. *Mexican Ry.* v. *Pinkney,* 149 U. S. 194; *In re Wright,* 134 U. S. 135.

Assuming that the particular defect is jurisdictional rather than procedural, the trial court has power to permit jurisdictional averments through amendments. *McEldowney* v. *Card,* 193 Fed. 475; *Atchison, etc. Ry.* v. *Gilliland,* 193 Fed. 608; *Howard* v. *de Cordova,* 177 U. S. 609; *Norton* v. *Larney,* 266 U. S. 511.

The facts do not constitute a showing of "good cause" that the certificate of citizenship was "illegally procured." *United States* v. *Richmond,* 17 F. (2d) 28. "Illegally procured" must be distinguished from a decree based on procedural defect. *Luria* v. *United States,* 231 U. S. 9.

The juxtaposition of the words "fraud" and "illegally procured" in § 15 indicates that illegal procurement was to be an act similar in character to "fraud."

The Government's remedy upon a judgment in which a procedural defect has occurred, is through appeal only. *Tutun* v. *United States,* 270 U. S. 568; *Luria* v. *United States,* 231 U. S. 9; *United States* v. *Richmond,* 17 F. (2d) 28; *United States* v. *Pandit,* 15 F. (2d) 285; *United States* v. *Salomon,* 231 Fed. 461, aff'd, 231 Fed. 928; *United States* v. *Srednik,* 19 F. (2d) 71; *United States* v. *Lenore,* 207 Fed. 865; *United States* v. *Erickson,* 188 Fed. 747.

The decree admitting the petitioner to citizenship is *res judicata.* In the present proceedings no new question of fact or of law is raised. The records in both proceedings are practically identical.

See *Johannessen* v. *United States,* 225 U. S. 227; *United States* v. *Ginsberg,* 243 U. S. 472; *United States* v. *Ness,* 245 U. S. 319; *United States* v. *Pandit,* 15 F. (2d) 285, certiorari denied, 273 U. S. 759; *North Carolina R. R.* v. *Story,* 268 U. S. 288; *United States* v. *Richmond,* 17 F. (2d) 28; *United States* v. *Lenore,* 207 Fed. 865; *United States* v. *Srednik,* 19 F. (2d) 71.

The serious consequences of the decision of the Circuit Court of Appeals in this case cannot be exaggerated. Such an action as is contemplated by § 15 does not seem to be barred by any statute of limitations. Consequently an action of this character may be brought long after the decree of naturalization has been granted, and after real property has been acquired by the person naturalized and his status has in many ways been affected.

*Solicitor General Mitchell,* with whom *Assistant Attorney General Luhring* and *Messrs. Harry S. Ridgely* and *Franklin G. Wixson* were on the brief, for the United States.

The rule of strict construction is to be applied to the Naturalization Act. The requirement that the certificate

of arrival shall be filed with the petition is one of substance, and the naturalization courts have no discretion to dispense with it. *United States* v. *Ginsberg,* 243 U. S. 472; *United States* v. *Ness,* 245 U. S. 319; *In re Liberman,* 193 Fed. 301; *Ex parte Eberhardt,* 270 Fed. 334; *In re Olsen,* 18 F. (2d) 425; *In re Hollo,* 206 Fed. 852; *United States* v. *Leles,* 236 Fed. 784; *United States* v. *Milder,* 284 Fed. 571; *United States* v. *Martorana,* 171 Fed. 397; *Ex parte Lange,* 197 Fed. 769; *In re Friedl,* 202 Fed. 300.

The failure to file the certificate of arrival with the petition makes the naturalization one illegally procured within the meaning of § 15, authorizing cancellation proceedings. *United States* v. *Ginsberg, supra; United States* v. *Mulvey,* 232 Fed. 513; *United States* v. *Koopmans,* 290 Fed. 545; *United States* v. *Albertini,* 206 Fed. 133; *United States* v. *Shanahan,* 232 Fed. 169; *United States* v. *Ness, supra.*

Congress has not attempted to provide for appeals from naturalization decrees entered in state courts. In at least three States the state courts have held that the state laws do not provide for such appeals. If the right to assail naturalization certificates by proceedings under § 15 is denied in cases where there has been a disregard of requirements of law by such state courts, the United States would have no remedy, unless through petition for certiorari to this Court under § 237 (b) of the Judicial Code.

If a cancellation proceeding is within the scope of § 15, the defense of *res judicata* is not available against the United States because of its appearance in the naturalization case. *United States* v. *Ness, supra; United States* v. *Ovens,* 13 F. (2d) 376; *United States* v. *Milder, supra; United States* v. *Mulvey, supra; United States* v. *Leles, supra; United States* v. *Ali,* 20 F. (2d) 998; *Gokhale* v. *United States,* 26 F. (2d) 360, certiorari granted, *post,* p. 591.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The petitioner obtained a certificate of naturalization by a decree of a District Court of the United States in February, 1924. In June, 1925, the United States filed a petition to have the certificate cancelled on the ground that it was illegally procured. The District Court dismissed the Government's suit, 13 F. (2d) 662. But this decision was reversed by the Circuit Court of Appeals and an order cancelling the certificate of naturalization was directed. 21 F. (2d) 28. A writ of certiorari was granted by this Court, 276 U. S. 609.

The petition for naturalization was filed on November 13, 1923, but at that time there was not filed the certificate from the Department of Labor stating the date, place, and manner of arrival in the United States, and the declaration of intention of such petitioner, which the Naturalization Act of June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Code, Title 8, § 380), required to be attached to and made part of the petition. It is said that the Department of Labor did not issue the certificate until November 24, 1923, and it was not mailed to the clerk of the Naturalization Court until December 3. The hearing on naturalization took place on February 11, 1924, and the District Court, against the objection of the United States, ordered the certificate filed and attached to the petition *nunc pro tunc,* as of the date when the petition was filed, and made the decree purporting to admit the petitioner to citizenship that has been annulled in the present proceeding. The petitioner says that the original decree made the question *res judicata,* and that it was right, or at least within the power of the Court.

By § 15 of the Naturalization Act, (C., § 405,) it is made the duty of district attorneys upon affidavit showing good cause therefor to institute proceedings for cancellation " on the ground that the certificate of citizenship

was illegally procured." The first question is whether the certificate was illegally procured within the meaning of § 15. If the statute makes it a condition precedent to the authority of the Court to grant a petition for naturalization that the Department of Labor's certificate of arrival shall be filed at the same time, then, when it appears on the face of the record that no such certificate has been filed, a decree admitting to citizenship is bad. It is illegal in the sense that it is unauthorized by and contrary to the law. *United States* v. *Ginsberg,* 243 U. S. 472, 475. *United States* v. *Ness,* 245 U. S. 319, 324, 325.

We are of opinion that the Circuit Court of Appeals was right in holding that the filing with the petition of the certificate of arrival was a condition attached to the power of the court. Although the proceedings for admission are judicial, *Tutun* v. *United States,* 270 U. S. 568, they are not for the usual purpose of vindicating an existing right but for the purpose of getting granted to an alien rights that do not yet exist. Hence not only the conditions attached to the grant, but those attached to the power of the instrument used by the United States to make the grant must be complied with strictly, as in other instances of Government gifts. By § 4 of the Act an alien may be admitted to become a citizen of the United States in the manner prescribed, "and not otherwise." And by the same section the certificate from the Department of Labor is to be filed " at the time of filing the petition." (C., §§ 372, 379.) The form provided by § 27 (C., § 409) alleges that the certificate is attached to and made a part of the petition. The Regulations of the Secretary of Labor embodied our interpretation of the law, and would have warned the petitioner if she had consulted them. Rule 5, Ed. February 15, 1917; Ed. September 24, 1920. *United States* v. *Ness,* 245 U. S. 319, 323. It already has been decided that the filing of the certificate is an essential prerequisite to a valid order of naturalization, *United*

*States* v. *Ness, supra,* and that a hearing in chambers adjoining the courtroom does not satisfy the requirement of a hearing in open Court. *United States* v. *Ginsberg,* 243 U. S. 472. The reasoning that prevailed in those cases must govern this. A hearing in less than ninety days from the public notice required by § 6 (Code, § 396) surely would have been as bad as a hearing in chambers. But as it has been decided that no valid decree could be made until the certificate was filed and as the hearing took place and the decree was entered in less than ninety days from the time when the certificate was received the want of power seems to us doubly plain. If, after the certificate came, the petition had been refiled, a new notice had been given and ninety days had been allowed to elapse before the hearing, there would be a different case.

It is said that the District Court had control of procedural matters and could cure formal defects. Very likely it had power to cure defective allegations, but it had not power to supply facts. If, as we decide, the petitioner was required to file the Department of Labor's certificate at the same time that she filed her petition, the District Court could not cure her failure to do so and enlarge its own powers by embodying in an order a fiction that the certificate was filed in time.

As the certificate of citizenship was illegally obtained, the express words of § 15 authorize this proceeding to have it cancelled. The judgment attacked did not make the matter *res judicata,* as against the statutory provision for review. The difference between this and ordinary cases already has been pointed out and would be enough to warrant a special treatment. But it hardly can be called special treatment to say that a record that discloses on its face that the judgment transcends the power of the judge may be declared void in the interest of the sovereign who gave to the judge whatever power he had.

*Judgment affirmed.*

# LEHIGH VALLEY RAILROAD COMPANY *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS ET AL.

## SAME *v.* SAME.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Nos. 24 and 54. Argued October 10, 11, 1928.—Decided November 19, 1928.

1. An agreement upon a plan for eliminating a grade crossing, adopted tentatively by the engineer staffs of a railroad and of the State Highway Commission of New Jersey, and followed by expenditures on the part of the railroad company but not executed by the company or the Commission, *held* not to have constituted a contract or an estoppel. P. 30.
2. A state commission adopted a plan to eliminate a grade crossing between a railroad and an important state highway, retaining the straight alignment of the highway at the crossing and approaches, and providing width for present and future exigencies of travel, but entailing heavy expense—more than $300,000—to the railroad company due chiefly to the necessity of raising the tracks to clear the highway and to the added width of the viaduct resulting from the sharp angle at which the highway and railroad crossed. A plan proposed by the company for avoiding these features by changing the place of crossing and relocating the highway for some distance on either side would have saved the company over $100,000, but was rejected by the commission because it involved making several curves in the highway and several deep cuts for its passage, deemed dangerous to travel. *Held* that to require the greater expense could not be adjudged violative of the Fourteenth Amendment considering the importance of the crossing, the probable permanence of the improvement, the demands upon the highway now and in the near future, and the dangers to be avoided. P. 33.
3. Under the Fourteenth Amendment, a State cannot put railroad companies to greater expense in the abolition of grade crossings than is reasonably necessary to avoid their dangers to the public. P. 34.
4. Reasonable expenditures for the abolition of grade crossings required by a State of an interstate railroad and not shown to interfere with or impair its economical management and service, are consistent with the Transportation Act. P. 35.

5. An order of the Public Utilities Commission of New Jersey requiring a railroad company to eliminate a grade crossing at its own expense, objected to as confiscatory, is reviewable in fact and in law by the Supreme Court of the State upon certiorari, pursuant to its statutory and inherent powers. *Ohio Valley Water Co.* v. *Ben Avon,* 253 U. S. 287, distinguished. P. 36.
6. *Semble* that, were this remedy by certiorari inadequate or unavailable, resort could be had to the Court of Chancery. P. 40.

Affirmed.

APPEALS from decrees of the District Court, of three judges, one decree denying a temporary injunction, the other dismissing the bill on final hearing, in a suit by the Railroad Company to enjoin enforcement of a grade crossing order.

*Messrs. Duane E. Minard* and *George S. Hobart,* with whom *Mr. E. H. Burgess* was on the brief, for appellant.

In requiring appellant to make unreasonable and wasteful expenditures for structures and maintenance, the order unreasonably and arbitrarily burdens, interferes with, impedes and discriminates against the interstate and foreign commerce of appellant, and impairs the usefulness of its facilities therefor. *McAneny et als.* v. *N. Y. Central R. R.,* 238 N. Y. 122, *Ex parte 74,* 58 I. C. C. 220; *Reduced Rates, 1922,* 68 I. C. C. 676; Senate Report No. 304, House Report No. 456 on Transportation Act, 1920; *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388; *Railroad Comm'n* v. *Southern Pacific Co.,* 264 U. S. 331; *Akron, etc. R. R.* v. *United States,* 261 U. S. 184; *Dayton-Goose Creek R. R.* v. *United States,* 263 U. S. 456; *Railroad Comm'n* v. *Chicago, B. & Q. R. R. Co.,* 257 U. S. 563; *A. C. & Y. R. R. Co.* v. *United States,* 261 U. S. 184; *Colorado v. United States,* 271 U. S. 153; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Weaver* v. *Palmer Bros.,* 270 U. S. 402; *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197; *Michigan Comm'n* v. *Duke,* 266 U. S. 570.

The Board, under the guise of regulation, may not compel the use and operation of the company's property for

public convenience without just compensation. *Banton* v. *Belt Line Ry.*, 268 U. S. 413.

If the Board's order requires an unnecessary width or length of under-pass, or unnecessary sidewalk spaces, or a substantial increase in the cost of the project by reason of maintaining the present alignment of the highway when a relocation of the highway and a change of its alignment can be made without impairing the safety or convenience of the public, that order imposes upon the plaintiff an unreasonable expenditure for this structure in violation of the Transportation Act.

For the protection of the carriers as instruments of commerce, Congress has very properly exercised the right to limit the expenditures for improvements and structures to the reasonable requirements of the situation, in order to maintain the balance, in the interest of the shippers and public on the one hand and the carriers on the other, between rates fixed by the Interstate Commerce Commission (over which the carriers have no control) and the expenditures that the carriers may lawfully be required to make for improvements. Having limited the income and directed the outgo, it would be a strange situation which left it open to the States to require the expenditure of millions of dollars in excess of reasonable requirements, for local improvements like grade crossings eliminations, which earn no revenue for the carrier, and benefit only the people in the localities affected and the competing local transportation agencies operating, free of cost, on the public highways improved by such expenditures.

The order of the Board violates the Constitution by impairing the obligation of the contract previously made between the appellant and the State Highway Commission for the alteration of the grade crossing in question.

The order of the Board, and the statutes under which it was made, as construed by the Courts of New Jersey, violate the due process and equal protection clauses of the

Constitution. They constitute an unreasonable exercise of the police power by requiring an unreasonable expenditure for the elimination of the crossing, and thereby deprive appellant of its property without due process of law.

This case presents a new question, namely, whether the police power is reasonably exercised when it requires the security holders and patrons of the railroad to pay more than twice the cost of providing the reasonable requirements of public safety and convenience, in order to provide nothing of safety, but a pure luxury of convenience. Appellant complains, not of the reasonable necessities of the situation, but only of the excessive requirements of the order of the Board.

This case is analogous to those in which courts have restrained the action of the State, or of an administrative board, which was undertaken to fix or limit rates of public utilities in such a way as to prevent a fair return upon the value of their property. See *Public Service Ry. Co.* v. *Board of Comm'rs,* 276 Fed. 979, appeal dismissed per stipulation, 266 U. S. 636; *N. Y. Telephone Co.* v. *Board,* 5 F. (2d) 245, aff'd, 271 U. S. 23; *Middlesex Water Co.* v. *Board,* 10 F. (2d) 519. Cf. *Nectow* v. *City of Cambridge,* 277 U. S. 183; *Chicago, etc. Ry.* v. *Minneapolis,* 238 Fed. 384.

A writ of certiorari is the proper, and only, remedy to review an order of the Board. *Acquackanonk Water Co.* v. *Comm'n,* 97 N. J. L. 366. The New Jersey Supreme Court has construed the Public Utilities Act as limiting its power to set aside an order of the Board made within its jurisdiction, to cases where there is no evidence to support reasonably the order. The Court of Errors and Appeals has construed it as conferring upon the Supreme Court merely the power to set aside an order and not to compel the Board to revise its order or make a new one. *Public Service Co.* v. *Board,* 87 N. J. L. 581, affirming 84 N. J. L. 463; *Erie* v. *Board,* 90 N. J. L. 672. The allow-

ance or refusal of a writ of certiorari is discretionary with the State Supreme Court and is, therefore, not subject to review. *Cavanagh* v. *Bayonne,* 63 N. J. L. 176; *Woglom* v. *Perth Amboy,* 80 N. J. L. 469.

Thus the Act not only fails to provide, but, as construed by the courts of New Jersey, expressly denies a means of review of an order of the Board as of right, and not only fails to provide, but expressly denies the party aggrieved, the right to submit the issue of confiscation to a judicial tribunal for determination upon its independent judgment. See *Erie* v. *Board,* 89 N. J. L. 57; s. c. 90 N. J. L. 672; *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428; *Bluefield, etc. Co.* v. *Comm'n,* 262 U. S. 679.

It is therefore unconstitutional under *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287; *Keller* v. *Potomac Electric Power Co., supra; Bluefield, etc. Co.* v. *Comm'n, supra; Ohio Utilities Co.* v. *Comm'n,* 267 U. S. 359; *Northern Pacific Ry.* v. *Department of Public Works,* 268 U. S. 39. *New York, etc. R. R.* v. *Bristol,* 151 U. S. 556, distinguished.

*Mr. John O. Bigelow* for the appellees.

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

These are two appeals from orders of a circuit judge and two district judges of the United States sitting in the District Court of New Jersey, denying to the Lehigh Valley Railroad Company injunctions sought by it in that court under § 380, United States Code, Title 28; § 266 of the Judicial Code. The defendants were the Board of Public Utility Commissioners, the Attorney General, and Francis L. Bergen, Prosecutor of the Pleas of Somerset County, all of New Jersey. The order sought to be enjoined was one made by the Board of Public Utility

Commissioners requiring the Railroad Company to eliminate two railroad grade crossings in Hillsborough Township, Somerset County, New Jersey, and to substitute for both of them one overhead crossing, to cost the railroad company $324,000. It was alleged that the change would involve unreasonable expenditure and thereby violate Par. 2, § 15, of the Act of Congress to Regulate Commerce, as amended by the Transportation Act of 1920, by interposing a direct interference with interstate commerce and imposing a direct burden thereon; that it would confiscate the property of the railroad company, deny it the equal protection of the laws and impair the obligation of a contract between the company and the State Highway Commission. The three federal judges heard the application for a temporary injunction and denied it, and on final hearing entered a decree dismissing the bill.

The state highway involved is Route No. 16, and crosses the Lehigh Valley Railroad in a direction northeasterly and southwesterly, at an angle of 29 degrees, with approaches on either side at the grade of 5 per cent. for a distance of 125 feet from the tracks. The right of way of the railroad company at this crossing is 100 feet wide and is occupied by four main operating tracks and various railroad appurtenances. 230 feet east of the center line of the crossing is a station on the westbound side of the railroad known as "Royce Valley."

At a point 1,400 feet easterly there is another grade crossing on what is called the Camp Lane Road, branching off from the highway in a southeasterly direction across the railroad at a practically level grade. The order of the Board would eliminate this crossing also.

In December, 1922, negotiations were opened between the Railroad Company and the State Highway Commission for the purpose of considering a plan for these eliminations. The negotiations continued until March 11,

1924, when the State Highway Commission adopted a resolution approving a plan of their engineer. There was public objection to it, and the negotiations continued, until finally the engineering staff of both the Company and the Highway Commission agreed on Plan C, to cost $109,000. The Railroad Company expended some $5,000 in preliminary preparation for its execution.

No contract was ever signed, either by the Railroad or the Commission. The Highway Commission had statutory power to make such a contract, but none was made other than the informal agreement between the engineering staffs.

The matter was then taken up in 1926 by the Board of Public Utility Commissioners, which was vested with authority to order railroad companies to eliminate grade crossings and to direct how they should be constructed. On November 24, the Board of Public Utilities issued an order to the Railroad Company providing for a different plan from that considered by the Highway Commission, to cost $324,000.

The Railroad Company sought to restrain the enforcement of this order by application for certiorari to a judge of the Supreme Court of New Jersey. He heard the preliminary application and an argument on the subject, together with evidence in the form of affidavits on the issue made, denied the application for a restraining order, and ordered the certiorari presented before the full Supreme Court *en banc*. The application was there presented on briefs and was denied.

A preliminary question is whether there was a contract made between the Railroad Company and the State Highway Commission, so that the order by the Board of Public Utility Commissioners would be an impairment of it and a violation of the Federal Constitution. There was certainly no legal contract completed between the Highway Commission and the Railroad Company. Plans were only

tentatively agreed upon. The expenditure of $5,000 in anticipation of the execution of the contract, to move some tracks, did not constitute an estoppel equivalent to making it or agreeing to it.

It is objected by the Railroad Company that the expense of the crossing of $324,000 is unreasonable, when it might have been constructed by an expenditure of at least $100,000 less.

The State of New Jersey, lying between New York and Philadelphia and the West, has always been a thoroughfare for intrastate and interstate commerce. The State has issued bonds to the extent of $70,000,000 for the improvements of its roads, and they now aggregate 1,500 miles in length. The highway with which we are concerned is known as Route 16, and is one of the chief arteries of travel between central New Jersey and the lake and mountain regions of the northern part of the State, northeastern Pennsylvania and the lower counties of New York. In connection with two other highway routes, it has become one of the principal roads between New York and Philadelphia. The traffic diagonally across the State is so heavy and so constantly growing that no one road can carry it all. So another route, No. 29, was authorized by the Legislature in 1927, and when it is completed, the traffic at Royce Valley crossing, already heavy, will be much increased. The highway here in question was an ancient county road laid out in 1811. It has always been a road at this point running straight 2,000 feet north of the railroad and 2,500 feet south of it.

Two plans for elimination of the two crossings were finally presented, one by the chief engineer of the Board of Public Utility Commissioners, and one, called Plan C, by the Railroad Company. The plan of the Board provided for keeping the highway straight, carrying it under a bridge of the railroad tracks with a width of 66 feet, elevating the tracks for clearance, and dividing the high-

way by a central pier of 5 feet, two roadways of 20 feet each, and two sidewalks of 10 feet 6 inches each.

Plan C provided for the vacation and abandonment of the highway where it crosses the railroad right of way, so that Route 16 would come to a dead end both north and south of the railroad. It provides further for the laying out and establishing of a new stretch of highway which would cross the railroad about 400 feet east of the present crossing. It would first have a 6 degree curve to the east. It would then have a straight course of about 250 feet to the entrance of the tunnel under the railroad tracks. A short distance beyond the tunnel a second 6 degree curve to the west would begin, and then a third 6 degree curve to the east and the roadway would join Route 16 at a point about 1,000 feet south of the intersection of the route with the center line of the railroad. It would thus have three 6 degree curves in it in about half a mile, with cuts, which at stations 100 feet apart would have 7 feet of depth at one, 10 feet of depth at another, 7½ feet of depth at a third, and 5 feet at a fourth.

Plan C provided for two roadways each 18 feet wide and a center pier 5 feet wide, making a total width of 41 feet, and would create an angle of divergence of 54 degrees. It would make the tunnel under the railroad, measured along the center pier, about 75 feet long, as against 105 feet by the Board plan. The original cost as proposed by the Railroad plan was $109,000, but by including the Camp Lane elimination, and the two sidewalks on the roadway in the tunnel, both of which were plainly needed, and the increase in the width of the tunnel roadways, the cost was increased to $205,000, and to these additions and others the Company ultimately acceded.

The chief increases in the cost of the Board plan over Plan C, as modified, are in the requirement that the highway shall remain straight, and in the circumstance that

under the Board plan the bridge of the railroad tracks must be raised to secure sufficient clearance for the use of the straight highway beneath. The tunnel and the bridge over it, if straight, must be 105 feet long, while under the railroad plan, with the three curves, and the cuts below the surface, the bridge would be only 75 feet, or shorter by one-third.

The witnesses for the Railroad testify that 6 degree curves are not dangerous, and that the additional cost of $100,000 for preserving the straight road is not within the limit of reasonableness. The advantage of straightness in such a road through a tunnel is clear. The curves in the cuts of from 5 to 10 feet in the railroad plan would tend to increase the embarrassment of driving and to obscure the clearness with which the drivers could see those ahead in and through the tunnel and the curves. This highway is not infrequently crowded with vehicles. When Route No. 29 is completed, it will certainly be more crowded. The immediate prospect of using new Route 29 makes greater room in the roadways most desirable. The large expenditure to secure such advantages does not seem to be arbitrary or wasteful when made for two busy highways instead of one.

It is not for the Court to cut down such expenditures merely because more economical ways suggest themselves. The Board has the discretion to fix the cost. The function of the Court is to determine whether the outlay involved in the order of the Board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future, and other considerations similarly relevant.

An increase from $200,000 to $300,000 for a railroad crossing might well, under different circumstances from

those here, be regarded as so unreasonable as to make the order a violation of the company's constitutional rights and to be in the nature of confiscation. The protection of the Fourteenth Amendment in such cases is real and is not to be lightly regarded. A railroad company, in maintaining a path of travel and transportation across a State, with frequent trains of rapidity and great momentum, must resort to reasonable precaution to avoid danger to the public. This Court has said that where railroad companies occupy lands in the State for use in commerce, the State has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. *Erie R. R.* v. *Board,* 254 U. S. 394. This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the Court, where the cost is questioned, to determine whether it is within reasonable limits.

This follows from principles clearly established by this Court. *M. K. & T. R.* v. *Oklahoma,* 271 U. S. 303; *Mo. Pac. Ry.* v. *Omaha,* 235 U. S. 121, 129, 131; *Lawton* v. *Steele,* 152 U. S. 133, 137; *Norfolk Ry.* v. *Commission,* 265 U. S. 70, 74; *Commission* v. *Mobile R. R. Co.,* 244 U. S. 388, 390, 391; *Dobbins* v. *Los Angeles,* 195 U. S. 223. We emphasize this not because there is doubt about it, but because we deprecate the impression, apparently entertained by some, that in the safeguarding of railroad

crossings by order of state or local authority the exercise of police power escapes the ordinary constitutional limitation of reasonableness of cost. This is apt to give to local boards a sense of freedom which tempts to arbitrariness and extravagance. The case before us is one which is near the line of reasonableness, but for the reasons given we think it does not go beyond the line.

An elaborate argument is made by counsel for the Railroad Company to impeach the validity of the order of the Board of Public Utilities in this case because of the amendment to the Interstate Commerce Law, § 15-a, par. 314, § 416, contained in the Transportation Act of 1920. Based on this, it is said that the Board has no right to order these unreasonable expenditures for construction, because they exceed the legal duties of the carrier and the reasonable requirements of public safety and convenience. It is not necessary for us to controvert the proposition that unreasonably extravagant grade crossings are to be enjoined not only as violations of the Fourteenth Amendment but also as forbidden by the Transportation Act.

But we can not see that the rule invoked from either will be violated by the order now made. The care of grade crossings is peculiarly within the police power of the States, *Railroad Comm'n* v. *Southern Pacific Co.,* 264 U. S. 331, 341; and if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear. It was certainly not intended by the Transportation Act to take from the States, or to thrust upon the Interstate Commerce Commission, investigation into parochial matters like this, unless, by reason of their effect on economical management and service, their general bearing is clear. *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331. The latter case makes a distinction between the local character of

the usual elimination of grade crossings and the vital character from the standpoint of finance of the investment of large sums in the erection of a Union Station.

The final objection to the order is that the statute providing for the elimination of grade crossings by the Board of Public Utilities impinges on the constitutional rights of the Company, because it makes no provision for appeal from the decision of the Board of Public Utilities to a court with jurisdiction judicially to determine independently, on the law and facts, whether the property of the Company is being confiscated, in violation of the Fourteenth Amendment to the Federal Constitution. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287. In that case, the Public Service Commission of Pennsylvania instituted an investigation and took evidence upon a complaint charging a water company with demanding unreasonable rates. The Commission fixed the valuation of the Company's property and established rates on that basis. The Company contended that the valuation upon which the income was calculated was much too low, and deprived it of a reasonable return and therefore confiscated its property. On appeal to the Superior Court, that court reviewed the certified record, appraised the property, reversed the order and remanded the proceedings with directions to authorize rates sufficient to yield 7 per centum of the sum. The Supreme Court reversed the decree, saying that there was competent evidence tending to sustain the Commission's conclusion, and as no abuse of discretion appeared, the Superior Court could not under the Pennsylvania statute interfere. This Court held on error that, because the plaintiff in error had not had proper opportunity for an adequate independent judicial hearing as to confiscation on the law and the facts, the challenged order was invalid, and that the judgment of the Supreme Court of the State must be reversed.

We do not think the *Ben Avon* case applies here. In this case Chapter 195 of the Laws of 1911 of New Jersey created a Board of Public Utility Commissioners and prescribed its duties and powers. By §§ 21 and 22 of that Act, the Board is vested with authority to protect the traveling public at grade crossings by directing the Railroad Company to install such protective device or devices, and adopt such other reasonable provision for the protection of the traveling public at such crossing, as in the discretion of the Board shall be necessary.

Section 38 of this Act, as amended by Chapter 130 of the Laws of 1918, provides that any order made by the Board may be reviewed upon certiorari after notice, and the Supreme Court is given jurisdiction to review the order, and to set it aside when it clearly appears that there was no evidence before the Board reasonably to support the same, or that the same was without the jurisdiction of the Board. If it should appear equitable and just that a rehearing be had before the Board, the Supreme Court may determine that such hearing be had, upon such terms and conditions as are reasonable.

The language of § 38 in respect to the appeal to the Supreme Court is much broadened by the construction of that court. It has been established by its decisions that the Legislature of New Jersey may not impair the powers of the Supreme Court and the Court of Chancery as they existed when the State Constitution was adopted, and there is much latitude in their jurisdiction growing out of this. *Traphagen* v. *West Hoboken,* 39 N. J. L. 232; *Flanigan* v. *Guggenheim Smelting Co.,* 63 N. J. L. 647; *In re Prudential Insurance Co.,* 82 N. J. Eq. 335.

The case of *Public Service Gas Co.* v. *Board of Comm'rs,* 84 N. J. L. 463, s. c. 87 N. J. L. 581, construing § 38, as amended, is an illustration. It came before the Supreme Court on certiorari for consideration whether rates

fixed by the Board for a Public Service Gas Company of Passaic were unjust, discriminatory and unreasonable. The Supreme Court said of § 38 [p. 466]:

"If this language is taken literally, we should be powerless in any case within the jurisdiction of the Board to set aside its order if there was any evidence to support it, no matter how overwhelming the evidence to the contrary might be. It is needless to say that such a literal construction of section 38 would bring it into conflict with our constitution. It needs no act of the legislature to confer on us the power to review the action of an inferior tribunal, and the legislature can not limit us in the exercise of our ancient prerogative. That the legislature did not intend to do so is made clear by a consideration of the whole act. We are, by the express terms of section 38, authorized to set aside the order when it is without the jurisdiction of the board. The jurisdiction of the board to fix rates is, by section 16c, limited to cases where the existing rate is unjust, unreasonable, insufficient or unjustly discriminatory or preferential. The only words important for the present case are unjust and unreasonable, since the commissioners themselves went no further in their adjudication. To determine then whether the commissioners had jurisdiction, we must first determine whether the existing rate was unjust and unreasonable, and in determining that fact we are not limited to the question whether it clearly appears that there was no evidence before the board to support reasonably its order; section 16c does not purport to limit the scope of our inquiry into the fact, and we must therefore determine it in the usual way according to the whole of the evidence."

The Supreme Court proceeded itself to consider all the evidence in the case and to find whether the old rate was unreasonably high and the new rate reasonable. It said [p. 468]:

"All these considerations lead us to the conclusion that if there is any presumption in favor of the order of the commissioners, it depends, like the opinion of the court of another state, upon the strength of the reasoning by which it is supported. This is subject, however, to the qualification that in legislative action the courts will not merely substitute their judgment for that of a legislative body.

"We must, therefore, determine for ourselves upon all the evidence whether the former rate for gas in the Passaic district was unjust and unreasonable, and whether the new rate is just and reasonable."

The case went to the Court of Errors and Appeals, and the action was affirmed on that opinion. There may be some confusion in a review of cases on certiorari by the Supreme Court of New Jersey; but the *Passaic* case has never been overruled, and under it there is an appeal to a court which may examine the facts and the law independently as to the justice and reasonableness of the order. It is true that the court said that the case before it was not technically a confiscation case but it resembled it so much that it used cases from this Court on confiscation to guide its rulings, and said:

"Since all cases of the kind may come before that tribunal and its decisions upon the constitutional questions would be binding upon us, we ought to adopt the same rule."

The *Passaic* case was followed in the consideration of the same § 38 in *Erie R. R.* v. *Board,* 89 N. J. L. 57; s. c. 90 N. J. L. 672, a grade crossing case, in which the Supreme Court said [p. 68]:

"The next ground of attack is that the evidence taken before the board of public utility commissioners does not justify or reasonably support the board's conclusion or findings. To that end, the insistence is, that this court

has power and should review the board's findings of fact. We understand such to be the power of this court."

Objection is further made to this remedy before the Supreme Court, that it is by certiorari and is within the discretion of the Court. That, however, is hardly a serious obstacle. As Chief Justice Kinsey, in *State* v. *Anderson,* 1 N. J. L. 318, 320, said:

". . . as upon a certiorari the court have by law a discretionary power, I do not mean by this a power to do what they please not directed by law and precedents, but, to employ the language of a great judge, to be confined to those limits, within which an honest man competent to the discharge of the duties of his office ought to be confined; . . ."

This Court said of provisions for certiorari in a California statute like this, *i. e., Nappa Valley Electric Co.* v. *Railroad Comm'n,* 251 U. S. 366 [p. 372]:

"In those cases the applications for writs of certiorari were denied, which was tantamount to a decision of the Court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the State of California."

But if for any reason that remedy, as defined in those decisions, should not be available or should be inadequate, it would seem to be clear that resort then might be had to the Court of Chancery. In *Allen* v. *Distilling Co.,* 87 N. J. Eq. 531, the Court of Chancery in New Jersey used this language [p. 543]:

"So long as courts of equity are to serve the purpose of the creation of the court of chancery of England, and in this state the court of chancery is the sucessor, in all that such term implies, of that court, jurisdiction must depend only upon the existence of, or a threatened wrong, and the absence of an adequate remedy at law. . . . Due to our habit of endeavoring to find decided cases to fit each

situation, we too often overlook the fundamental reasons for the creation or evolution of the court. It received no grant of express powers nor were express duties imposed upon it. The law courts were left to deal with the violation of all rights for which they could give an adequate remedy. The duty of relieving against any remaining wrongs was imposed upon the court of chancery."

We are of opinion that the infirmity in the Pennsylvania statute which was pointed out in *Ohio Valley Co.* v. *Ben Avon Borough* is not present in the New Jersey statutes.

*Affirmed.*

MR. JUSTICE MCREYNOLDS is of opinion that the action of the Board of Public Utility Commissioners was unreasonable and arbitrary and should be set aside. To permit the Commissioners to impose a charge of $100,000 upon the Railroad under the pretense of objection to a six per cent. curve in a country road is to uphold what he regards as plain abuse of power.

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## BOSTON SAND AND GRAVEL COMPANY *v.* UNITED STATES.

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

No. 15. Argued February 28, 29, 1928. Reargued October 18, 1928.—Decided November 19, 1928.

1. A special act empowering the District Court to determine a case arising from a collision between a warship and a private craft, and to decree for "the amount of the legal damages sustained by reason of said collision . . . upon the same principles and measure of liability with costs as in like cases in admiralty between private parties," should not be construed to allow interest in a recovery against the United States although interest is commonly included in collision cases where the Government is not a party. P. 46.

2. This and similar acts, considered with general legislation *in pari materia,* in the light of the rule exempting the United States from interest, shows a policy of Congress to distinguish between the damages caused by a collision and the later loss caused by delay in paying them. P. 47.
3. The fact that if the United States had prevailed in the suit it could have claimed interest, does not signify that the statute accords a similar right to the private party, since the right of the United States to recover interest is independent of the statute. P. 49.

19 F. (2d) 744, affirmed.

CERTIORARI, 275 U. S. 519, to a decree of the Circuit Court of Appeals, refusing to allow interest against the United States in a collision case litigated under a Special Act of Congress. The District Court had ordered the damages divided, 7 F. (2d) 278, and the petitioner sought interest on its share.

*Mr. John W. Davis,* with whom *Mr. Foye M. Murphy* was on the brief, for petitioner.

The word "damages" in an enabling act is sufficient to give to the claimant interest against the Government, whenever interest would be allowed as damages in like circumstances between private persons. *U. S. ex rel. Angarica* v. *Bayard,* 127 U. S. 251; 7 Op. A. G. 523.

Interest as awarded in collision cases in admiralty between private parties is damages within the proper legal meaning of that term. Sedgwick on Damages, 9th ed., p. 552; Sutherland on Damages, 4th ed., pp. 939, 940; *Williams* v. *American Bank,* 4 Metc. 317; *Dana* v. *Fiedler,* 12 N. Y. 40; *Parrott* v. *Knickerbocker Ice Co.,* 46 N. Y. 361; 3 Op. A. G. 635; *Watts* v. *United States,* 129 Fed. 222; *The Umbria,* 166 U. S. 404; *The Scotland,* 118 U. S. 507; *The America,* 1 Fed. Cas. No. 284; *The Rhode Island,* 20 Fed. Cas. No. 11740a; *Guibert* v. *The George Bell,* 3 Fed. 581; *Fabre* v. *Cunard S. S. Co.,* 53 Fed. 288; *The Rabboni,* 53 Fed. 952; *The Reno,* 134 Fed. 555;

*In re Great Lakes Dredge & Dock Co.,* 250 Fed. 916; *New York, etc. Co.* v. *United States,* 16 F. (2d) 945.

The rule is the same in England. *The Dundee* (1827) 2 Haggard, 137; *The Hebe* (1847) 2 W. Robinson, 530; *The Kate* (1899) Prob. Div. 165; *The Kong Magnus* (1891) Prob. Div. 223; Roscoe on Damages in Maritime Collisions, 2d ed. pp. 5, 39.

There undoubtedly are rare cases which recognize that there is an element of discretion in the allowance of interest in collision cases. Examples are *The Scotland,* 118 U. S. 507; *The Albert Dumois,* 177 U. S. 240; *The Maggie J. Smith,* 123 U. S. 349. But this discretion has so uniformly been exercised to allow interest that its allowance has become practically a rule of law in the absence of a showing of some extraordinary circumstance making it inequitable to allow it. But two circumstances are recognized as justifying the refusal of interest—laches in bringing suit, and vexatious appeals. Benedict on Admiralty, 5th ed., p. 495; Roscoe, op. cit., p. 41.

Admiralty Courts continually refer to the allowance of interest as the usual rule. *In re Great Lakes Dredge & Dock Co.,* 250 Fed. 916; *Straker* v. *Hartland,* 2 H. & M. 570; *Frazer* v. *Carpet Co.,* 141 Mass. 126; *Managua Navigation Co.* v. *Aktieselskabet Borgestad,* 7 F. (2d) 990; *The America,* 1 Fed. Cas. No. 284. See also *The J. J. Gilchrist,* 173 Fed. 666; *N. Y. & Cuba Mail S. S. Co.* v. *United States,* 16 F. (2d) 945, and cases cited *supra.*

Where a word has a judicially settled meaning, it must be presumed that Congress has used it in that sense where it appears in a statute. *The Abbotsford,* 98 U. S. 440; *Kepner* v. *United States,* 195 U. S. 100; *United States* v. *Merriam,* 263 U. S. 179.

If the argument of the Government be sustained and the rule of the *Angarica* case be held inapplicable to maritime torts because the admiralty court has discretion in

extreme cases to deny interest, then the rule of that case cannot logically be applied to any tort case; for under the decisions of this Court, the jury in non-maritime tort cases is possessed of the same discretion. *Lincoln* v. *Claflin,* 7 Wall. 132; *District of Columbia* v. *Robinson,* 180 U. S. 92; *Drumm-Floto Co.* v. *Edmisson,* 208 U. S. 534.

Doubt is resolved by the explicit provision that the "legal damages" shall be awarded "upon the same principle and measure of liability with costs in like cases between private parties." 1 Op. A. G. 268; *United States* v. *McKee,* 91 U. S. 442.

The provision in the present act for costs to the successful party still further fortifies the conclusion that full restitution was intended.

Out of ninety-six special acts passed since 1912 when they began to appear commonly, comparable in phraseology to that here in question, four include interest *eo nomine.* Eight explicitly exclude it and eighty-four make no mention of it *eo nomine.* It is easy for Congress to say so, if it is its intention to exclude it. *Tiger* v. *Western Investment Co.,* 221 U. S. 286. In other cases the merits have been considered, damages determined by the Committee and a stated sum has been reported out and voted by Congress directly as relief, sometimes with interest. The Suits in Admiralty Act provides for interest at 4%—by judicial construction, from the date of the collision. *Middleton* v. *United States,* 286 Fed. 548. But in *Comus* v. *Lake Frampton,* 1927 A. M. C. 1713, a libel brought under this Act, an owner was allowed by the Circuit Court of Appeals for the Second Circuit, 6% interest against the United States under the court's broad equity power because the Government in a cross-libel was recovering under the usual rule 6% per annum as a part of its own damages.

It must be clear that what Congress has done in one case is no guide to what it intends in another. The fact

is there is no ambiguity in the present case in the Act itself if the judicially settled meanings of the words used are given effect.

The weight of authority, dealing with similar statutes, supports the petitioner and not the Government. The only live and relevant judicial precedents for the decision herein are *Pennell* v. *United States,* 162 Fed. 75, and *Nantasket Beach S. S. Co.* v. *United States,* 297 Fed. 656. *Whitelaw* v. *United States,* 9 F. (2d) 103; *Watts* v. *United States,* 129 Fed. 222; and *Nippon Yusen, etc.* v. *United States,* 1926 A. M. C. 1008, distinguished.

See *Texas Co.* v. *United States,* 16 F. (2d) 945; *New York and Cuba S. S. Co.* v. *United States,* 16 F. (2d) 948, both here on certiorari; *The Commonwealth,* 297 Fed. 651; *The Friedrich der Grosse,* 1926 A. M. C. 361; *Alaska Commercial Co.* v. *United States,* 1925 A. M. C. 1269; *Commonwealth & Dominion Line* v. *United States,* 20 F. (2d) 729.

The allowance of interest will accord with the decisions of this Court in many similar situations and is necessary to a full and fair reparation for the Government's tort, as in prize cases. *The Charming Betsey,* 2 Cranch 64; *The Anna Maria,* 2 Wheat. 327; *The Amiable Nancy,* 3 Wheat. 546; *The Appollon,* 9 Wheat. 362; *The Nuestra Senora de Regla,* 108 U. S. 92; *The Paquete Habana,* 189 U. S. 453; *The Labuan,* Blatchf. Pr. Cas. 165; *The Sybil,* Blatchf. Pr. Cas. 615; 6 Moore, Dig. Int. L., 1029; Moore, Int. Arbitrations; Hague Court Reports, 228, 234, 297. And see *Erskine* v. *Van Arsdale,* 15 Wall. 75; *Miller* v. *Robertson,* 266 U. S. 243; *Banco Mexicano* v. *Deutsche Bank,* 262 U. S. 591; *Standard Oil Co.* v. *United States,* 267 U. S. 76; *Seaboard Air Line* v. *United States,* 261 U. S. 299; *Brooks-Scanlon Corp'n* v. *United States,* 265 U. S. 106; *Liggett & Myers Co.* v. *United States,* 274 U. S. 215; *Phelps* v. *United States,* 274 U. S. 341; *United States* v. *Rogers,* 255 U. S. 163; *Hull No. 5, etc.* v. *United States,*

1927 A. M. C. 485; *United States* v. *The Thekla,* 266 U. S. 328; *The Barendrecht,* 11 F. (2d) 377.

*Assistant Attorney General Farnum,* with whom *Solicitor General Mitchell* and *Mr. John T. Fowler, Jr.,* were on the brief, for the United States.

Mr. Justice Holmes delivered the opinion of the Court.

This is a libel in admiralty brought by the petitioner to recover for damages done to its steam lighter *Cornelia* by a collision with the United States destroyer *Bell.* It is brought against the United States by authority of a special Act of May 15, 1922, c. 192, 42 Stat. 1590. There has been a trial in which both vessels ultimately were found to have been in fault and it was ordered that the damages should be divided. 7 F. (2d) 278. Thereafter the damages were ascertained and the petitioner sought to be allowed interest upon its share. (There was no cross libel.) The Circuit Court of Appeals, going on the words of the statute, parallel legislation, and the general understanding with regard to the United States, held that no interest could be allowed. 19 F. (2d) 744. As there was a conflict of opinion with the Second Circuit dealing with similar language in a special act, *New York & Cuba Mail S. S. Co.* v. *United States,* 16 F. (2d) 945, a writ of certiorari was allowed by this Court, 275 U. S. 519.

The material words of the Act are that the District Court " shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs as in like cases in admiralty between private parties with the same rights of appeal." On a hasty reading one might be led to believe that Con-

gress had put the United States on the footing of a private person in all respects. But we are of opinion that a scrutiny leads to a different result. It is at least possible that the words fixing the extent of the Government's liability were carefully chosen, and we are of opinion that they were. We start with the rule that the United States is not liable to interest except where it assumes the liability by contract or by the express words of a statute, or must pay it as part of the just compensation required by the Constitution. *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 304, 306. Next we notice that when this special act was passed there was a recent general statute on the books, the Act of March 9, 1920, c. 95, § 3, 41 Stat. 525, 526, allowing suits in admirality to be brought *in personam* against the United States, in which it was set forth specifically that interest was to be allowed upon money judgments and the rate was four per centum, not the six per centum that the petitioner expects to get. The later general statute passed as a substitute for special bills like the one before us, allows suits in admiralty for damages done by public vessels but excludes interest in terms. Act of March 3, 1925, c. 428, § 2, 43 Stat. 1112.

We are satisfied by the argument for the Government that the policy thus expressed in the Act of 1925 had been the policy of the United States for years before 1922, and that the many private acts like the present generally have been understood, before and since the act now in question, not to carry interest by the often repeated words now before us. This was stated by the Attorney General in a letter to the Chairman of the Senate Committee on Claims when the Act of 1925 was under consideration (Sen. Report 941, p. 12, 68th Cong., 2d Sess.) and the bill was amended so as to remove all doubt. The Act of March 2, 1901, c. 824, 31 Stat. 1789, believed to be the first of the private acts in the present

form, was passed after an amendment striking out an allowance of interest, thus showing that the words now relied upon then were understood not to allow it. The same thing has happened repeatedly with later acts, and when by exception interest has been allowed, it has been allowed by express words. Before 1901, since 1871, such cases had been referred to the Court of Claims, which was forbidden by statute to allow interest. Rev. Stats. § 1901. Code, Title 28, § 284. It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute. But, as we have said, the usage of Congress simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops, and that it distinguishes between the damages caused by the collision and the later loss caused by delay in paying for the first,—between damages and 'the allowance of interest on damages', as it is put by Mr. Justice Bradley in *The Scotland,* 118 U. S. 507.

What the Act authorizes the Court to ascertain and allow is the 'amount of the legal damages sustained by reason of said collision.' Of these, interest is no part. It might be in case of the detention of money. But this is not a claim for the detention of money, nor can any money be said to have been detained. When a jury finds a man guilty of a tort or a crime, it may determine not only the facts but also a standard of conduct that he is presumed to have known and was bound at his peril to follow. *Nash* v. *United States,* 229 U. S. 373, 377. But legal fiction never reached the height of holding a defendant bound

to know the estimate that a jury would put upon the damage that he had caused. As the cause of action is the damage, not the detention of the money to be paid for it, it could be argued in a respectable Court, as late as 1886, that at common law, even as a matter of discretion, interest could not be allowed. *Frazer* v. *Bigelow Carpet Co.*, 141 Mass. 126. And although it commonly is allowed in admiralty, still the element of discretion is not wholly absent there. As stated by Mr. Justice Bradley in *The Scotland,* 118 U. S. 507, "The allowance of interest on damages is not an absolute right." When the Government is concerned, there is no obligation until the statute is passed and the foregoing considerations gain new force.

It has been urged that the United States would claim interest, and that, as the statute speaks of 'damages due either for or against the United States' the claims on the two sides stand alike. But that is not true. The United States did not need the statute, and it has been held that, even in the adjustment of mutual claims between an individual and the Government, while the latter is entitled to interest on its credits, it is not liable for interest on the charges against it. *United States* v. *Verdier,* 164 U. S. 213, 218, 219. *United States* v. *North American Transportation & Trading Co.,* 253 U. S. 330, 336.

The mention of costs and the omission of interest again helps the conclusion to which we come. Compare Judicial Code, § 152, and the same, § 177. U. S. Code, Title 28, §§ 258, 284.

*Decree affirmed.*

MR. JUSTICE SUTHERLAND, dissenting.

In collision cases between private parties, interest, as a general rule, is allowed upon the amount of the loss sustained. That the allowance may be to some extent in the discretion of the court does not affect the question presented here, since the court below denied interest not as

a matter of discretion but upon the ground that it had no power to allow it against the United States. From an examination of the record, it fairly may be assumed that if the case had been one between private parties interest would have been allowed.

It is said that when interest is allowed it is no part of the damages. But, very clearly, I think, the settled rule is to the contrary. When the obligation to pay interest arises upon contract, it is recoverable thereon as damages for failure to perform; "and when recoverable in tort it is chargeable on general principles as an additional element of damage for the purpose of full indemnity to the injured party." 1 Sutherland on Damages (4th Ed.) § 300, p. 939. In *Wilson* v. *City of Troy*, 135 N. Y. 96, the New York Court of Appeals, holding that in certain actions sounding in tort interest is allowed "as a part of the damages" as matter of law, said (pp. 104, 105): "The reason given for the rule is that interest is as necessary a part of a complete indemnity to the owner of the property as the value itself, and in fixing the damages, is not any more in the discretion of the jury than the value . . . In an early case in this state the principle was recognized that interest might be allowed, by way of damages, upon the sum lost by the plaintiff in consequence of defendant's negligence. (*Thomas v. Weed*, 15 John. 255.)" These principles find abundant support in the decisions of this Court.

In *The "Atlas,"* 93 U. S. 302, 310, the general rule is laid down that satisfaction for the injury sustained is the true rule of damages, and that by this is meant that the measure of compensation shall be equal to the amount of injury received, to be calculated for the actual loss occasioned by the collision, upon the principle that the sufferer is entitled to complete indemnification for his loss. Complete recompense for the injury is required.

In *The "Wanata,"* 95 U. S. 600, 615, this Court, pointing out the essential difference between costs and interest,

said: "Interest is not costs in any sense, and, when allowed, it should be decreed as damages, and be added to the damages awarded in the District Court."

In *United States* v. *North Carolina,* 136 U. S. 211, 216, this Court said: "Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; . . ."

In *The "Santa Maria,"* 10 Wheat. 431, 445, Mr. Justice Story, speaking for the Court, said: "Damages are often given by way of interest for the illegal seizure and detention of property; and, indeed, in cases of tort, if given at all, interest partakes of the very nature of damages."

In *The "Umbria,"* 166 U. S. 404, 421, this Court recognized that the general rule was that in cases of total loss by collision damages are limited to the value of the vessel, with interest thereon, etc.

See, also, *Redfield* v. *Ystalyfera Iron Company,* 110 U. S. 174, 176; *The "Scotland,"* 105 U. S. 24, 35.

It does not seem necessary to cite the numerous decisions of the lower federal and state courts to the same effect. A very good statement is to be found in *Balano* v. *The Illinois,* 84 Fed. 697, where it was held that the value of the injury done to the vessel is to be ascertained, and then an amount equal to interest thereon to the time of the trial may be added, not strictly as interest, but as part of the damage compensation. The court said [p. 698]:

"The sum called interest added to the $5,000 was necessary to make full compensation at this time. It is not strictly interest—which is due only for the withholding of a debt—but the compensation for the permanent injury to the vessel was due as of the time when it was inflicted, and the addition of what is called interest is justly added for withholding it . . . it is quite well settled that in ascertaining the amount of compensation to be

paid, it is justifiable to find the extent of the injury valued in money, and add a sum equal to interest to make compensation at the time of such finding."

This is in accordance with the general rule that for the wrongful sinking of a ship the owner is entitled to *restitutio in integrum,* that is, he is entitled " to be put in as good position pecuniarily as if his property had not been destroyed." *Standard Oil Co.* v. *So. Pacific Co.,* 268 U. S. 146, 155, 158.

In the light of the foregoing, I am unable to see any ground for differentiating the rule of damages applicable to the present case from that applicable to eminent domain cases, that is to say, the owner is entitled to the amount that would be *just compensation* if the ship had been taken by the power of eminent domain. Just compensation means " the full and perfect equivalent of the property taken . . . the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken . . . the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added." *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304, 306. See also, *Liggett & Myers* v. *United States,* 274 U. S. 215.

In *Miller* v. *Robertson,* 266 U. S. 243, 258, the rule is stated: " Generally, interest is not allowed upon unliquidated damages. *Mowry* v. *Whitney,* 14 Wall, 620, 653. But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages."

It follows indubitably from these premises that interest is allowable against the United States by the words " legal damages " *ex vi termini.* If additional reason for this

conclusion be needed, it will be found in the definite determination of this Court that the obligation of the United States to pay interest may be imposed by the name of *damages* as well as by the name of *interest*. *Angarica* v. *Bayard*, 127 U. S. 251, 260, where it is said that one of the recognized exceptions to the rule that the United States is not liable to pay interest is "where interest is given expressly by an act of Congress, either by the name of interest or by that of damages."

For this conclusion, the Court cites a number of opinions of the Attorneys General of the United States, among them that of Attorney General Cushing reported in 7 Op. A. G. 523, from the head-note to which the language above quoted was taken. In the course of that opinion the Attorney General said (p. 531):

"There is another possible case of apparent, but not real, exception, if the case exists, and that is, of 'damages' provided by statute to be assessed against the Government. In one of the general acts above cited, a statute-interest on the detention of money is the established rendering of the term 'damages.' (1 Stat. at Large, p. 85.) If, therefore, any such case of claim on the Government can be shown, with color of demand for interest as 'damages,' it will be no departure from the rule never to allow interest except on express requirement of statute."

By the statute under consideration the United States is made liable for "legal damages" upon the same principle and measure of liability as in like cases between private parties. The authorities above reviewed put the meaning of these words beyond all reasonable doubt; and it is not permissible to attempt to vary that meaning by construction. The rule announced by Chief Justice Marshall in *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96—"Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one

indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."—has, ever since, been followed by this Court.

In *Hamilton* v. *Rathbone,* 175 U. S. 414, 419, it is said: "The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." (Citing cases.)

And the Court added (p. 421): "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve,* but not to *create* an ambiguity."

It was further said that if the section of law there under consideration were an original act there would be no room for construction, and that only by calling in the aid of a prior act was it possible to throw a doubt upon its proper interpretation.

The rule was tersely stated in *United States* v. *Hartwell,* 6 Wall. 385, 396: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."

This is also the recognized rule of the English courts. In one of the English decisions Lord Denman said the

court was bound to look to the language employed and construe it in its natural and obvious sense, even though that was to give the words of the act an effect probably never contemplated by those who obtained the act and very probably not intended by the legislature which enacted it. *The King* v. *The Commissioners,* 5 A. & E. 804, 816. See also, *United States* v. *Lexington Mill Co.,* 232 U. S. 399; *Caminetti* v. *United States,* 242 U. S. 470, 485; *Russell Co.* v. *United States,* 261 U. S. 514, 519.

The enforcement of the statute according to its plain terms results in no absurdity or injustice, for, as this Court recently said, in holding the United States liable for damages including interest in a collision case where the Government had come into court to assert a claim on its own behalf: "The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it." *United States* v. *The Thekla,* 266 U. S. 328, 340.

To refuse interest in this case, in my opinion, is completely to change the clear meaning of the words employed by Congress by invoking the aid of extrinsic circumstances to import into the statute an ambiguity which otherwise does not exist and thereby to set at naught the prior decisions of this Court and long established canons of statutory construction.

MR. JUSTICE BUTLER, MR. JUSTICE SANFORD and MR. JUSTICE STONE concur in this opinion.

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## UNITED STATES *v.* CAMBRIDGE LOAN AND BUILDING COMPANY.

CERTIORARI TO THE COURT OF CLAIMS.

No. 46. Argued October 23, 24, 1928.—Decided November 19, 1928.

1. A corporation which by the law of its State is a building and loan association, and the business of which is conducted in accordance with that law, is a "building and loan association" within the

meaning of sections 231 of the Revenue Acts of 1918 and 1921, granting exemption from income tax, if its operations be not so related to mere money-making as to constitute a gross abuse of the name. P. 57.

2. The activities of the respondent in the way of receiving deposits on interest and making loans to persons not among its members (borrowers being required since the Act of 1921, *supra,* to purchase from one to five shares of its stock) did not disqualify it for the tax exemption. *Id.*

3. The Act of 1921, *supra,* in confining the exemption to building and loan associations "substantially all of the business of which is confined to making loans to members," did not limit loans to the amount of shares subscribed for. P. 59.

4. An Act directing that certain taxes be refunded as "illegally collected" is an interpretation of the prior Act under which they were exacted and by implication approves decisions of the federal courts holding the exaction unwarranted. P. 58.

61 Ct. Cls. 631, affirmed.

CERTIORARI, 276 U. S. 614, to a judgment allowing recovery on a claim for money paid under duress as income taxes.

*Mr. T. H. Lewis, Jr.,* Attorney, Bureau of Internal Revenue with whom *Solicitor General Mitchell* and *Assistant Attorney General Galloway* were on the brief, for the United States.

*Mr. L. L. Hamby* for respondent.

*Messrs. Cleaveland R. Cross* and *Herbert W. Nauts* filed a brief as *amici curiae* by special leave of Court.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the respondent to recover the amount of taxes for the years 1918 through 1923, paid under duress, from which it says that it was exempt by the Acts under which the taxes were levied. It recovered

in the Court of Claims and a writ of certiorari was granted by this Court, April 9, 1928.

The respondent is incorporated under the laws of Ohio, by which it is recognized as a building and loan association, and it has conducted its business in accordance with the laws of that State. The Revenue Act of 1918, February 24, 1919, c. 18, § 231, 40 Stat. 1057, 1076, exempts from the taxes in question "(4) Domestic building and loan associations and cooperative banks without capital stock organized and operated for mutual purposes and without profit." The Act of November 23, 1921, c. 136, § 231, 42 Stat. 227, 253, exempts "(4) Domestic building and loan associations substantially all the business of which is confined to making loans to members; and cooperative banks without capital stock organized and operated for mutual purposes and without profit." These are the statutes concerned. No definition is given of building and loan associations, and the question is what scope is to be given to the words.

The rudimentary form of such associations is supposed to be a society raising by subscription of its members a fund for making advances to members in order to enable them to build or buy houses of their own. A member is entitled to borrow on sufficient security an amount equal to his subscription for shares and when the shares are paid up by the instalment payments required and the profits of the company his indebtedness is cancelled. The Government argues that the essence of these societies, what gives them their quasi public character and the only thing that warrants exempting them from taxes, is that their single purpose is to enable people to get homes of their own. When one of them yields to the temptation to enlarge its operations and to make a little money outside, the Government says, it loses its title to its distinctive name and to the exemption that the statute gives. The respondent received a large proportion of

deposits from persons who were not members and it paid interest upon the same, and it also made considerable loans to such persons until the passage of the Act of 1921. Even when the borrower was a stockholder he was required only to subscribe for from one to five shares regardless of the amount of the loan. It is argued that thus the society became a mere money-making institution like an ordinary bank.

But for such an association to start it must have some money to lend, and the typical member does not have it. Long before Congress dealt with loan and building associations, an esteemed writer upon the subject had insisted on the reasonableness of allowing them to issue full paid stock with fixed dividends, both in his book and upon the bench. Endlich, Building Associations, 2d. ed. (1895), § 462. *Folk* v. *Capital Savings & Loan Ass'n,* 214 Penn. 529, 534, 544 (1906). The same author recognized depositors, § 56, and with more or less qualification the right to lend to outsiders, §§ 314, *et seq.,* and to borrow §§ 297, *et seq.* Under the Ohio statute the respondent has these powers, and still, as we have said, is called a building and loan association by that State. The same name was commonly used in other States and similar powers were given with more or less restriction. When Congress exempted such associations from the income tax of course it was speaking of existing societies that commonly were known as such, not of ideals that would have been hard to find. And this is not left to inference alone. Some corporations having been taxed under the Act of August 5, 1909, c. 6, § 38; 36 Stat. 11, 12, which exempted 'domestic building and loan associations organized exclusively for the mutual benefit of their members,' the Act of February 26, 1917, c. 129; 39 Stat. 1491, 1493, directed the tax to be refunded as 'illegally collected' and included the respondent among the corporations named. This Act followed and by implication sanctioned decisions to similar

effect in *Herold* v. *Park View Building & Loan Ass'n,* 210 Fed. 577 (203 Fed. 876); *Central Building, Loan & Savings Co.* v. *Bowland,* 216 Fed. 526.

This interpretation was adhered to for the Act of 1909 and succeeding Acts, including that of 1918 now before us, until a few months before the Act of 1921. It was incorporated in Regulations of the Commissioner of Internal Revenue approved by the Secretary of the Treasury as late as January 28, 1921, and up to then no taxes had been levied or paid. In June of that year, however, the Regulations were modified so as to declare the societies taxable if the amounts borrowed from and lent to non-members were out of proportion to the borrowing needs of the members, and otherwise to limit the use of such societies as a mask to escape taxation. The present taxes are upheld by the Government on the ground that the respondent is such a mask. It is argued that even admitting all that has been said thus far, a State cannot make a bank exempt merely by calling it a building and loan association. No doubt extravagant cases might be imagined. But these associations are well known and a State is not likely to be party to a scheme to enable a private company to avoid federal taxation by giving it a false name. The statutes speak of 'domestic' associations, that is, associations sanctioned by the several States. They must be taken to accept, with the qualifications expressly stated, what the States are content to recognize, unless there is a gross misuse of the name. The State of Ohio has recognized and still recognizes the respondent as belonging to the class which its name indicates. Very possibly the company has strained its privileges to near the limit, but we are not prepared to condemn the nomenclature adopted by the State. When the Act of 1921 was passed and added the words 'substantially all the business of which is confined to making loans to members,' the respondent conformed to the

statute, by requiring membership as a condition to a loan. The statute did not limit loans to the amount of stock subscribed for. We may add that the net dividends are distributed to members at an equal rate to all.

We deem it plain that no taxes were warranted before the Act of 1921, and are of opinion that the taxes under that also were not justified, although as we have said the rights of the company were pressed somewhat far. In coming to this result we have not thought it necessary to go into details of disputed significance, thinking it enough to state the point of view from which we regard the case.

The assessment was not made until September 18, 1924, up to which time the respondent not unreasonably had supposed itself exempt, and then was taxed retrospectively for the five years before the one then current. In the meantime the respondent has distributed its money in dividends to its members and they presumably have paid income taxes on the dividends received. The statute of limitations had run or was running against them when the Government at the last moment filed a motion to remand that would have delayed the case and would have given the statute a further chance to run. The facts alleged in the motion sufficiently appear in the findings of the Court of Claims and so far as material have been assumed in the discussion of the case.

*Judgment affirmed.*

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## UNITED STATES *v.* LENSON.

CERTIORARI TO THE COURT OF CLAIMS.

No. 48. Argued October 24, 1928.—Decided November 19, 1928.

Under the Act of June 10, 1922, a lieutenant of the Staff Corps of the Navy, who has served for fifteen years as enlisted man, warrant officer and commissioned officer, and whose first appointment to

the permanent service was as a lieutenant, junior grade, of the Staff Corps, corresponding to a first lieutenant in the Army, is not entitled to pay of the fourth period if his total commissioned service does not equal that of a lieutenant commander of the line of the Navy drawing the pay of that period. P. 62.

63 Ct. Cls. 420, reversed.

CERTIORARI, 276 U. S. 612, to a judgment of the Court of Claims allowing a claim for pay presented by a lieutenant in the Navy.

*Solicitor General Mitchell,* with whom *Assistant Attorney General Galloway* was on the brief, for the United States.

*Mr. George A. King,* with whom *Messrs. Wm. B. King* and *George R. Shields* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a claim by a lieutenant of the Staff Corps of the Navy, under the Act of June 10, 1922, c. 212, 42 Stat. 625, (Code, Title 37, §§ 1, 4,) which went into effect on July 1, 1922, that by § 1 of that Act he is entitled to pay of the fourth period there mentioned from the date of the Act to April 23, 1924, amounting to $1,935.89. On the last date he had served seventeen years, as enlisted man and officer, and since then has received fourth period pay. The Court of Claims gave the claimant judgment for the sum named. A writ of certiorari was granted by this Court, 276 U. S. 612.

As stated by his counsel the claimant had been in continuous service for over fifteen years when the Act took effect, about eleven years as enlisted man, six months as a warrant officer and three and a half years as commissioned officer. His first appointment in the permanent service in the Navy was as a lieutenant, junior grade, of the Staff Corps, corresponding to a first lieutenant in the

Army. The pay of the fourth period, $3,000, is given "to lieutenants of the Staff Corps of the Navy, and lieutenants and lieutenants (junior grade) of the line and Engineer Corps of the Coast Guard whose total commissioned service equals that of lieutenant commanders of the line of the Navy drawing the pay of this period." The absence of a comma after 'Coast Guard' is laid hold of to show that the qualification as to commissioned service applies only to the last clause and not to lieutenants of the Staff Corps of the Navy, but no intelligible reason is given for limiting it in that way. The length of commissioned service seems in reason as proper a consideration in determining the pay of one class as of the other. If then the claimant's total commissioned service must have equaled that of lieutenant commanders of the Navy drawing fourth period pay, we are of opinion that his claim must fail.

The pay of the fourth period is given by the same section to lieutenant commanders of the Navy, "who have completed fourteen years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army." The claimant points out that his first appointment corresponded, as we have said, to that of a first lieutenant in the Army. But the requirement is that his commissioned service should equal that of lieutenant commanders. If this could be satisfied by any service less than the fourteen years, the alternative would be that of a lieutenant commander drawing fourth period pay whose total service was not more than what the claimant can show.

It is argued that by the Act of March 3, 1883, c. 97, 22 Stat. 473, (Code, Title 34, § 231,) all service of the officer was put on the footing of commissioned service, and that by this same § 1 of the Act of 1922 now before us, "For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted

in computing longevity pay." But when Congress with all this before it, specified commissioned service we must take it to have meant commissioned service and not something else that for other purposes was just as good.

The same paragraph of the same section gives pay of the fourth period to lieutenants of the Navy 'who have completed seventeen years' service.' Under that provision the claimant's service as an enlisted man is counted and he now gets the pay. But this brings out the contrast embodied in the words between service and commissioned service. Assuming that lieutenant commanders could make out their fourteen years by counting service rendered before they received commissions, still it is the commissioned service of the claimants that must equal that of the lieutenant commanders, and we repeat the claimant shows no case of a lieutenant commander whose service or even whose commissioned service was not more than about three years and a half. The statute is not very clear, but we are of opinion that the Government is right in denying the claim.

*Judgment reversed.*

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## NEW YORK EX REL. BRYANT *v.* ZIMMERMAN ET AL.

ERROR TO THE SUPREME COURT OF NEW YORK.

No. 2. Submitted October 11, 1927.—Decided November 19, 1928.

1. Jurisdiction of this Court over an appellate case can not be established by consent or acquiescence of parties. P. 66.
2. The validity of a state statute may be drawn in question under § 237a of the Judicial Code, on the ground of its being repugnant to the Federal Constitution, without the use of any particular form of words. If the record as a whole shows, either expressly or by clear intendment, that this claim of invalidity and ground therefor were brought to the attention of the state court with fair precision and in due time, the claim is to be regarded as having been adequately presented. P. 67.

3. To show that such claim of invalidity was denied by the state court, it is not necessary that the ruling shall have been put in direct terms; it suffices if the necessary effect of the judgment has been to deny the claim. P. 67.
4. A proceeding in *habeas corpus* in a state court, in keeping with the state practice, to obtain the release of one held in custody under a criminal charge, upon the ground that the state statute on which the charge is based violates the Federal Constitution, is a "suit" within the meaning of Jud. Code, § 237a; and an order of the state court of last resort refusing the discharge is a final judgment in that suit and subject to review by this Court. P. 70.
5. The privilege of being and remaining a member of an oath-bound association within a State can not be within the privilege and immunities clause of the Fourteenth Amendment, since it is not a privilege arising out of United States citizenship. P. 71.
6. To require associations having an oath-bound membership to file with a state officer sworn copies of their constitutions, oaths of membership, etc., with lists of their members and officers, and to provide that persons who become or remain members, or attend meetings, knowing that such requirement has not been complied with, shall be arrested and punished, is a reasonable exercise of the police power, and not a violation of such persons' liberty under the due process clause of the Fourteenth Amendment. P. 72.
7. Such regulations do not violate the equality clause of the Fourteenth Amendment when applied to one class of oath-bound associations and not to another class, if the class so regulated has a tendency to make the secrecy of its purposes and membership a cloak for conduct inimical to the personal rights of others and to the public welfare, while the other class is free from that tendency. P. 73.
8. Confining the regulations to associations having a membership of twenty or more persons is not an unreasonable discrimination. P. 77.

241 N. Y. 405, affirmed.

ERROR to a final order of the Supreme Court of New York, entered upon remittitur from the Court of Appeals. The latter court affirmed the Appellate Division in affirming an order discharging the relator's writ of habeas corpus. See 123 Misc. 859; 213 App. Div. 414.

*Messrs. John H. Connaughton, Wm. F. Zumbrunn,* and *Wm. B. Brown* submitted for plaintiff in error.

*Messrs. Albert Ottinger,* Attorney General of New York, *John H. Clogston,* Deputy Attorney General, *Walter F. Hofheins,* and *Guy B. Moore* submitted for defendants in error.

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

The relator, Bryant, who was held in custody to answer a charge of violating a statute of New York, brought a proceeding in habeas corpus in a court of that State to obtain his discharge on the ground, as was stated in the petition, that the warrant under which he was arrested and detained was issued without any jurisdiction, in that the statute which he was charged with violating was unconstitutional.

The court sustained the validity of the statute and refused to discharge him, 123 Misc. 859; and that judgment was affirmed by the Appellate Division, 213 App. Div. 414, and by the Court of Appeals, 241 N. Y. 405. He then sued out the present writ of error under § 237(a) of the Judicial Code—his assignment of errors presented in obtaining the writ being to the effect that the Court of Appeals erroneously had held the statute valid against a contention made by him that it was invalid because repugnant to so much of the Fourteenth Amendment to the Constitution of the United States as declares:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The material parts of the state statute (Art. V–A Civil Rights Law; c. 664, Laws 1923, 1110) are as follows:

"Sec. 53. Every existing membership corporation, and every existing unincorporated association having a membership of twenty or more persons, which corporation or association requires an oath as a prerequisite or condition of membership, other than a labor union or a benevolent order mentioned in the benevolent orders law, within thirty days after this article takes effect, and every such corporation or association hereafter organized, within ten days after the adoption thereof, shall file with the secretary of state a sworn copy of its constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year. . . . ."

"Sec. 56. . . . Any person who becomes a member of any such corporation or association, or remains a member thereof, or attends a meeting thereof, with knowledge that such corporation or association has failed to comply with any provision of this article, shall be guilty of a misdemeanor."

Both parties treat the case as rightly here and as presenting the question whether the state statute is repugnant to the provisions before quoted from the Fourteenth Amendment. But as consent or acquiescence of the parties does not suffice to establish our appellate jurisdiction, and some of our number have doubted the existence of such jurisdiction in this case, we now take up the question.

Section 237a of the Judicial Code (§ 344, Title 28, U. S. Code) provides that this Court may review upon writ of error[1] "a final judgment or decree in any suit" in the

[1] The acts of January 31, 1928, c. 14, 45 Stat. 54, and April 26, 1928, c. 440, 45 Stat. 466, substituted an appeal for a writ of error. See Revised Rules, 275 U. S., appendix, pp. 630, 646, 647.

court of last resort of a State " where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." It is under this provision that a review is invoked.

There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.[2]

Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.[3]

With these general rules in mind we turn to what is shown in this case. The petition for habeas corpus, while asserting that the state statute was " unconstitutional," contained no mention of any constitutional provision, state or federal. The opinion delivered by the court of

[2] *Crowell* v. *Randell,* 10 Pet. 368, 392, 398; *Neilson* v. *Lagow,* 12 How. 98, 109–110; *Furman* v. *Nichol,* 8 Wall. 44, 56; *Green Bay etc., Canal Co.* v. *Patten Paper Co.,* 172 U. S. 58, 67–68; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird,* 243 U. S. 592, 598–599; *Whitney* v. *California,* 274 U. S. 357, 360.

[3] *Crowell* v. *Randell, supra; Chapman* v. *Goodnow,* 123 U. S. 540, 548; *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 236; *Walter A. Wood Co.* v. *Skinner,* 139 U. S. 293, 295; *Roby* v. *Colehour,* 146 U. S. 153, 159–160; *St. Louis, Iron Mountain & Southern Ry Co.* v. *Starbird, supra,* p. 601.

first instance was similarly indefinite. Up to that point it is left uncertain whether the claim of invalidity was grounded on some provision of the state constitution, or on some provision of the Constitution of the United States, or on both. If this were all, there plainly would be no basis for a review in this Court. But more appears. The relator took an appeal to the Appellate Division. The appeal was not accompanied by an assignment of errors, but this was not an omission. The local practice does not recognize an assignment of errors as known in other jurisdictions; it merely requires the appellant to set forth in a printed brief "the points to be relied on by him." In the opinion delivered, which for present purposes is deemed part of the record,[4] the Appellate Division stated distinctly that the relator's claim of invalidity was grounded on asserted repugnance to both the due process of law clause of the state constitution and the clauses hereinbefore quoted from the Fourteenth Amendment. After so stating the claim the court considered it at length and denied it. From that decision the relator appealed to the Court of Appeals. Again the appeal was not accompanied by an assignment of errors, and for the same reason as before. See Rule 7, Court of Appeals Rules. The appeal was entertained and the decision of the Appellate Division was affirmed. The Court of Appeals in its opinion does not mention the constitution of the State or the Fourteenth Amendment, but does state that the relator was asserting the "unconstitutionality" of the statute on the ground that it deprived him of his liberty without due process of law and denied him the equal protection of the laws, etc. Nothing in the opinion is at all indicative of an aban-

[4] *Murdock* v. *Memphis,* 20 Wall. 590, 633; *Philadelphia Fire Association* v. *New York,* 119 U. S. 110, 116; *San Jose Land & Water Co.* v. *San Jose Ranch Co.,* 189 U. S. 177, 179–180; *Neilsen* v. *Lagow,* 12 How. 98, 109–110.

donment by the relator of his reliance on the Fourteenth Amendment which was so distinctly stated in the opinion of the Appellate Division. On the contrary, the court's discussion of the case and its citation of authorities proceed as if it were considering the identical claim of invalidity that was presented in the Appellate Division and there denied. Among the citations are several decisions of this Court dealing only with the clauses before quoted from the Fourteenth Amendment. Indeed, the opinion shows that in upholding the statute against the contention that it denies the equal protection of the laws the Court of Appeals practically rested its decision "on the authority" of *Radice* v. *New York,* 264 U. S. 292, 296, 297, where another statute of New York assailed as in conflict with the equal protection clause of that Amendment was sustained.

From this showing in the record, coupled with the absence from the state constitution of an equal protection of the laws clause, we think it apparent that the claim of invalidity by reason of the statute's repugnance to the Fourteenth Amendment was presented to the Court of Appeals and that by its decision the statute was upheld against that claim.

Upon looking at that decision as published in the official reports (241 N. Y. 405) we find it stated by the reporter in his accompanying synopsis of the briefs that the brief on behalf of the relator embodied the specific claim that the statute was invalid because in conflict with the equal protection and other provisions of the Fourteenth Amendment. But as we otherwise reach the conclusion that the claim was adequately made, there is no need to notice what is said in the reporter's synopsis beyond observing that it probably points to the reason why both parties, and the Chief Judge who allowed the writ of error, treated the case as one in which the question of the validity of the statute under the Constitution of the United States had been properly presented.

Our jurisdiction to review the decision is questioned also because of the nature of the case, it being a proceeding in habeas corpus brought to obtain the discharge of one who is held in custody to answer a charge of violating a state statute alleged to be invalid by reason of its conflict with the Constitution of the United States. But we think our jurisdiction is in this regard so well established by prior decisions and long-continued practice that it is not debatable.

In the early case of *Holmes* v. *Jennison,* 14 Pet. 540, 563, 568, 597, this Court held after much consideration that a proceeding in habeas corpus in a state court to obtain the release of one held in custody upon a criminal charge, where the detention is alleged to be in violation of the Constitution of the United States, is a "suit" within the meaning of the jurisdictional statute, and that an order of the state court of last resort refusing to discharge him is a final judgment in that suit and subject to review by this Court. That holding has been respected and given effect in an unbroken line of later decisions, all of which in their material facts and surroundings were like the case now before us.[5] It also has been followed in other cases related in principle.[6]

The proceeding before us was not brought in antagonism to the established practice in the State, but in entire

[5] *Smith* v. *Alabama,* 124 U. S. 465; *Osborne* v. *Florida,* 164 U. S. 650; *Lieberman* v. *Van De Carr,* 199 U. S. 552; *Silz* v. *Hesterberg,* 211 U. S. 31; *Flaherty* v. *Hanson,* 215 U. S. 515; *Collins* v. *Texas,* 223 U. S. 288; *Sligh* v. *Kirkwood,* 237 U. S. 52.

[6] *Abelman* v. *Booth,* 21 How. 506; In re *Neagle,* 135 U. S. 1; *Ward v. Racehorse,* 163 U. S. 504; *Urquhart* v. *Brown,* 205 U. S. 179, 181–182. And see *Weston* v. *Charleston,* 2 Pet. 449, 464; *Plessy* v. *Ferguson,* 163 U. S. 537; *Mt. Vernon Cotton Co.* v. *Alabama Power Co.,* 240 U. S. 30; *Detroit & Mackinac Ry. Co.* v. *Michigan R. R. Comm.,* 240 U. S. 564; *St. Louis, B. & M. Ry. Co.* v. *Taylor,* 266 U. S. 200.

keeping with that practice as confirmed by local statutes. Civil Practice Act, Art. 77, §§ 1230–1235, 1251. This was recognized in the decisions given by the courts of the State. And the proceeding was independent, adversary, and both adapted and directed to the enforcement of a most important personal right. It is quite unlike the fragmentary or branch proceeding considered in *Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.*, 243 U. S. 251, 256; the judgment in which was held to be interlocutory only, and not final in the sense of the jurisdictional statute.

We are accordingly of opinion that the case and the judgment therein are of such a nature that we have jurisdiction to review the latter.

The offense charged against the relator is that he attended meetings and remained a member of the Buffalo Provisional Klan of the Knights of the Ku Klux Klan, an unincorporated association—but neither a labor union nor a benevolent order mentioned in the benevolent orders law—having a membership of more than twenty persons and requiring an oath as a prerequisite or condition of membership, he then having knowledge that such association had wholly failed to comply with the requirement in § 53.

There are various privileges and immunities which under our dual system of government belong to citizens of the United States solely by reason of such citizenship. It is against their abridgement by state laws that the privilege and immunity clause in the Fourteenth Amendment is directed. But no such privilege or immunity is in question here. If to be and remain a member of a secret, oath-bound association within a State be a privilege arising out of citizenship at all, it is an incident of state rather than United States citizenship; and such protection as is thrown about it by the Constitution is in no

wise affected by its possessor being a citizen of the United States. Thus there is no basis here for invoking the privilege and immunity clause.[7]

The relator's contention under the due process clause is that the statute deprives him of liberty in that it prevents him from exercising his right of membership in the association. But his liberty in this regard, like most other personal rights, must yield to the rightful exertion of the police power. There can be no doubt that under that power the State may prescribe and apply to associations having an oath-bound membership any reasonable regulation calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare. The requirement in § 53 that each association shall file with the secretary of state a sworn copy of its constitution, oath of membership, etc., with a list of members and officers is such a regulation. It proceeds on the two-fold theory that the State within whose territory and under whose protection the association exists is entitled to be informed of its nature and purpose, of whom it is composed and by whom its activities are conducted, and that requiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required. The requirement is not arbitrary or oppressive, but reasonable and likely to be of real effect. Of course, power to require the disclosure includes authority to prevent individual members of an association which has failed to comply from attending meetings or retaining membership with knowl-

[7] *Slaughter House Cases,* 16 Wall. 36, 77, *et seq.; Bradwell* v. *Illinois,* 16 Wall. 130, 139; *Bartemeyer* v. *Iowa,* 18 Wall. 129, 133; *Minor* v. *Happersett,* 21 Wall. 162, 171; *United States* v. *Cruikshank,* 92 U. S. 542, 551–552; *Giozza* v. *Tiernan,* 148 U. S. 657, 661; *In re Lockwood,* 154 U. S. 116, 117.

edge of its default. We conclude that the due process clause is not violated.

The main contention made under the equal protection clause is that the statute discriminates against the Knights of the Ku Klux Klan and other associations in that it excepts from its requirements several associations having oath-bound membership, such as labor unions, the Masonic fraternity, the Independent Order of Odd Fellows, the Grand Army of the Republic and the Knights of Columbus—all named in another statute which provides for their incorporation and requires the names of their officers as elected from time to time to be reported to the secretary of state.

The principle to be applied in determining whether a particular discrimination or classification offends against the equal protection clause is shown in the following excerpts from some of our decisions:

*Patsone* v. *Pennsylvania,* 232 U. S. 138, 144—"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 80, 81. The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160."

*Miller* v. *Wilson,* 236 U. S. 373, 383—"The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest."

*Radice* v. *New York,* 264 U. S. 292, 296—"Such classification must not be 'purely arbitrary, oppressive or capricious.' *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92. But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary.' *Arkansas Natural Gas Co.* v. *Railroad Commission,* 261 U. S. 379, 384, and cases cited. Thus classifications have been sustained which are based upon differences between fire insurance and other kinds of insurance, *Orient Insurance Co.* v. *Daggs,* 172 U. S. 557, 562; between railroads and other corporations, *Tullis* v. *Lake Erie & Western R. R. Co.,* 175 U. S. 348, 351; between barber shop employment and other kinds of labor, *Petit* v. *Minnesota,* 177 U. S. 164, 168; between 'immigrant agents' engaged in hiring laborers to be employed beyond the limits of a State and persons engaged in the business of hiring for labor within the State, *Williams* v. *Fears,* 179 U. S. 270, 275; between sugar refiners who produce the sugar and those who purchase it, *American Sugar Refining Co.* v. *Louisiana, supra.*"

*Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 400—"The equal protection clause does not detract from

the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' *Power Co.* v. *Saunders*, 274 U. S. 490, 493."

The courts below recognized the principle shown in the cases just cited and reached the conclusion that the classification was justified by a difference between the two classes of associations shown by experience, and that the difference consisted (a) in a manifest tendency on the part of one class to make the secrecy surrounding its purposes and membership a cloak for acts and conduct inimical to personal rights and public welfare, and (b) in the absence of such a tendency on the part of the other class. In pointing out this difference one of the courts said of the Ku Klux Klan, the principal association in the included class: "It is a matter of common knowledge that this organization functions largely at night, its members disguised by hoods and gowns and doing things calculated to strike terror into the minds of the people"; and later said of the other class: "These organizations and their purposes are well known, many of them having been in existence for many years. Many of them are oath-bound and secret. But we hear no complaints against them regarding violation of the peace or interfering with the rights of others." Another of the courts said: "It is a matter of common knowledge that the association or organization of which the relator is concededly a member exercises activities tending to the prejudice and intimidation of sundry classes of our citizens. But the legislation is not confined to this society"; and later said of the other class, "Labor unions have a recognized lawful purpose. The benevolent orders mentioned in the Benevolent Orders Law have already received legislative scrutiny and been

granted special privileges so that the legislature may well consider them beneficial rather than harmful agencies." The third court after recognizing "the potentialities of evil in secret societies" and observing that "the danger of certain organizations has been judicially demonstrated"—meaning in that State,—said: "Benevolent orders, labor unions and college fraternities have existed for many years, and, while not immune from hostile criticism, have on the whole justified their existence."

We assume that the legislature had before it such information as was readily available, including the published report of a hearing before a committee of the House of Representatives of the 57th Congress relating to the formation, purposes and activities of the Ku Klux Klan.[8] If so, it was advised—putting aside controverted evidence—that the order was a revival of the Ku Klux Klan of an earlier time with additional features borrowed from the Know Nothing and the A. P. A. orders of other periods; that its membership was limited to native born, gentile, protestant whites; that in part of its constitution and printed creed it proclaimed the widest freedom for all and full adherence to the Constitution of the United States, in another exacted of its members an oath to shield and preserve "white supremacy," and in still another declared any person actively opposing its principles to be "a dangerous ingredient in the body politic of our country and an enemy to the weal of our national commonwealth"; that it was conducting a crusade against Catholics, Jews and Negroes and stimulating hurtful religious and race prejudices; that it was striving for political power and assuming a sort of guardianship over the administration of local, state and national af-

[8] House Committee Hearings, 1921, Vol. 302. See also, The Challenge of the Klan, by Stanley Frost; The Ku Klux Klan, by John M. Mecklin.

fairs; and that at times it was taking into its own hands the punishment of what some of its members conceived to be crimes.

We think it plain that the action of the courts below in holding that there was a real and substantial basis for the distinction made between the two sets of associations or orders was right and should not be disturbed.

Criticism is made of the classification on the further ground that the regulation is confined to associations having a membership of twenty or more persons. Classification based on numbers is not necessarily unreasonable. There are many instances in which it has been sustained. We think it not unreasonable in this instance. With good reason the legislature may have thought that an association of less than twenty persons would have only a negligible influence and be without the capacity for harm that would make regulation needful.

We conclude that all the objections urged against the statute are untenable as held by the courts below.

*Judgment affirmed.*

Separate opinion of MR. JUSTICE McREYNOLDS.

For two reasons, I think we have no jurisdiction of this writ of error and that it should be dismissed.

The cause was finally determined by the Court of Appeals of New York, January 12, 1926. The record fails to disclose that any federal question was presented to or considered by that court. Moreover, the real controversy between the parties involves no substantial federal question.

The petition for habeas corpus—presented to the Supreme Court—affirmed that plaintiff in error was confined in the Buffalo jail under pretense that he had "violated Chapter 664 of the Laws of 1923, which law is commonly known as the Walker Law, and which law is sec-

tions 53, 54, 55 and 56 of Article V-A of the Civil Rights Law." These sections are printed below.* It then alleged " that said imprisonment and restraint is illegal in this, to-wit: That the Magistrate was without jurisdiction to issue the warrant, or cause his arrest, inasmuch as chapter 664 of the Laws of 1923, is unconstitutional and void and of no force or effect." And upon that ground alone it sought the petitioner's release. The petition did not refer to the Federal Constitution or any statute of the United States.

The warrant for plaintiff in error's arrest was based upon an information which, in the language of the Court of Appeals, charged " that he attended a meeting of and remained a member of Buffalo Provisional Klan of the Knights of the Ku Klux Klan with knowledge that said

* " Section 53. Copies of documents and statements to be filed. Every existing membership corporation, and every existing unincorporated association having a membership of twenty or more persons, which corporation or association requires an oath as a prerequisite or condition of membership, other than a labor union or a benevolent order mentioned in the benevolent orders law, within thirty days after this article takes effect, and every such corporation or association hereafter organized, within ten days after the adoption thereof, shall file with the secretary of state a sworn copy of its constitution, by-laws, rules, regulations and oath of membership together with a roster of its membership and a list of its officers for the current year. Every such corporation and association shall, in case its constitution, by-laws, rules, regulations or oath of membership or any part thereof, be revised, changed or amended, within ten days after such revision or amendment file with the secretary of state a sworn copy of such revised, changed or amended constitution, by-law, rule, regulation or oath of membership. Every such corporation or association shall within thirty days after a change has been made in its officers file with the secretary of state a sworn statement showing such change. Every such corporation or association shall at intervals of six months file with the secretary of state a sworn statement showing the names and addresses of such additional members as have been received in such corporation or association during such interval.

" Section 54. Resolutions Concerning Political Matters.—Every such corporation or association shall, within ten days after the adoption

association, which has more than twenty members, requires an oath as a prerequisite or condition of membership, and is not a labor union or a benevolent order mentioned in the Benevolent Orders Law (Cons. Laws, ch. 3) had not complied with the provisions of the statute by filing with the Secretary of State a sworn copy of its constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year." The writ of habeas corpus followed the usual form; the record contains no return thereto.

Upon an affidavit that the constitutionality of Chapter 664, Act of 1923, had been challenged, the Supreme Court permitted the Attorney-General to intervene.

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thereof, file in the office of the secretary of state every resolution, or the minutes of any action of such corporation or association, providing for concerted action of its members or of a part thereof to promote or defeat legislation, federal, state or municipal, or to support or to defeat any candidate for political office.

"Section 55. Anonymous Communications Prohibited.—It shall be unlawful for any such corporation or association to send, deliver, mail or transmit to any person in this state who is not a member of such corporation or association any anonymous letter, document, leaflet or other written or printed matter, and all such letters, documents, leaflets or other written or printed matter, intended for a person not a member of such corporation or association, shall bear on the same the name of such corporation or association and the names of the officers thereof together with the addresses of the latter.

"Section 56. Offenses; Penalties.—Any corporation or association violating any provision of this article shall be guilty of a misdemeanor punishable by a fine of not less than one thousand dollars nor more than ten thousand dollars. Any officer of such corporation or association and every member of the board of directors, trustees or other similar body, who violates any provision of this article or permits or acquiesces in the violation of any provision of this article by any such corporation shall be guilty of a misdemeanor. Any person who becomes a member of any such corporation or association, or remains a member thereof, or attends a meeting thereof, with knowledge that such corporation or association has failed to comply with any provision of this article, shall be guilty of a misdemeanor."

The cause was heard by the Supreme Court upon the petition, information, warrant, writ of habeas corpus, and argument of counsel. No other evidence was introduced. There is nothing to show that the association to which plaintiff in error belonged had any connection whatever with the Ku Klux Klan of the last century; nothing to show its purpose, or the nature of the oath taken by members.

The Supreme Court discharged the writ, but neither its judgment nor the accompanying opinion mentions the Federal Constitution or any statute of the United States. Without supporting evidence, that Court said: "It may be assumed that the legislature informed itself of conditions bearing upon the proposed legislation. These conditions probably are not such as would enable the Court to take judicial notice of them, but the legislature could well have learned of the acts of the Klan. It is a matter of common knowledge that this organization functions largely at night, its members disguised by hoods and gowns and doing things calculated to strike terror into the minds of the people. It is claimed that they are organized against certain of the citizens by reason of race or religion."

Thereupon the cause was appealed to the Appellate Division without any assignment of errors and that Court affirmed the order discharging the writ. The opinion there contains the following language—

"The facts are not in dispute. Relator sued out a writ of habeas corpus upon the theory that the statute in question is unconstitutional and that is the only question to be determined. . . .

"Relator complains that the exemption in said statute of labor unions and the benevolent orders mentioned in the Benevolent Orders Law is an unlawful classification in violation of Sec. 6 of Article 1, of the Constitution of

the State of New York, which provides among other things that no person shall be deprived of life, liberty or property without due process of law, and of Sec. 1 of the 14th Amendment of the Federal Constitution, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no state shall deprive any citizen of life, liberty, or property, without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the law. . . .

"It is a matter of common knowledge that the association or organization of which relator is concededly a member exercises activities tending to the prejudice and intimidation of sundry classes of our citizens. . . ."

The foregoing is the only direct reference to Federal Constitution or laws disclosed by the record.

Finally, the cause went by appeal and without assignment of error to the Court of Appeals of New York. That court affirmed the order of the Appellate Division and delivered a supporting opinion which does not mention the Federal Constitution, or any statute of the United States. Certainly it cannot be said that the record affirmatively discloses that any federal question was raised or considered in the Court of Appeals.

In *Crowell* v. *Randell* (1836), 10 Peters 368, 392, upon motion to dismiss the writ of error to the Supreme Court of Delaware for want of jurisdiction, Mr. Justice Story, in behalf of the Court, said—

"In the interpretation of this section [25] of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction two things should have occurred and be apparent in the record: first, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon by the same court, in the manner required by

the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable that they did exist, and were made. The principal, perhaps the only important, difficulty which has ever been felt by the court, has been in ascertaining in particular cases whether these matters (the question and decision) were apparent on the record. And here the doctrine of the court has been, that it is not indispensable that it should appear on the record, *in totidem verbis,* or by direct and positive statement, that the question was made and the decision given by the court below on the very point; but that it is sufficient, if it is clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment."

The language of the Act of February 25, 1925, and of the Judiciary Act of 1789, presently important, is substantially the same.

In *Michigan Sugar Company* v. *Michigan,* 185 U. S. 112, 113, by Chief Justice Fuller, this Court said—

" The Supreme Court of the State did not refer to the Federal Constitution or consider and decide any Federal question. For aught that appears, the court proceeded in its determination of the cause without any thought that it was disposing of such a question.

" The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this court to re-examine the final judgment of a state court, under the third division of section 709, cannot arise from mere inference, but only from averments so distinct and positive as to place

it beyond question that the party bringing the case here from such court intended to assert a Federal right. The statutory requirement is not met unless the party unmistakably declares that he invokes for the protection of his rights, the Constitution, or some treaty, statute, commission or authority, of the United States. Applying this rule to the case before us, the writ of error cannot be maintained."

In *Whitney* v. *California,* 274 U. S. 357, 360, we held—

"It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court."

*Crowell* v. *Randell,* 10 Pet. 368, 392; *Railroad Co.* v. *Rock,* 4 Wall. 177, 180; *California Powder Works* v. *Davis,* 151 U. S. 389, 393; *Cincinnati, etc. Railway* v. *Slade,* 216 U. S. 78, 83; *Hiawassee Power Co.* v. *Carolina-Tenn. Co.,* 252 U. S. 341, 343; *New York* v. *Kleinert,* 268 U. S. 646, 650, were cited. See also *Mellon* v. *O'Neil,* 275 U. S. 212, 214; *Dewey* v. *Des Moines,* 173 U. S. 193, 199; *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175, U. S. 626, 634.

It is not enough that the opinion of the Appellate Division referred to the Constitution of the United States. To give us jurisdiction the record must show affirmatively that the federal question was before the Court of Appeals. Mere inference will not do. This rule has been rigidly enforced for a hundred years.

The function of a writ of habeas corpus is to test the validity of challenged imprisonment—not the guilt or innocence of the prisoner. And over and over again this Court has asserted that it will not permit habeas corpus to perform the office of a writ of error.

It must now be accepted as settled doctrine in this Court that one is not deprived of any federal right merely by being put on trial for violating a state statute which conflicts with the Federal Constitution. Nor is one deprived of his federal right solely because he may be imprisoned after conviction of violating a state statute admittedly in conflict with the Federal Constitution.

It follows that when the petition for habeas corpus alleged that plaintiff in error was imprisoned under a charge of violating a state statute said to be unconstitutional and void, no real federal question was raised. The legality of his imprisonment did not depend at all upon the validity of the act which it was said he had violated. His right was to an orderly hearing upon the charge, with the privilege of ultimate review here. And as the habeas corpus proceeding never involved any substantial question arising under the Constitution or laws of the United States, we have no jurisdiction to review it.

Undoubtedly, cases like this have been entertained here in the past. But, since it has become settled law that mere imprisonment and trial under a charge based upon an unconstitutional state statute does not deprive one of his liberty without due process of law, we should deny further jurisdiction. There is no longer any controverted federal question essential to decision of the cause.

This view is aided by consideration of the serious and manifest evil which will follow a different course. Certainly, we should not undertake to determine the validity of a state statute in advance of trial upon the merits simply because some prisoner sees fit to sue out a writ of habeas corpus upon the alleged ground of conflict between the statute and Federal Constitution.

# CHARLES WARNER COMPANY *v.* INDEPENDENT PIER COMPANY.

# SAME *v.* S. S. "GULFTRADE."

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

Nos. 22 and 23. Argued October 10, 1928.—Decided November 19, 1928.

1. A steamship desiring to pass a flotilla of scows towed by a tug which she had followed on the flood tide up the Delaware River and thence into the still water of the Schuylkill, repeated a passing signal after making the turn, and upon receiving an assent from the tug, proceeded up the mid-channel of the Schuylkill and collided with the scows, which had been swung across it laterally from the tug by the momentum imparted by the tide in the Delaware. *Held,* that the tug by assenting to the passing did not assume responsibility for the maneuver, and that the fault lay entirely with the steamship, as she should have anticipated the effect of the tide and kept out of the way. P. 89.
2. Objections to a decree made by respondents who did not themselves apply for certiorari, are not to be considered. P. 91.

20 F. (2d) 111, reversed; District Court affirmed.

CERTIORARI, 275 U. S. 521, to a decree of the Circuit Court of Appeals which modified the decree of the District Court in a collision case. The petitioner, Charles Warner Company, owner or charterer of the tug *Taurus* and several scows, libeled, *in rem,* the steamship *Gulftrade,* one of the two respondents herein (Gulf Refining Company, claimant) and two tugs, the *Triton* and the *Churchman.* It also sought damages from the two tug-owners *in personam.* The District Court gave judgment against the *Gulftrade* and the Independent Pier Company, the other respondent herein, owner of the *Triton,* and dismissed the libel as to the *Churchman* and its owner. The Circuit Court of Appeals decreed that the damages

should be divided between the petitioner and the respondents. The latter did not apply for certiorari.

*Mr. Everett H. Brown, Jr.*, for petitioner.

It was the duty of the *Gulftrade*, the overtaking vessel, to keep out of the way of the *Taurus* and its tow, the overtaken vessel, and the assent by the *Taurus* to the passing signal of the *Gulftrade* constituted no more than an acknowledgment of the purpose of the *Gulftrade*, an assent to the passage at her risk, and an agreement on the part of the *Taurus* not to endanger the passage by permitting an interfering change in her position or in the position of her tow. Inland Rules, Art. 18, Rule VIII, Rule IX; Art. 23, Art. 24; Pilot Rule VI; Spencer, Marine Collisions, § 69; *The Rhode Island*, Olcott 505; Fed. Cas. 11,745; *Whitridge* v. *Dill*, 23 How. 448; *City of Baltimore*, 282 Fed. 490; *Southern Pacific Co.* v. *Haglund*, 277 U. S. 304; *Atlas Transportation Co.* v. *Lee Line Steamers*, 235 Fed. 492.

The *Taurus* was not guilty of fault in assenting to the passing signal of the *Gulftrade*.

*Mr. Howard M. Long* for respondent in No. 22.

The collision was due solely to the failure of the *Taurus* to keep her tow in line. Art. 21, Pilot Rules; *The Garden City*, 19 Fed. 524; *The Dentz*, 29 Fed. 525; *The Menominee*, 197 Fed. 736; *The Aurora*, 258 Fed. 439; *The Wrestler*, 232 Fed. 448; *The City of Baltimore*, 282 Fed. 490.

The Circuit Court of Appeals erred in not completely reversing the decree of the District Court and in not holding the *Taurus* solely at fault for the collision.

*Mr. Chauncey I. Clark*, with whom *Mr. Frederic Conger* was on the brief, for respondent in No. 23.

The collision was due solely to the failure of the *Taurus* to keep her tow in line. *The Wrestler*, 232 Fed. 448; *The*

*Aurora,* 258 Fed. 439; *The Madison,* 250 Fed. 850; *The Wyckoff,* 138 Fed. 418; *The R. J. Moran,* 299 Fed. 500; *The Genessee,* 138 Fed. 549; *The Zouave,* 122 Fed. 890; *The Overbrook,* 149 Fed. 785; *The Pencoyd,* 157 Fed. 134; *Thames Towboat Co.* v. *Penna. R. R. Co.,* 157 Fed. 305; *The George W. Childs,* 67 Fed. 269.

*Southern Pacific Co.* v. *Haglund,* 277 U. S. 304 was not an overtaking situation; it was one of special circumstances. *Atlas Transportation Co.* v. *Lee Line Steamers,* 235 Fed. 492, is analogous to this case, only in that both presented an overtaking situation.

Mr. Justice McReynolds delivered the opinion of the Court.

These two numbers on our docket present one cause in admiralty. It arose out of a collision between the single screw steamer Gulftrade—429 feet long, 59 foot beam—and two loaded scows which, with two others, were being towed by the tug Taurus upon hawsers astern. The flotilla was about 400 feet long. Both the tug and scows were owned or chartered by petitioner, Charles Warner Company. The Gulftrade was accompanied by the tugs Triton and Churchman, made fast to her port bow and port quarter. They were owned respectively by Independent Pier Company and Alfred E. Churchman. The Triton's master was upon the steamer and commanded the three associated vessels.

The accident occurred in the Schuylkill River near its confluence with the Delaware at 3: 00 P. M., October 1st, 1923. The weather was fair, tide flood, wind light.

Drawing her tow the Taurus passed slowly up the Delaware with the tide and rounded into the still water of the two hundred foot channel of the Schuylkill. The Gulftrade followed under her own power carrying with her the attending tugs, their engines motionless until

the last moment before the collision. Shortly after the flotillas entered the Schuylkill the Gulftrade for the third time, by a single blast, indicated her desire to pass to starboard—eastward. The Taurus (as she had done twice before while in the Delaware) gave an assenting blast. Attempting to pass in mid-channel, the steamer struck two of the scows and caused material loss.

The District Court found that "the set of the tide swung the tail of the tow to the eastward and more or less athwart the channel until it had straightened out. . . . This, however, was a condition which the steamship was bound to anticipate and doubtless did. What happened was that the navigator of the ship expecting the tow would go to the westward and seeing it was so headed assumed it would be out of his way by the time he reached the passing point and that a passage up mid-channel would be clear. In this he miscalculated and hence the collision." It declared the steamer guilty of negligence; the Taurus without fault; and awarded full damages in favor of petitioner Charles Warner Company primarily against the Independent Pier Company, owner of the Triton, and secondarily against the Gulftrade.

The Circuit Court of Appeals held—"Under the circumstances the Taurus was in fault in giving consent to the Gulftrade to come ahead, relying too much on her ability to get out of the channel. Evidently the Taurus miscalculated the situation. So, also, it seems the Gulftrade was at fault. She was the following vessel. All she had to do was to hold back and not run into the scows. She certainly saw danger ahead when she gave the second signal and she certainly saw it more imminent when she gave the third signal. It was quite clear that she did go ahead and took an equal chance with the Taurus on the ability of the latter to give her free channelway to pass. The result was a needless collision."

We cannot conclude that the Taurus was in fault. She was prudently navigated in plain view of the Gulftrade who knew the relevant facts; and by assenting that the latter might pass she certainly did not assume responsibility for the maneuver. At most the Taurus obligated herself to hold her course and speed so far as practicable, to do nothing to thwart the overtaking vessel, and that she knew of no circumstances not open to the observation of the Gulftrade which would prevent the latter from going safely by, if prudently navigated. Of course no ship must ever lead another into a trap. There was ample room for the Gulftrade to pass. But if not, she should have slowed down and kept at a safe distance. Her fault was the direct and sole cause of the collision.

By the Act to adopt regulations for preventing collisions, etc., approved June 7, 1897, (c. 4, 30 Stat. 96, *et seq.*) it is provided—

"Art. 18, Rule VIII. When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam-whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel

ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel.

"Art. 23. Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

"Art. 24. Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel."

Under these regulations the duty of the *Gulftrade* was clear. She should have anticipated the effect of the flood tide in the Delaware upon the flotillas as they rounded into the still water of the Schuylkill and kept herself out of the zone of evident danger.

In *Southern Pacific Co.* v. *Haglund* (*The Thoroughfare*), 277 U. S. 304, 310, we said—

" The *Relief* was not at fault in accepting the passing signal of the *Thoroughfare*. This was merely an assent to the proposed passage in the rear of the *Enterprise*, expressing an understanding of what the *Thoroughfare* proposed to do and an agreement not to endanger or thwart it by permitting an interfering change in the position of the *Enterprise*. See *Atlas Transp. Co.* v. *Lee Line Steamers* (C. C. A.), 235 Fed. 492, 495. And the *Relief*, being in a position to fully carry out its agreement, was under no obligation to decline the passing signal because of the approach of the *Union* on the other side and to sound instead a warning signal. There was nothing in the situation to indicate that the approach of the *Union* would prevent the *Thoroughfare* from passing safely, if, as the *Relief* had the right to assume, it were navigated with due care."

In *Atlas Transp. Co.* v. *Lee Line Steamers*, 235 Fed. 492, 495, the Circuit Court of Appeals (8th C. C. A.) had held—

" The reply of the Josh Cook to the passing signal of the Rees Lee was no more than an assent to it, at the risk of

the vessel proposing it. It expressed an understanding of what the Rees Lee proposed to do, and an agreement not to thwart it; but the success of the maneuver was at the risk of the Rees Lee."

*Whitridge* v. *Dill,* 23 How. 448, 453—

"The vessel astern, as a general rule, is bound to give way, or to adopt the necessary precautions to avoid a collision. That rule rests upon the principle that the vessel ahead, on that state of facts, has the sea-way before her, and is entitled to hold her position; and consequently the vessel coming up must keep out of the way."

*The Steamer Rhode Island,* Fed. Cas. 11,745—20 Fed. Cas. 646, 650—

"The approaching vessel, when she has command of her movements, takes upon herself the peril of determining whether a safe passage remains for her beside the one preceding her, and must bear the consequences of misjudgment in that respect."

See also *City of Baltimore,* 282 Fed. 490, 492; *The Pleiades,* 9 F. (2d) 804, 806.

Objections to the decree below were offered by counsel for respondents in their briefs and arguments here. But no application for certiorari was made in their behalf and we confine our consideration to errors assigned by the petitioner. *Steele* v. *Drummond,* 275 U. S. 199, 203; *Federal Trade Comm'n* v. *Pacific Paper Ass'n,* 273 U. S. 52, 66; *Webster Co. v. Splitdorf Co.,* 264 U. S. 463, 464; *Alice State Bank* v. *Houston Pasture Co.,* 247 U. S. 240, 242; *Hubbard* v. *Tod,* 171 U. S. 474, 494; *The Maria Martin,* 12 Wall. 31, 40.

The decree of the Circuit Court of Appeals is reversed and that of the District Court is affirmed. The cause will be remanded to the latter court for further proceedings in conformity with this opinion.

*Reversed.*

# HERKNESS *v.* IRION, COMMISSIONER OF CONSERVATION, ET AL.

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

No. 3. Argued October 8, 1928.—Decided November 19, 1928.

1. A bill which challenges the validity, under the Federal Constitution, of an order of a state administrative board purporting to be authorized by a state statute, and seeks to enjoin its enforcement, is within the jurisdiction of the District Court under Jud. Code, § 266 where application for an interlocutory injunction is pressed to hearing; and an appeal from a decree dismissing the bill after the interlocutory injunction has been denied, may be taken directly to this Court. P. 93.
2. Acts 91, of 1922, and 252, of 1924, of Louisiana, do not empower the Commissioner of Conservation to refuse a permit to manufacture carbon black from natural gas to a person able and willing to comply with the statutory requirements. P. 94.

11 F. (2d) 386, reversed.

APPEAL from a final decree of the District Court, dismissing a bill for an injunction. The court, composed of three judges under Jud. Code § 266, had previously denied an application for a preliminary injunction.

*Mr. John W. Davis,* with whom *Messrs. Maurice B. Saul, Joseph N. Ewing, Allen S. Olmsted, 2d,* and *Esmond Phelps* were on the brief, for appellant.

*Messrs. Percy Saint,* Attorney General of Louisiana, *W. H. Thompson,* Assistant Attorney General, and *Edward Rightor* submitted for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit was brought in a federal court for Louisiana by Herkness, an owner of natural gas wells, to enjoin the

Commissioner of Conservation and the Attorney General of that State from interfering with the erection, on plaintiff's land, and the operation, of a factory for the manufacture of carbon black from natural gas. The bill alleges that a number of other persons are now engaged in that business and have been for many years with the sanction of the Department of Conservation; that it had been its practice to require persons about to engage in such manufacture to apply for a permit; that one of its rules declares unlawful the erection of such a factory without having first obtained one; that plaintiff was refused a permit; that the sole ground of refusal was the policy recently announced by the Commissioner not to issue a permit for the erection of any new carbon black plants and to gradually reduce the amount of gas which holders of permits to operate existing plants can utilize for that purpose; and that his policy has become a fixed rule of administration. The bill charges that the order refusing to issue a permit to the plaintiff is void, because in excess of the powers conferred by the statutes or which could be conferred under the constitution of the State; and also because it violates the due process clause and the equal protection clause of the Fourteenth Amendment. A restraining order and an interlocutory injunction, as well as a permanent injunction, were sought. There were adequate allegations of threatened irreparable injury.

The District Judge issued a restraining order. The hearing upon the application for an interlocutory injunction was had before three judges, under § 266 of the Judicial Code as amended; and the case was later submitted by agreement as upon final hearing. The court denied the injunction and dismissed the bill, 11 F. (2d) 386; but later granted a restraining order pending the appeal. As the bill challenged the validity under the Federal Constitution of an order of an administrative board of the State,

the District Court had jurisdiction under § 266, *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290, and this Court has jurisdiction on direct appeal. We have no occasion to consider any of the constitutional questions presented. For, in our opinion, the statutes do not purport to confer upon the Commissioner power to refuse a permit to a person able and willing to comply with the requirements prescribed by the statute. See *Greene* v. *Louisville & Interurban Railroad Co.*, 244 U. S. 499, 508; *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 295.

The conservation of natural resources has been the subject of much legislation in Louisiana.[1] The possible wastefulness of the use of natural gas in the manufacture of carbon black was recognized; and the Legislature dealt fully with this use by Act 252 of 1924, which, in effect, embodies the provisions of Act 91 of 1922. *State* v. *Thrift Oil & Gas Co.*, 162 La. 165, 193. No law declares such use necessarily wasteful. Nor has the State purported to confer upon the Commissioner power to refuse a permit to new concerns and to restrict the use to the persons already engaged in the manufacture of carbon black. On the contrary, the use is expressly sanctioned in § 1 of Act 91 of 1922, which declares, " that natural gas may be used in the manufacture of carbon black under the conditions as fixed and imposed by the provisions of " that Act. And it is to those conditions and the means of ensuring their observance that the other provisions of the Act relate. Section 2 thereof directs the Commissioner to determine " what percentage of consumption of natural gas produced by each gas well may be used in the manufacture of carbon black . . ., which percentage shall not be less than fifteen per cent. and not more

[1] Act 71 of 1906; Act 144 of 1908; Acts 172, 190, 196 and 283 of 1910; Act 127 of 1912; Acts 268 and 270 of 1918; Act 250 of 1920.

than twenty per cent. of the potential capacity of such well. . . ." By § 3 he is authorized to reduce the consumption of natural gas used in the manufacture of carbon black below that minimum "after promulgation for sixty days of an order to that effect, whenever [and only whenever] it is actually necessary to do so in obtaining an adequate supply of natural gas for domestic heating and lighting purposes in the State of Louisiana, and for manufacturing plants, industries and enterprises located and operated within the State of Louisiana, other than those engaged in the manufacture of carbon black. . . ." Other sections of the 1922 Act define the conditions under which natural gas can be burned into carbon black. There is not even a contention that a condition existed which would have authorized the issue of an order reducing the minimum percentage of use, pursuant to § 3 of Act 91 of 1922.

Many detailed provisions concerning permits for the building of plants to burn natural gas into carbon black were added by Act 252 of 1924. But the additional provisions, and the specific powers there conferred upon the Commissioner, deal only with regulation of the use. The legislation contemplates, not restriction of the use to existing plants, but the further issue of permits to all who will "completely abide by and comply with all the provisions of this Act, and with all the rules and regulations of the Commissioner of Conservation established under the provisions of the Act." § 5. And it expressly provides that "The authority given the Commissioner of Conservation by this Act shall in no sense be understood to supersede or nullify any of the provisions of this Act, or any other act of this State, but shall be cumulative and in aid thereof." § 11.

As it is clear that the refusal of the Commissioner was not justified by any statutory provision, we have no occasion to consider the limitations imposed by the constitu-

tion of the State upon discriminatory action [2] and upon delegation of legislative power to an executive department.[3]

*Reversed.*

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## HUNT, GOVERNOR OF ARIZONA, ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

No. 44. Argued October 23, 1928.—Decided November 19, 1928.

1. When the numbers of wild deer on a national forest and game preserve have increased to such excess that by over-browsing upon and killing young trees, bushes and forage plants they cause great injury to the land, it is within the power of the United States to cause their numbers to be reduced by killing and their carcasses to be shipped outside the limits of such reserves. P. 100.
2. This power springs from the federal ownership of the lands affected, and is independent of the game laws of the State in which they are situate. *Id.*
3. A direction for such killing and shipment, given by the Secretary of Agriculture, was within the authority conferred upon him by Act of Congress. *Id.*
4. Carcasses and parts of the deer so killed, should be marked before being taken from the reserves, to show that the deer were killed there under authority of the Secretary of Agriculture. P. 101.

19 F. (2d) 634, modified and affirmed.

APPEAL from a decree of permanent injunction granted by the District Court after a final hearing by three judges in a suit brought by the United States. The decree en-

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[2] See *State of Louisiana* v. *Mahner,* 43 La. Ann. 496; *Town of Crowley* v. *West,* 52 La. Ann. 526, 533; *Town of Mandeville* v. *Band,* 111 La. 806; *State ex rel. Galle* v. *New Orleans,* 113 La. 371; *New Orleans* v. *Palmisano,* 146 La. 518; *State ex rel. Dickson* v. *Harrison,* 161 La. 218.

[3] See *State* v. *Billot,* 154 La. 402; *State* v. *Thrift Oil & Gas Co.,* 162 La. 165.

joined the Governor, the Game Warden, a county attorney and a sheriff, of the State of Arizona, from arresting or prosecuting officers and agents of the United States under the state game laws, for or on account of the killing, possession and transportation of deer under an order made by the Secretary of Agriculture to protect a National Forest and Game Preserve from the destructive effects of over-browsing.

*Mr. Earl Anderson,* Assistant Attorney General of Arizona, with whom *Mr. John W. Murphy,* Attorney General, was on the brief, for appellants.

The bill is defective under the rule announced in *New Jersey* v. *Sargent,* 269 U. S. 328. See *Georgia* v. *Stanton,* 6 Wall. 50; *Marge* v. *Parsons,* 114 U. S. 325; *Muskrat* v. *United States,* 219 U. S. 346; *Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158; *Massachusetts* v. *Mellon,* 262 U. S. 447.

A court of equity will not grant an injunction to restrain state officers from prosecuting under a state statute, because there is an adequate remedy at law by presenting a defense in such prosecutions.

This Court has no jurisdiction to entertain the action because it is, in fact, a suit against the State. *Fitts* v. *McGee,* 172 U. S. 516; *Arbuckle* v. *Blackburn,* 113 Fed. 616; *Bisbee* v. *Insurance Agency,* 14 Ariz. 313; *Davis* v. *American Society,* 75 N. Y. 363.

The title to all wild deer on the Grand Canyon National Game Preserve is vested in the State of Arizona. *Ex parte Crosby,* 38 Nev. 389; *Ward* v. *Race Horse,* 163 U. S. 504; *New York* v. *Becker,* 241 U. S. 562; *Geer* v. *Connecticut,* 161 U. S. 519; *La Coste* v. *Department,* 263 U. S. 535; *Ex parte Maier,* 103 Cal. 476; *Harper* v. *Galloway,* 58 Fla. 255; *Lawton* v. *Steele,* 152 U. S. 133; *United States* v. *McCullough,* 221 Fed. 288; *United States* v. *Samples,* 259 Fed. 479; *United States* v. *Shauver,* 214

Fed. 154; *McCready* v. *Virginia,* 94 U. S. 391; 31 Stat. c. 553, p. 187; *Rupart* v. *United States,* 181 Fed. 87.

If the Government may kill deer on the game preserve, contrary to state game laws, the State would have a right to prosecute persons for possessing the deer and removing them from Arizona contrary to those laws. A State may prosecute a person for the possession of the carcasses of wild game contrary to the provisions of its laws, although such game was lawfully taken under the laws of another State. *Ex parte Maier,* 103 Cal. 476; *New York* v. *Hesterberg,* 211 U. S. 31; *State* v. *Shattuck,* 96 Minn. 45.

Even though the United States owns the lands upon which the deer range, it may not take or kill the deer in violation of the Arizona game laws. *State* v. *Gallop,* 126 N. C. 979; *Percy* v. *Astle,* 145 Fed. 53; *Smith* v. *Odell,* 185 N. Y. S. 647.

The Federal Government has no better rights in the game preserve than an ordinary citizen has on his private lands. *Light* v. *United States,* 220 U. S. 523; *United States* v. *Tulley,* 140 Fed. 899; *United States* v. *Pennsylvania,* 48 Fed. 669; *State* v. *Tulley,* 31 Mont. 365; *Gill* v. *State,* 141 Tenn. 379.

We concede that under certain conditions or circumstances a property owner may kill game at a time different from that prescribed by the state game laws. But he must show that, at the time of killing, the particular animals killed were injuring or about to injure his property.

Congress has set aside this preserve as a feeding ground and park for the particular deer which the Government now seeks to slaughter. Act of June 29, 1906, 34 Stat. 607.

*Solicitor General Mitchell,* with whom *Messrs. R. W. Williams,* Solicitor, Department of Agriculture, and *Robert P. Reeder* were on the brief, for the United States.

That Congress may legislate for the protection of the public domain, even though that legislation may involve an exercise of what is known as the police power, is established. *Camfield* v. *United States,* 167 U. S. 518; *Utah Light & Power Co.* v. *United States,* 243 U. S. 389; *McKelvey* v. *United States,* 260 U. S. 353; *United States* v. *Alford,* 274 U. S. 264.

The contention of the appellants that, because of the game laws of the State of Arizona restricting the killing of deer, the United States must remain inactive and allow the forests on its public domain to be seriously damaged, if not destroyed, is without any support in the decisions of this Court.

State courts have held that a private proprietor may kill wild game when necessary to protect his property, and that state game laws, if construed to prevent it, would be invalid. *Aldrich* v. *Wright,* 53 N. H. 398; *State* v. *Ward,* 170 Iowa 185; *State* v. *Burk,* 114 Wash. 370. *Cf. Barrett* v. *State,* 220 N. Y. 423.

Mr. Justice Sutherland delivered the opinion of the Court.

The Kaibab National Forest and the Grand Canyon National Game Preserve, covering practically the same area, are situated north of the Colorado River in Arizona. They were created by proclamations of the President under authority of Congress. During the last few years deer on these reserves have increased in such large numbers that the forage is insufficient for their subsistence. The result has been that these deer have greatly injured the lands in the reserves by over-browsing upon and killing valuable young trees, shrubs, bushes and forage plants. Thousands of deer have died because of insufficient forage. Attempts were made under the direction of the Secretary of Agriculture to remove some of the deer from

the reserves to other lands, but these entirely failed, as did other means. The district forester, acting under the direction of the Secretary of Agriculture, proceeded to kill large numbers of the deer and ship the carcasses outside the limits of the reserves. That this was necessary to protect the lands of the United States within the reserves from serious injury is made clear by the evidence. The direction given by the Secretary of Agriculture was within the authority conferred upon him by act of Congress. And the power of the United States to thus protect its lands and property does not admit of doubt, *Camfield* v. *United States,* 167 U. S. 518, 525–526; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404; *McKelvey* v. *United States,* 260 U. S. 353, 359; *United States* v. *Alford,* 274 U. S. 264, the game laws or any other statute of the state to the contrary notwithstanding.

Appellants interfered with these acts of the United States officials and threatened to arrest and prosecute any person or persons attempting to kill or possess or transport such deer, under the claim that such officials were proceeding in violation of the game laws of the State of Arizona, the observance of which would have so restricted the number of deer to be killed as to render futile the attempt to protect the reserves. Three persons who had killed deer under authority of United States officials were actually arrested. Thereupon suit was brought to enjoin appellants from continuing or threatening such interference, arrest or prosecution. The court below, after a trial, found for the United States and entered a decree in accordance with the prayer of the bill, with the limitation, however, that the decree should not be construed to permit the licensing of hunters to kill deer within said reserves in violation of the state game laws. 19 F. (2d) 634.

While the Solicitor General does not concede the authority of the court to make this limitation, he is content

to let the decree stand. We, therefore, pass the matter without consideration and accept the opinion and decree below, with the modification that all carcasses of deer and parts thereof shipped outside the boundaries of the reserves shall be plainly marked by tags or otherwise, in such manner as the Secretary of Agricuture may by regulations prescribe, to show that the deer were killed under his authority within the limits of the reserves.

*Thus modified the decree is affirmed.*

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## EX PARTE THE PUBLIC NATIONAL BANK OF NEW YORK.

ON PETITION FOR A WRIT OF MANDAMUS.

No. 16 Original. Argued October 29, 1928.—Decided November 19, 1928.

1. Section 266 of the Judicial Code, which provides that no injunction restraining the enforcement of any statute of a State by restraining the action "of any officer of such State" in the enforcement of such statute shall be granted upon the ground of unconstitutionality of such statute, except upon a hearing and determination by a court composed of three judges, does not apply where the action sought to be enjoined is that of a municipal officer in performance of local, as distinguished from state, functions. P. 103.
2. A case has not the force of a precedent on a question which, though existent in the record, was not raised or considered by the court. P. 105.

Rule discharged.

Upon Return to a rule issued by this Court to three judges who had convened as a district court under Jud. Code, § 266, in an injunction suit, but had dissolved of their own motion in the belief that the suit was not within that section. The rule called upon them to show cause why a writ of mandamus should not issue requiring them to reconvene and proceed with the suit.

*Mr. Martin Saxe,* with whom *Messrs. Henry L. Moses, Robert C. Beatty, Herman G. Kopald,* and *Edward F. Colladay* were on the brief, for petitioner.

*Mr. Wm. H. King,* with whom *Messrs. George P. Nicholson* and *Eugene Fay* were on the brief, for Mr. Andrew B. Keating, as Receiver of Taxes of the City of New York, and Mr. William Reid, Jr., as City Collector.

*Mr. Henry S. Manley,* with whom *Mr. Albert Ottinger,* Attorney General, was on the brief, for the State of New York.

*Honorable Learned Hand* and *Honorable Augustus N. Hand, Circuit Judges,* and *Honorable William Bondy,* District Judge, submitted on printed return for themselves.

Mr. Justice Sutherland delivered the opinion of the Court.

The petitioner, a national banking association organized under the National Bank Act, with its principal office in the City of New York, brought suit in the federal district court for the southern district of New York against Andrew B. Keating, receiver, and William Reid, Jr., collector of taxes of the City of New York, to enjoin them from collecting taxes assessed against shares in the association in pursuance of a state law but by, and for the sole use of, the city. The prayer for relief rested upon the contention that the provisions of the state law, which fixed the rate of tax, discriminated in favor of other moneyed capital in the hands of individual citizens of the state, in contravention of § 5219 Rev. Stats., and of provisions of the Constitution of the United States. A statutory court of three judges was constituted under § 266 of the Judicial Code (U. S. Code, Title 28, § 380), and a master appointed, by whom evidence was taken and

reported. When the case came on for final hearing, the court, of its own motion, dissolved after directing that the cause proceed before a single district judge upon the ground that the suit was not one coming within the terms of § 266. Petitioner applied to this Court for a writ of mandamus requiring the judges composing the statutory court to reconvene and proceed to a determination of the case. Upon filing the petition, a rule to show cause was issued, upon a return to which the application has been heard.

The statutory court held that § 266 did not apply because neither of the defendants was an officer of the state and the suit involved only the action of city officials in the collection of taxes for the use of the city. In support of this ruling, *Ex parte Collins,* 277 U. S. 565, was relied upon. In that case suit was brought to enjoin proceedings under a resolution of the City of Phoenix, Arizona, directing the paving of a street upon which petitioner was an abutting owner. The improvement was to be made pursuant to general statutes of the state, which were assailed as contravening the due process clause of the Fourteenth Amendment. The district judge denied a request to call two judges to sit with him, upon the ground that the case did not come within § 266. This Court sustained the action of the district judge and held that the section did not apply, although the constitutionality of a statute was challenged, because the defendants were local officers and the suit concerned matters of interest only to the particular municipality involved. We need add little to what we there said.

Section 266 provides that no injunction "restraining the enforcement . . . of any statute of a State by restraining the action of any officer of such State in the enforcement . . . of such statute . . . shall be issued or granted . . . upon the ground of the unconstitutionality of such statute" except upon a hearing and determina-

tion of a court composed of three judges. The suit here involved the constitutionality of a state statute, but it was not brought to restrain "the action of any officer of such State in the enforcement" thereof. The persons sued are municipal officers, having no state functions to perform, but charged only with the duty of collecting and receiving taxes assessed by other city officials in no respect for the use of the state but for and in behalf of the city alone. In effect, the contention for petitioner practically comes to this—that the general purpose of § 266 being to safeguard state legislation assailed as unconstitutional from the improvident action of federal courts, the words "by restraining the action of any officer of such State in the enforcement . . of such statute" are without significance. In other words, we are asked to ignore the quoted words and read the section as though they were not there.

But we are not at liberty thus to deny effect to a part of a statute. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that "significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Market Co.* v. *Hoffman,* 101 U. S. 112, 115. We are unable to perceive any ground for departing from the rule in the case before us. It follows that, giving effect to the phrase in question, § 266 requires the concurrence of two things in order to give the three-judge court jurisdiction: (1) the suit must seek to have a state statute declared unconstitutional, or that in effect, and (2) it must seek to restrain the action of *an officer of the state* in the enforcement of such statute. See *Henrietta Mills Co.* v. *Rutherford County,* 26 F. (2d) 799, 800; *Connor* v. *Board of Comm'rs of Logan County,*

*Ohio,* 12 F. (2d) 789, 790; *Connecting Gas Co.* v. *Imes,* 11 F. (2d) 191, 194–195. The second requisite here is lacking.

Our attention is directed to several cases disposed of under § 266, where this Court passed on the merits although the suits were against local officers. We do not stop to inquire whether, at least in some of these cases, the so-called local officers in fact represented the state or exercised state functions in the matters involved and properly might be held to come within the provision of § 266 now under review. Compare, for example, *People ex rel. Plancon* v. *Prendergast,* 219 N. Y. 252, 258; *State ex rel. Lopas* v. *Shagren,* 91 Wash. 48, 52; *Griffin* v. *Rhoton,* 85 Ark. 89, 93–94; *Fellows* v. *Mayor,* 8 Hun. 484, 485–488; *Chickasha Cotton Oil Co.* v. *Lamb & Tyner,* 28 Okla. 275, 286. It is enough to say, as was said in the *Collins* case, that the propriety of the hearing before three judges was not considered in the cases to which we are referred; and they cannot be regarded as having decided the question. *Webster* v. *Fall,* 266 U. S. 507, 511; *United States* v. *Mitchell,* 271 U. S. 9, 14.

*Rule discharged.*

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## LOUIS K. LIGGETT COMPANY *v.* BALDRIDGE, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL.

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

No. 34. Argued October 8, 1928.—Decided November 19, 1928.

1. The business of a foreign corporation is property, and the corporation a "person," within the meaning of the due process and equal protection clauses of the Fourteenth Amendment. P. 111.
2. A foreign corporation may not be subjected to statutes that are in conflict with the Federal Constitution by a State in which it has been permitted to do business. *Id.*

3. A state statute forbidding any corporation to own a pharmacy or drug store in addition to those owned at the time of the enactment, unless all of its stockholders are licensed pharmacists, violates the due process clause of the Fourteenth Amendment as applied to a foreign corporation which owned such stores under license of the State, and sought to extend its business by acquiring and operating others. P. 111.
4. Mere stock ownership in a corporation owning and operating a drug store, can have no real or substantial relation to the public health. P. 113.
5. That the stock of corporations owning and operating chain drug stores is bought and sold on the stock exchanges and must be largely held by persons who are not registered pharmacists, are facts that may be judicially noticed. *Id.*

22 F. (2d) 993, reversed.

APPEAL from a decree of the District Court, composed of three judges, dismissing the bill whereby appellant drug store company sought to enjoin the Attorney General and other officers of Pennsylvania, from prosecuting it under an act regulating the ownership of drug-stores. The court had previously denied an application for a preliminary injunction.

*Messrs. Owen J. Roberts* and *Roy M. Sterne,* with whom *Mr. George C. Chandler* was on the brief, for appellant.

*Mr. Paul C. Wagner,* Deputy Attorney General of Pennsylvania, with whom *Mr. Thomas J. Baldridge,* Attorney General, was on the brief, for appellees.

The action of the Legislature in passing the statute is of great weight as indicating the necessity for the enactment. *Graves* v. *Minnesota,* 272 U. S. 425.

The Court of Common Pleas of Philadelphia County has held the Act constitutional, and the case is on appeal to the Supreme Court of Pennsylvania.

A similar Act of New York was upheld in *Tucker* v. *N. Y. State Board of Pharmacy,* 217 N. Y. S. 217.

The importance of assuring the proper enforcement of the laws governing the distribution of narcotics and liquors

by pharmacies, is evident. The statutory regulations in Pennsylvania, prior to May 13, 1927, were inadequate.

The connection between the regulation of a profession and the ownership of the business conducted in the practice of the profession has been recognized in the practice of both law and medicine. Legislatures and courts have realized that ownership carries with it a responsibility which does much to insure the proper practice of a profession when ownership is restricted to those qualified to practice. Practically all the States have found it necessary to prohibit corporations from entering the professions by employing lawyers or doctors to act for them. *People* v. *Title Guaranty & Trust Co.,* 227 N. Y. 366; *Re Coöperative Law Co.,* 198 N. Y. 479; *Harmon* v. *Siegel-Cooper Co.,* 167 N. Y. 244; *People* v. *Dermatological Institute,* 192 N. Y. 454; *World's Dispensary Medical Ass'n* v. *Prince,* 203 N. Y. 419; *People* v. *Merchants' Protective Corp'n,* 189 Cal. 531; *People* v. *California Protective Ass'n,* 76 Cal. App. 354; *New Jersey Co.* v. *Schonert & Son,* 95 N. J. Eq. 12; *Hodgen* v. *Commonwealth,* 142 Ky. 722.

In these cases, the elements of responsibility and control are emphasized as the result of requiring not only that the person who practices a profession shall be duly licensed and regulated, but that the owner of the business resulting from the professional practice shall likewise be a licensed practitioner.

The Act of May 13, 1927, does not deny to appellant the equal protection of the Law. *Sperry & Hutchinson Co.* v. *Rhodes,* 220 U. S. 502; *Dent* v. *West Virginia,* 129 U. S. 114; *People* v. *Griswold,* 213 N. Y. 92; *State* v. *Creditor,* 44 Kan. 565; *Ex parte Whitley,* 144 Cal. 167; *Hodgen* v. *Commonwealth,* 142 Ky. 722.

The regulation of a profession involves principles different from those applicable to the regulation of an ordinary trade or occupation.

*Mr. Sol M. Stroock, as amicus curiae,* filed a brief on behalf of the Whelan Drug Company, by special leave of Court.

*Messrs. Charles H. Sachs* and *Louis Caplan,* as *amici curiae,* filed a brief on behalf of the May Drug Company, by special leave of Court.

Mr. Justice Sutherland delivered the opinion of the Court.

This appeal brings here for consideration a challenge to the constitutionality of an act of the Pennsylvania legislature approved May 13, 1927, Penna. Stats., Supp. 1928, § 9377a-1, 9377a-2, a copy of which will be found in the margin.* The act provides that every pharmacy or drug store shall be owned only by a licensed pharmacist, and, in the case of corporations, associations and co-

* "Section 1. Every pharmacy or drug store shall be owned only by a licensed pharmacist, and no corporation, association, or copartnership shall own a pharmacy or drug store, unless all the partners or members thereof are licensed pharmacists; except that any corporation organized and existing under the laws of the Commonwealth or of any other state of the United States, and authorized to do business in the Commonwealth, and empowered by its charter to own and conduct pharmacies or drug stores, and any association or copartnership which, at the time of the passage of this act, still owns and conducts a registered pharmacy or pharmacies or a drug store or drug stores in the Commonwealth, may continue to own and conduct the same; but no other or additional pharmacies or drug stores shall be established, owned, or conducted by such corporation, association, or copartnership, unless all the members or partners thereof are registered pharmacists; but any such corporation, association, or copartnership, which shall not continue to own at least one of the pharmacies or drug stores theretofore owned by it, or ceases to be actively engaged in the conduct of a pharmacy, shall not be permitted thereafter to own a pharmacy or a drug store, unless all of its partners or members are registered pharmacists; and except that any person, not a licensed pharmacist, who, at the time of the passage of this

partnerships, requires that all the partners or members thereof shall be licensed pharmacists, with the exception that such corporations as are already organized and existing and duly authorized and empowered to do business in the state and own and conduct drug stores or pharmacies, and associations and partnerships, which, at the time of the passage of the act, still own and conduct drug stores or pharmacies, may continue to own and conduct the same.

The appellant is a Massachusetts corporation authorized to do business in Pennsylvania. At the time of the passage of the act, appellant was empowered to own and conduct and owned and thereafter continued to own and operate a number of pharmacies or drug stores at various places within the latter state. After the passage of the act, appellant purchased and took possession of two addi-

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act, owns a pharmacy or a drug store in the Commonwealth, may continue to own and conduct the same, but shall not establish or own any additional pharmacy or drug store, or if he or she ceases to operate such pharmacy or drug store, shall not thereafter own a pharmacy or drug store, unless he or she be a registered pharmacist; and except that the administrator, executor, or trustee of the estate of any deceased owner of a registered pharmacy or drug store, may continue to own and conduct such pharmacy or drug store during the period necessary for the settlement of the estate: Provided, That nothing in this section shall be construed to prevent or affect the ownership, by other than a registered pharmacist, of a store or stores wherein the sale or manufacture of drugs or medicines is limited to proprietary medicines and commonly used household drugs, provided such commonly used household drugs are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists, manufacturing pharmacists, wholesale grocers, or wholesale druggists.

"Section 2. Any person, copartnership, or corporation, violating the provisions of this act, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not more than one hundred dollars. Each day any such pharmacy is owned contrary to the provisions of this act shall be considered a separate offense."

tional drug stores in that state and carried on and continues and intends to continue to carry on a retail drug business therein under the title of " drug store " or " pharmacy," including the compounding, dispensing, preparation and sale at retail of drugs, medicines, etc. The business was and is carried on through pharmacists employed by appellant and duly registered in accordance with the statutes of the state. All of the members [stockholders] of the appellant corporation are not registered pharmacists, and, in accordance with the provisions of the act, the Pennsylvania State Board of Pharmacy has refused to grant appellant a permit to carry on the business. It further appears that the state Attorney General and the District Attorney of the proper county have threatened and intend to and will prosecute appellant for its violation of the act, the penalties for which are severe and cumulative. Suit was brought to enjoin these officers from putting into effect their threats, upon the ground that the act in question contravenes the due process and equal protection clauses of the Fourteenth Amendment. It is clear from the pleadings and the record, and it is conceded, that if the act be unconstitutional as claimed, appellant is entitled to the relief prayed. *Terrace* v. *Thompson,* 263 U. S. 197, 215; *Ex parte Young,* 209 U. S. 123.

The court below, composed of three judges, heard the case upon the pleadings, affidavits and an agreed statement of facts, and rendered a decree denying a preliminary injunction and, upon the agreed submission of the case, a final decree dismissing the bill for want of equity. 22 F. (2d) 993. The statute was held constitutional upon the ground that there was a substantial relation to the public interest in the ownership of a drug store where prescriptions were compounded. In support of this conclusion, the court said that medicines must be in the store before they can be dispensed; that what is there is dic-

tated not by the judgment of the pharmacist but by those who have the financial control of the business; that the legislature may have thought that a corporate owner in purchasing drugs might give greater regard to price than to quality, and that if such was the thought of the legislature the court would not undertake to say that it was without a valid connection with the public interest and so unreasonable as to render the statute invalid.

That appellant's business is a property right, *Duplex Co.* v. *Deering,* 254 U. S. 443, 465; *Truax* v. *Corrigan,* 257 U. S. 312, 327, and as such entitled to protection against state legislation in contravention of the federal Constitution, is, of course, clear. That a corporation is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment, and that a foreign corporation permitted to do business in a state may not be subjected to state statutes in conflict with the federal Constitution, is equally well settled. *Kentucky Co.* v. *Paramount Exch.,* 262 U. S. 544, 550; *Power Co.* v. *Saunders,* 274 U. S. 490, 493, 496–497; *Frost Trucking Co.* v. *R. R. Comm'n,* 271 U. S. 583, 594 *et seq.* And, unless justified as a valid exercise of the police power, the act assailed must be declared unconstitutional because the enforcement thereof will deprive appellant of its property without due process of law.

The act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary invasion of appellant's property rights guaranteed by the Constitution. See *Adair* v. *United States,* 208 U. S. 161, 173–174; *Mugler* v. *Kansas,* 123 U. S. 623, 661. The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears

a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. Here the pertinent question is: What is the effect of mere ownership of a drug store in respect of the public health?

A state undoubtedly may regulate the prescription, compounding of prescriptions, purchase and sale of medicines, by appropriate legislation to the extent reasonably necessary to protect the public health. And this the Pennsylvania legislature sought to do by various statutory provisions in force long before the enactment of the statute under review. Briefly stated, these provisions are: No one but a licensed physician may practice medicine or prescribe remedies for sickness; [1] no one but a registered pharmacist lawfully may have charge of a drug store; [2] every drug store must itself be registered, and this can only be done where the management is in charge of a registered pharmacist; [3] stringent provision is made to prevent the possession or sale of any impure drug or any below the standard, strength, quality and purity as determined by the recognized pharmacopoeia of the United States; [4] none but a registered pharmacist is permitted to compound physician's prescriptions; [5] and, finally, the supervision of the foregoing matters and the enforcement of the laws in respect thereof are in the hands of the state Board of Pharmacy, which is given broad powers for these purposes.

It, therefore, will be seen that without violating laws, the validity of which is conceded, the owner of a drug store, whether a registered pharmacist or not, cannot purchase or dispense impure or inferior medicines; he cannot,

[1] Pa. St. 1920, § 16779.

[2] Pa. St. 1920, §§ 9323, 9327.

[3] Pa. St. Supp. 1928, § 9329a–2.

[4] Pa. St. 1920, § 9337; Pa. St. Supp. 1928, § 9339.

[5] Pa. St. 1920, §§ 9317, 9323.

unless he be a licensed physician, prescribe for the sick; he cannot, unless he be a registered pharmacist, have charge of a drug store or compound a prescription. Thus, it would seem, every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded.

The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with *ownership*. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, " under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, 513. See also *Meyer* v. *Nebraska,* 262 U. S. 390, 399–400; *Norfolk Ry.* v. *Public Service Comm'n,* 265 U. S. 70, 74; *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535; *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 412–415; *Fairmont Co.* v. *Minnesota,* 274 U. S. 1, 9–11.

In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact

that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the Fourteenth Amendment.

*Decree reversed.*

HOLMES, J., dissenting.

A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacists, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be more likely to observe the business with an intelligent eye than a casual investor who looked only to the standing of the

stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less. It has been recognized by the professions, by statutes and by decisions that a corporation offering professional services is not placed beyond legislative control by the fact that all the services in question are rendered by qualified members of the profession. See *People* v. *Title Guarantee & Trust Co.,* 227 N. Y. 366; *Tucker* v. *New York State Board of Pharmacy,* 217 N. Y. Supp. 217, 220. *Matter of Co-operative Law Co.,* 198 N. Y. 479. *People* v. *Merchants Protective Corporation,* 189 Cal. 531. *New Jersey Photo Engraving Co.* v. *Carl Schonert & Sons,* 95 N. J. Eq. 12. *Hodgen* v. *Commonwealth,* 142 Ky. 722.

But for decisions to which I bow I should not think any conciliatory phrase necessary to justify what seems to me one of the incidents of legislative power. I think however that the police power as that term has been defined and explained clearly extends to a law like this, whatever I may think of its wisdom, and that the decree should be affirmed.

Of course the appellant cannot complain of the exception in its favor that allows it to continue to own and conduct the drug stores that it now owns. The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and those of a later time. *Sperry & Hutchinson Co.* v. *Rhodes,* 220 U. S. 502, 505.

MR. JUSTICE BRANDEIS joins in this opinion.

# WASHINGTON EX REL SEATTLE TITLE TRUST COMPANY, TRUSTEE, ETC. *v.* ROBERGE, SUPERINTENDENT OF BUILDING OF SEATTLE.

ERROR TO THE SUPREME COURT OF WASHINGTON.

No. 29. Argued October 11, 12, 1928.—Decided November 19, 1928.

1. Zoning measures must find their justification in the police power exerted in the public interest; unnecessary and unreasonable restrictions may not be imposed upon the use of private property or the pursuit of useful activities. P. 120.
2. A trust company owning and maintaining, as trustee, a philanthropic home for old people in a residential district, sought to replace the structure with a larger one for the same purposes, but was denied a permit under a zoning ordinance providing that such a building should be permitted "when the written consent shall have been obtained of the owners of two-thirds of the property within 400 feet of the proposed building." The denial was based upon the sole ground that such consent had not been obtained, there being nothing to show that the building and its use would constitute a nuisance or be otherwise objectionable in the community or conflict with the public interest or the general zoning plan. *Held:*

   (1) That the condition requiring consent of property owners was repugnant to the due process clause of the Fourteenth Amendment. P. 121.

   (2) The condition being void, the trustee was entitled to a permit. P. 123.

144 Wash. 74, reversed.

ERROR to a judgment of the Supreme Court of Washington, which affirmed the dismissal of an action for a writ of mandate to compel the Superintendent of Building of the City of Seattle to issue a permit to the relator, the plaintiff in error.

*Mr. Corwin S. Shank,* with whom *Mr. Glenn J. Fairbrook* was on the brief, for plaintiff in error.

*Mr. A. C. Van Soelen,* with whom *Mr. Thomas J. L. Kennedy* was on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Since 1914, the above named trustee has owned and maintained a philanthropic home for aged poor. It is located about six miles from the business center of Seattle on a tract 267 feet wide, extending from Seward Park Avenue to Lake Washington, having an average depth of more than 700 feet and an area of about five acres. The home is a structure built for and formerly used as a private residence. It is large enough to accommodate about 14 guests and usually it has had about that number. The trustee proposes to remove the old building and in its place at a cost of about $100,000 to erect an attractive two and one-half story fireproof house large enough to be a home for 30 persons. The structure would be located 280 feet from the avenue on the west and about 400 feet from the lake on the east, cover four per cent. of the tract and be mostly hidden by trees and shrubs. The distance between it and the nearest building on the south would be 110 feet, on the north 160 and on the west 365.

A comprehensive zoning ordinance (No. 45382) passed in 1923 divided the city into six use districts and provided that, with certain exceptions not material here, no building should be erected for any purpose other than that permitted in the district in which the site is located. § 2. The land in question is in the "First Residence District." The ordinance permitted in that district single family dwellings, public schools, certain private schools, churches, parks, and playgrounds, an art gallery, private conservatories for plants and flowers, railroad and shelter stations. § 3 a. And, upon specified conditions, it also permitted garages, stables, buildings for domestic animals, the office of physician, dentist or other professional person when located in his or her dwelling (§ 3 b), fraternity, sorority and boarding houses, a community clubhouse, a memorial building, nurseries, greenhouses, and buildings necessary

for the operation of public utilities. § 3 c. It declared that the section should not be construed to prohibit the use of vacant property in such district for gardening or fruit raising, or its temporary use for fairs, circuses, or similar purposes. § 3 e. By an ordinance (No. 49179) passed in 1925, § 3 c was amended by adding: "A philanthropic home for children or for old people shall be permitted in First Residence District when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." *

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* The pertinent provisions of the ordinance as amended follow:

The title is:

An ordinance regulating and restricting the location of trades and industries; regulating and limiting the use of buildings and premises and the height and size of buildings; providing for yards, courts or other open spaces; and establishing districts for the said purposes.

Section 2:

(a) For the purpose of regulating, classifying and restricting the location of trades and industries and the location of buildings designed, erected or altered for specified uses, The City of Seattle is hereby divided into six (6) Use Districts, namely: First Residence District, Second Residence District, Business District, Commercial District, Manufacturing District and Industrial District.

(b) The boundaries of the aforesaid districts are laid out and shown upon the map designated "Use Map," filed in the office of the City Comptroller and ex-officio City Clerk. . . . The Use Districts on said map are hereby established.

(c) . . . No building shall be erected, altered, or used, nor shall any premises be used, for any purpose other than that permitted in the use district in which such building or premises is located.

(d) Where a use in any district is conditioned upon a public hearing or the consent of surrounding property, such use if existing at the time this ordinance becomes effective, shall be allowed repairs or rebuilding without such hearing or consent.

Section 3. First Residence District.

(a) The following uses only are permitted in a First Residence District:

(1) Single Family Dwellings.

Subsequently the trustee, without having obtained consents of other landowners in accordance with the provisions just quoted, applied for a permit to erect the new home. It is the superintendent's official duty to issue permits for buildings about to be erected in accordance with valid enactments and regulations. He denied the application solely because of the trustee's failure to furnish such consents. Then the trustee brought this suit in the superior court of King County to secure its judgment and writ commanding the superintendent to issue the permit; and it maintained throughout that the ordinance, if construed to prevent the erection of the proposed building, is arbitrary and repugnant to the due process and equal protection clauses of the Fourteenth

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(2) Public Schools.

(3) Private Schools in which prescribed courses of study only are given and are graded in a manner similar to public schools or are of a higher degree.

(4) Churches.

(5) Parks and Playgrounds (including usual park buildings).

(6) Art Gallery or Library Building.

(7) Private Conservatories for Plants and Flowers.

(8) Railroad and Shelter Stations.

(b) In a First Residence District, buildings and uses such as are ordinarily appurtenant to dwellings shall be permitted, subject to the limitations herein provided. A garage in a first residence district shall not occupy more than seven per cent (7%) of the area of the lot, and the business of repairing motor vehicles shall not be conducted therein. In the case of a private stable, the written consent must be obtained of the owners of fifty (50) per cent of the property within a radius of two hundred (200) feet of the proposed building. The number of animals, not counting sucklings, in a private stable shall not exceed one for every two thousand (2,000) square feet contained in the area of the lot on which such building is located. Not more than one appurtenant building having a floor area of not to exceed thirty (30) square feet which is used for the housing of domestic animals or fowls shall be permitted on any lot in the First Residence District, except that a building of greater area or a greater number of buildings shall be permitted when the written consent

Amendment. That court held that the amended ordinance so construed is valid and dismissed the case. Its judgment was affirmed by the highest court of the State. 144 Wash. 74

The trustee concedes that our recent decisions require that in its general scope the ordinance be held valid. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365. *Zahn* v. *Board of Public Works*, 274 U. S. 325. *Gorieb* v. *Fox*, 274 U. S. 603. *Nectow* v. *Cambridge*, 277 U. S. 183. Is the delegation of power to owners of adjoining land to make inoperative the permission, given by § 3 (c) as amended, repugnant to the due process clause? Zoning

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shall have been obtained of the owners of fifty (50) per cent of the dwellings within two hundred (200) feet of the proposed building; provided that such consent shall not be required if the number of said dwellings is less than four (4). The office of a physician, dentist, or other professional person when located in his or her dwelling, also home occupations engaged in by individuals within their dwellings shall be considered as accessory uses, provided that no window display is made or any sign shown other than one not exceeding two (2) square feet in area and bearing only the name and occupation of the occupant. The renting of rooms for lodging purposes only, for the accommodation of not to exceed six (6) persons, in a single family dwelling shall be considered an accessory use.

(c) A fraternity house, sorority house or boarding house when occupied by students and supervised by the authorities of a public educational institution, a private school other than one specified in paragraph (a) this section (3), a community club house, memorial building, nursery or greenhouse, or a building which is necessary for the proper operation of a public utility may be permitted by the Board of Public Works after a public hearing. *A philanthropic home for children or for old people shall be permitted in First Residence District when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building.*

. . . .

(e) Nothing in this section shall be construed to prohibit the use of vacant property for gardening or fruit raising or its temporary use, conformable to Law, for fairs, circuses or similar purposes.

measures must find their justification in the police power exerted in the interest of the public. *Euclid* v. *Ambler Realty Co., supra,* 387. "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Nectow* v. *Cambridge, supra,* p. 188. Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. *Lawton* v. *Steele,* 152 U. S. 133, 137. *Adams* v. *Tanner,* 244 U. S. 590, 594. *Meyer* v. *Nebraska,* 262 U. S. 390, 399–400. *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, 513. *Norfolk Ry.* v. *Public Service Comm'n,* 265 U. S. 70, 74. *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535. *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 412, 415. *Tyson & Brother* v. *Banton,* 273 U. S. 418, 442.

The right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—

uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank* v. *Richmond,* 226 U. S. 137, 143. *Browning* v. *Hooper,* 269 U. S. 396.

*Cusack Co.* v. *City of Chicago,* 242 U. S. 526, involved an ordinance prohibiting the putting up of any billboard in a residential district without the consent of owners of a majority of the frontage on both sides of the street in the block where the board was to be erected The question was whether the clause requiring such consents was an unconstitutional delegation of power and operated to invalidate the prohibition. The case was held unlike *Eubank* v. *Richmond, supra,* and the ordinance was fully sustained. The facts found were sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of such districts. Pp. 529, 530. It is not suggested that the proposed new home for aged poor would be a nuisance. We find nothing in the record reasonably tending to show that its construction or maintenance is liable to work any injury, inconvenience or annoyance to the community, the district or any person. The facts shown clearly distinguish the proposed building and use from such billboards or other uses which by reason of their nature are liable to be offensive.

As the attempted delegation of power cannot be sustained, and the restriction thereby sought to be put upon

the permission is arbitrary and repugnant to the due process clause, it is the duty of the superintendent to issue, and the trustee is entitled to have, the permit applied for.

We need not decide whether, consistently with the Fourteenth Amendment, it is within the power of the State or municipality by a general zoning law to exclude the proposed new home from a district defined as is the first district in the ordinance under consideration.

*Judgment reversed.*

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## JORDAN, SECRETARY OF STATE OF CALIFORNIA, ET AL. *v.* TASHIRO ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 13. Argued April 13, 1928. Reargued October 9, 1928.—Decided November 19, 1928.

1. Where, by the terms of a state law, aliens were entitled to file articles of incorporation for certain purposes if so privileged by a treaty of the United States, and not otherwise, and the highest court of the State granted them a writ of mandamus against state officers upon the ground that such privilege, specially set up and claimed, was secured by the treaty, a review of the case at the instance of the officers is within the jurisdiction of this Court under Jud. Code, § 237 (b). P. 126.
2. Obligations of treaties should be liberally construed to effect the apparent intention of the parties to secure equality and reciprocity between them. Where a treaty admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred. P. 127.
3. The treaty of commerce and navigation between the United States and Japan authorizes citizens of Japan to carry on trade within the United States and "to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

*Held* that this includes the operation of a hospital as a business undertaking, the leasing of land for that purpose, and the exercise of these privileges through a corporate agency. Pp. 126, 129.
201 Cal. 236, affirmed.

CERTIORARI, 277 U. S. 580, to a judgment of the Supreme Court of California which granted a writ of mandamus against the present petitioners, the Secretary of State and Deputy Secretary of State, of California, commanding them to file articles of incorporation tendered by the respondents, who were Japanese aliens.

*Mr. U. S. Webb,* Attorney General of California, with whom *Messrs. Robert W. Harrison* and *Wm. F. Cleary,* Deputy Attorneys General, were on the brief, for petitioners.

*Mr. J. Marion Wright* for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

The respondents, subjects of Japan residing in California, presented for filing in the office of the Secretary of State of California, one of the petitioners, proposed articles of incorporation of the "Japanese Hospital of Los Angeles." The articles provided for the creation of a business corporation with a share capital of $100,000. They purported to authorize the corporation to construct and operate in Los Angeles a general hospital with a home for nurses and resident physicians, and to lease land for that purpose.

Although the articles complied with all provisions of the California statutes governing the organization of a corporation for such purposes, the petitioners refused to file them on the ground that, as the respondents were citizens of Japan, the Alien Land Law of the State did not permit an incorporation by them for the purposes named. The respondents then brought, in the Supreme Court of Cali-

fornia, a proceeding in mandamus to compel the petitioners to file the proposed articles and to issue a certificate of incorporation to the hospital. The mandamus petition set up that the Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan, proclaimed April 5, 1911, 37 Stat. 1504, and now in force, conferred on citizens and subjects of the Empire of Japan the right to incorporate in the United States for the purposes named in the proposed articles.

The state court granted the writ as prayed, basing its determination on the construction of the Treaty. *Tashiro* v. *Jordan,* 201 Cal. 236. This Court granted the petition of the Secretary of State of California for certiorari, 277 U. S. 580.

Section 2 of the Alien Land Law of California, as amended by the Act of the Legislature, approved June 20, 1923, Stats. 1923, p. 1020, provides that aliens of a class in which respondents are included may acquire, possess and enjoy real estate within the state "in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise." Section 3, in like terms, permits (a) acquisition of land by a corporation, the majority of whose stockholders are aliens, and (b) the purchase by aliens of stock in corporations owning or leasing land, only for purposes prescribed by such a treaty.

The statutes of California do not otherwise forbid the organizing of a corporation by citizens of Japan residing in the state, and by these enactments there was effected perfect harmony in the operation of the statute and of the Treaty. What the Treaty prescribes the statute authorizes. There is thus no possibility of conflict between the exercise of the treaty-making power of the federal government and the reserved powers of the state such as that

suggested in *Geofroy* v. *Riggs,* 133 U. S. 258, 267, on which petitioners placed reliance on the argument.

The Supreme Court of California, in passing upon the application for mandamus, granted the relief prayed, not as a matter of statutory construction, but because it thought the conduct of a hospital by Japanese citizens through the instrumentality of a corporation, organized under the laws of the state, was a privilege secured to the respondents by the Treaty which the state statute did not purport to withhold. The privilege challenged by petitioners is one specially set up or claimed under a treaty of the United States and sustained by the state court and the case is thus one within the jurisdiction of this Court conferred by § 237 (b) of the Judicial Code. Compare *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 120.

The question presented is one of the construction of the Treaty, the relevant portions of which are printed in the margin.[1] It in terms authorizes the citizens of Japan to carry on trade within the United States and "to lease land for residential and commercial purposes, and gen-

[1] Treaty of commerce and navigation between the United States and Japan.

. . . ARTICLE I. The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. . . .

The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects. . . .

erally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

The petitioners insist that the construction and operation of a hospital is not one of the purposes prescribed by the Treaty, which, it is argued, are limited so far as "trade" and "commerce" are concerned to the purchase and sale or exchange of goods and commodities, and that, in any case, the Treaty does not confer upon Japanese subjects, resident in California, the privilege of forming a corporation under the laws of California or of leasing lands through a corporate agency for such a purpose.

The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. See *Geofroy* v. *Riggs, supra; Tucker* v. *Alexandroff,* 183 U. S. 424, 437; *Wright* v. *Henkel,* 190 U. S. 40, 57; *In re Ross,* 140 U. S. 453, 475. Upon like ground, where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred. *Asakura* v. *Seattle,* 265 U. S. 332; *Tucker* v. *Alexandroff, supra; Geofroy* v. *Riggs, supra.*

While in a narrow and restricted sense the terms "commerce," or "commercial," and "trade" may be limited to the purchase and sale or exchange of goods and commodities, they may connote, as well, other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise. *Asakura* v. *Seattle, supra.* And although commerce includes traffic in this narrower sense, for more than a century it has been judicially recognized that in a broad sense it

embraces every phase of commercial and business activity and intercourse. See *Gibbons* v. *Ogden,* 9 Wheat. 1, 189.

Considerations which led this Court to conclude that the terms "trade" and "commerce" as used in this Treaty do not include agriculture, and the circumstances attending the making of the Treaty which were deemed to exclude from the operation of its broad language any grant of the privilege of acquiring and using lands within the United States for agricultural purposes, were discussed in the opinions in *Terrace* v. *Thompson,* 263 U. S. 197, 223; *Webb* v. *O'Brien,* 263 U. S. 313, 323; *Frick* v. *Webb,* 263 U. S. 326, 333, and need not now be detailed. But in *Asakura* v. *Seattle, supra,* it was held that the language of this Treaty securing to Japanese citizens the privilege of carrying on trade within the United States was broad enough to comprehend all classes of business which might reasonably be embraced in the word trade, and included the privilege of carrying on the business of a pawnbroker. In *Clarke* v. *Deckebach,* 274 U. S. 392, 396, in considering the Treaty with Great Britain of July 3, 1815, 8 Stat. 228; August 6, 1827, 8 Stat. 361, granting reciprocal liberty of commerce between the United States and Great Britain, and in holding that the guarantee that "... the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce," did not extend to a British subject engaged in keeping a poolroom within the United States, we took occasion to point out that the language of the present Treaty with Japan was of broader scope than that then before the Court.

Giving to the terms of the Treaty, as we are required by accepted principles, a liberal rather than a narrower interpretation, we think, as the state court held, that the terms "trade" and "commerce," when used in conjunction with each other and with the grant of authority to lease land for "commercial purposes" are to be given a

broader significance than that pressed upon us, and are sufficient to include the operation of a hospital as a business undertaking; that this is a commercial purpose for which the Treaty authorizes Japanese subjects to lease lands.

It is said that the elimination from the original draft of this clause of the Treaty of words authorizing the leasing of land for "industrial, manufacturing and other lawful" purposes (see *Terrace* v. *Thompson, supra,* p. 223) leads to the conclusion that land might not be leased for hospital purposes by Japanese subjects, even though under the other provisions of the Treaty they might be permitted to operate such an institution. But as the leasing of land for a hospital is obviously not for an industrial or manufacturing purpose, this argument presupposes that the phrase "commercial purposes" is limited to merchandising businesses, which for reasons already stated we deem inadmissible. Moreover, a construction which concedes the authority of Japanese subjects to operate a hospital but would deny to them an appropriate means of controlling so much of the earth's surface as is indispensable to its operation, does not comport with a reasonable, to say nothing of a liberal, construction. The Supreme Court of California has reached a like conclusion in *State of California* v. *Tagami,* 195 Cal. 522, holding that this Treaty secured to a Japanese subject the privilege of leasing land within the state for the purpose of using and occupying it for the maintenance of a health resort and sanitarium.

The contention that the Treaty does not permit the exercise of the privileges secured by it through a corporate agency requires no extended consideration. The employment of such an agency is incidental to the exercise of the granted privilege. But it is not an incident which enlarges the privilege by annexing to the permitted business another class of business otherwise excluded from the

grant, as would have been the case in *Terrace* v. *Thompson, supra,* had the business of farming been deemed an incident to the business of trading in farm products.

The principle of liberal construction of treaties would be nullified if a grant of enumerated privileges were held not to include the use of the usual methods and instrumentalities of their exercise. Especially would this be the case where the granted privileges relate to trade and commerce and the use of land for commercial purposes. It would be difficult to select any single agency of more universal use or more generally recognized as a usual and appropriate means of carrying on commerce and trade than the business corporation. And it would, we think, be a narrow interpretation indeed which, in the absence of restrictive language, would lead to the conclusion that the Treaty had secured to citizens of Japan the privilege of engaging in a particular business, but had denied to them the privilege of conducting that business in corporate form. But here any possibility of doubt would seem to be removed by the clause which confers on citizens and subjects of the High Contracting Parties the right "... to do anything generally incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

*Affirmed.*

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## PACIFIC STEAMSHIP COMPANY *v.* PETERSON.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 49. Argued October 24, 1928.—Decided November 26, 1928.

1. Under § 20 of the Seamen's Act, as amended by § 33 of the Merchant Marine Act, which provides that any seaman who shall suffer personal injury in the course of his employment may, "at his election" maintain an action for damages at law, etc., an action to recover compensatory damages for an injury due to the

negligence of another member of the crew may be maintained by the injured seaman against his employer although the seaman has demanded and received of the employer the maintenance, cure and wages accorded in such cases by the old admiralty rules. Pp. 134–138.

2. The right to maintenance, cure and wages under the old admiralty rules is a contractual right, cumulative to and not inconsistent with, or an alternative of, the new right to recover compensatory damages for injuries caused by negligence. P. 136.
3. A general expression in an opinion concerning a particular aspect or effect of a statute, as to which no question was raised in the case, will not control judgment in a subsequent suit presenting the very point for decision, nor prevent the determination as an original question of the proper construction of the statute in that particular. P. 136.

145 Wash. 460, affirmed.

CERTIORARI, 276 U. S. 612, to a judgment of the Supreme Court of Washington affirming a recovery of damages by a seaman from the owner of his ship, in an action for personal injuries occasioned by the negligence of the ship's mate.

*Mr. W. Carr Corrow,* with whom *Messrs. Benjamin S. Grosscup* and *J. O. Davies* were on the brief, for petitioner.

On the construction of the Act, see *Panama Ry. Co.* v. *Johnson,* 264 U. S. 375; *Engel* v. *Davenport,* 271 U. S. 33; *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316; *Kuhlman* v. *Fletcher Co.,* 20 F. (2d) 465; *Lorang* v. *Alaska S. S. Co.,* 298 Fed. 547; *Wagstaff* v. *United States,* 281 Fed. 877; *Hughes* v. *Alaska S. S. Co.,* 287 Fed. 427; *Rosinski* v. *Conners,* 21 F. (2d) 591.

On what constitutes an election, see *Robb* v. *Vos,* 155 U. S. 13; 12 C. J. 336; *The Santa Barbara,* 263 Fed. 369; *The Bouker, No. 2,* 241 Fed. 831; *The Balsa,* 10 F. (2d) 408.

The construction placed upon this statute by the Supreme Court of Washington, which requires a ship-owner to pay full compensation under both the old rules and the new, would render the statute unconstitutional. Such a

construction is to be avoided. *Gulf, etc. Ry. Co.* v. *Ellis,* 165 U. S. 150.

A seaman may not bring more than one action under the old rules to recover his full compensation for an injury received, splitting a cause of action. *Cf. Baltimore S. S. Co.* v. *Phillips, supra.*

*Mr. Harry E. Foster,* with whom *Mr. Melville Monheimer* was on the brief, for respondent.

Mr. Justice Sanford delivered the opinion of the Court.

Peterson, a seaman, brought an action at law in a Superior Court of Washington against his employer, the Pacific Steamship Co., the owner of a domestic merchant vessel on which he was serving, to recover damages for personal injuries suffered at sea on a voyage between the ports of Puget Sound and California.

The complaint charged that the injury resulted from the negligence of the mate of the vessel—there being no charge that the vessel was unseaworthy—and based the right of action expressly on § 20 of the Seamen's Act of 1915,[1] as amended by § 33 of the Merchant Marine Act of 1920.[2] This provides: "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply." [3]

The Company, in its answer, not only denied the averments of negligence, but alleged, generally, in Par. 2,

[1] 38 Stat. 1164, c. 153.

[2] 41 Stat. 988, c. 250; U. S. C., Tit. 46, § 688.

[3] A like right of action is given to the personal representative of any seaman whose death results from such personal injury.

" that long prior to the commencement of plaintiff's action set out in his said complaint, the plaintiff elected to receive wages to the end of the voyage, and maintenance and cure for any injuries which he received on said voyage; and the plaintiff has received his wages to the end of the voyage and has received maintenance and cure for any injury received, and received the same prior to the filing of his said complaint herein, and he cannot now maintain an action under the Jones Act, or any other act, for damages for any injuries received upon the voyage ": and " for further answer and affirmative defense " alleged, particularly, in Par. 3, that as soon as the vessel arrived at San Francisco the plaintiff was removed from the vessel by the defendant and conveyed to the Marine Hospital for maintenance and cure; that he " has received from the defendant at said hospital maintenance and cure as far as medical and surgical attention can reasonably effect a cure," and also received his wages from the defendant to the end of the voyage, aggregating $41.10, prior to the commencement of the suit; and that " plaintiff in accepting said wages to the end of the voyage and in permitting defendant to take him to said Marine Hospital . . . and in consenting to go thereto for maintenance and cure for the injuries he received, elected to take compensation for said injury under the general admiralty and maritime law in such cases made and provided, and he has been fully and completely compensated by defendant for said injuries under the said general admiralty and maritime law, and the plaintiff made said election to accept compensation and received the same under the general admiralty and maritime law long prior to the filing of this suit and the plaintiff cannot now elect to sue or maintain this action, for damages under section 20 of the act of congress of March 4, 1915, as amended by section 33 of the Act of June 5th, 1920, known as the Jones Act."

The court, on the plaintiff's motion, struck from the answer the allegations in Par. 2; and also sustained a

demurrer interposed by the plaintiff to the "affirmative defense" in Par. 3 on the ground that it did not state facts sufficient to constitute a defense to the action. The case proceeded to trial, and the plaintiff had verdict and judgment. The judgment was affirmed by the Supreme Court of the State. 145 Wash. 460.[4] A petition for a writ of certiorari, directed solely to the rulings as to the right to maintain the suit under § 33 of the Merchant Marine Act, was then granted.

By the general maritime law of the United States prior to the Merchant Marine Act, a vessel and her owner were liable, in case a seaman fell sick, or was wounded in the service of the ship, to the extent of his maintenance and cure, whether the injuries were received by negligence or accident, and of his wages, at least so long as the voyage was continued, and were liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship and her appliances; but a seaman was not allowed to recover an indemnity for injuries sustained through the negligence of the master or any member of the crew. *The Osceola,* 189 U. S. 158, 175; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 380; *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, 258.

By § 33 of the Merchant Marine Act, as heretofore construed, the prior maritime law of the United States was modified by giving to seamen injured through negligence the rights given to railway employees by the Employers Liability Act of 1908 and its amendments, and permitting these new substantive rights to be asserted and enforced in actions *in personam* against the employers in federal or state courts administering common-law remedies, with the right of trial by jury, or in suits in admiralty in courts administering maritime remedies, without trial by

[4] Department 2 of the Supreme Court; petition for rehearing denied by the Court *en banc.*

jury. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375; *Engel* v. *Davenport,* 271 U. S. 33; *Panama R. R.* v. *Vasquez,* 271 U. S. 557; *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316.

The defendant contends, on the one hand, that this statute gives an injured seaman the new right of action for damages merely as an alternative right to those provided by the old maritime rules, which he may enforce "at his election," thereby requiring him to elect whether he will proceed for the recovery of maintenance, cure, wages, and indemnity under the old maritime rules, or for the recovery of damages under the new rule; and hence that if he demands and receives from the employer maintenance, cure and wages under the old maritime rules, he is bound by that as an election and cannot thereafter maintain an action for damages under the statute.

The plaintiff contends, on the other hand, that the words "at his election" as used in the statute, refer, at the most, to an election between an action for compensatory damages, on the ground of negligence, under the new rule, and the inconsistent action for indemnity or compensatory damages on the ground of unseaworthiness, under the old maritime rules; and not to an election between an action for damages under the new rule and the consistent and cumulative remedy for maintenance, cure and wages under the old rules.

We pass without determination the question whether the affirmative allegations of fact in the answer, as distinguished from the conclusions of the pleader, show that the plaintiff had in fact demanded or received maintenance and cure from the defendant, or had merely acquiesced in being taken by the defendant to the Marine Hospital and there receiving from the United States, without expense to himself or to the defendant, maintenance and treatment as a disabled seaman; and we proceed to the determination of the sole question argued by counsel,

that is, whether, if the plaintiff had demanded and received maintenance, cure and wages from the defendant, this constituted an election which prevented him from thereafter maintaining a suit for compensatory damages under the statute.

It was stated, in general terms, in *Panama R. R. Co.* v. *Johnson, supra,* at p. 388, that the statute "extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified . . ." And see *Engel* v. *Davenport, supra,* at p. 36. But this general statement does not define the scope of the election or the precise alternative accorded—a question which was not involved or discussed in either of these cases. And while an incidental statement in the *Engel* case, at p. 36, if taken broadly, might well be understood to mean that the right to recover compensatory damages under the new rule was granted as an alternative to the allowances covered by the old rules, including maintenance, cure and wages, this was at the most a general expression respecting a particular as to which no question was raised—no allowance for maintenance, cure and wages being there involved—which ought not to control the judgment in a subsequent suit when the very point is presented for decision, *Cohens* v. *Virginia,* 6 Wheat. 264, 399, *Downes* v. *Bidwell,* 182 U. S. 244, 258, *Weyerhaeuser* v. *Hoyt,* 219 U. S. 380, 394, *Bailey* v. *Baker Ice Machine Co.,* 239 U. S. 268, 272, or to prevent the determination as an original question of the proper construction of the statute in that particular. See *United States* v. *Corbett,* 215 U. S. 233, 239.

What then were the "alternatives" accorded to an injured seaman by the maritime law, as modified, between which the statute grants him an election? Plainly, we think, the right under the new rule to compensatory dam-

ages for injuries caused by negligence is not an alternative of the right under the old rule to maintenance, cure and wages—which arises, quite independently of negligence, when the seaman falls sick or is injured in the service of the ship, and grows out of that which was termed in *The Montezuma* (C. C. A.), 19 F. (2d) 355, 356, the "personal indenture" created by the relation of the seaman to his vessel. In *Harden* v. *Gordon,* 2 Mason 541, 11 Fed. Cas. 480, 481—cited with apparent approval in the *Osceola* case, at p. 172—Mr. Justice Story said that a claim for the expenses of curing a seaman in case of sickness "constitutes, in contemplation of law, a part of the contract for wages, and is a material ingredient in the compensation for the labour and services of the seamen." And in *The A. Heaton* (C. C.), 43 Fed. 592, 595, Mr. Justice Gray, speaking for the court, said that the right of a seaman to receive his wages to the end of the voyage and to be cured at the ship's expense, being "grounded solely upon the benefit which the ship derives from his service, and having no regard to the question whether his injury has been caused by the fault of others or by mere accident, does not extend to compensation or allowance for the effects of the injury; but it is in the nature of an additional privilege, and not of a substitute for or a restriction of other rights and remedies," and "does not, therefore, displace or affect the right of the seaman to recover against the master or owners for injuries by their unlawful or negligent acts." Thus, it has been held that claims for maintenance, cure and wages, and for indemnity for injuries occasioned by unseaworthiness, may be demanded and recovered in the same proceeding, *Roebling's Sons Co.* v. *Erickson* (C. C. A.), 261 Fed. 986, 988; that a recovery in one proceeding for wages and maintenance does not preclude the recovery in a subsequent proceeding of indemnity for injuries resulting from unseaworthiness, *The Rolph* (C. C. A.), 299 Fed. 52, 55; and that there is

no inconsistency between the right to recover compensatory damages under the new rule for injuries caused by negligence and the right to recover maintenance, cure and wages under the old rules, the remedies not being of such a nature that the adoption of one is a repudiation or negation of the other, *Lippman* v. *Romich* (C. C. A.), 26 F. (2d) 601, 602. In short, the right to maintenance, cure and wages, implied in law as a contractual obligation arising out of the nature of the employment, is independent of the right to indemnity or compensatory damages for an injury caused by negligence; and these two rights are consistent and cumulative.

The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute. Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term. But, whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, *Baltimore S. S. Co.* v. *Phillips, supra,* 321, for which he is entitled to but one indemnity by way of compensatory damages.

Considered in the light of these several remedies and the extent of the inconsistency between them, we agree with the view expressed by the Supreme Court of Washington that the statute was not intended to restrict in any way the long-established right of a seaman to mainte-

nance, cure and wages,—to which it made no reference. And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness; and that no election is required between the right to recover compensatory damages for a tortious injury under the new rule and the contractual right to maintenance, cure and wages under the old rules—the latter being a cumulative right in no sense inconsistent with, or an alternative of, the right to recover compensatory damages.

It results that there was no error in the rulings as to the affirmative defense interposed by the defendant. And the judgment is

*Affirmed.*

Mr. Justice Holmes concurs in the result.

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## UNADILLA VALLEY RAILWAY COMPANY *v.* CALDINE, ADMINISTRATOR.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 73. Argued November 27, 1928.—Decided December 10, 1928.

A train arrived at a station where, by the express, printed rule of the railroad company, it must be held to await the passing of another train moving upon the same track in the opposite direction. The station agent had been informed by telephone that the other train was coming, and there was some evidence that he told the motorman of the first train, but he did not tell the conductor. Disobeying the rule, the conductor ordered the motorman to proceed and, the latter obeying, a collision resulted by which the conductor was killed. In an action brought by his administrator against the railroad company under the Employers' Liability Act,

*held* that the plaintiff could not be heard to say that the accident was due in part to the negligence of the motorman in obeying the conductor's command; nor could it be attributed in part to the station master's neglect to warn the conductor. P. 141.

246 N. Y. 365, reversed.

CERTIORARI, 277 U. S. 578, to a judgment of the Court of Appeals of New York, which reversed a contrary decision of the Supreme Court, Appellate Division, and affirmed a judgment for damages recovered at the Trial Term by the present respondent in an action under the Federal Employers' Liability Act. See 218 App. Div. 5; 217 N. Y. S. 705.

*Mr. H. Prescott Gatley,* with whom *Messrs. Benjamin S. Minor, Arthur P. Drury,* and *Wirt Howe* were on the brief, for petitioner.

*Mr. David F. Lee,* with whom *Mr. Thomas B. Kattell* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

Harold E. Caldine, an employee on the petitioner's railroad, was killed in a collision and his administrator brought this action. The case is within the Federal Employers' Liability Act and the only question before us is whether the death resulted in whole or in part from the negligence of any of the employees of the carrier, within the meaning of the Act. Act of April 22, 1908, c. 149, § 1; 35 Stat. 65. Code, Title 45, § 51.

Caldine was conductor of train No. 2 upon a single track that passed through Bridgewater. He had printed orders that his train was to pass train No. 15 in Bridgewater yard, and that train No. 15 was to take a siding there to allow No. 2 to pass. The order was permanent unless countermanded in writing by the superintendent. Its purpose to prevent a collision was obvious and there was no excuse for not obeying it. But this time, after

reaching Bridgewater, instead of waiting there as his orders required him to do, Caldine directed his train to go on. The consequence was that at a short distance beyond the proper stopping place his train ran into train No. 15 rightly coming the other way, and he was killed. The facts relied upon to show that the collision was due in part to the negligence of other employees are these. The conductor of No. 15 generally, or when he was a little late in arriving at a station about two miles from Bridgewater, would telephone to the station agent at Bridgewater that he was coming. He did so on the day of the collision. The station agent who received the message testified that he told the motorman of No. 2, but the motorman denied it. At all events the deceased, the conductor of No. 2, did not receive the notice. It is argued that the failure to inform the conductor, and the act of the motorman in obeying the conductor's order to start, if, as the jury might have found, he knew that train No. 15 was on the way, were negligence to which the injury was due at least in part. It is said that the motorman should have refused to obey the conductor and should have conformed to the rule, and that his act in physically starting the car was even more immediately connected with the collision than the order of the deceased.

The phrase of the statute, "resulting in whole or in part," admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the Railroad Company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed, and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered.

He cannot hold the Company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts. See *Davis* v. *Kennedy*, 266 U. S. 147.

Still considering the case as between the petitioner and Caldine, it seems to us even less possible to say that the collision resulted in part from the failure to inform Caldine of the telephone from train No. 15. A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act. Caldine had a plain duty and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey. There was some intimation in the argument for the respondent that the rule had been abrogated. The Courts below assumed that it was in force and we see no reason for doubting that their assumption was correct.

We have dealt with the difficulties that led the Court of Appeals to a different conclusion and are of opinion that the judgment must be reversed.

*Judgment reversed.*

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## NORTHERN COAL & DOCK COMPANY ET AL. *v.* STRAND ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 41. Argued October 23, 1928.—Decided December 10, 1928.

1. The work of a stevedore whilst engaged in unloading a vessel at dock is maritime in character, although it consume but part of his time under his employment, the remainder being devoted to work ashore. P. 144.
2. A stevedore having been killed while at work on a vessel at dock unloading cargo for the consignee, the cause of action against the

employer for the death was governed by the Merchant Marine Act—the stevedore was a "seaman" within that Act—and the state compensation law cannot apply. P. 145.

193 Wis. 515, reversed.

CERTIORARI, 276 U. S. 611, to a judgment of the Supreme Court of Wisconsin sustaining an award under the State Workmen's Compensation Act.

*Mr. Charles Quarles,* with whom *Messrs. Louis Quarles, Lyman T. Powell,* and *John S. Sprowls* were on the brief, for petitioners.

*Messrs. John A. Cadigan, Peter B. Cadigan,* and *Andrew Nelson,* were on the brief for respondent, Strand.

*Mr. Mortimer Levitan,* Assistant Attorney General of Wisconsin, with whom *Mr. John W. Reynolds,* Attorney General, was on the brief, for respondent, Industrial Commission of Wisconsin.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Petitioner, the Northern Coal & Dock Company, an Ohio corporation whose business is mining, hauling and selling coal, maintained a dock on Superior Bay, Wisconsin, where it received and unloaded coal brought by vessels from other lake ports. It employed regularly some eighteen men who worked upon the dock or went upon vessels made fast thereto and unloaded them, as directed. Charles Strand was one of those so employed. October 10, 1924, while on the steamer Matthew Andrews assisting, as his duties required, in the discharge of her cargo, he was struck by the clamshell and instantly killed.

Respondent Emma Strand, the widow, asked the Industrial Commission of Wisconsin for an award of death benefits against the petitioners—employer and insurance car-

rier. It found that both Strand and his employer were subject to the State Compensation Act and awarded benefits. To review this ruling petitioners brought an action in the Dane County circuit court. That court sustained the award and the State Supreme Court approved its action.

Strand's employment contemplated that he should labor both upon the land and the water. When killed he was doing longshore or stevedore work on a vessel lying in navigable waters, according to his undertaking. His employment, so far as it pertained to such work, was maritime; the tort was maritime; and the rights of the parties must be ascertained upon a consideration of the maritime law. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 217; *Washington* v. *Dawson & Co.,* 264 U. S. 219. Originally, that law afforded no remedy for damages arising from death; but we have held that it might be supplemented by state death statutes which prescribe remedies capable of enforcement in court. *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242. We have also held that state statutes providing compensation for employees through commissions might be treated as amending or modifying the maritime law in cases where they concern purely local matters and occasion no interference with the uniformity of such law in its international and interstate relations. *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469; *Millers' Underwriters* v. *Braud,* 270 U. S. 59, 64; *Smith & Son* v. *Taylor,* 276 U. S. 179.

The unloading of a ship is not matter of purely local concern. It has direct relation to commerce and navigation, and uniform rules in respect thereto are essential. The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred.

Chap. 331, Wisconsin Stats. 1923 (§ 331.03, 1925 Stats.) provides for recovery of damages arising from death caused by wrongful act, neglect, or default. The same statutes (§ 102.01, 102.02, 102.03, 102.04, and 102.05, *et seq.*) deprive the employer in personal injury cases of any defense based upon assumption of risk, negligence of fellow servants, or contributory negligence (not wilful), unless he has elected to pay compensation in the manner specified, and direct that no contract, rule or regulation shall relieve him from this restriction. Also that where both employer and employee are subject to the provisions of the act the liability for compensation therein provided shall be in lieu of all other. One who employs three or more workers is declared to have elected to be subject to the act unless he has indicated the contrary. And, generally, where he has not given notice to the contrary, an employee is subject to the act whenever the employer is.

There is nothing in the record to indicate that when contracting with its stevedores the Dock Company actually agreed to subject itself to the liabilities imposed by the State Compensation Act. And it is enough here to say that the State had no power to impose upon an employer liabilities of that kind in respect of men engaged to perform the work of stevedores on ship board.

The Act of March 30, 1920, 41 Stat. 537, which provides that the personal representative may sue whenever death may be caused by wrongful act, neglect, or default on the high seas, is mentioned in the opinion below; but we think it has no bearing upon the present controversy.

Section 33 of "An Act To provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, etc."—Jones, or Merchant Marine, Act—approved June 5, 1920, 41 Stat.

988, 1007, amends section 20, Act of March 4, 1915, to read as follows:

"Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

*In International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, 52, (October 18, 1926) the plaintiff—a longshoreman—while at work in the hold of a vessel at dock, suffered serious injury through negligence. He sued the employer for damages in the state court and recovered. This Court affirmed the judgment and ruled that within the intendment of the Merchant Marine Act "'seaman' is to be taken to include stevedores employed in maritime work on navigable waters as the plaintiff was."

*New York Central* v. *Winfield,* 244 U. S. 147, 151, considered the effect of the Federal Employers' Liability Act, c. 149, 35 Stat. 65; c. 143, 36 Stat. 291, upon the former right of employees to recover under the laws of the States. That act provides that every interstate carrier by railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving

widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then to the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier," etc. We held "the act is comprehensive and also exclusive," and denied the right of an employee of an interstate carrier to recover under a state statute even in respect of injuries suffered without fault as to which the federal act provides no remedy.

*Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, ruled that § 20, Act of March 4, 1915, as amended by the Merchant Marine Act, incorporated the Federal Employers' Liability Act into the maritime law of the United States. See *Engel* v. *Davenport,* 271 U. S. 33, 35.

We think it necessarily follows from former decisions that by the Merchant Marine Act—a measure of general application—Congress provided a method under which the widow of Strand might secure damages resulting from his death, and that no state statute can provide any other or different one. See *Patrone* v. *Howlett,* 237 N. Y. 394.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Reversed.*

STONE, J., concurring:

I concur in the result. As the majority have placed their conclusion, in part at least, on the grounds that a stevedore, while working on a ship in navigable waters, is a "seaman" within the meaning of the Jones Act, *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, and that by the Jones Act Congress has occupied the field and excluded all state legislation having application within it, I am content to rest the case there. Similar effect has

been given to the Federal Employers' Liability Act, *N. Y. Central R. R. Co.* v. *Winfield,* 244 U. S. 147.

But I should have found it difficult to say that the present case is controlled by the maritime law and so to suggest that workmen otherwise in the situation of the respondent, but who are not seamen and therefore are not given a remedy by the Jones Act, are excluded from the benefits of a compensation act like that of Wisconsin.

The state act here is contractual, as we have held in *Booth Fisheries Co.* v. *Industrial Comm'n,* 271 U. S. 208, and the employer is bound to pay compensation in accordance with the schedules of the act because the parties have agreed that they shall apply rather than the common or any other applicable law. The employer, a wholesale coal dealer, owned or controlled no ships and, except that it owned a dock at which coal was delivered to it from ships, had no connection with maritime affairs. The employee's regular work was non-maritime and he spent but two per cent. of his time unloading his employer's coal from ships. To me it would seem that the rights of parties who have thus stipulated for the benefits of a state statute in an essentially non-maritime employment are not on any theory controlled by the maritime law or within the purview of *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, *Washington* v. *Dawson & Co.,* 264 U. S. 219.

Nor would it seem that resort by an employee only casually working on a ship, through such a non-maritime stipulation, to a state remedy not against the ship or its owner, but against the employer engaged in a non-maritime pursuit, is anything more than a local matter or would impair the uniformity of maritime law in its international or interstate relation. *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469; *Millers' Underwriters* v. *Braud,* 270 U. S. 59. And see *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242. Recovery in a state court upon an

insurance policy upon the life of a seaman for death occurring on a ship on the high seas while in the performance of his duties would not, I suppose, be deemed to have that effect or be precluded by the admiralty law, even though some of the provisions of the policy were imposed by state statute.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in this opinion.

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## SECURITY MORTGAGE COMPANY *v.* POWERS, TRUSTEE IN BANKRUPTCY.

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

No. 32. Argued October 12, 1928.—Decided December 10, 1928.

1. When it is asserted that real property, or its proceeds, in a bankrupt estate is subject to a lien for attorney's fees arising from a loan contract secured by the land and made before the bankruptcy proceedings were begun, the contract is to be construed and the validity of the lien determined by the bankruptcy court, in accordance with the law of the State where the contract was made and the land is situated; but whether the liability is enforceable in the circumstances may raise federal questions peculiar to the law of bankruptcy. P. 153.
2. Petitioner held promissory notes secured by land in Georgia. The land was acquired from the debtor by one who assumed and agreed to pay the debt and later was adjudicated a bankrupt. The notes provided for 10% attorney's fees, "if collected by law or through an attorney at law." After the adjudication, there was a default in the payment of interest; petitioner notified the original debtor of its election to declare the principal due, and took against the original debtor only, without joining the bankrupt or the trustee, the steps prescribed by § 4252 of the Georgia Code, which provides that obligations to pay attorney's fees upon any note in addition to interest "are void," unless the debtor fails to pay the debt on or before the return day of the court to which suit is brought for collection of the same, and which requires the holder to serve notice on the debtor of his intention to sue and of the term of court. The suit having resulted in a judgment against the original debtor for

principal, interest and attorney's fees, and declaring these amounts a special lien on the property, and the property having in the meantime been sold in the bankruptcy court and bought in by the petitioner, the question arose whether credit for the attorney's fees should be allowed the petitioner out of the proceeds of the sale, which remained subject to the lien. *Held:*

(1) Enforcement of the lien for the attorney's fees was not precluded by § 63 of the Bankruptcy Act, upon the ground that the liability remained contingent until after the bankruptcy adjudication. The lien was not contingent; and property subject to a perfected lien securing a liability still contingent at the time of bankruptcy is not discharged from the lien by the adjudicaton. P. 155.

(2) The contingent obligation to pay attorney's fees having been part of the original loan transaction, and the consideration for the lien having been the loan—a "present consideration"—and not the attorney's services, allowance of the attorney's fees was not excluded by § 67d of the Bankruptcy Act. P. 156.

(3) Secton 4252 of the Georgia Code does not mean that a contract to pay attorney's fees shall be void until validated thereunder; it merely adds a statutory condition to the contract. P. 156.

(4) If the petitioner in this case, which knew that the bankrupt had assumed and become primarily liable for the debt, failed to notify the trustee of its election to declare the debt due or of the suit under § 4252, Georgia Code, or if its sole purpose in bringing that suit, knowing the defendant, the original debtor, to be insolvent, was to increase by the amount of the attorney's fees the claim payable in bankruptcy under the lien—it is not entitled to credit for the attorney's fees. Pp. 157, 158.

3. Where the grounds upon which the Circuit Court of Appeals had affirmed a judgment were found by this Court to be untenable, but there were other reasons requiring the same results if facts, not included in the stipulated record, were found to exist, the case was reversed and remanded to the District Court with directions for further proceedings. P. 159.

21 F. (2d) 965, reversed.

CERTIORARI, 276 U. S. 610, to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court, in bankruptcy, disallowing a claim for attorney's fees.

*Mr. John E. Benton* for petitioner.

*Mr. Walter S. Dillon* for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Florida Furniture Company was adjudicated bankrupt in the Southern District of Florida. Among its assets was real estate in Georgia, acquired by purchase from the Hanson Motor Company. An ancillary receiver appointed in the Northern District of Georgia took possession of this property. It was subject to a loan deed (see *Scott* v. *Paisley,* 271 U. S. 632) given to secure notes of the Hanson Company for $90,000 and interest, which the Furniture Company had assumed and agreed to pay. The trustee in bankruptcy applied for leave to sell the property free from the lien. The secured notes were held at the time of the adjudication and thereafter by the Security Mortgage Company. An order was served upon it to show cause why the trustees' application should not be granted. It appeared, but made no opposition. Leave to sell was granted, preserving to the lien creditor its rights in the proceeds of the sale. Under that order, the property was sold; and the Mortgage Company became the purchaser at a price exceeding the amount of all liens. It asked to be allowed as a credit against the purchase price, among other things, the sum of $9,442.40 for attorney's fees.

The secured indebtedness was represented by a principal note and ten coupon interest notes. Each note contained the following clause: "With interest after maturity until paid at eight per cent per annum with all costs of collection, including ten per cent as attorney's fees, if collected by law or through an attorney at law." So far as appears, the Mortgage Company did not employ

an attorney until after it had been served with the order to show cause, on the trustee's application for leave to sell the property. There had been no default before the adjudication. Thereafter, a coupon interest note matured and was not paid. Before the leave to sell was granted, the Mortgage Company, because of this default, gave notice to the Hanson Company of its election to declare the principal note due. It also gave to the Hanson Company notice in writing that it intended to bring suit in the City Court of Atlanta and to claim the attorney's fees, unless the the indebtedness was paid. Twelve days later, the Mortgage Company brought such a suit against the Hanson Company, without attempting to join the bankrupt, the receiver, or the trustee. It does not appear that notice of the acceleration of the principal note, or of the intention to sue, or of the bringing of the suit against the Hanson Company was given to the bankrupt, the trustee, or the receiver. Prior to the sale of the property by the trustee, judgment was entered against the Hanson Company for the principal and interest and for $9,442.40 attorney's fees. That judgment declared those amounts to be a special lien upon the property.

Over the objection of the trustee, the claim for attorney's fees was allowed by the referee as a credit against the purchase price. The District Judge disallowed it without writing an opinion. The certificate of the referee set forth the facts; and the parties stipulated that the "certificate contains all of the facts necessary to a clear understanding of the issue made on appeal to the Circuit Court" of Appeals. That court affirmed the judgment, 21 F. (2d) 965. This Court granted a writ of certiorari, 276 U. S. 610. Whether disallowance of the credit for attorney's fees was error is the sole question for decision.

Under § 67 of the Bankruptcy Act the trustee takes property subject to valid liens existing at the time of the institution of the bankruptcy proceedings. The Mortgage Company makes no contention that the judgment in the state court establishes as *res judicata* either the claim for attorney's fees or the existence of the lien therefor. It concedes that by no action in the state court, and by no act of the Mortgage Company, could a lien be attached to the property after it had passed to the trustee, see *Murphy* v. *Hofman Co.,* 211 U. S. 562; and that the bankruptcy court must determine for itself whether a lien exists and the amount of the indebtedness secured thereby. See *Hebert* v. *Crawford,* 228 U. S. 204; *Chicago Board of Trade* v. *Johnson,* 264 U. S. 1, 11. The proceedings in the state court are relied upon merely to show compliance with the condition which § 4252 of the Georgia Code makes a prerequisite to the enforcement of any contract to pay attorney's fees. See *Stone* v. *Marshall & Co.,* 137 Ga. 544; *Turner* v. *Peacock,* 153 Ga. 870, 879.

The provision of the Georgia Code is this: "Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same: Provided, the holder of the obligation sued upon, his agent, or attorney notifies the defendant in writing, ten days before suit is brought, of his intention to bring suit, and also the term of the court to which suit will be brought." The validity of the lien claimed by the Mortgage Company for attorney's fees must be determined by the law of Georgia; for the contract was there made and was secured by real estate there situate. *Humphrey*

v. *Tatman,* 198 U. S. 91. See *Benedict* v. *Ratner,* 268 U. S. 353, 359. The construction of the contract for attorney's fees presents, likewise, a question of local law. See *Farmers Bank* v. *Fed. Reserve Bank,* 262 U. S. 649, 660. Whether the liability is, under the circumstances, enforceable against the proceeds of the sale raises federal questions peculiar to the law of bankruptcy. The character of the obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy, either as a provable claim or by way of a lien upon specific property. The obligation is held to be enforceable by action *in personam* in the federal courts for Georgia, *Perry* v. *John Hancock Life Insurance Co.,* 2 F. (2d) 250.

The Mortgage Company contends that, although the collection of the note was made not through the suit in the state court, but through the uncontested sale in the bankruptcy court, it should be deemed a collection "by law or through an attorney" within the meaning of the contract. Many decisions of the courts of the State lend support to that contention. They hold that attorney's fees are recoverable, not like costs as an incident of the suit, but as a part of the principal debt; [1] that by the giving of notice of intention to sue, the commencement of the suit and the failure of the debtor to pay on or before the return day, a vested right arises which a later payment of the debt could not affect; [2] that the liability for attorney's fees is not dependent upon the collection having been made through a suit brought in compliance with the Code; [3] and that it may be enforced against the

[1] *Royal* v. *Edinburgh-American Co.,* 143 Ga. 347, 350; *Evans* v. *Atlantic Nat'l Bank,* 147 Ga. 621.

[2] *Harris* v. *Powers,* 129 Ga. 74, 86–88; *Mount Vernon Bank* v. *Gibbs,* 1 Ga. App. 662; *Valdosta R. R. Co.* v. *Citizens Bank,* 14 Ga. App. 329, 332–333; *Equitable Life Assurance Society* v. *Patillo,* 37 Ga. App. 398.

[3] *Guarantee Trust and Banking Co.* v. *American National Bank,* 15 Ga. App. 778.

land held as security; although the debtor has become insolvent, *McCall* v. *Herring,* 116 Ga. 235, 238–239; or the property has passed to an administrator, *Harris* v. *Powers,* 129 Ga. 74; or to a receiver, *Guarantee Trust and Banking Co.* v. *American National Bank,* 15 Ga. App. 778, 782–784.[4] The trustee does not question that the Hanson Company became personally liable for the attorney's fees, despite the proceedings taken in bankruptcy. His objections go only to the enforcement of the liability against the proceeds of the property sold.

*First.* The trustee contends that the credit for the attorney's fees was precluded by provisions of the Bankruptcy Act. He insists that, at the time of the adjudication, the liability was contingent, since at the time there had not been any default; and under § 63 of the Bankruptcy Act a contingent claim is not provable.[5] But the Mortgage Company does not seek to prove the claim in bankruptcy. It asks to have it allowed as a part of the principal debt, which is secured by a lien upon the property sold. The federal courts for Georgia have, in a series of cases, refused to permit this to be done, on the ground that the liability was contingent at the time of the adjudi-

[4] In *Equitable Life Assurance Society* v. *Pattillo,* 37 Ga. App. 398, it was held that the holder of a secured note providing for attorney's fees might, at the same time, sue at law *in personam* and proceed to foreclose under a power of sale; and, that if the debt was not paid before the return day of the suit, he might retain the attorney's fees from the proceeds of a sale made under the power before entry of the judgment. It is only when the default in payment was due to the creditor's failure to perform a duty to realize upon collateral held that the right to attorney's fees is denied. Compare *Rylee* v. *Bank of Statham,* 7 Ga. App. 489, 495–498.

[5] For cases to that effect involving similar contracts for attorney's fees under the laws of other States see: *In re Roche,* 101 Fed. 956 (Texas); *In re Jenkins,* 192 Fed. 1000 (So. Car.); *British & American Mortgage Co.* v. *Stuart,* 210 Fed. 425, 430 (Ala.). Compare *Gugel* v. *New Orleans National Bank,* 239 Fed. 676 (La.); *First Savings Bank & Trust Co.* v. *Stuppi,* 2 F. (2d) 822 (N. M.).

cation. See *In re Weiland,* 197 Fed. 116; *In re Ledbetter,* 267 Fed. 893; *In re Hotel Equipment Co.,* 297 Fed. 842, 845; *In re Stamps,* 300 Fed. 162. Compare *In re Gimbel,* 294 Fed. 883. We find nothing in the Bankruptcy Act to justify such a refusal. The lien was not inchoate at the time of the adjudication. It had already become perfect when the principal note and the loan deed securing it were given. Property subject to a lien to secure a liability still contingent at the time of bankruptcy is not discharged from the lien by the adjudication. The secured obligation survives; and if it is that of a third person is usually unaffected by the bankruptcy. When by the happening of the event the contingent liability becomes absolute, the lien becomes enforceable [6] though this occurs after the adjudication.

*Second.* The trustee contends that allowance of the credit is barred by § 67d, because the liability for attorney's fees not having become absolute until after the adjudication, is excluded by the provision which allows outstanding liens " to the extent of such present consideration only." The contention has support in *In re Mobile Chair Co.,* 245 Fed. 211.[7] But it was rejected, and we think properly, in *In re Rosenblatt,* 299 Fed. 771. The contingent obligation to pay attorney's fees was a part of the original transaction. The consideration for the lien was not the attorney's services, but the $90,000 advanced by the Mortgage Company; and this was a present consideration. See *Bank of Lumpkin* v. *Farmers Bank,* 35 Ga. App. 340.

*Third.* The trustee contends that under the Bankruptcy Act the claim must be disallowed, because, by the

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[6] See *In re Stoddard Bros. Lumber Co.,* 169 Fed. 190, 195; *In re Farmers' Supply Co.,* 170 Fed. 502, 506–507; *In re Sullivan,* 21 F. (2d) 834; *Estes* v. *Estes & Sons,* 24 F. (2d) 756.

[7] See in accord, *Matter of Quertinmont,* 10 A. B. R. (N. S.) 47 (Referee, W. Va.).

Georgia Code, the contract was void unless and until the statutory condition had been complied with; that, consequently, at the time of the adjudication, no valid contract existed; and that the bankrupt's estate can not be affected by a validation, equivalent to the making of a wholly new contract, occurring thereafter. This seems to be the view taken by the federal courts for Georgia. See *In re Stamps,* 300 Fed. 162, 164. The question depends primarily upon the construction of § 4252 of the Georgia Code, and thus primarily upon the local law. The language of the statute lends some color to the trustee's contention. No case in a court of the State has been called to our attention in which consideration of this contention was had. Those which discuss the significance of the word "void," as used in this section, throw little light upon it.[8] Despite the language employed, we are of opinion that the Legislature did not contemplate validation of a void contract, but merely added a statutory condition to the written contract to pay attorney's fees.

*Fourth.* Two further possible objections to the allowance of the attorney's fees are suggested. The first is lack of notice to the trustee of the action of the Mortgage Company which resulted in the judgment in the state court recovered against the Hanson Company. The principal note was payable in 1930, with a provision for acceleration in case of default. The Mortgage Company's election to declare it immediately due, for default in payment of the interest coupon, was exercised after it had been made a party to the trustee's application for leave to sell—a proceeding which would presumably result in payment of the debt. The referee did not find whether

[8] Compare the statement in *Johnson* v. *Globe Co.,* 11 Ga. App. 485, that prior to notice the right to attorney's fees is "embryonic only" with that in *Mount Vernon Bank* v. *Gibbs,* 1 Ga. App. 662, 666, that upon payment before return day "the obligation to pay attorney's fees becomes void."

or not the Mortgage Company gave the trustee notice of its election to accelerate the maturity of the principal; or notice that the suit had been brought. The Mortgage Company then knew that the bankrupt had agreed with the Hanson Company to pay the note and that the property had become primarily liable for the debt. If it failed to give the trustee notice of the election and of the intention to bring suit, we think that it is not entitled to the credit for attorney's fees. For, if he had been notified, the trustee might have arranged to pay the note on or before the return day of the suit against the Hanson Company. The purpose of the Georgia statute is clear. It is to protect the debtor, in spite of default, from any liability for attorney's fees, unless he fails to pay after the lapse of the ten days from receiving notice of intention to sue and such further time as must intervene between the commencement of the suit and the return day. *Harris* v. *Powers,* 129 Ga. 74, 88; *Edenfield* v. *Bank of Millen,* 7 Ga. App. 645, 648. The Legislature cannot have intended that the creditor should be able to impose the additional liability for attorney's fees, without giving to the real debtor the notice and opportunity to pay which the statute contemplated that a debtor should have. This objection also involves primarily a question of local law; and no decision directly in point has been found. But decisions applying the Georgia statute to somewhat similar situations support this conclusion.[9]

*Fifth.* The remaining suggested objection is this: The trustee asserts that, at the time of the commencement of the suit against the Hanson Company, it was absolutely insolvent and without assets; and that the sole purpose of bringing the suit against it was to increase, by the amount of the attorney's fees, the claim payable in bankruptcy

[9] *Loftus* v. *Alexander,* 139 Ga. 346; *Chamlee* v. *Austin,* 150 Ga. 279.

under the lien. It is settled that the mere fact of the debtor's insolvency under the state law does not prohibit the rendering of a judgment for attorney's fees. "Such a condition," says the court in *Harris* v. *Powers*, 129 Ga. 74, 86, "may make it more difficult, and sometimes impossible, for a creditor to realize upon his judgment; but he is not debarred from the privilege of obtaining it." The case at bar presents, however, additional facts. It is asserted that the suit against the Hanson Company was brought, not for the purpose of collecting the debt, but solely for the purpose of enhancing the amount which was obtainable without suit, through the lien upon the proceeds of the property. If this is true, the statutory provision designed for the protection of the debtor was employed solely as a means of oppression. We will not assume, in the absence of a decision by a Georgia court, that the Legislature intended to permit such use.

Neither of the two objections to the allowance of the credit last discussed appear to have been considered by the referee or by either of the lower courts. Nor does the certificate of the referee contain the specific findings of fact necessary to support either of them. The Court of Appeals rests its affirmance of the judgment denying the credit for attorney's fees upon provisions of the Bankruptcy Act which we hold are not applicable, or upon a construction of the Georgia statute which we deem erroneous. Under these circumstances, the decree of the Circuit Court of Appeals must be reversed with directions to remand the case to the District Court. But the District Court shall be directed to treat the stipulation concerning the certificate as failing to include elements essential to a final adjudication; to determine whether or not either of these two objections, which we hold meritorious if sustained by the facts, is so sustained; and if so sustained, the credit for attorney's fees shall be disallowed. If the

District Court finds that neither of said objections is so sustained, credit for the attorney's fees shall be allowed, for the amount due and secured by the lien, in conformity with this opinion.[10]

*Reversed.*

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## WEIL ET AL. *v.* NEARY.

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

No. 59. Argued October 26, 1928.—Decided January 2, 1929.

1. When, in a common law suit in a District Court, the issues have been referred to a referee in accord with the local practice by consent of parties, and the referee's findings of fact and conclusions of law have been approved and adopted by that court, the appellate court may examine the findings and determine whether they support the judgment. Rev. Stats. § 649. P. 163.
2. A bankruptcy rule of a District Court forbidding trustees in bankruptcy to retain as their attorney the attorney for creditors of the bankrupt, is valid and has the force of law. Pp. 165–169.
3. A contract between an attorney for trustees in bankruptcy and an attorney for creditors whereby the compensation to be allowed the former by the court for his services for the trustees shall be shared with the latter and such services shall be performed under the latter's supervision, is contrary to public policy and professional ethics, and is void, even though there was no actual fraud and the results were beneficial to the estate. Pp. 167, 171.
4. Upon review of a judgment recovered on such a contract by the attorney who had acted for creditors against the one who had acted for the trustees in bankruptcy, this Court can only reverse the judgment and direct a dismissal of the action, leaving the successful party to restore the fees in controversy to the bankrupt estate by appropriate steps in the bankruptcy court. P. 174.

22 F. (2d) 893, reversed.

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[10] Compare *Estho* v. *Lear,* 7 Pet. 130; *Chicago, Milwaukee &c. Ry.* v. *Tompkins,* 176 U. S. 167, 179–180; *United States* v. *Rio Grande Irrigation Co.,* 184 U. S. 416; *Lincoln Gas & Electric Light Co.* v. *Lincoln,* 233 U. S. 349, 364–365; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 243 U. S. 281, 289; *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 172.

CERTIORARI, 276 U. S. 613, to a judgment of the Circuit Court of Appeals affirming a judgment recovered against Weil and Thorp on their contract with Untermyer. The contract provided that the compensation to be received by Weil and Thorp as attorneys for the trustees in a bankruptcy proceeding should be enjoyed in part by Untermyer and that their services as such attorneys should be performed under his supervision. The contract had been assigned by Untermyer to Neary.

*Mr. A. Leo Weil,* with whom *Messrs. J. G. Milburn, Jr.,* and *Louis Salant* were on the brief, for petitioners.

*Mr. Louis Marshall* for respondent.

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

In May, 1921, Neary, a citizen of New York—assignee of Samuel Untermyer and acting for him—brought suit in the Supreme Court of that State for more than $70,000, against A. Leo Weil and Charles M. Thorp, citizens of Pennsylvania. The defendants removed the cause to the District Court for the Southern District of New York, on the ground of diverse citizenship. In oral argument it was conceded that Untermyer is the real party in interest as plaintiff, so we shall hereinafter refer to him as such.

By his complaint, amended by leave of court to conform to the evidence, Untermyer alleged that he had been retained as attorney and counsel for many creditors of one Josiah V. Thompson, a Pennsylvania banker and coal operator, to collect indebtedness amounting to millions of dollars. To that end Untermyer retained the defendants, Weil and Thorp, of Pittsburgh, to conduct bankruptcy proceedings under his supervision, upon an agreement that they were to accept $5,000 in full payment for their services. Such proceedings were accordingly instituted against

Thompson on the petition of three creditors in the District Court of the United States for the Western District of Pennsylvania and he was adjudicated a bankrupt. Trustees were chosen and Weil and Thorp were selected as their counsel.

Plaintiff's complaint avers that because of complications which arose it was thereafter agreed that the compensation of the defendants for services in the bankruptcy proceedings should not be limited as stipulated, and that the plaintiff and his firm, Guggenheimer, Untermyer & Marshall, should collaborate with the defendants under the supervision of the plaintiff in the performance of services to the trustees. Also that the defendants should retain, out of allowances eventually made by the bankruptcy court in payment for their services, such sum as the plaintiff considered just and equitable, the remainder to be paid to Untermyer himself. Pursuant to this agreement the defendants continued to render services in the bankruptcy proceedings under the general supervision of the plaintiff, for which seven allowances were made and paid to them out of the bankrupt estate, from July 18, 1919, to May 10, 1924. The complaint further alleges that, in pursuance of the contract, the plaintiff fixed a fair and reasonable division between plaintiff and defendants but that they refused to pay the plaintiff the sums claimed under that division.

Weil and Thorp filed separate answers. They denied that there was any agreement, express or implied, between the plaintiff and them regarding the performance of services after appointment of the trustees in bankruptcy, or regarding the compensation for services performed by them thereafter. They admitted receipt of the allowances made to them by the court, but alleged that the services rendered after their designation and confirmation as general counsel to the trustees were rendered in collaboration with other counsel and not in collaboration with or

under the direction of the plaintiff or his firm; also that any services rendered by the plaintiff and his firm were rendered as counsel to the creditors' committee and not otherwise. They further said that any such agreement or understanding as that alleged by plaintiff would have been unprofessional, contrary to public policy, illegal and void.

There was no jury. The case was referred to a referee as under the New York Practice Act, who concluded that Weil and Thorp were jointly and severally indebted to the plaintiff in the sum of $57,064, with interest from November 15, 1920. A judgment accordingly was directed.

Pursuant to a written stipulation signed and filed by the parties the court ordered:

"That the trial of the above entitled action be and the same hereby is referred to Allen Wardwell, Esq., as Referee, to hear, try and determine the same, with all the powers to act and rule upon the said trial possessed by the Court."

Requests for findings were submitted to the referee by both sides. He marked his rejection, modification or approval of each, and filed a report of his findings of fact and conclusions of law. All were approved and adopted by the court. A bill of exceptions, prepared by the defendants, was not allowed because tendered out of time. In this situation the defendants concede that they are bound by the findings.

The plaintiff contends that this Court may not examine the findings to determine whether they support the judgment, and he relies on *Campbell* v. *United States,* 224 U. S. 99. That was a common law case in a District Court at a time when no provision for waiver of a jury or for findings of fact by such court had been made by statute. Since then, §§ 649 and 700 of the Revised Statutes have been extended to District Courts. Now under § 649 if in a common law suit in a District Court the parties consent to refer the issues in accord with local practice

to a referee to make findings of fact and report conclusions of law thereon which the court approves and adopts, the appellate court may examine the findings and determine whether they support the judgment. *Shipman* v. *Straitsville Mining Co.,* 158 U. S. 356, 361; *Chicago, Milwaukee & St. Paul Ry.* v. *Clark,* 178 U. S. 353, 364; *Boogher* v. *Insurance Co.,* 103 U. S. 90, 97; *Paine* v. *Central Vermont R. R.,* 118 U. S. 152, 158; *David Lupton's Sons Co.* v *Auto Club of America,* 225 U. S. 489, 493.

A summary of the findings follows:

In 1915, Untermyer was retained as attorney for from 90 to 95 per cent. of the creditors of Thompson to collect his indebtedness out of his property, amounting to many million dollars. The affairs were greatly involved, and it was agreed among the creditors that the debtor's extensive properties should be conserved so that they might be applied equitably to the payment of the claims. In January, 1915, application was made to a state court in Pennsylvania for receivers, and they were appointed, and this held the estate together. But when the case was carried to the Supreme Court of the State on error, the receivership was set aside, on the ground that it had been erroneously created. The defendants, Weil and Thorp, had no interest in or connection with Thompson, his estate or his creditors until after the close of the receivership, when, in August, 1917, Untermyer employed Weil and Thorp to secure the adjudication of Thompson as a bankrupt, and retained the firm to initiate and carry through the proceedings under his supervision, fixing their compensation at $5,000. This was accepted, and accordingly on the petition of three of the creditors of Thompson, on September 10, 1917, he was adjudicated a bankrupt. Weil and Thorp, after their employment by Untermyer and before the bankruptcy, had helped in the effort to sell the properties under several plans, one of them called the Young plan, with the hope that all the properties could

be sold; but the plans as such failed except that there was carved out of the Young plan the sale of what was called the Frick property.

At a meeting of the creditors, trustees were selected on October 17, 1917, and their appointment was duly confirmed on the 18th. The defendants, Weil and Thorp, were, on October 18th, elected general counsel for the trustees upon their individual certifications in writing that they did not represent any interests which would in any way be antagonistic or adverse in the event that they were so employed. Untermyer, who had appeared previously in the record as counsel for the committee of creditors, was not elected counsel for the trustees and did not so certify. The certificate was filed by Weil and Thorp in accord with Rule 5 of the Rules of Bankruptcy of the District Court of the United States for the Western District of Pennsylvania:

"Attorney for the Estate and His Duties. Unless specially authorized by the court, receivers and trustees in bankruptcy shall not retain as their attorney, the attorney of the bankrupt, of the petitioning creditors, of the person applying for the appointment of a receiver, or of any creditor, and trustees shall not retain as their attorney any attorney who has obtained proxies or voted upon the election of such trustees, or who is an attorney for persons holding such proxies."

Immediately after the appointment of the trustees and their counsel, they proceeded to conclude the Frick sale. Its substantial terms had been negotiated by Untermyer as counsel for the creditors' committee prior to the bankruptcy. On closing it a written application signed by Weil, Thorp and Untermyer, was made to the bankruptcy court for the payment out of the proceeds of separate and exact compensation to Weil and Thorp, to certain associate counsel for the trustees and to Untermyer. This was subsequently approved by the court. The expected sale

of the rest of the Thompson property under the Young option was never consummated, and the expected composition in the bankruptcy did not take place.

The affairs of the Thompson estate were very complicated, and Untermyer was the person most conversant with their legal aspect. The trustees when selecting defendants as their counsel realized that they had been counsel for the committee of creditors under Untermyer.

It had become apparent that the defendants had to perform services in the settlement of the estate which exceeded those originally thought to be necessary. Thereupon the contract was made between Weil and Thorp on the one hand, and Untermyer on the other, which is set forth in the amended bill of complaint, and on which this suit was brought. The defendants continued to render services under the general supervision and with the active assistance and collaboration of Untermyer and his firm. The trustees realized large sums for the benefit of creditors.

Allowances totalling more than $142,000 were made in the bankruptcy proceedings and paid to the defendants as follows:

| | |
|---|---|
| September 3, 1918, July 2, 1919, and July 1, 1919 | $30,500 |
| June 1, 1920 | 45,466 |
| October 27, 1920 | 68,093 |

On being informed of these payments, Untermyer, on November 15, 1920, pursuant to the agreement decided that of the total sum so received the defendants should retain 60 per cent., and pay the remaining 40 per cent. to him. The defendants were duly notified of this decision, but refused to pay Untermyer any part of such receipts.

On November 30, 1920, the firm of Weil and Thorp was dissolved. Weil succeeded as counsel in the bankruptcy proceedings, and further allowances were made to him, $21,000 on May 10, 1924, and later $23,000. Although 40 per cent. of these were claimed by Untermyer, the referee

did not allow them. Untermyer had made no determination as to their division.

The referee held that the contract between Untermyer and the defendants was limited to the preservation of the estate and came to an end with the final disposition of the properties by what was called the Piedmont sales and did not apply to fees allowed Weil for services rendered in the general administration of the estate, for which the allowances of $21,000 and $23,000 had been made. Also that the interests of the creditors represented by Untermyer were identical with those of the general creditors.

Upon the facts so found we are of opinion that the contract sued on is clearly contrary to public policy and does not sustain the challenged judgment.

It is contended that in cases where a contract is attacked because contrary to public policy, the burden of proof is upon those who claim illegality, and that in such cases the principle *res magis valeat quam pereat* applies. *Hobbs* v. *McLean,* 117 U. S. 567; *Valdes* v. *Larrinaga,* 233 U. S. 705, 709; *Baltimore & Ohio S. W. Ry.* v. *Voigt,* 176 U. S. 498; *Steele* v. *Drummond,* 275 U. S. 199, 204, 206; *Canal Co.* v. *Hill,* 15 Wall. 94; *Curtis* v. *Gokey,* 68 N. Y. 300; *Dykers* v. *Townsend,* 24 N. Y. 57; *Ormes* v. *Dauchy,* 82 N. Y. 443; *Shedlinsky* v. *Budweiser Brewing Co.,* 163 N. Y. 437; *Lorillard* v. *Clyde,* 86 N. Y. 384, 387. These cases state with force the necessity for maintaining the right of freedom of contract and the objections to lightly interfering therewith. But generally they turn on the construction of words and on the rule that the presumption, where there is an ambiguity, should be in favor of validity. They have little value here. There is no doubt of the meaning of the contract.

Untermyer was counsel for many creditors. He was forbidden by Rule No. 5 before quoted to become counsel for the trustees unless specially authorized by the court. He represented 90 per cent. or more of the general creditors.

There is no presumption or finding that the bankruptcy court especially authorized Untermyer to serve as counsel for the trustees or knew that the allowances to Weil were in part for Untermyer, or that he was to divide them between Weil and himself. Had there been evidence that the court had such knowledge certainly the referee would have found it. The point was crucial. Nor is it strange that there was no such evidence. Untermyer's relations to the bankruptcy and to the creditors were such that it would have been difficult for the court to learn or infer that he had changed his activities from work for the creditors to that of the trustees without direct announcement of the change.

Many abuses have occurred in the bankruptcy practice and none is more frequent than that by which the attorney for petitioning creditors becomes counsel for the trustees subsequently appointed. This mingling of interests, frequently conflicting, is generally regarded by courts as working to the detriment of one of the parties and to the undue advantage of another. Experience has shown the wisdom and necessity of separating the function and obligation of counsel by forbidding the employment in different interests of the same person. In this way only may the court be advised how conflicting interests are represented. Rule No. 5 was adopted as an obvious safeguard. The danger of giving entire freedom of selection of counsel to the trustees lies in the temptation of the attorney for some creditors when he becomes counsel for the trustees, to use his function as representative of all the creditors, unjustly to favor or oppose particular creditors or to induce the trustees to do so. Rule 5 leaves it to the court to waive the restriction if with knowledge of the particular circumstances it appears safe so to do, but if the court does not know of a proposed departure, it has no means of protecting creditors from the danger the rule is intended to avoid.

The validity and effect of Rule 5 came before the Circuit Court of Appeals of the Third Circuit in *W. J. Robertson's Case,* 4 F. (2d) 248. One Kaufman, as counsel for certain creditors, had filed an involuntary petition for them. The receiver presented a petition to the referee for the appointment of Kaufman as his attorney. On the back of the petition there later appeared, written in lead pencil, the word "Refused." Apparently in ignorance of the refusal, Kaufman acted for the receiver without objection from anyone. He filed several papers in behalf of the receiver, and obtained orders on some of them, and in all these it was recited that Kaufman was the attorney of the receiver. When a fee of $300 was asked for Kaufman, it was disallowed by the referee. On appeal the District Court affirmed the order. Of Rule 5, now under consideration, the Circuit Court of Appeals said [p. 249]:

"The court is vested with authority to make this rule. Section 2 (15) of the Bankruptcy Act of 1898 (Comp. St. § 9586). It seems to us both wise and reasonable. . . . While on general principles the laborer is worthy of his hire, and counsel should be paid a reasonable fee for services rendered, yet the apparent retention here was a plain violation of the rule of court. It was the duty of the receiver to comply with the rules of court. Both he and the petitioner are attorneys and knew the rule. Otherwise a petition for authority to retain Mr. Kaufman would not have been presented. If the receiver and his counsel chose to act in disregard of, or in opposition to, the rule, or upon an unwarranted assumption that authority had been or would be given, they are responsible for the consequences of the refusal of authority."

It is clear that a rule of court thus authorized and made has the force of law. *Rio Grande Irrigation Company* v. *Gildersleeve,* 174 U. S. 603, 608; *Thompson* v. *Hatch,* 3 Pick. 512; *District of Columbia* v. *Roth,* 18 App. D. C., 547, 550; *Murphy* v. *Gould,* 39 App. D. C., 363, 367; *Wil-*

*kinson* v. *Walker,* 292 Fed. 395, *State* v. *Lankford,* 158 Ind. 34; *Advance Veneer Lumber Co.* v. *Hornaday,* 49 Ind. App. 83.

Early in the bankruptcy proceedings on the conclusion of the Frick sale the court allowed specific compensation to the defendants, to certain associate counsel for the trustees, and to Untermyer. This, it is suggested, shows the court knew Untermyer was receiving compensation for services to the trustees and approved such action. But this incident has no such significance. It merely indicates that the court approved an agreement between counsel to pay the expenses of the trust incurred largely before the bankruptcy, of which its indebtedness for Untermyer's services in making the Frick sale, while he was acting as counsel for the committee of creditors, was properly one. It is entirely consistent with subsequent want of information by the court that Untermyer was serving as counsel for the trustees.

The referee suggests that failure by Weil or Untermyer to advise the court of the contract sued on ought not to invalidate it, because if either had called attention to the arrangement there would have been no objection by the court. We quote from his opinion:

"The only objection that I can see to the contract was that it does not seem in terms to have been made known to the Court or to the Referee, but there is no reason to suppose that had the plaintiff or the defendant called the attention of the Court to the arrangement as made, there would have been any objection to the plaintiff sharing in these fees. Certainly the Court's or the Referee's ignorance of the agreement did not tend to increase the allowances to counsel, nor is there anything but commendation by the Referee and the Court for the services rendered to the estate by counsel, in which the plaintiff bore a considerable part, whether or not that fact was known to the Court. In any event, it does not seem to me that

the defendants can now contend that the failure to bring the matter to the attention of the Court on subsequent allowances as they did on the Frick sale can be put forward to defeat the plaintiff's contention."

We can not concur in this view. We find no reason for assuming that the District Court would not have made serious objection to the contract had it known its terms. Such an assumption would be unfair to the court. Certainly it was not for another court to determine whether the situation justified a waiver of the rule. The referee and the Circuit Court of Appeals held that it was the duty of Weil to advise the court of the contract. We think it was no more the obligation of Weil than it was of Untermyer. Both were engaging in the same violation of the rule.

There were two issues in the present case. One was whether the contract sued on was made. Weil said it was not. Untermyer said it was, and the referee has found with him. The other issue was whether the agreement between Untermyer and Weil was contrary to public policy. The referee found that both participated in the breach of the rule. Neither can be relieved from the resulting invalidity of the contract by charging that the other ought to have told the court of it.

The controversy is not an ordinary one between the two parties. The issue concerns the action of both Untermyer and Weil towards the bankruptcy court. A question of public policy is presented—not a mere adjudication of adversary rights between the two parties.

Another feature of the contract that calls for condemnation is the provision that Untermyer shall have power to supervise and direct Weil in the rendition of service to the trustees. Of this, the court certainly could know nothing. Weil's duty was to exercise his independent judgment in respect of his duties. He could not abdicate to Untermyer. The contract made the latter *dominus*

*litis,* and operated as an intolerable imposition on the judge of the bankruptcy court. This was contrary to public policy; it was in direct conflict with the professional and official duty of Weil as an officer of the bankruptcy court and counsel for the trustees.

Still another reason for condemnation of this contract is the provision under which the compensation allowed to Weil was to be divided by Untermyer between the two. The court made allowances to Weil without knowledge that a part of them was to be received and enjoyed by Untermyer. It necessarily assumed that allowances were being made to Weil and no one else. Instead of this they really were made to Untermyer, the attorney for creditors, for such division between Weil and himself as he might determine. The evils to which such a practice might lead are manifest. It would, in effect, take from the court the judicial function and vest it in an unrecognized stranger.

Both the Circuit Court of Appeals and the referee held that this provision of the contract would not tend to increase the allowance to counsel. We are unable to follow the argument. Certainly there would be a temptation to both Untermyer and Weil to seek so to increase the allowance as to secure a generous provision for both. Motive for excessive allowance could hardly be more direct.

For the protection of the estate and itself the bankruptcy court must rely largely on counsel for the trustees, as also on counsel for creditors, to keep watch against unjust charges. Under this contract there would be an obvious incentive for counsel to do otherwise.

Complaints of those interested in the honest and effective administration of the bankruptcy law led this court three years ago to adopt several new rules in respect to the compensation of attorneys, receivers and trustees. Rule 42 requires that, where an attorney applies for compensation from a bankrupt estate he shall file a petition under

oath setting forth a full and detailed statement of his services, and the amount claimed therefor, to be accompanied by an affidavit of the applicant that no agreement has been made, directly or indirectly, and that no understanding exists, for a division of fees between the applicant, the receiver, the trustee, the bankrupt or the attorney of any of them; and the rule directs that no allowance of compensation shall be made in the absence of such petition and affidavit. These rules were adopted after the contract in this case was made, and therefore have no direct application here. But they clearly show the previous abuses which it was hoped to avoid by their adoption, and explain the necessity and reason for the earlier adoption of Rule 5, in the Western District of Pennsylvania, which does apply to the contract here and renders it illegal.

We have specially referred to Rule 5, under which the illegality of the contract is clear, but we are not to be understood as holding that without the rule the transaction under consideration would not be contrary to public policy and void.

The chief argument that is pressed upon us to declare the contract valid and to sustain the judgment based upon it, is the success with which the plaintiff is found to have worked out a useful settlement of the estate for the benefit of the creditors, and the absence of any finding or showing that there was actual fraud. But this is not a sufficient answer to the charge of illegality. The contract is contrary to public policy—plainly so. What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases. Even if the ultimate results in the management of the Thompson estate were good, that could be no excuse for a contract plainly illegal, because tending to produce the recognized abuses which follow fraud and disloyalty by agents and trustees. Enforcement of such contracts when

actual evil does not follow would destroy the safeguards of the law and lessen the prevention of abuses. *Tool Co.* v. *Norris,* 2 Wall. 45; *Woodstock Iron Co.* v. *Richmond Extension Co.,* 129 U. S. 643; *Oscanyan* v. *Arms Co.,* 103 U. S. 261; *Meguire* v. *Corwine,* 101 U. S. 108; *Connors* v. *Connolly,* 86 Conn. 641; *Richardson* v. *Crandall,* 48 N. Y. 348; *Palmbaum* v. *Magulsky,* 217 Mass. 306, 308. But we must not be understood as implying that no harm resulted to the Thompson estate or its creditors.

We conclude that the contract set up by Untermyer in the amended petition, framed to meet the evidence, is in violation of public policy and professional ethics. Such a transaction between counsel calls for judicial condemnation. This requires a reversal of the judgment of the court below.

Where a party seeks to enforce a contract and it is found to be invalid because contrary to public policy, the usual result is that the court dismisses the action and leaves the parties as it finds them. Weil, the defendant appearing *pro se,* announced to us in open court that he would be entirely content with any disposition of the amount sued for, provided it was not appropriated to the satisfaction of a contract deemed plainly illegal and void, and the making of which he denied. He tendered his consent to any disposition of the funds in controversy which this Court might regard as proper. The difficulty with that proposal is the want of power in this case to make a disposition of the funds with due regard to the bankruptcy proceeding which is not now before this Court. We therefore must reverse the judgment below and direct a dismissal of the action, leaving Weil to take such steps as may be appropriate to enable the bankruptcy court to pass the funds in controversy to the creditors.

*Judgment reversed.*

# LASH'S PRODUCTS COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 98. Argued December 7, 1928.—Decided January 2, 1929.

1. The tax imposed by § 628 of the Revenue Act of 1918 on soft drinks sold by the manufacturer in bottles, etc., "equivalent to 10 per centum of the price for which so sold," is a tax on the manufacturer alone which, accurately speaking, cannot be "passed on" to the purchaser. P. 176.
2. Where a manufacturer sold such goods at his regular prices plus 10% added to cover the tax and not separately billed, and the purchasers, being notified of the arrangement, paid the whole, the tax payable by the manufacturer was properly computed on the total amount so paid by the purchasers. *Id.*

64 Ct. Cls. 252, affirmed.

CERTIORARI, 277 U. S. 581, to a judgment of the Court of Claims rejecting a claim for over-payment of taxes.

*Mr. A. R. Serven,* with whom *Messrs. Daniel R. Forbes* and *Richard D. Daniels* were on the brief, for petitioner.

*Solicitor General Mitchell,* with whom *Assistant Attorney General Galloway* and *Mr. Gardner P. Lloyd* were on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit to recover the amount of certain taxes paid under the Revenue Act of 1918 (Act of February 24, 1919, c. 18, § 628, 40 Stat. 1057, 1116). By § 628 there is imposed on "soft drinks, sold by the manufacturer, . . . in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold." This tax was paid by the petitioner, calculated at ten per centum of the sum actually received by it for the goods sold. But the petitioner had notified its customers beforehand that it

paid the ten per cent. tax and it contends that in this way it passed the tax on and that the true price of the goods was the sum received less the amount of the tax. The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. *Heckman & Co.* v. *I. S. Dawes & Son Co.*, 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. Still the question as to the meaning of the statute remains.

The petitioner supports its position by a regulation of the Commissioner that when the tax is billed as a separate item it is not to be considered as an increase in the sale price. Naturally a delicate treatment of a tax on sales might seek to avoid adding a tax on the amount of the tax. But it is no less natural to avoid niceties and to fix the tax by the actual price received. Congress could do that as properly as it could have added one-tenth to the tax on the price as fixed by the other items determining the charge to the buyer. The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price, and if the statute were taken literally, as there would be no reason for not taking it if it were now passed for the first time, there might be difficulty in accepting the Commissioner's distinction even if the tax were made a separate item of the bill. But if, in view of the history in the Solicitor General's brief, we assume with him that the practice of the Commissioner has been ratified by Congress, we agree with his argument that the petitioner must take the privilege as it is offered. It did not bill its tax as a separate item, and the Commissioner's Regulations notified it that 'if the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price' although they purported to make a different rule 'when the tax is billed as a separate item.'

There has been some difference of opinion in the lower Courts but we regard the interpretation of the law as plain.

*Judgment affirmed.*

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## COMMERCIAL CASUALTY INSURANCE COMPANY *v.* CONSOLIDATED STONE COMPANY.

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

No. 75. Argued November 27, 1928.—Decided January 2, 1929.

1. The objection that a suit in the District Court between citizens of different States was not brought in the district of the residence of either, goes only to the venue and is waived when the defendant, though duly summoned, remains passive, neither answering nor appearing, and suffers judgment by default. P. 179.
2. The waiver in such case results also under § 11311, Ohio Gen. Code, the objection to venue being apparent on the face of the plaintiff's petition. P. 180.

RESPONSE to a question certified by the Circuit Court of Appeals.

*Mr. Rees H. Davis,* with whom *Mr. Paul Lamb* was on the brief, for the Commercial Casualty Insurance Company.

*Mr. Norman A. Emery,* with whom *Mr. Union C. DeFord* was on the brief, for the Consolidated Stone Company.

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

We here are concerned with a certificate wherein the Circuit Court of Appeals for the Sixth Circuit, pursuant to § 346, Title 28, United States Code, propounds a question of law arising in a case pending in that court.

The material facts are: A corporation of Indiana brought a transitory action at law against a corporation of New Jersey in a federal district court in Ohio. That court's jurisdiction was invoked only on the ground that the parties were citizens of different States; and the value of the matter in controversy was in excess of the statutory requirement. The defendant was doing business in Ohio and, in accord with the state law, had designated a local agent upon whom process against it might be served. Summons was duly served within the district upon that agent. The defendant neither appeared nor answered within the period limited therefor, and judgment went against it by default. Later in the same term the defendant moved that the judgment be vacated and the action dismissed because the action was brought in a district in which neither party resided. That motion was denied. The defendant then moved that the judgment be vacated, and leave to defend be granted, on the asserted ground that the summons, although forwarded by the agent to the defendant's home office, had been overlooked. That motion also was denied. The defendant then sued out a writ of error from the Circuit Court of Appeals. The certificate—after eliminating the ruling on the second motion—says of the asserted basis of the first motion:

"Familiar cases say that this defect in the jurisdiction pertains to the venue, and defendant may either insist upon it or may waive it. In this case there was neither affirmative insistence nor affirmative waiver. Defendant allowed the time for effective objections to expire and did nothing."

Shortly stated, the question propounded is whether it was open to the defendant, after permitting the cause to proceed to judgment by default, to object that the action was not brought in the district of the residence of either party.

The pertinent statutes are sections 41 and 112, Title 28, United States Code. One provides that district courts shall have "original jurisdiction" of certain classes of civil suits, including suits "between citizens of different States" where the value of the matter in controversy, exclusive of interest and costs, exceeds $3,000. The other provides that "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."

These provisions often have been examined and construed by this Court. Summarized, the decisions are directly to the effect that the first provision invests each of the district courts with general jurisdiction of all civil suits between citizens of different States, where the matter in controversy is of the requisite pecuniary value; and that the other provision does not detract from that general jurisdiction, but merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election.[1]

The decisions also make it plain that the privilege must be "seasonably" asserted; else it is waived.[2] Whether there was a seasonable assertion in the present case is the real question to be determined.

We are of opinion that the privilege is of such a nature that it must be asserted at latest before the expiration of the period allotted for entering a general appearance and

[1] *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U. S. 653, 655 and cases cited; *Peoria & Pekin Union Ry. Co.* v. *United States*, 263 U. S. 528, 535–536; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 383–385; *Seaboard Rice Milling Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 270 U. S. 363, 365; *Great Northern Ry. Co.* v. *Galbreath Cattle Co.*, 271 U. S. 99, 102–103.

[2] *Martin* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 688; *In re Keasbey and Mattison Co.*, 160 U. S. 221, 229–231; *General Investment Co.* v. *Lake Shore Ry. Co.*, 260 U. S. 261, 273.

challenging the merits. In ordinary course, when that period expires the defendant either will have appeared generally for the purpose of contesting the merits or by suffering a default will have assented that his adversary's allegations be taken as confessed for the purposes of judgment. In either event the suit will have reached the stage where attention must be given to the merits. In common practice objections to venue are presented and acted upon at an earlier stage; and this, so far as we are advised, is true of the elective privilege here in question. No adjudged case is cited in which a different practice is either sustained or shown. To hold that such a privilege may be retained until after the suit has reached the stage for dealing with the merits and then be asserted would be in our opinion subversive of orderly procedure and make for harmful delay and confusion.

It was apparent on the face of the plaintiff's petition that jurisdiction was grounded solely on diversity of citizenship and that the suit was brought in a district of which neither party was a resident. The defendant, although duly served with a proper summons apprising it of the time within which it was required to appear and answer, permitted that time to elapse without making any objection to the venue, or place of suit, by motion, pleading or otherwise.

The Ohio practice statute prescribes that all objections thus appearing when so neglected shall be deemed to have been waived, " except only that the court has no jurisdiction of the subject matter of the action and that the petition does not state facts which show a cause of action." Ohio Gen. Code, sec. 11311.

Here the objection was not that the court was without jurisdiction of the subject matter of the suit, but that the suit was not brought in the district of the residence of either party—a waivable matter of venue only.[3]

[3] *Peoria & Pekin Union Ry. Co.* v. *United States, supra.*

Our conclusion is that the objection was not seasonably made and therefore that under our decisions, as also the Ohio statute, it was waived. The question before stated must be answered in the negative. A second or alternative question is propounded in the certificate, but an answer to it is rendered unnecessary by the answer to the other.

*Question No. 1, Answered No.*

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## RUSSELL ET AL. *v.* UNITED STATES.

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

No. 58. Argued November 22, 1928.—Decided January 2, 1929.

1. The Revenue Act of 1921 limited the time within which income and profits taxes imposed by the Act of 1918 might be assessed, and within which suit might be brought to collect them, to five years from the filing of the return. Section 277 of the Revenue Act of 1924 preserves the same limitation generally, but where assessment is made within the prescribed period, § 278 permits suit to be brought within six years from the assessment, that section declaring, however, that it shall not authorize any suit barred by existing limitation, or "affect any assessment" made before the date of the Act. *Held,* considering these and other features of the 1924 Act, that the provision extending the time for suit should be construed prospectively as relating only to assessments made after that Act was passed. P. 185.
2. Changes introduced by a later Act cannot authorize construction of an earlier one not consonant with its language. P. 188.

22 F. (2d) 249, reversed.

CERTIORARI, 276 U. S. 612, to a judgment of the Circuit Court of Appeals which reversed a decree dismissing a bill brought by the United States against the stockholders to recover the amount of income and profits taxes which had been assessed against a corporation before it was dissolved and its assets distributed among the defendants.

*Messrs. Douglas Arant* and *Wm. S. Pritchard,* with whom *Messrs. Lee C. Bradley, Jr.,* and *John D. Higgins* were on the brief, for petitioners.

*Mr. Edwin G. Davis,* with whom *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for the United States.

*Messrs. J. Robert Sherrod, Joseph D. Peeler,* and *Ward Loveless; John E. Hughes; Louis O. Van Doren, Wm. R. Conklin,* and *Edward S. Bentley; J. C. Murphy;* and *Clarence N. Goodwin,* filed briefs, as *amici curiae,* by special leave of Court.

Mr. Justice McReynolds delivered the opinion of the Court.

The United States by bill filed January 23, 1925, sought to recover from petitioners, stockholders of the Pine Lumber Company, additional income and profit taxes for the year 1918 assessed against that Corporation in March, 1924. The Company made a return to the Collector for 1918 on June 12, 1919, and afterwards paid the amount indicated thereby.

Petitioners claimed the suit was barred under the limitation specified by the applicable statute. They succeeded in the District Court; but the Circuit Court of Appeals held another view and reversed the decree dismissing the bill.

The statutory provisions which require special consideration are printed below.

Revenue Act, 1918, c. 18, 40 Stat. 1057, 1083:

"Sec. 250 (d). Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return

was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. . . ."

Revenue Act, 1921, c. 136, Title II—Income Tax, 42 Stat. 227, 265:

"Sec. 250 (d). The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, . . . shall be determined and assessed within five years after the return was filed, . . . and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, . . . shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act . . ."

Revenue Act, 1924, c. 234, Title II [effective January 1, 1924] 43 Stat. 253, 299, 300, 301, 303, 352:

"Sec. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279 [274 and 279 are not here important]—

"(1) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

"(2) The amount of income, excess-profits, and war-profits taxes imposed by . . . the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

"Sec. 278 (a) . . . (b) . . . (c) . . .

"(d) Where the assessment of the tax is made within the period prescribed in section 277 *or in this section,* [the italicized words are unimportant here] such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

"(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

"Sec. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the

taxes imposed by this title, except as otherwise provided in section 277."

[Title XI]

"Sec. 1100. (a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c);

"Title II (called 'Income Tax') as of January 1, 1924; . . .

"(b) The parts of the Revenue Act of 1921 which are repealed by this Act shall (except as provided in sections 280 and 316 [316 is not important here] and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in the Revenue Act of 1921, of all taxes imposed by prior income, war-profits, or excess-profits tax acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes. . . ."

From the foregoing it appears: Under the Act of 1918 both assessment and suit within five years were necessary. The Act of 1921 required that taxes imposed thereby should be assessed within four years; that taxes payable under the Acts of 1918, and earlier ones, should be assessed within five years; and it limited the period within which any suit might be brought to five years after the return. With the exceptions specified by § 278, the Act of 1924 requires that assessment of taxes laid by it or the Act of 1921 and any suit to collect the same shall come within four years after the return; also in respect of taxes due

under the Acts of 1918, etc., that no assessment or suit shall be permitted later than five years after the return.

The exceptions to the general rule of § 277 which are specified by § 278, and here important, relate to those cases only where there has been assessment but no suit; and petitioners aver that these exceptions do not apply where the assessment was made prior to June 2, 1924.

According to the general limitations contained in the Acts of 1918, 1921, and 1924 the time within which suit might have been brought upon the assessment of March, 1924, against the Pine Lumber Company expired June 12, 1924—five years after the *return* date. And unless the Act of 1924 repealed the old limitation and established another, petitioners must prevail. The United States claim that § 278, Act of 1924, extended the limitation to March, 1930—six years after the *assessment*. Petitioners deny that the Act of June 2, 1924, should be so construed. They maintain that it did not extend the period for suit where an assessment had been made prior to its passage, and say that § 278 (e), (2), expressly negatives the contrary theory.

When the Revenue Act of 1924 passed, many parties were liable for taxes imposed by former Acts—1921, 1918, etc.; against some there were assessments; others had not been assessed. It made provision concerning taxes thereafter to accrue; also for those already due. It distinguished between existing assessments and those which were to follow. It established a Board of Tax Appeals and gave the right of appeal thereto whenever thereafter the Commissioner should propose to assess for deficiency. It thus created a radical distinction between assessments prior to June 2, 1924, and later ones which, generally at least, if objected to, could not be made without assent of the Board. To secure proper action by the Board might require considerable time, and this was provided for by extending the limitation to six years after assessment.

But the taxpayer was afforded protection against any improper action by the Commissioner through an appeal before any assessment could be actually imposed—a new and valuable right.

Section 1100, Act of 1924, kept in force "except as otherwise provided in sections 280 and 316 [316 is unimportant here] and except as otherwise specifically provided in this Act" those parts of the Act of 1921 which provided for assessment and collection of taxes imposed by that Act or earlier ones. Section 280 plainly relates only to assessments made subsequent to June 2, 1924; but counsel for the United States maintain that within the meaning of § 1100 modification of the Act of 1921 was specifically provided by §§ 277 and 278 when read in conjunction.

Section 277, as above shown, limits suits for taxes imposed by the Act of 1918 to five years after the return, except (§ 278) in certain cases where an assessment has been made. In the excepted cases the period for suit is extended to six years after the assessment. But § 278 further provides that it shall not authorize the collection of a tax after the same has been actually barred by the applicable statute, and further that it shall not affect any assessment made prior to June 2, 1924.

Manifestly, but for § 278 petitioners would be free from liability under the five year limitation in the Act of 1918, continued by the Act of 1921. If § 278 refers only to assessments made after June 2, 1924, petitioners are not liable.

If an assessment made before that date came within the ambit of § 278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—would extend for some five years a liability which had almost expired. *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, 162 declares—"Statutes are not to be given retroactive effect or construed to change the status of claims fixed in

accordance with earlier provisions unless the legislative purpose so to do plainly appears." No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in § 278 or otherwhere.

Paragraph (e), (2), of § 278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not "affect" an assessment within the meaning of the paragraph. We cannot agree. Some real force must be given to the words used—they were not employed without definite purpose. The rather obvious design, we think, was to deprive § 278 of any possible application to cases where assessment had been made prior to June 2, 1924.

The legislative history of the Act of 1924 lends support to the conclusion which we have reached. The changes introduced into the Act of 1926 can not authorize construction of the earlier one not consonant with the language there employed.

The judgment is reversed. The cause will be remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion.

*Reversed.*

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## SLAKER, ADMINISTRATOR, *v.* O'CONNOR ET AL.

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

No. 61. Argued November 23, 1928.—Decided January 2, 1929.

An appeal based on frivolous grounds and causing delay will be dismissed and a penalty may be taxed against the appellant.

Appeal from 22 F. (2d) 147, dismissed.

APPEAL from a decree of the Circuit Court of Appeals, which reversed a decree of the District Court in a suit against the administrator.

*Mr. Paul E. Boslaugh,* with whom *Messrs. John A. Lawler* and *Edmund Nuss* were on the brief, for appellant.

*Messrs. James M. Johnson, Bernard McNeny,* and *Donald W. Johnson* were on the brief for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Charles O'Connor and others brought suit in the District Court of the United States for Nebraska against John Slaker, Administrator of John O'Connor, deceased, and the State of Nebraska, wherein they sought to establish claims to certain property within that State which belonged to John O'Connor at the time of his death. The petition contained three counts none of which questioned the validity of a state statute.

Upon motion the District Court dismissed the petition for want of jurisdiction, and thereafter allowed a broad appeal to the Circuit Court of Appeals. The latter held the cause was properly dismissed as to the State, but that under two counts of the petition jurisdiction existed as to the Administrator—appellant here. It accordingly reversed the action of the trial court and remanded the cause for further proceedings. The Administrator then sought and secured allowance of an appeal to this Court.

Manifestly, the decree below is not final. Under the Act of February 13, 1925, § 240 (b), appeals to this Court from circuit courts of appeals lie only from final judgments or decrees (*Martinez* v. *International Banking Corp'n,* 220 U. S. 214, 223; *Collins* v. *Miller,* 252 U. S. 364, 370) in cases where the validity of a state statute is

drawn in question on the ground of repugnance to the Constitution, treaties, or laws of the United States, and the decision is against its validity.

Section 1010, Rev. Stats. (§ 878, U. S. Code) provides—

"Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

Section 1012, Rev. Stats. (omitted from Judicial Code), in its present form provides—

"Appeals from the district courts shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error." U. S. Code, Supp. I, Title 28, § 880.

The 30th (formerly 23rd) rule of this Court provides—

"2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, may be awarded upon the amount of the judgment.

"3. Paragraphs 1 and 2 of this rule shall be applicable to decrees for the payment of money in cases in equity, unless otherwise specially ordered by this court."

The above provisions were considered in *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 106, and *Wagner Electric Co.* v. *Lyndon*, 262 U. S. 226, 233. Together those cases determine that where a writ of error or appeal is dismissed because the alleged ground therefor is so unsubstantial as to be frivolous, a penalty may be imposed. In the first cited case—writ of error to state court—penalty of five per centum was imposed upon the plaintiff in error; in the second—an appeal from federal court—the appellant was subjected to penalty of fifteen hundred dollars and required to pay the costs. See also *Gibbs* v. *Diekma*, 131 U. S. Appendix clxxxvi.

Here, without any authority of law, the appellant obtained an appeal. Thereby he has needlessly consumed our time and imposed serious delay upon the appellees and otherwise burdened them.

The appeal must be dismissed. Damages of one hundred and fifty dollars payable to the appellees, together with all costs, will be taxed against the appellant.

*Appeal dismissed.*

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## ROE *v.* KANSAS EX REL. SMITH, ATTORNEY GENERAL, ET AL.

ERROR TO THE SUPREME COURT OF KANSAS.

No. 63. Argued November 23, 1928. — Decided January 2, 1929.

1. A writ of error based on a frivolous ground will be dismissed and a penalty may be taxed against the plaintiff in error. P. 192.
2. There is no basis for doubting the power of a State to condemn places of unusual historical interest for the use and benefit of the public. P. 193.
3. Construction of state condemnation statutes by the State Supreme Court *held* binding on this Court. *Id.*

Writ of Error to 124 Kan. 716, dismissed.

ERROR to a judgment of the Supreme Court of Kansas affirming a judgment for the condemnation of plaintiff-in-error's land.

*Mr. T. F. Railsback,* with whom *Mr. J. H. Brady* was on the brief, for plaintiff in error.

*Mr. Wm. A. Smith,* Attorney General of Kansas, *Messrs. John G. Egan* and *Roland Boynton,* Assistant Attorneys General, *Mr. Howard Payne,* County Attorney, and *Messrs. Ray H. Calihan* and *Randal C. Harvey* were on the brief for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This writ of error to the Supreme Court of Kansas must be dismissed. The alleged grounds therefor are so lacking in substance that they may be properly designated as frivolous.

Plaintiff in error unsuccessfully resisted condemnation by the State of Kansas of the Shawnee Mission, a place held by the court below to possess unusual historical interest. She claims that the legislation under which the proceedings were conducted conflicts with the Fourteenth Amendment and to permit its enforcement will deprive her of property without due process of law. Her theory is that the assailed statutes do not adequately specify the reason for the condemnation and fail to reveal the use to which the property is to be put; that it "was not taken for any specified or particular use, and therefore, for no public use."

Chapter 26, Art. 3, Kansas Rev. Stats. 1923, provides—

"That the power of eminent domain shall extend to any tract or parcel of land in the State of Kansas, which possesses unusual historical interest. Such land may be taken for the use and benefit of the State by condemnation as herein provided." And Chap. 205, Laws of 1927, declares that the land in question possesses unusual historical interest and directs its taking for the use of the State by condemnation, as provided by law.

The Supreme Court of the State held that [124 Kan. 716, 718]—

"The meaning of the statute is clear enough, that places invested with unusual historical interest may be acquired by the state by gift, devise, or condemnation, for the use and benefit of the state, as places of that character. If

there were any doubt about this, the joint resolution and the appropriation act relating to acquisition of the Shawnee Mission interpret the eminent domain statute, and show what the legislative intention was. The state historical society is to be custodian of the place. On taking it over, a qualified person is to make a survey and recommend measures for proper preservation and restoration of the Mission, and all things are to be done necessary to and consistent with use of the place by the state as a place of unusual historical interest." And further that the Shawnee Mission is a place invested with unusual historical interest the use of which by the State is a public one.

Under the circumstances here revealed the construction placed upon her statutes by the Supreme Court of Kansas is binding upon us. *McCullough* v. *Virginia,* 172 U. S. 102; *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527, 530; *Union Lime Co.* v. *Chicago & N. W. Ry. Co.,* 233 U. S. 211, 221. In view of what was said in *United States* v. *Gettysburg Electric Ry. Co.,* 160 U. S. 668, 680, there is no basis for doubting the power of the State to condemn places of unusual historical interest for the use and benefit of the public.

In *John Slaker, Admr.* vs. *Charles O'Connor,* just decided, *ante* p. 188, we have referred to the statutes and rule which give us authority to impose penalties and costs where causes are brought here upon frivolous appeals or writs of error. The alleged ground for the present writ is without substance, and the circumstances justify the imposition of a penalty upon the party at fault.

The writ of error will be dismissed and a penalty of two hundred dollars, payable to the defendants in error, together with all costs, will be taxed against the plaintiff in error.

*Writ of error dismissed.*

27228°—29——13

# STATE HIGHWAY COMMISSION OF WYOMING *v.* UTAH CONSTRUCTION COMPANY.

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

No. 96. Argued December 6, 1928.—Decided January 2, 1929.

1. Suit against the State Highway Commission and its members on a road construction contract executed by it in the name and on behalf of the State, *held* in effect a suit against the State. P. 199.
2. The District Court can have no jurisdiction on the ground of diverse citizenship of a suit against a State. P. 200

23 F. (2d) 638, reversed; 16 *id.* 322 (District Court), affirmed.

CERTIORARI, 277 U. S. 580, to a judgment of the Circuit Court of Appeals reversing a judgment of the District Court which dismissed for want of jurisdiction an action on a contract.

*Mr. Marion A. Kline,* with whom *Messrs. Wm. O. Wilson, James A. Greenwood,* and *John Dillon* were on the brief, for petitioner.

*Mr. Benjamin S. Crow,* with whom *Messrs. John W. Lacey, Herbert Lacey,* and *W. L. Walls* were on the brief, for respondent.

The contract is not by its terms a contract between the plaintiff and the State. The commission has no authority to contract in any other name than its own. Wyoming Comp. Stats. 1920, c. 186. It will be presumed to have contracted in an authorized manner. *Sloan Shipyard Co.* v. *U. S. Shipping Board,* 258 U. S. 549.

The recital that it acts in a representative capacity will not operate to bind any other than itself. *Ohio* v. *Swift & Co.,* 270 Fed. 141.

The contract, moreover, has abundant internal evidence that the Commission was the contracting party. The supplemental agreement confirms this.

Whether the State is the real party defendant should not be controlled by the rule laid down for ascertaining the application of the Eleventh Amendment. The State has waived its immunity by consenting that the suit may be brought, i. e., that the Commission may sue and be sued. The Eleventh Amendment was enacted in response to the public clamor over the decision in *Chisholm* v. *Georgia*. *Hans* v. *Louisiana*, 134 U. S. 1. The Amendment has therefore been given a liberal construction with the view of protecting the State's immunity. *Regan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362.

But § 24 of the Judicial Code has been given a broad and liberal construction with a view of upholding the Court's jurisdiction. Those acting in a representative capacity, when authorized to sue or be sued, stand upon their own citizenship irrespective of the citizenship of the persons they represent, whose rights or property are involved. The citizenship of the parties to the record governs.

The fact that the Commission is a mere agency, or arm, of the State formed to perform a governmental function, does not prevent its suing or being sued in its own right and name, if it is a legal entity.

That the Commission has no funds or property out of which a judgment rendered against it may be satisfied, if such be the fact, does not render the Commission any the less a party to the action, which it must defend in its own right where suit against it in its own name is expressly authorized. If there are no funds or property of the Commission which can be reached it will be presumed that the legislature which authorized it to be sued, will eventually supply it with funds to satisfy any judgments rendered against it.

But the Commission has, or may have, property out of which the judgment may be defrayed. Also, the so-called State Highway fund is not strictly a state fund. It is sub-

ject to the disposal of the Commission and is set apart for it.

Having established the Commission as a body in its nature suable, the Legislature of Wyoming could not, by its amendment to § 3025 of the statute, restrict jurisdiction to its own courts and thus abridge the jurisdiction of the federal courts.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Prior to 1916 the State of Wyoming could not engage in works of internal improvement unless specially authorized by popular vote. During that year the following section was added to Article XVI of her Constitution:

"Sec. 9. State highway construction. The provision of Section 6 of Article XVI of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways; but the legislature shall have power to provide for the construction and improvement of public roads and highways in whole or in part by the state, either directly or by extending aid to counties."

In 1919 the Legislature passed the State Highway Act, Session Laws 1919, Ch. 132, which directed:

That there shall be a Highway Department consisting of a Commission of five members, and a superintendent. The "Commission shall have the power to sue in the name of the State Highway Commission of Wyoming, and may be sued by such name in any court upon any contract executed by it." All roads, the cost of which is paid from the State Highway Fund, shall be constructed in accordance with plans and specifications prepared by the Highway Superintendent and shall be performed by or under

contracts approved and awarded by the Commission. Except as otherwise specified " construction and maintenance of all State Highways, including bridges and culverts thereon, shall be performed at the expense of the State and by and under the supervision of the commission and State Highway Superintendent." "A State Highway Fund is created, to be in the custody and keeping of the State Treasurer," and payments therefrom shall be on warrants based upon vouchers by the Highway Superintendent.

The original act was amended in 1927 so as to provide— " The commission shall have the power to sue in the name of ' The State Highway Commission of Wyoming ' and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it."

By a contract dated June 1st, 1922, " between the State of Wyoming, acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the State of Utah, hereinafter called the Contractor," the parties undertook:—That the contractor, at its own cost should do all work and furnish all labor, materials, and tools, " except such as are mentioned in the specifications to be furnished by the State of Wyoming," and construct a designated highway. " The State of Wyoming shall pay and the Contractor shall receive and accept as full compensation for everything furnished and done by the Contractor under this contract and also for all loss or damage arising out of the nature of the work, the action of the elements or from any unforseen contingencies or difficulties encountered in the prosecution of the work, the prices stipulated in the proposal." " Time shall be of the essence of this contract," and for failure to complete the work as agreed " damage will be sustained by the State of Wyoming . . .; and it is therefore agreed that said Contractor shall pay to the State of Wyoming,

as liquidated damages and not as penalty, an amount equal to the cost of maintaining the necessary force of engineers and inspectors on the work during the additional time . . .; and the State Highway Commission may deduct the same from the amount due or to become due to the Contractor . . ." "The State of Wyoming hereby reserves the right to accept and make use of any portion of said work before the completion of the entire work without invalidating the contract, or binding itself to accept the remainder of the work or any portion thereof whether completed or not." The writing concluded thus— "In witness whereof the State of Wyoming, acting through its State Highway Commission, party of the first part, has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed." It was signed "State Highway Commission of Wyoming, by L. E. Laird, Superintendent"; and by the Utah Construction Company.

A supplemental agreement dated December, 1922, and signed "State Highway Commission of Wyoming, by L. E. Laird, Superintendent" and the Utah Construction Company, undertook to modify the contract of June 1st, 1922, in certain material respects.

By an amended petition, naming the Wyoming State Highway Commission and its individual members as defendants, filed in the United States District Court of Wyoming August 2, 1925, the Utah Construction Company sought to recover damages arising out of the breach of the above-described construction contract, as supplemented. Jurisdiction of the court was invoked under § 24 of the Judicial Code (U. S. Code, § 41) on the ground of diverse citizenship of the parties. The petition alleges that the plaintiff is a citizen of Utah; the Commission and its individual members are citizens of Wyoming; more than $3,000 is involved.

The District Court concluded that the suit, in effect, is one against the State; a State is not a citizen under the Judiciary Acts; there is no diversity of citizenship; and no jurisdiction.

The Circuit Court of Appeals thought that the proceeding is not really one against the State, and that the statute makes the Highway Commission a legal entity subject to suit. It accordingly reversed the District Court and directed that the cause be remanded.

It seems to us sufficiently clear that the suit is, in effect, against the State of Wyoming. The contract for the construction of the work in question was between the Utah Construction Company and the State. The State, acting through the Highway Commission, as it might through any officer, became a party to the original agreement and obligated herself thereby. Neither the Commission nor any of its members assumed any direct or personal responsibility. The supplemental agreement was not intended to impose liability where there was none before. Its purpose, considering the changed circumstances, was to modify in the ways specified what the original parties had undertaken to do. The Commission was but the arm or *alter ego* of the State with no funds or ability to respond in damages. There is no claim that the members of the Commission are personally liable. *Hjorth Royalty Co.* v. *Trustees of University,* 30 Wyo. 309; *Franzen* v. *Southern Surety Co.,* 35 Wyo. 15; *In re Ayers,* 123 U. S. 443, 502; *Hopkins* v. *Clemson College,* 221 U. S. 636, 642; *Ex parte State of New York,* No. 1, 256 U. S. 490, 500.

It is unnecessary for us to consider the effect of the general grant of power to sue or be sued to the Highway Commission or its withdrawal in 1927—this suit, in effect, is against the State and must be so treated. No consent by the State to submit itself to suit could affect the ques-

tion of diverse citizenship. "A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different States; and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws or treaties of the United States." *Postal Telegraph Cable Co.* v. *Alabama,* 155 U. S. 482, 487. *Minnesota* v. *Northern Securities Co.,* 194 U. S. 48, 63.

Here the petition showed no diversity of citizenship between the real parties in interest—the State and the Construction Company. No other ground of jurisdiction was asserted. Consequently there was no jurisdiction. The judgment of the Circuit Court of Appeals must be reversed; that of the District Court will be affirmed.

*Reversed.*

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## WEST, SECRETARY OF THE INTERIOR, *v.* STANDARD OIL COMPANY.

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

No. 71. Argued October 24, 25, 1928—Decided January 2, 1929.

1. Authority of the Secretary of the Interior to determine whether land claimed under a school land grant to a State was known to be mineral when the survey was approved, may be exercised by him directly without preliminary resort to a hearing before the local land officers. P. 213.
2. Land comprised in a section numbered 36 was deeded by the State of California as part of her school land grant, her title depending under the granting act of Congress upon the mineral character of the land not having been known at the time when the survey was approved. For the purpose of determining this question purely in the interest of the United States, no claim under the federal laws having been advanced by any third party, the Land Department ordered a hearing before the local land

officers. Subsequently, a Secretary of the Interior at the instance of those claiming under the State himself gave a hearing and, without specifying reasons, directed that the proceedings before the local officers be dismissed. *Held*:

(1) That, assuming the Secretary had power to decide the question of known mineral character conclusively and thus end the jurisdiction of the Department over the land, the making of this finding of fact can not be implied in support of his order, the case being unlike that of a judgment, or an administrative act passing title, such as a patent. Pp. 213, 214.

(2) To ascertain whether such finding was actually made, matters leading up to the order may be examined, such as the brief of counsel filed with the Secretary, the notice of the hearing, and the stenographer's transcript of the proceedings. P. 214.

(3) The function of the Secretary was to determine the question of fact whether the mineral character of the land was known when the survey was approved, to the end that, in such case, the interests of the United States might be protected, through legal proceedings if necessary. It was not his duty to adjudicate generally upon the rights of the State or her grantees; and a decision by him arrived at without deciding this question of fact and which upheld their claim because in his opinion other facts not questioned had operated as a matter of law to estop the Government from disputing their title, was beyond his authority. Pp. 218–220.

(4) The action of the Secretary having been based upon such unauthorized grounds, his successor was not thereby precluded from reopening the original inquiry. P. 220.

57 App. D. C. 329, 23 F. (2d) 750, reversed.

CERTIORARI, 276 U. S. 613, to a decree of the Court of Appeals of the District of Columbia, which affirmed a decree of the Supreme Court of the District enjoining the Secretary of the Interior from continuing proceedings in a local land office brought for the purpose of ascertaining whether certain land in California comprised in a school section was known to be mineral when the survey of the section was approved.

*Mr. W. Carr Morrow* for petitioner.

The determination of the mineral or non-mineral character of this land at the time the survey was ap-

proved, can be made only by the Department of the Interior. Until the matter is closed by final action, the proceedings of an officer of the Department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing. *New Orleans* v. *Paine,* 147 U. S. 261; *Michigan Land Co.* v. *Rust,* 168 U. S. 589.

The Secretary of the Interior has repeatedly exercised authority to review and reverse, upon the same record, the decisions of a preceding Secretary. *Parcher* v. *Gillen,* 26 L. D. 34; *Cagle* v. *Mendenhall,* 26 L. D. 177; *Harkrader* v. *Goldstein,* 31 L. D. 87; *Brooks* v. *McBride,* 35 L. D. 441.

The order of 1904 relieving certain lands from suspension was not an adjudication of their non-mineral character.

The regulations of March 6, 1903, providing that a State would not be permitted to make selection in lieu of land within a school section alleged to be mineral in character, unless there were mineral actually discovered upon the base land, was not a determination of the non-mineral character of the land in question and did not operate to vest title in the State.

The equities in this case are adverse to the claim of respondent.

Secretary Fall's order of dismissal was not a determination of the non-mineral character of the land as of January 26, 1903.

The brief and argument before Secretary Fall constitute respondent's answer to the charges then pending, and are part of the pleadings in that case. This Court may examine the pleadings and even the testimony to ascertain what the order of dismissal meant. *Russell* v. *Place,* 94 U. S. 606; *DeSollar* v. *Hanscome,* 158 U. S. 216; *Fayerweather* v. *Ritch,* 195 U. S. 276; *Nat'l Foundry* v. *Oconto Water Co.,* 183 U. S. 216; *Hornbuckle* v. *Stafford,* 111

U. S. 389; *Baker* v. *Cummings,* 181 U. S. 117; *Washington Gas Co.* v. *District of Columbia,* 161 U. S. 316.

Section 36 could not be alienated from the Government except by an adjudication of its non-mineral character by the Interior Department.

The only way in which testimony could be taken on such an issue was before the local land office, as there is no provision either in the rules or the practice for taking testimony before the Secretary. Therefore, if Secretary Fall undertook to decide the case on the merits without giving the Government a chance to present its evidence or to be heard on its contention, he was exceeding his powers, and any order or ruling made by him under these conditions is absolutely void. *McDonald* v. *Mabee,* 243 U. S. 90; *Simon* v. *Southern Ry.,* 236 U. S. 115; *Webster* v. *Reid,* 11 How. 437; *Windsor* v. *McVeigh,* 93 U. S. 274; *Louisiana* v. *Garfield,* 211 U. S. 70.

The suit is one against the United States. *Louisiana* v. *Garfield, supra; Oregon* v. *Hitchcock,* 202 U. S. 60; *Naganab* v. *Hitchcock,* 202 U. S. 473; *New Mexico* v. *Lane,* 243 U. S. 52; *Minnesota* v. *Hitchcock,* 185 U. S. 373; *Louisiana* v. *McAdoo,* 234 U. S. 627; *Ex parte New York,* 256 U. S. 490.

*Messrs. Oscar Sutro* and *Louis Titus,* with whom *Messrs. Frederic D. McKenney* and *J. Spaulding Flannery* were on the brief, for respondent.

The Interior Department has jurisdiction in the first instance to determine whether or not the land is of such character as to come within the terms of the grant. *Burke* v. *Southern Pacific Co.,* 234 U. S. 669.

The contest filed in this case followed the usual procedure and raised the sole issue whether or not the land was known mineral land at the date of approval of the survey, i. e., January 26, 1903, and whether or not the title therefore had passed to the State.

The contest was formally decided by the Secretary. That decision is the letter of June 9, 1921. It is in the ordinary form of judgments rendered by the Department. *Ary* v. *Iddings,* 12 L. D. 252; *Coder* v. *Lotridge,* 12 L. D. 643; *John H. Reed,* 6 L. D. 563; *Anderson* v. *Northern Pacific,* 7 L. D. 163; *Dahlstrom* v. *St. Paul,* 12 L. D. 59; *West* v. *Hitchcock,* 205 U. S. 80.

Such decisions are judicial in character, partaking of the nature of judgments. *United States* v. *Schurz,* 102 U. S. 378; *Wisconsin Central R. R. Co.* v. *Price County,* 133 U. S. 496; *Wyoming* v. *United States,* 255 U. S. 489; *United States* v. *Winona,* 67 Fed. 948; *New Dunderberg Mining Co.* v. *Old,* 79 Fed. 598; *Steel* v. *Smelting Co.,* 106 U. S. 447; *Ellifson* v. *Phillips,* 18 L. D. 299; *Payne* v. *New Mexico,* 255 U. S. 367.

The judgment of the Secretary was a judgment on the merits and the judgment so shows on its face. It conclusively implies a finding that the land was not known mineral land at the date of the approval of the survey. *Fauntleroy* v. *Lum,* 210 U. S. 230; *Last Chance Mining Co.* v. *Tyler,* 157 U. S. 683; *American Express Co.* v. *Mullins,* 212 U. S. 311; *Smelting Co.* v. *Kemp,* 104 U. S. 636; *Chandler* v. *Calumet & Hecla Mining Co.,* 149 U. S. 79; *Burke* v. *Southern Pacific,* 234 U. S. 669; *Buena Vista Petroleum Co.* v. *Tulare,* 67 Fed. 226.

Neither the preliminary discussions nor the transcript can be used to contradict the plain terms of the judgment. *Smelting Co.* v. *Kemp,* 104 U. S. 636; *Baxter* v. *Buchholz-Hill Co.,* 227 U. S. 637; *West* v. *Hitchcock,* 205 U. S. 80; *De Cambra* v. *Rogers,* 189 U. S. 119; *Martin* v. *Evans,* 85 Md. 8.

The proceedings, however, do show a hearing and decision on its merits.

The Secretary had jurisdiction to decide the contest even though there had been no previous trial in the local land office and no hearing before the Commissioner.

*Knight* v. *U. S. Land Ass'n,* 142 U. S. 161; *Hawley* v. *Diller,* 178 U. S. 476; *Lake Superior Ship Canal Co.* v. *Patterson,* 30 L. D. 160; *Harvey M. LaFollette,* 26 L. D. 453.

The rule of the Department that school land would not be considered mineral unless there was an actual exposure of mineral, was not abrogated.

The equities are with respondent and the fact that these equities were urged before the Secretary shows transferees were seeking decision on the merits. Subsequent withdrawals could not alter the State's rights.

The judgment is not void because the Secretary considered certain evidence immaterial. A judgment can never be attacked in a collateral proceeding for mere error. The rule that judgments are impervious to collateral attack on any ground, except that they are void, applies to judgments of the Department of the Interior. *United States* v. *Schurz,* 102 U. S. 378; *Knight* v. *U. S. Land Ass'n,* 142 U. S. 161; *Noble* v. *Union River Logging R. R.,* 147 U. S. 165; *United States* v. *Winona,* 67 Fed. 948; *Burke* v. *Southern Pacific,* 234 U. S. 669.

Neither a patent nor an act equivalent to a patent can be set aside except in a direct proceeding brought for that purpose. *Burke* v. *Southern Pacific, supra; Noble* v. *Union River Logging R. R., supra.* Various kinds of acts of the Department are equivalent to the issuance of a patent. Such acts either operate to transfer the title of the land from the United States to the claimant, or are a confirmation of a title that has already vested. Sometimes such an act, which is equivalent to a patent, is a mere certification of a list to the State, sometimes the mere approval of a survey, sometimes the approval of a selection, sometimes the approval of a map, sometimes the approval of a railroad right of way, sometimes an act of Congress and sometimes a decision of the Department. But whatever the act taken by the Department, it is held

to be the equivalent of a patent, provided there is no further action for the Department to take. *Shaw* v. *Kellogg,* 170 U. S. 312; *Michigan Land Co.* v. *Rust,* 168 U. S. 589; *Chandler* v. *Calumet & Hecla Mining Co.,* 149 U. S. 79; *Noble* v. *Union River Logging R. R.,* 147 U. S. 165; *Del Pozo* v. *Wilson Cypress Co.,* 269 U. S. 82; *Morrow* v. *Whitney,* 95 U. S. 551; *Boquillas Cattle Co.* v. *Curtis,* 213 U. S. 339; *Landeau* v. *Hanes,* 21 Wall. 521; *United States* v. *Schurz,* 102 U. S. 378.

In this case, there was nothing further for the Interior Department to do. There was no provision for the doing of any further act in connection with the title. The grant was a grant *in praesenti.* The title passed to the State, unless the land was known mineral land at the date of the approval of the survey. The United States filed a formal proceeding to have it determined that the title had not passed to the State. That proceeding came on for hearing before the tribunal having jurisdiction to hear it. The hearing was held and the judgment was rendered that the title had passed from the United States and that the State's title had vested. There was no other act that the Department could take; there was no further paper for it to sign; there was no entry to be made; there was nothing further of any kind or character to be done. The last act in the transmission of the title to the State had been performed, and under the authorities cited, the title had passed to the State.

The judgment having determined that the title had passed to the State, the land is no longer a part of the public domain, therefore the present Secretary has no jurisdiction over it. His attempt to hold hearings or make orders with reference to this land is beyond his jurisdiction and may be enjoined as an unwarranted clouding of title. *Moore* v. *Robbins,* 96 U. S. 530; *Noble* v. *Union River Logging R. R.,* 147 U. S. 165; *United*

*States* v. *Schurz,* 102 U. S. 378; *Lane* v. *Watts,* 234 U. S. 525; *United States* v. *Stone,* 2 Wall. 525.

The suit is not against the United States.

Mr. Justice Brandeis delivered the opinion of the Court.

This suit was brought in October, 1925, by the Standard Oil Company in the Supreme Court of the District of Columbia against Dr. Work, the then Secretary of the Interior, to enjoin the continuation of proceedings in the local land office at Visalia, California, ordered by him with a view to ascertaining and determining whether particular lands were known to be mineral in character when the survey of them was accepted. *State of California, Standard Oil Co., Transferees,* 51 L. D. 141. Upon his resignation, Secretary West was substituted as defendant. The proceedings were of the kind commonly employed by the Secretary of the Interior to ascertain the existence of alleged facts reported by a representative of the General Land Office, because of which the title of one claiming public lands is questioned in the Department. The Register and Receiver, after hearing the parties in interest, make report of their findings. These are subject to an appeal, on the evidence, to the Land Commissioner, and also to a further appeal to the Secretary. Upon the ultimate findings, the Commissioner decides, subject to the supervision and control of the Secretary, what action, if any, shall be taken. Compare *George W. Dally,* 41 L. D. 295, 299. Circular No. 460, February 26, 1916, 44 L. D. 572, prescribes the procedure.

The proceedings here involved concern Section 36, Township 30 South, Range 23 East, Mount Diablo B. & M.—that land being in Elks Hills, Kern County, California. Section 36 is one of the sections in each township which, if not mineral or otherwise disposed of, was

granted by Congress to the State of California in aid of public schools, by Act of March 3, 1853, c. 145, § 6, 10 Stat. 244, 246. Under patents issued by the State in 1910, and mesne conveyances, the Standard Oil Company claims title to part, and an interest in the rest, of the section. Drilling on this land, begun in 1918, has been followed by extensive oil mining operations. The proceedings were based on a charge that on January 26, 1903, the date of the approval of the survey, the land was known to be mineral in character. If the land was then known to be mineral, the title confessedly did not pass by the Act. For Congress excluded mineral land from the grant. *Mining Co.* v. *Consolidated Mining Co.,* 102 U. S. 167; *Mullan* v. *United States,* 118 U. S. 271, 276. See also *Wyoming* v. *United States,* 255 U. S. 489, 500; *Work* v. *Louisiana,* 269 U. S. 250, 257-8. If it was not then known to be mineral, the legal title passed to the State on that date. For the land was within one of the sections in place designated in the granting Act. *United States* v. *Morrison,* 240 U. S. 192; *United States* v. *Sweet,* 245 U. S. 563.

The Act of 1853 here involved, like those granting school lands to many other States,[1] makes no provision for determining what part of the land is thus excluded from the grant. It does not provide for the issue of patents or for any equivalent action by the Department to evidence the transfer of title to the State. No patent to the State, or

[1] See Joint Hearings before Senate Committee on Public Lands and Surveys and House Committee on Public Lands on S. 3078 and H. R. 9182, to assure title to granted school lands, February 11 and 12, 1926; Report of Senate Committee No. 603, April 5 [16] 1926, 69th Congress, First Session; Report of House Committee, No. 1617, December 9, 1926, 69th Congress, Second Session; No. 1761, January 13, 1927, 69th Congress, Second Session; 67 Cong. Record, p. 8424; 68 Cong. Record, pp. 1815, 1820, 2015, 2581. See also Hearings of Subcommittee, 69th Cong., First Session, pursuant to S. Res. 347, Vol. 2, pp. 1987–2062.

evidence of title or interest in another, has in fact been issued by the Secretary of the Interior. Nor has there been in the Department any contest between the State and another claimant which might have resulted in a determination of the character of the land. Whether this land was known to be mineral at the date of the survey must, therefore, be established otherwise. The Standard Oil Company contends that its non-mineral character had, before Secretary Work's order, been established by a final determination in the Department; that thereby the Department lost jurisdiction over the land; and that, for this reason, continuation of the proceedings should be enjoined.[2]

It is true that among the several officers of the Land Department action had repeatedly been taken having some relation to the character of the land prior to the order of Secretary Work. The survey, which was approved January 26, 1903, returned it as mineral. In 1904, a special agent reported it as non-mineral. In 1908, it was temporarily withdrawn from agricultural entry pending examination and classification by the United States Geological Survey. In 1909, the Director of the Geological Survey classified it as oil land. In 1910, the Secretary recommended its withdrawal for a petroleum reserve and the recommendation was approved by the President. In 1912, it was placed in Naval Petroleum Reserve No. 1. On January 14, 1914, the proceedings in the land office here involved were initiated. The papers having been mislaid or misfiled in the local office, the proceedings lay dormant; and process was not served until after March 2, 1921. Then the Register and Receiver were ordered by the Land Commissioner, under Secretary Payne, to proceed in accordance with Circular No. 460. On June 9,

[2] By reason of subsection (c) of § 1 of the Act of January 25, 1927, 44 Stat. 1026, the proceedings here involved are not affected by that Act. See 52 L. D. 51–54.

1921, before further action thereon, Secretary Fall directed the Land Commissioner to dismiss the proceedings and notify all parties in interest of the dismissal.

On May 8, 1925, Secretary Work vacated Secretary Fall's order and directed the Register and Receiver to proceed to a hearing of the charge that the land was known to be mineral in character on January 26, 1903.[3] If at the time of Secretary Work's order the Department still had jurisdiction of the land, he possessed the power to review the action of his predecessor and to deal with the matter as freely as he could have done if the dismissal of the proceedings had been his own act or that of a subordinate official. For, so long as the Department retains jurisdiction of the land, administrative orders concerning it are subject to revision. *New Orleans* v. *Paine,* 147 U. S. 261; *Beley* v. *Naphtaly,* 169 U. S. 353, 364; *Lane* v. *Darlington,* 249 U. S. 331; *Parcher* v. *Gillen,* 26 L. D. 34; *Aspen Consolidated Mining Co.* v. *Williams,* 27 L. D. 1. Compare *Louisiana* v. *Garfield,* 211 U. S. 70, 75. If, on the other hand, either Secretary Fall's order of dismissal, or some earlier action of the Government, terminated the jurisdiction of the Department, Secretary Work's order reinstating the proceedings was a nullity; and the Standard Oil Company is entitled to enjoin their continuance. *Noble* v. *Union River Logging R. R. Co.,* 147 U. S. 165; *Lane* v. *Watts,* 234 U. S. 525; *Burke* v. *Southern Pacific R. R. Co.,* 234 U. S. 669, 686.

In support of its contention that the jurisdiction had ended, the Company relied in its bill upon two earlier acts of the Department, besides Secretary Fall's order, as constituting a final determination that the land was not known to be mineral at the date of the approval of the

[3] This action was taken after a joint resolution of Congress, dated February 21, 1924, 43 Stat. 15. It is conceded that this fact has no legal significance in the case. The basis on which Secretary Work proceeded is shown in his decision reported in 51 L. D. 141.

survey. The Supreme Court of the District did not pass on the legal effect of the two other acts. Upon the stipulated facts it ruled and found: (1) That Secretary Fall had jurisdiction to determine the known mineral character of Section 36, without awaiting the trial by the local land office and appeals from the findings there made. (2) That the Secretary granted a hearing before himself for the purpose of determining the issues raised by the proceedings and gave notice to all parties in interest of such hearing. (3) That he had before him evidence which he had a right to consider and which supported his dismissal of the proceedings. (4) That he dismissed the proceedings after a consideration of the law and facts and directed that the parties in interest be notified of the dismissal and that the case be closed on the records. (5) That the order of dismissal was reduced to writing by his direction and was a judicial determination of the known mineral character of the land on January 26, 1903. (6) That the order of dismissal reduced to writing was a judgment on the merits, and its correctness could not be questioned by collateral proceedings, except for fraud. A decree for a permanent injunction was entered. That decree was affirmed by the Court of Appeals of the District, 57 App. D. C. 329, 23 F. (2d) 750. This Court granted a writ of certiorari, 276 U. S. 613.

Ordinarily, where an act granting public lands excludes those known to be mineral, the determination of the fact whether a particular tract is of that character rests with the Secretary of the Interior. See *Cameron* v. *United States,* 252 U. S. 450, 464; *Burke* v. *Southern Pacific R. R. Co.,* 234 U. S. 669, 684–87. But compare *Dunbar Lime Co.* v. *Utah-Idaho Sugar Co.,* 17 F. (2d) 351. If such act provides for the issue of a patent, whether it be to pass the title or to furnish evidence that it has passed, the patent imports that final determination of the non-mineral character of the land has been made. The issue of

the patent terminates the jurisdiction of the Department over the land. See *Barden* v. *Northern Pacific R. R.*, 154 U. S. 288, 327–331; *Courtright* v. *Wisconsin Central R. R. Co.*, 19 L. D. 410; *Heirs of C. H. Creciat*, 40 L. D. 623. And in the courts the patent is accepted, upon a collateral attack, as affording conclusive evidence of the non-mineral character. *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640, 641; *Barden* v. *Northern Pacific R. R.*, 154 U. S. 288, 327. Similarly, if the granting act provides for other action by the Secretary equivalent to a patent, such as approval of a list of the lands, the approval ends the jurisdiction of the Department, *Cole* v. *Washington*, 37 L. D. 387; *Sewell A. Knapp*, 47 L. D. 152; and it, likewise, imports that the necessary determination has been made. *Chandler* v. *Calumet & Hecla Mining Co.*, 149 U. S. 79. Compare *Fred S. Porter*, 50 L. D. 528, 532–533. Even where the granting act does not require either the issue of a patent to the grantee or such equivalent action, the Secretary may have occasion to make a determination of the known mineral character of the land, as when rights adverse to the grantee are asserted under the mineral, leasing or other laws. See *Work* v. *Braffet*, 276 U. S. 560; *Albert E. Dorff*, 50 L. D. 219; *Utah* v. *Lichliter*, 50 L. D. 231; *George G. Frandsen*, 50 L. D. 516. In such event, the issue of the patent, or other instrument evidencing title, likewise imports that the determination has been made. *Steel* v. *Smelting Co.*, 106 U. S. 447, 451. Compare *State of Louisiana*, 30 L. D. 626. For, in every such case, the determination of the mineral character is a prerequisite to the authority exercised in the performance of a duty imposed. *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640–641.

The Standard Oil Company contends that Secretary Fall determined that the land was not known to be mineral on January 26, 1903; and that this determination in the informal hearing before him was legally an equivalent of a determination of the fact in formal proceedings be-

fore the Register and Receiver under Circular No. 460. We agree that if Secretary Fall had determined as a fact that the land was not then known to be mineral, his order dismissing the proceedings would have had the same legal effect as if it had followed the more formal procedure prescribed by Circular No. 460. For the Secretary is not obliged to employ proceedings in the local land office as the means for making the determination as to the known mineral character. He could himself hear the evidence in the first instance. Nor is he obliged, in so ascertaining the facts, to follow a procedure similar to that prescribed for the local land office. See *Knight* v. *U. S. Land Ass'n,* 142 U. S. 161, 177–178. We assume, without deciding, that if Secretary Fall had determined as a fact that the land was not known to be mineral on January 26, 1903, his order dismissing the proceedings would have ended the jurisdiction of the Department over the land. And this determination would, ordinarily, be conclusive on the courts, even if there were demonstrable error in the admission, or appreciation of evidence. See *Shepley* v. *Cowan,* 91 U. S. 330, 340; *Lee* v. *Johnson,* 116 U. S. 48, 49. But we are of the opinion that Secretary Fall did not make a determination of that fact.

Secretary Fall's order is embodied in a letter sent by his direction to the Commissioner of the General Land Office, which after referring to the proceedings before the Register and Receiver, says:

"The transferees of the State of California, representatives of the Department of Justice, and of the Navy Department appeared before Secretary Fall on June 8, 1921, and presented the matter orally, whereupon, after consideration of the law and facts involved, the Secretary verbally directed that the proceedings be dismissed. You are therefore authorized and directed to dismiss the proceedings against the State of California and its transferees *in re* said secs. 16 and 36. Notify all parties in interest of the dismissal and close the case upon your records."

The letter embodying Secretary Fall's direction to dismiss the proceedings does not state why he did so. The Company argues that the dismissal was an order judicial in its nature; that in form the order is a judgment on the merits; that this judgment conclusively implies a finding of the fact that the land was not known to be mineral at the date of the approval of the survey; and that no evidence is admissible to contradict what the order imports. It may be assumed that the hearing was conducted in the judicial manner; that it was what is often called a quasi-judicial proceeding. But the order of dismissal is not a judgment.[4] Compare *Dickson* v. *Luck Land Co.*, 242 U. S. 371, 374. It was an administrative act. And, unlike such administrative acts as a patent or the approval of a list of lands pursuant to a duty imposed upon the Secretary, the order of dismissal does not carry the implication that all determinations essential to the passing of title have been made. Since it does not, there may be inquiry *in pais* to ascertain whether Secretary Fall actually made such a determination. To that end the occurrences leading up to the entry of the order of dismissal may be examined. Compare *Parcher* v. *Gillen*, 26 L. D. 34; *Harkrader* v. *Goldstein*, 31 L. D. 87.

In the oral argument of counsel for the Company, in this Court, there was perhaps a suggestion that Secretary Fall actually passed upon the known mineral character of the land as of January 26, 1903, when the survey was approved. But no such contention is made in the brief filed here. And when the occurrences which preceded the making of the order are examined, it becomes clear that Secretary Fall made no determination of the contested issue of

[4] The Department has repeatedly ruled that its decisions are not to be controlled by the same strict doctrine of *res judicata* which obtains as to judgments of the courts. *Osborn* v. *Knight*, 23 L. D. 216, 218; *Joseph Pretzel*, 24 L. D. 64, 65; *Ernest B. Gates*, 41 L. D. 384. Compare *Howard A. Robinson*, 43 L. D. 221.

fact, which was to be the subject of a hearing before the local officers if he deemed the issue material. He rested his order of dismissal on a supposed rule of law; holding, on the admitted facts, that the actual known mineral character on January 26, 1903, was not of legal significance. In so ruling, he yielded to the argument of counsel for the Standard Oil Company, who insisted that the then known mineral character had become immaterial, because the Government was estopped, by action taken prior to 1921, from questioning the Company's title. The brief filed by counsel with Secretary Fall prior to his granting the hearing; the notice of the proposed hearing before Secretary Fall on June 8, 1921, given by the Department to the Attorney General and the Secretary of the Navy; and the stenographic report of that hearing, establish that this was the only matter considered by Secretary Fall.

That brief was entitled an " argument in support of the request that the Secretary of the Interior decide that in view of the previous action of the department and of its regulations in force in January, 1903, the title to said section is vested in the State of California or its grantees." [5] The notice recited that the Standard Oil Company and the Pan American Oil Company had " asked to be heard orally in the matter of proposed proceeding by the Government to determine whether or not said section passed to the State of California under its school grant." The hearing

[5] The brief states: " There is no reason why this decision as to the title of the State should not be made now without putting the State to the enormous and costly burden of proof, such as was in issue in the Elk Hills case. [*United States* v. *Southern Pacific Company*, 251 U. S. 1.] In other words, if the absence of clear proof of the mineral character of the section in 1903 in the shape of discovery of mineral was sufficient to characterize the land as nonmineral under the regulations and repeated decisions of the department, it will make no difference that by the application of the principles of the Elk Hills case it could be successfully shown that the land within the reasoning of that decision was believed to be mineral land."

consisted of an oral statement by counsel for the Company, interrupted from time to time by questions or remarks. The statement was not a recital of evidence in support of the factual assertion that the land was not known to be mineral on January 26, 1903. It was an argument in support of the legal proposition that the proceedings should be closed without deciding that issue of fact, because certain rules of law, arising from past action of the Department, as well as controlling equities, estopped the Government from denying that the title had passed.[6]

[6] The prior action relied upon as vesting title in the State and its transferees was: (1) The fact that the land was classified as non-mineral in 1904, when, upon receipt of a report from Special Agent Ryan that it was non-mineral, it was relieved from suspension; (2) the fact that, on March 6, 1903, the Department adopted an administrative rule respecting school land grants that the State would not be permitted to make lieu selections based on the alleged mineral character of land within a school section, unless it proved that there had been actual discovery or exposure of mineral thereon. Mr. Sutro argued that since under this rule the State could not have made the land the base for a lieu selection, it was legally entitled to retain it; and having acted on the rule, its transferees were unaffected by later decisions of this Court (*Diamond Coal Co.* v. *United States*, 233 U. S. 236; *United States* v. *Southern Pacific Company*, 251 U. S. 1) inconsistent with the rule. In closing he said:

"And I submit that in this case, where there is no fraud, no possible allegation of fraud, where the State, five years after the classification of this land, sold it in good faith to people who bought it in good faith, and who held it for 10 years, and who have now invested some millions of dollars in the land, that the time has passed when the United States can assert its title thereto, and that the United States is estopped by the judgment of this department that this was non-mineral land in 1904, and by its own regulations, which defined it as nonmineral land in 1903. Now if you will ask me what it is I am asking you to do, I will say it is this: I am asking the department to close this case on the ground that the title is in the State, and there is nothing further to investigate." Secretary Fall then said: "What you are asking now is that if convinced that the rule is as you state it, that instead of allowing this case to go to a hearing, and then in event I would hold with you, so deciding at that time, that if I am

The conclusion that Secretary Fall did not determine the known mineral character of the land on January 26, 1903, is alone consistent with the stipulated facts.[7]

Most significant among the stipulated facts is the following: "It was the contention of the transferees from the State, with which contention Assistant Secretary Finney disagreed at the hearing, that it could serve no pur-

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with you that I should decide it at this time and prevent the delay in the trial?" After some further discussion, Secretary Fall asked: "Is Mr. Sutro's statement of the case practically admitted?" First Assistant Secretary Finney answered: "I think that is substantially the case." Whereupon the Secretary said: "The contest will be dismissed."

[7] The land lies within Naval Petroleum Reserve No. 1; a part of it is immediately adjacent to that involved in *United States* v. *Southern Pacific Company*, 251 U. S. 1, which was rendered in 1919. The fact that the proceedings were pending was not discovered by the Chief of the Field Division of the Land Office until the close of 1920. In February, 1921, the importance of taking immediate action to protect supposed interests of the United States in the land was brought to the attention of the Department of Justice and the Secretary of the Navy. On March 2, 1921, the Commissioner of the General Land Office directed the Register and Receiver and the Chief of the Field Division to take prompt action to determine by proper proceedings whether the land was known to be mineral at the date of the approval of the survey. The advisability of protecting the supposed interests of the Government, pending that determination, by an application for a receiver and an injunction, was considered by the several departments. That course was deemed inadvisable. Conference with representatives of the Company resulted in an agreement that it would endeavor to secure from the Department of the Interior an early hearing and determination with respect to the known mineral character of the land; that, until such determination, there should be no further development thereon; and that the Government would not take any action in court. Thereafter, on several days prior to May 26, 1921, Mr. Oscar Sutro, representing the Standard Oil Company, presented to Secretary Fall and the First Assistant Secretary, a request for an early determination with respect to the title to Section 36. On May 26, he filed with the Secretary the brief above referred to. On May 28, 1921, the Secretary gave the Attorney General and the Secretary of the Navy the notice of hearing above referred to.

pose to take evidence in the local land office to determine the question whether or not said section or the lands adjacent thereto showed structural and geological conditions indicative in 1903 of the existence of oil on said section under conditions justifying developments therefor for the reason that said questions presented an immaterial question of fact and said question was not argued or discussed at the proceedings held on June 8, 1921, or at any conferences prior thereto between the representatives of the transferees and the Secretary of the Interior or the First Assistant Secretary of the Interior, except as shown in the brief and in the transcript of proceedings." [The stenographic report of the hearing above referred to.]

Thus, Secretary Fall did not hear evidence or make a determination on the issue of fact as to the known mineral character of the land within the meaning of the decisions in *Diamond Coal Co.* v. *United States,* 233 U. S. 236 and *Southern Pacific Co.* v. *United States* 251 U. S. 1; and this because he deemed the fact in issue of no legal significance. It is true that in making the ruling of law that the Standard Oil Company's title was unassailable, the Secretary undertook to pass upon the merits of its claim to the land. For he concluded that, because of the conceded facts, urged by the Company's counsel as creating an estoppel, the United States was precluded from questioning the title of the State and its transferees. But that decision could not end the jurisdiction of the Department, unless Congress conferred upon the Secretary of the Interior authority to determine the validity of the Company's claim to the land, as a matter of law, without passing upon the contested issue of fact. To that question we now address ourselves.

Where by the terms of an act, the Secretary is required, upon application of the claimant, to issue a patent, as in *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 589, 592; or to certify a list, as in *Frasher* v. *O'Connor,* 115 U. S. 102

115-116; or to approve a location for a right of way, as in *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165; or to make a survey and approve a selection, as in *Shaw* v. *Kellogg*, 170 U. S. 312, Congress, by implication, confers upon the Secretary the power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed. After issue of the patent or other like instrument, his findings of facts are conclusive, in the absence of fraud or mistake, not only upon the Department, but upon the courts, *De Cambra* v. *Rogers*, 189 U. S. 119; *Love* v. *Flahive*, 205 U. S. 195, 198; and though his rulings on matters of law are reviewable in the courts, *Doolan* v. *Carr*, 125 U. S. 618, 625; *Wisconsin Central R. R.* v. *Forsythe*, 159 U. S. 46, 61, they are not subject to re-examination by the Department. *Johnson* v. *Towsley*, 13 Wall. 72, 83–84. For in making such determinations he acts as a special tribunal with judicial functions. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324.

But here no similar affirmative duty rested upon the Secretary to the performance of which the determination of the question of law was incidental. Secretary Fall owed no active duty to the State or to any other claimant. His duty in respect to the land was solely that owed to the United States—the duty to preserve its interests therein. The inquiry directed to be made in the local land office had been ordered by a predecessor solely in the performance of that duty. If as a result of the inquiry it should be found that the land was known to be mineral, the Government would, if necessary, bring legal proceedings for possession and for damages or an accounting. If it should be found that the land was not known to be mineral, there would be no occasion for any further departmental action. Secretary Fall had, of course, the power to vacate the order of his predecessor that the Register and Receiver proceed with the investigation. For it is within the dis-

cretion of every Secretary to decide what investigations he shall pursue in the public interest; and no Secretary is obliged to continue an inquiry which he believes to be futile. But the question here is whether he can by action other than the final determination of fact, preclude resumption of the inquiry in the Department, and thereby vest the title of known mineral land in the State.

We think that Congress did not confer upon the Secretary of the Interior the power to pass generally upon the right of the State to the land. When the Secretary has the duty to issue a patent or to furnish other evidence of title of a claimant, he must have authority to determine the questions of law incident to the performance of that duty. *Litchfield* v. *Register,* 9 Wall. 575, 577–578. But here no such duty rested upon him. Compare *Louisiana* v. *Garfield,* 211 U. S. 70, 77. Authority to determine as a fact the known mineral character of the lands falls naturally to the Secretary as "the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States" to public lands. *Knight* v. *U. S. Land Ass'n,* 142 U. S. 161, 178. But that authority does not carry the power to relinquish the jurisdiction of the Department over the land without determining, as a fact, that it was non-mineral at the time of the approval of the survey. Compare *Work* v. *Louisiana,* 269 U. S. 250, 261. The broad power of control and supervision conferred upon the Secretary "does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act." *Payne* v. *Central Pacific Railway Co.,* 255 U. S. 228, 236. See, also, *Burfenning* v. *Chicago, St. Paul &c. Ry.,* 163 U. S. 321; *Daniels* v. *Wagner,* 237 U. S. 547, 558. To read into the legislation, under such circumstances, authority to pass upon the State's claim of right to the land, regardless of its known mineral character, would create, by implication,

a power in direct contravention of the expressed intention of Congress that mineral lands were not granted to the State. Thus, the Secretary would be constituted an agent rather for relinquishing than for preserving the rights of the United States in the public lands. See *Shaw* v. *Kellogg*, 170 U. S. 312, 337–338.

When Secretary Fall undertook to determine, not as a fact whether the land was known to be mineral in 1903, but as a proposition of law that, because of other conceded facts, the Company's title had become unassailable, he acted without authority; and the order of dismissal based thereon did not remove the land from the jurisdiction of the Department.

*Reversed.*

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

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## COGEN *v.* UNITED STATES.

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

No. 89. Argued November 20, 1928.—Decided January 2, 1929.

An application by a defendant in a criminal case, after indictment and before trial, for a summary order requiring the United States Attorney to return papers taken from the defendant without a warrant, and for the suppression of all evidence obtained therefrom, *held* not to be an independent proceeding; the order of the District Court denying the application *held* interlocutory and not independently appealable.

24 F. (2d) 308, affirmed.

CERTIORARI, 277 U. S. 579, to a judgment of the Circuit Court of Appeals which dismissed a writ of error to an order of the District Court denying an application for return of papers and for suppression of evidence in a criminal case.

*Mr. Sanford H. Cohen* for petitioner.

*Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. George C. Butte* and *John J. Byrne* were on the brief for the United States.

Mr. Justice Brandeis delivered the opinion of the Court.

Cogen, with others as codefendants, was indicted in the federal court for southern New York on a charge of conspiracy to violate the National Prohibition Act. Before the indictment, certain papers had been taken from his person without a warrant. After the indictment and before trial, he applied to that court, in the criminal case, for an order requiring the United States Attorney to return the papers; and to suppress all evidence obtained therefrom, on the ground that the search and seizure had been in violation of his constitutional rights. The application was denied. Before the trial of the cause, Cogen sued out a writ of error from the Circuit Court of Appeals. It dismissed the writ, holding that the order sought to be reviewed was interlocutory and hence not appealable. 24 F. (2d) 308. This Court granted a writ of certiorari. 277 U. S. 579. The sole question for decision is whether the order of the District Court is a final judgment within the meaning of § 128 of the Judicial Code.

Cogen claims that it is final, contending that his application for surrender of the papers is a collateral matter, distinct from the general subject of the litigation; and that the order thereon finally settled the particular controversy. He argues that, being so, it falls, like the orders in *Forgay* v. *Conrad,* 6 How. 201, 203–204; *Trustees* v. *Greenough,* 105 U. S. 527, 531; and *Williams* v. *Morgan,* 111 U. S. 684, 699, within the exception to the general rule which limits the right of review to judgments which are

both final and complete. See *Collins* v. *Miller,* 252 U. S. 364, 370; *Oneida Navigation Corp'n* v. *W. & S. Job & Co.,* 252 U. S. 521.

It is true that the order deals with a matter which, in one respect, is deemed collateral. As was said in *Segurola* v. *United States,* 275 U. S. 106, 111–112: " . . . a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it." Hence, a defendant will, ordinarily, be held to have waived the objection to the manner in which evidence has been obtained unless he presents the matter for the consideration of the court seasonably in advance of the trial; and he does this commonly by a motion made in the cause for return of the property and for suppression of the evidence. The rule is one of practice; and is not without exceptions. See *Gouled* v. *United States,* 255 U. S. 298, 305; *Agnello* v. *United States,* 269 U. S. 20, 34–35; *Panzich* v. *United States,* 285 Fed. 871, 872.

It is not true that the order on such a motion deals with a matter distinct from the general subject of the litigation. Usually the main purpose of the motion for the return of papers is the suppression of evidence at the forthcoming trial of the cause. The disposition made of the motion will necessarily determine the conduct of the trial and may vitally affect the result. In essence, the motion resembles others made before or during a trial to secure or to suppress evidence, such as applications to

suppress a deposition, *Grant Bros.* v. *United States,* 232 U. S. 647, 661–662; *Pullman Co.* v *Jordan,* 218 Fed. 573, 577; to compel the production of books or documents, *Pennsylvania R. R. Co.* v. *International Coal Mining Co.,* 156 Fed. 765; for leave to make physical examination of a plaintiff, *Union Pacific Ry. Co.* v. *Botsford,* 141 U. S. 250; or for a subpoena *duces tecum, Murray* v. *Louisiana,* 163 U. S. 101, 107; *American Lithographic Co.* v. *Werckmeister,* 221 U. S. 603, 608–610. The orders made upon such applications, so far as they affect the rights only of parties to the litigation, are interlocutory. Compare *Alexander* v. *United States,* 201 U. S. 117. It is only when disobedience happens to result in an order punishing criminally for contempt, that a party may have review by appellate proceedings before entry of the final judgment in the cause. *Union Tool Co.* v. *Wilson,* 259 U. S. 107 110–111.

It is not true that the decision on such a motion for the return of papers necessarily settles the question of their admissibility in evidence. If the motion is denied, the objection to the admissibility as evidence is usually renewed when the paper is offered at the trial. And, although the preliminary motion was denied, the objection made at the trial to the admission of the evidence may be sustained. For as was said in *Gouled* v. *United States,* 255 U. S. 298, 312-313: ". . . where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial." Upon a review of the final judgment against the defendant, both the refusal to order return of the property and its admission in evidence are commonly assigned as errors. See *Weeks* v. *United States,* 232 U. S. 383, 387–389; *Byars* v. *United States,* 273

U. S. 28, 29; *Marron* v. *United States,* 275 U. S. 192, 193-194.[1] Compare *Adams* v. *New York,* 192 U. S 585, 594.

Motions for the return of papers and the suppression of evidence made in the cause in advance of the trial, under this rule of practice, must be differentiated from independent proceedings brought for a similar purpose. Where the proceeding is a plenary one, like the bill in equity in *Dowling* v. *Collins,* 10 F. (2d) 62, its independent character is obvious; and the appealability of the decree therein is unaffected by the fact that the purpose of the suit is solely to influence or control the trial of a pending criminal prosecution. Applications for return of papers or other property may, however, often be made by motion or other summary proceeding, by reason of the fact that the person in possession is an officer of the court. See *United States* v. *Maresca,* 266 Fed. 713; *United States* v. *Hee,* 219 Fed. 1019, 1020. Compare *Weinstein* v. *Attorney General,* 271 Fed. 673. Where an application is filed in that form, its essential character and the circumstances under which it is made will determine whether it is an independent proceeding or merely a step in the trial of the criminal case. The independent character of the summary proceedings is clear, even where the motion is filed in a criminal case, whenever the application for the papers or other property is made by a stranger to the litigation, compare *Ex parte Tiffany,* 252 U. S. 32; *Savannah* v. *Jesup,* 106 U. S. 563; *Gumbel* v. *Pitkin,* 113 U. S. 545; or wherever the motion is filed before there is any indictment or information against the movant, like the motions in *Perlman* v. *United States,* 247 U. S. 7 and *Burdeau* v. *McDowell,* 256 U. S. 465; or wherever the criminal proceeding contemplated or pending is in another court, like the motion in *Dier* v. *Banton,* 262 U. S. 147; or wherever

[1] Also *Murby* v. *United States,* 293 Fed. 849, 851; *Bell* v. *United States,* 9 F. (2d) 820. Compare *Giles* v. *United States,* 284 Fed. 208, 209; *Shields* v. *United States,* 26 F. (2d) 993.

the motion, although entitled in the criminal case, is not filed until after the criminal prosecution has been disposed of, as where under the National Prohibition Act a defendant seeks, after acquittal, to regain possession of liquor seized.[2] And the independent character of a summary proceeding for return of papers may be so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movant is pending in the same court. This was true in *Essgee Co.* v. *United States,* 262 U. S. 151, where the petition was entitled as a separate matter and was referred to by the court as a special proceeding.

Motions for the return of property, made in connection with a motion to quash a search warrant issued under the National Prohibition Act, may be independent proceedings, but are not necessarily so. By Act of October 28, 1919, c. 85, Title II, § 25, 41 Stat. 305, 315 and Espionage Act, June 15, 1917, c. 30, Title II, § 16, 40 Stat. 217, 229, Congress made specific provision, by an independent proceeding, for the vacation of a warrant wrongfully issued and for return of the property.[3] *Dumbra* v. *United States,* 268 U. S. 435, was such a case. *Steele* v. *United States, No. 1,* 267 U. S. 498, was also, so far as disclosed by the record in this Court.[4] Because it appeared to be such, the order therein denying the application was held in *Steele* v. *United States, No. 2,* 267 U. S. 505, to be *res judicata,* on the trial of the information filed after the seizure for un-

[2] *In re Brenner,* 6 F. (2d) 425; *Dickhart* v. *United States,* 16 F. (2d) 345. See *Mellet & Nichter Brewing Co.* v. *United States,* 296 Fed. 765, 770.

[3] See *Gallagher* v. *United States,* 6 F. (2d) 758; *United States* v. *Casino,* 286 Fed. 976.

[4] The fact that, on the docket of the District Court, the motion to vacate the search warrant appears to have been filed in the criminal case and to have been disposed of there, has been brought to our attention through the diligence of Cogen's counsel. But this fact was not disclosed by the records or briefs in either of the *Steele* cases.

lawful possession of the liquor.[5] But a motion for the return of property, although connected with a motion to quash a search warrant, may, if made in the same court in which a criminal proceeding is pending, be so closely associated with the criminal proceeding as to be deemed a part of it. Thus, where the motion to quash the search warrant and for return of the property is made by a party to the cause, is filed in the cause and seeks suppression of the evidence at the trial, it is apparent that the motion to quash the search warrant is an incident merely; that the real purpose of the application is to suppress evidence; and that it is but a step in the criminal case preliminary to the trial thereof. Circumstances may make this clear, even if the motion does not specifically pray for suppression of the evidence. In all such cases the order made on the motion is interlocutory merely.[6]

Where in cases arising under the National Prohibition Act a defendant seeks to obtain, by motion in advance of trial, return of property which was not seized under a search warrant, the interlocutory character of the order entered thereon is ordinarily clear.[7] This is true of the order here in question. The motion was not for the return of papers seized under a search warrant. It was filed in the criminal case after the indictment and before

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[5] *Voorhies* v. *United States,* 299 Fed. 275; *In re No. 191 Front St.,* 5 F. (2d) 282; *In re Hollywood Cabaret,* 5 F. (2d) 651; *United States* v. *Kirschenblatt,* 16 F. (2d) 202, are cases of the same character. The motion filed in the criminal case passed on in *Dowling* v. *Collins,* 10 F. (2d) 62, was assumed by the Circuit Court of Appeals to be so. Compare *Veeder* v. *United States,* 252 Fed. 414.

[6] See *Coastwise Lumber & Supply Co.* v. *United States,* 259 Fed. 847; *United States* v. *Broude,* 299 Fed. 332; *Jacobs* v. *United States,* 8 F. (2d) 981. Compare *Jacobs* v. *United States,* 24 F. (2d) 981.

[7] See *United States* v. *Maresco,* 266 Fed. 713, 719; *United States* v. *Marquette,* 270 Fed. 214; *United States* v. *Mattingly,* 285 Fed. 922. Compare *Croocker* v. *Knudsen,* 232 Fed. 857; *Fries* v. *United States,* 284 Fed. 825.

trial. It seeks not only return of the papers, but the suppression of all evidence obtained therefrom. And such suppression of evidence appears to be its main, if not its only purpose. The appeal was properly dismissed by the Circuit Court of Appeals.

*Affirmed.*

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## LAWRENCE ET AL. *v.* ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

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

No. 99. Argued December 3, 1928.—Decided January 2, 1929.

1. An interlocutory decree enjoining a state commission from carrying out an order restraining a railway company from removing shops and division point from one place to another in the State, leaves the company free to proceed with the removal pending appeal, if the injunction was not suspended by a supersedeas bond. P. 232.
2. Where such an interlocutory injunction was reversed on appeal because improvidently granted, but the shops, etc., had been removed meanwhile, and it seemed probable after the remand of the case that the complainant would be entitled to a permanent injunction, postponement of the question of restitution until final hearing was within the discretion of the District Court. P. 233.
3. An order of a state commission preventing a railway company from removing its shops and division point to another place in the State, the effect of which will clearly impair interstate passenger and freight service, is invalid under the commerce clause. P. 234.

30 F. (2d) 458, affirmed.

APPEAL from a decree of the District Court of three judges, permanently enjoining the members of the Corporation Commission of the State of Oklahoma from taking proceedings to prevent the Railway Company from removing its shops and division point. See s. c. 274 U. S. 588.

*Mr. C. B. Ames,* with whom *Messrs. Edwin Dabney,* Attorney General of Oklahoma, and *T. L. Blakemore* were on the brief, for appellants.

The application made by the Railway Company to the Corporation Commission did not comply with its duty or with the requirements of the statute.

The Act does not conflict with the commerce clause of the Constitution. Laws passed by a State in the exercise of its police powers are valid, even though they indirectly affect interstate commerce.

Imposing the burden of proof on the Railway Company is a valid provision.

It was the duty of the District Court to require the Railway Company to return its shops and division point to Sapulpa.

On reversal of a judgment, restitution will be ordered. *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216; *St. Louis-Southwestern Ry. Co.* v. *Consolidated Fuel Co.,* 260 Fed. 638; *Kansas City Southern Ry. Co.* v. *Southern Trust Co.,* 279 Fed. 801; *Wangelin* v. *Goe,* 50 Ill. 459; *Lake Shore, etc., Ry. Co.* v. *Taylor,* 134 Ill. 603; *Herrington* v. *Herrington,* 11 Ill. App. 121; *Atlantic Coast Line R. R.* v. *Seaboard Air Line Ry.,* 88 S. C. 464; *Morris* v. *Gray,* 37 Okla. 695; *Vanzandt* v. *Argentine Mining Co.,* 48 Fed. 770; *Silver Peak Mines* v. *Hanchett,* 93 Fed. 76; *Twenty-one Mining Co.* v. *Original Sixteen to One Mine,* 240 Fed. 106; *Haight* v. *Lucia,* 36 Wis. 355; *Mowrer* v. *State,* 107 Ind. 539; *People* v. *District Court,* 29 Colo. 182; *Coker* v. *Richey,* 108 Ore. 479.

The motion to require the Railway Company to restore the *status quo* should have been heard by the District Judge; and it was error for three judges to sit.

*Mr. C. B. Stuart,* with whom *Messrs. E. T. Miller, M. K. Cruce,* and *Ben Franklin* were on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case was before us in *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588. There, we reversed the decree granting an interlocutory injunction. Now the case is here on appeal from the final decree, which granted a permanent injunction. This decree was entered upon motion to dismiss the bill and supplemental bill. For the main facts reference is made to our earlier opinion. The supplemental bill sets forth the occurrences since entry of the interlocutory decree. It is largely with these that we are now concerned.

The petition for appeal from the interlocutory decree prayed " that the proper order touching security be made without superseding the decree." The appeal was allowed upon the filing of the usual bond for costs. The District Court, three judges sitting, had offered to the appellants the opportunity of suspending the interlocutory decree by giving a supersedeas bond. The offer was declined. Then the decree was made effective upon the Railway's filing a bond in the sum of $50,000. Immediately thereafter, the Railway commenced removal of its shops and division point from Sapulpa to West Tulsa. Before the interlocutory decree was reversed by us the removal had been completed; and the new shops and division point had been put into complete operation at West Tulsa. Promptly after our decision, the appellants applied to the District Court for an order requiring that forthwith, and before any further proceeding be taken in the cause, the Railway restore the conditions with respect to its shops and division point existing prior to the issue of the interlocutory injunction; and specifically " that it be required to re-build its trackage at Sapulpa as such trackage then existed; to return to Sapulpa all machinery and employees which have been removed by reason of said

interlocutory injunction; to restore the runs of its trains and particularly its freight trains so that Sapulpa will be the division point for said runs as it was before the issuance of said interlocutory injunction."

The District Court denied the motion. Instead, it issued an order that the Railway Company "as a preliminary step to further hearing of this cause" apply to the Corporation Commission of the State to dissolve the restraining orders theretofore made by it, restraining removal of the shops and division point, and to ratify the removal which had been effected. The Railway made application as directed; and the Commission set it for hearing. Then these appellants objected to any consideration of the application by the Commission, unless and until the Railway should have returned its shops and division point to Sapulpa. Their contention was that in making the removal, although under the protection of the interlocutory injunction, the Railway acted in contempt of the Commission's earlier order restraining such action; and that, for this reason, it should not be heard by the Commission until it had purged itself of the contempt. The Commission sustained the objection. Thereupon, the Railway filed its supplemental bill setting forth these and other facts; and the case went to final hearing in the District Court.

The appellants contend that it was error to grant the permanent injunction, because the suit was prematurely brought. They argue that the statute requiring application to the Commission before removal of the shops was a valid exercise of the police power; that this Court reversed the interlocutory decree because the Railway Company had omitted to make such application before seeking relief in the federal court; that the removal of the shops, although under the protection of the interlocutory injunction, was an abuse of the process of the court; that this action constituted a contempt of the Commission;

and that, since the Railway did not offer to purge itself of the contempt by restoring the *status quo,* and the Commission has refused to condone it, the District Court erred in granting the relief prayed.

The contention is unsound. The purpose of the restraining order, issued upon the filing of the bill, had been to maintain the *status quo.* It, therefore, contained a clause ordering "that the plaintiff in this case take no action toward removing its shops, division point, or changing the runs of its trains, until further order of this Court." This clause was omitted from the interlocutory decree. The purpose of the injunction thereby granted was not, as in *Vanzandt* v. *Argentine Mining Co.,* 48 Fed. 770; *Silver Peak Mines* v. *Hanchett,* 93 Fed. 76; and *Twenty-one Mining Co.* v. *Original Sixteen to One Mine,* 240 Fed. 106, to maintain the *status quo,* but to prevent interference with the desired change. "The interlocutory decree," as we have said, "set the Railway free to remove the shops before the case could be heard on final hearing." (274 U. S. 588, 594.) The District Court had, when it issued the injunction, jurisdiction of the parties and of the subject matter; and it has never relinquished its jurisdiction. It is true that this Court has held that the interlocutory decree was improvidently granted. But it did not declare that the decree was void. (274 U. S. 588, 591–592.) Compare *Arkansas Comm'n* v. *Chicago, Rock Island & Pacific R. R. Co.,* 274 U. S. 597, 598. The interlocutory injunction, until dissolved by our decision, was in full force and effect. The appellants refused to assume the risk attendant upon suspending the decree by means of a supersedeas bond. The appeal did not operate as a supersedeas. *Hovey* v. *McDonald,* 109 U. S. 150, 161; *Leonard* v. *Ozark Land Co.,* 115 U. S. 465. Compare *Virginian Ry.* v. *United States,* 272 U. S. 658, 668–669.

Thus, the interlocutory decree relieved the Railway from any duty to obey the restraining order of the Com-

mission. Because such was its effect, the lower court required the Railway to furnish the $50,000 bond. By availing itself of the liberty given to remove the shops and division point, the Railway assumed the risk of being required to restore them if it should be held that the interlocutory injunction was improvidently granted, see *Bank of United States* v. *Bank of Washington,* 6 Pet. 8, 17; *Arkadelphia Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134, 145–146; and also the risk of having to compensate the appellants, to the extent of $50,000, for any damages suffered by reason of the removal. But it was clear that, upon final hearing, the Railway might prove that it was entitled to a permanent injunction; and the District Court was not obliged to order restitution meanwhile. If it had not, when entering the interlocutory decree, required that bond be given, no damages could have been recovered on the dissolution of the injunction. *Russell* v. *Farley,* 105 U. S. 433, 437; *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Washburn Lignite Coal Co.,* 254 U. S. 370, 374. Although it required the bond, and this Court held that the interlocutory injunction had been improvidently issued, the District Court could, in its discretion, refuse to assess the damages until it should, after the final hearing, have determined whether the plaintiff was entitled to a permanent injunction. See *Redlich Mfg. Co.* v. *John H. Rice & Co.,* 203 Fed. 722. It might then refuse to allow recovery of any damages, even if the permanent injunction should be denied. See *Russell* v. *Farley,* 105 U. S. 433, 441–2.

Moreover, the reasons for not requiring restitution before final hearing were persuasive. It appears that there was nothing in the new location which could in any wise affect injuriously the health of the Railway's employees. The location of the shops at West Tulsa and the vicinity in which employees may live are sanitary. The removal to West Tulsa had cost $150,000. It had resulted in a

monthly saving of at least $33,500. It had effected a vast improvement of the interstate and other service. To restore the shops and division point to Sapulpa and make there the improvements essential to good service would require an outlay of $3,000,000, besides the expenditure of $300,000 for the shops; and it would entail in addition the operating expenses then being saved. Even with such large expenditures, restoration of the shops and division point to Sapulpa would inevitably impair interstate and other passenger and freight service. On these facts, which were established by affidavits filed in opposition to the motion to compel restitution, it must have seemed to the District Court at least probable that upon final hearing a permanent injunction would issue; and that to order restitution meanwhile would be, not merely an idle act, compare *Goltra* v. *Weeks,* 271 U. S. 536, 549, but one imposing unnecessary hardship on the Railway and the public.

We have no occasion to pass upon the constitutionality of the state statute. The facts just stated were later set forth in the supplemental bill of complaint and by submission on motion to dismiss the bill and supplemental bill were admitted on the final hearing. Assuming the statute to be valid, an order of the Commission denying leave to remove would, on these facts, clearly have violated the commerce clause. Compare *McNeill* v. *Southern Railway Co.,* 202 U. S. 543, 561. The Commission's refusal to hear the application was tantamount to such an order. The Railway was not in contempt. The terms of the restraining order had been superseded by the interlocutory injunction. To refuse to hear the application, which the District Court had directed the Railway to make, was an attempt to inflict punishment for an innocent act.

*Affirmed.*

Syllabus.

# WILLIAMS, COMMISSIONER OF FINANCE, ET AL. *v.* STANDARD OIL COMPANY OF LOUISIANA.

# SAME *v.* THE TEXAS COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Nos. 64 and 65. Argued November 23, 1928.—Decided January 2, 1929.

1. The business of dealing in gasoline, whatever its extent, is not a business "affected with a public interest"; and state legislation undertaking to fix the prices at which gasoline may be sold, violates the due process clause of the Fourteenth Amendment. P. 239.
2. A State may not impose as a condition on the doing of local business by a foreign corporation that it relinquish rights guaranteed by the Federal Constitution. P. 241.
3. A declaration in a statute that if any of its provisions be held invalid the validity of the others shall not be thereby affected creates a presumption of separability in place of the general rule to the contrary—a presumption overcome, however, when inseparability is evident or where there is a clear probability that, the invalid part being eliminated, the legislature would not have been satisfied with what remains. P. 241.
4. In c. 22 of Public Acts of Tennessee, 1927, the provision for fixing the prices of gasoline, which is unconstitutional, is inseparable from the other provisions relating to the creation of a Division of Motors and Motor Fuels, the collection of information, issuance of permits, and taxation to defray the expenses of the Division. P. 242.
5. The provision of the Act forbidding any dealer to grant any rebate, concession or gratuity to any purchaser for the purpose of inducing him to purchase, use or handle the dealer's gasoline, and the provision forbidding discrimination by selling at different prices to purchasers in the same or in different localities, are likewise mere appendants to the main purpose of price regulation, or, if separable, they are unconstitutional restrictions on the right of the dealer to fix his own prices. *Fairmont Co.* v. *Minnesota,* 274 U. S. 1. P. 244.

6. In construing an act for the purpose of determining the separability of its provisions, it is to be presumed that the legislature meant to obey a direction in the state constitution that each bill be confined to one subject, to be expressed in the title. P. 244.

24. F. (2d) 455, affirmed.

APPEALS from decrees of the District Court (three judges sitting) which granted interlocutory injunctions in suits brought by the two oil companies against officials of Tennessee to restrain enforcement of an act to regulate the price of gasoline. See *Standard Oil Co.* v. *Hall*, 24 F. (2d) 455.

*Messrs. Charles T. Cates, Jr.*, and *James J. Lynch*, with whom *Messrs. L. D. Smith*, Attorney General of Tennessee, and *H. N. Leech* were on the briefs, for appellants.

The two oil companies, because of the relations of one of them to a company which was ousted from Tennessee, and their relations to each other, and their monopolistic tendencies, are not entitled to carry on business in the State or to complain of the Act of 1927.

A foreign corporation is not entitled to carry on its business in any State except by complying with the conditions prescribed by such State. *Crescent Oil Co.* v. *Mississippi*, 257 U. S. 129; *Yeiser* v. *Dysart*, 267 U. S. 538; *Hall* v. *Geiger*, 242 U. S. 539; *Caldwell* v. *Sioux Co.*, 242 U. S. 558; *Merrick* v. *Halsey*, 242 U. S. 568.

Upon the facts disclosed in the record, the gasoline industry in Tennessee has been devoted to and is clothed with a public interest, and the legislation complained of was enacted in the proper exercise of the police power of the State. *Munn* v. *Illinois*, 94 U. S. 113; *Allnut* v. *Englis*, 12 East 527; *Brass* v. *North Dakota*, 153 U. S. 391; *Budd* v. *New York*, 143 U. S. 517; *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389; *Stafford* v. *Wallace*, 258 U. S. 495; *Oklahoma Natural Gas Co.* v. *Oklahoma*, 258 U. S. 234; *Wolff Packing Co.* v. *Industrial Court*, 262 U. S.

522; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331; *Oklahoma Gin Co.* v. *State,* 252 U. S. 339; *Rail & River Co.* v. *Yappel,* 236 U. S. 338; *McLean* v. *Arkansas,* 211 U. S. 539; *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13; s. c. 103 Tenn. 421; *Dayton Coal, etc. Co.* v. *Barton,* 183 U. S. 23; s. c. 103 Tenn. 604; *Leeper* v. *State,* 103 Tenn. 500.

If the price-fixing features of this Act are invalid, nevertheless the other regulatory features are valid and should be sustained.

The provision for the collection of data and its publication would be a valuable aid in suppressing the evils complained of. The data will be of great assistance to the officials of the State in enforcing the state Anti-Trust Act, and this "pitiless publicity" of evil practices would prevent in some measure at least some of the evils complained of. As to separability, cf. *Weller* v. *New York,* 268 U. S. 319. See also *State* v. *Howitt,* 107 Kan. 423; *Richardson* v. *Young,* 122 Tenn. 471; *Shea* v. *Mining Co.,* 55 Mont. 522; *State* v. *Trewitt,* 113 Tenn. 561; *Hall* v. *Geiger,* 242 U. S. 538; *Caldwell* v. *Sioux Falls Co.,* 242 U. S. 558; *Merrick* v. *Halsey,* 242 U. S. 568.

If rebating, price cutting, and discrimination may be prohibited by injunction, they may be prohibited by legislation. *Nash* v. *United States,* 259 U. S. 273; *State* v. *Standard Oil Co.,* 173 Fed. 177; *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157. See *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129; *Purity Extract Co.* v. *Lynch,* 226 U. S. 197.

*Messrs. John W. Davis* and *H. Dent Minor* for appellee in No. 64.

*Mr. John B. Keeble,* with whom *Messrs. Harry T. Klein* and *C. B. Ames* were on the brief, for appellee in No. 65.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases were considered together by the court below and are submitted together here. In both the validity of a statute of Tennessee is assailed as contravening the Federal Constitution. Appellee in No. 64 is a corporation organized under the laws of Louisiana, and appellee in No. 65 is a corporation organized under the laws of Delaware. From a time long prior to the passage of the statute, both have been engaged and are now engaged in the business of selling gasoline in the State of Tennessee.

The statute was adopted in 1927. Its purpose and effect are to fix prices at which gasoline may be sold within the state. A Division of Motors and Motor Fuels is created in the Department of Finance and Taxation and authorized to collect and record data concerning the manufacture and sale of gasoline, freight rates, differentials in price to wholesalers and retailers, the cost and expense of production and sale, etc. The information thus collected is made available for use by the Commissioner of Finance and Taxation in the regulation of prices at which gasoline may be sold in the state. Permits for such sale are to be issued subject to the approval of the commissioner but only at the prices fixed and determined. Prices of gasoline are to be fixed with a proper differential between the wholesale and retail price. Rebates, price concessions and price discrimination between persons or localities are forbidden. The prices first are to be stated by the applicant for a permit, and if not approved by the superintendent of the division are to be determined by that official, with a right of review by the commissioner and finally by the courts. Ch. 22. Public Acts Tennessee 1927, p. 53. By a general statute, Shannon's Tennessee Code, § 6437, a violation of the act is a misdemeanor and is punishable by fine and imprisonment. *Pressly* v. *State,* 114 Tenn. 534, 538.

Appellees brought separate suits in the court below to enjoin the state officers named as appellants from carrying out their intention to enforce the act and institute criminal proceedings for violations of it against appellees, respectively, and to have the act declared unconstitutional and void. Under the facts alleged, the suits were properly brought. *Terrace* v. *Thompson,* 263 U. S. 197, 214; *Tyson & Brother* v. *Banton,* 273 U. S. 418, 427–428.

The principal ground of attack, and the only one we need to consider here, is that the legislature is without power to authorize agencies of the state to fix prices at which gasoline may be sold in the state, because the effect will be to deprive the vendors of such gasoline of their property without due process of law in violation of the Fourteenth Amendment. Appellees applied for a temporary injunction against appellants, upon which there was a hearing, and the court below, consisting of three judges (§ 266 Jud. Code), granted the injunction as prayed. 24 F. (2d) 455, *sub nom. Standard Oil Co.* v. *Hall.*

It is settled by recent decisions of this Court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is "affected with a public interest." *Wolff Co.* v. *Industrial Court,* 262 U. S. 522; *Tyson & Brother* v. *Banton, supra; Fairmont Co.* v. *Minnesota,* 274 U. S. 1; *Ribnik* v. *McBride,* 277 U. S. 350. Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this Court, beginning with *Munn* v. *Illinois,* 94 U. S. 113, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to

be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect *granted* to the public. *Tyson & Brother* v. *Banton, supra,* p. 434. Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. *Id.,* p. 430. The meaning and application of the phrase are examined at length in the *Tyson* case, and we see no reason for restating what is there said.

In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase "affected with a public interest." Those decisions control the present case.

There is nothing in the point that the act in question may be justified on the ground that the sale of gasoline in Tennessee is monopolized by appellees, or by either of them, because, objections to the materiality of the contention aside, an inspection of the pleadings and of the affidavits submitted to the lower court discloses an utter failure to show the existence of such monopoly.

Nor need we stop to consider the further contention that appellees, being foreign corporations, may not carry on

their business within the state except by complying with the conditions prescribed by the state. While that is the general rule, a well-settled limitation upon it is that the state may not impose conditions which require the relinquishment of rights guaranteed by the Federal Constitution. *Frost Trucking Co.* v. *R. R. Comm'n.,* 271 U. S. 583, 593, *et seq.,* where the applicable decisions of this Court are reviewed.

Finally, it is said that even if the price-fixing provisions be held invalid other provisions of the act should be upheld as separate and distinct. This contention is emphasized by a reference to § 12 of the act, which declares: " That if any section or provision of this Act shall be held to be invalid this shall not affect the validity of other sections or provisions hereof."

In *Hill* v. *Wallace,* 259 U. S. 44, 71, it is said that such a legislative declaration serves to assure the courts that separate sections or provisions of a partly invalid act may be properly sustained " without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part." But the general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that, " standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." The question is one of interpretation and of legislative intent, and the legislative declaration " provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command." *Dorchy* v. *Kansas,* 264 U. S. 286, 290.

In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety. This is well stated in *Riccio* v. *Hoboken,* 69 N. J. L. 649, 662, where the New Jersey Court

of Errors and Appeals, in an opinion delivered by Judge Pitney (afterward a Justice of this Court), after setting forth the rule as above, said:

"In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process."

Compare *Illinois Central Railroad* v. *McKendree,* 203 U. S. 514, 528–530; *The Employers' Liability Cases,* 207 U. S. 463, 501; *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126, 132, *et seq.;* and see 1 Cooley's Constitutional Limitations (8th Ed.) 362, 363 and note.

The effect of the statutory declaration is to create in the place of the presumption just stated the opposite one of separability. That is to say, we begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains.

In the present case, it requires no extended argument to overcome the presumption and to demonstrate the indivisible character of the act under consideration. The particular parts of the act sought to be saved are found in §§ 1, 2, 3, 4 and 10. Section 1, after a preamble in respect of the importance of controlling the sale of gasoline and a declaration that such sale is impressed with a public use, creates the Division of Motors and Motor Fuels as already stated. Section 2 requires the superintendent of the division and other employees to make investigations, collect and record data concerning the manufacture and sale of gasoline, the cost of refining, freight rates, differ-

entials in wholesale and retail prices, costs and expenses incident to the sale, methods employed in the distribution of gasoline, and other data and information as may be material in ascertaining and determining fair and reasonable prices to be paid for gasoline. This information is declared to be available for use in the regulation of prices and for the inspection and information of the public. The superintendent is directed to issue permits for the sale of gasoline at prices fixed and determined as provided in other parts of the statute. Section 3 makes it unlawful for anyone to engage in the sale of gasoline without first having obtained a permit signed by the superintendent and approved by the Commissioner of Finance and Taxation, for which permit application must be made in accordance with and in compliance with all the requirements of the act. Section 4 requires that the application shall set forth whether the applicant proposes to do a wholesale or retail business, or both, the number and location of the different places where he is to operate and other like information. He must also set forth the price or prices at which he is at the time selling gasoline, the cost price thereof, including various items which enter into the price, and the price at which he proposes to sell. Section 10 imposes a special permit tax of $10 per annum for each place of sale at wholesale, and $1 per annum for each retail service station or curb pump. The tax thus imposed is constituted a special maintenance fund to aid in defraying the expenses of the Division of Motors and Motor Fuels.

The bare recital of these details shows conclusively that they are mere adjuncts of the price-fixing provisions of the law or mere aids to their effective execution. The function of the division created by § 1 is to carry these provisions into effect, and if they be stricken down as invalid the existence of the division becomes without object. The purpose of collecting the data set forth in § 2 is to

furnish information to aid in the fixing of proper prices. The requirements in § 3 that a permit must be obtained before any person can engage in the business of selling gasoline and those in § 4 that the application therefor must state the character of the business, the number and location of the places where business is to be carried on, the price or prices at which the applicant is then selling gasoline, the cost price thereof, and the price at which he proposes to sell, obviously constitute data for intelligently putting into effect the price-fixing provisions of the law or means to that end. The taxes imposed by § 10 are solely for the purpose of defraying the expenses of the Division of Motors and Motor Fuels, and since the functions of that division practically come to an end with the failure of the price-fixing features of the law, it is unreasonable to suppose that the legislature would be willing to authorize the collection of a fund for a use which no longer exists.

Appellants also insist that certain provisions in respect of rebating and discrimination contained in § 8 of the act are separable. Those provisions are that it shall be unlawful to grant any rebate, concession, or gratuity to any purchaser for the purpose of inducing the purchaser to purchase, use, or handle the gasoline of the particular dealer, and that it shall likewise be unlawful to discriminate for or against any purchaser by selling at different prices to purchasers in the same locality or in different localities. It seems clear that these provisions are mere appendants in aid of the main purpose; but, if treated as separable, they are unconstitutional restrictions upon the right of the private dealer to fix his own prices and fall within the principle of the decisions already cited. See especially *Fairmont Co.* v. *Minnesota, supra.*

This interpretation of the various provisions of the act is fortified by a requirement of the Tennessee Constitution (Art. II, § 17) that "no bill shall become a law which embraces more than one subject, that subject to be

expressed in the title." It is fair to conclude, and there is nothing to suggest the contrary, that in the passage of the present act the legislature intended to observe this requirement and confine the provisions of the act to the one subject of price-fixing.

Accordingly, we must hold that the object of the statute under review was to accomplish the single general purpose which we have stated, and, that purpose failing for want of constitutional power to effect it, the remaining portions of the act, serving merely to facilitate or contribute to the consummation of the purpose, must likewise fall.

*Decrees affirmed.*

MR. JUSTICE HOLMES dissents.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concur in the result.

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## GEORGE VAN CAMP & SONS COMPANY *v.* AMERICAN CAN COMPANY ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 94. Argued December 5, 6, 1928.—Decided January 2, 1929.

1. Petitioner and another company are severally engaged in the business of packing and selling food products in tin cans, in interstate commerce. Respondent manufactures tin cans, sells them to petitioner and the other company and leases them machines for sealing the cans. It sells to the other company at a discount of 20% below the announced standard prices at which it sells cans of the same kind to the petitioner; it charges the petitioner a fixed rental for the machines but furnishes them to the other company free; and it discriminates in other respects. The effect of the discrimination is to substantially lessen competition, and its tendency is to create a monopoly in the line of interstate commerce in which petitioner and the other company are competitively engaged.

*Held,* that the discrimination violates § 2 of the Clayton Act, which denounces price discrimination between different purchasers

where its effect may be to substantially lessen competition or tend to create a monopoly "in any line of [interstate] commerce." P. 253.

2. Where the language of a statute is clear and unambiguous, its meaning is not to be varied by resort to reports of Congressional Committees or other matters *dehors*. *Id.*
3. Exceptions to this general rule are rare, and deal with provisions which, literally applied, would offend the moral sense, involve injustice, oppression, or absurdity, or lead to an unreasonable result plainly at variance with the policy of the statute as a whole. *Id.*

RESPONSE to questions certified by the Circuit Court of Appeals touching a case in which the District Court dismissed a bill to enjoin violations of the Clayton Act.

*Mr. Solon J. Carter,* with whom *Messrs. Frederick E. Matson, James A. Ross, Austin V. Clifford, Harold K. Bachelder,* and *William C. Bachelder* were on the brief, for George Van Camp & Sons Company.

The intent of Congress must be determined by the words used, unless the language is ambiguous. *Minor* v. *Mechanics Bank,* 1 Pet. 46; *United States* v. *Hill,* 248 U. S. 420; *Thompson* v. *United States,* 246 U. S. 547; *United States* v. *Standard Brewery,* 251 U. S. 210. The words must be given their usual meaning. *Maillard* v. *Lawrence,* 16 How. 251; *United States* v. *Temple,* 105 U. S. 97; *Cherokee Tobacco Co.* v. *United States,* 11 Wall. 616; *Board* v. *Rollins,* 130 U. S. 662.

The word "any" as used is not ambiguous. *McMurray* v. *Brown,* 91 U. S. 257; *Caminetti* v. *United States,* 242 U. S. 470; *Danciger* v. *Cooley,* 248 U. S. 319; *Heiner* v. *Tindle,* 276 U. S. 582; *Nigro* v. *United States,* 276 U. S. 332; *Standard Oil Co.* v. *United States,* 221 U. S. 1; *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346.

An interpretation of the word "any" as used in § 2 of the Clayton Act to include lines of commerce other than

those engaged in by the discriminator is in harmony with the general purpose of all the anti-trust legislation of Congress. *Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, 257, U. S. 441; *Federal Trade Comm'n* v. *Western Meat Co.*, 272 U. S. 554. *Mennen Co.* v. *Federal Trade Comm'n*, 288 Fed. 744, considered and rejected.

The history of the Clayton bill, together with the conference committee reports and statements of the members of the conference committee on the floor of Congress, show that Congress intended the word "any" to be used in its broadest scope in § 2.

*Mr. Wm. H. Thompson,* with whom *Messrs. L. A. Welles, Samuel D. Miller, Frank C. Dailey,* and *Albert L. Rabb* were on the brief, for American Can Company.

*Mr. Henry H. Hornbrook,* with whom *Mr. Paul Y. Davis* was on the brief, for The Van Camp Packing Company.

The word "any" and the phrase in which it appears are to be read and construed as an integral part of the section. *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387. When so read, it will be apparent that the "line of commerce," competition in which is to be protected and monopoly in which is to be prevented, is and can only be that commerce in which "it shall be unlawful for any person to be engaged" and "in the course thereof" to make the prohibited discriminations. It is not reasonable to suppose, and Congress did not fear, that any person would go out of his way to create for the benefit of some other person a monopoly or a lessening of competition in a business in which he himself was not engaged. The natural, proximate, and necessary result of the granting of improper price discriminations or the making of tying contracts by a manufacturer of tin cans would be to lessen competition and to create a monopoly in the tin can business; and not in the canned goods

business, or the wholesale provision business, or the retail grocery business.

Such is the necessary construction of the same words used in § 3 of the Act, which should be given a like construction.

The word "competition" in that clause of § 2 now in question should be given the same meaning as the same word in the clause "made in good faith to meet competition," and the word in the latter clause clearly refers to competition with competitors of the seller, the persons "engaged in commerce," and to no other competition. The only attempt to define competition in § 2 is contained in the provision that nothing contained in the section shall prevent discrimination in price in the same or different communities made in good faith "to meet competition." Competition here must mean that between the discriminator and his competitors.

It is not proper to infer that the phrase "in any line of commerce" was inserted to extend the application of the words "monopoly" and "competition," since it was wholly unnecessary for that purpose.

The word "commerce," as used in the Clayton Act, is expressly limited to "trade or commerce among the several states." The most obvious purpose of the phrase "in any line of commerce" is restrictive and not extensive, to confine the operation of the Act to monopoly and lessening of competition resulting to trade in interstate and foreign commerce from the prohibited discriminations in interstate and foreign commerce.

It is apparent from the Congressional Journals that the creation of monopolies for the benefit of customers of a price discriminator, or the suppression of competition between such customers, was not one of the evils in contemplation upon the passage of the Clayton Act.

When, however, it is attempted to restrict the otherwise lawful competitive practices of persons engaged in

commerce, not because of any tendency to create monopoly or suppress competition for the person whose conduct is in question, but solely because of a deleterious effect upon competition between others, the fact that deliberate design to achieve such results is not to be anticipated, so that monopoly and suppression of competition thus caused must be of rare occurrence, coupled with the very apparent restriction upon the competitive freedom of the person whose conduct is regulated, gives every reason to scrutinize carefully the language sought to be so construed. *Federal Trade Comm'n* v. *Gratz,* 253 U. S. 421, at page 428.

The construction of § 2 of the Act suggested by appellees is in harmony with the policy of the Anti-Trust Laws. The only reported decisions support defendants' contention. *Mennen Co.* v. *Federal Trade Comm'n,* 288 Fed. 774; *National Biscuit Co.* v. *Federal Trade Comm'n,* 299 Fed. 733.

Mr. Justice Sutherland delivered the opinion of the Court.

This suit was brought in the Federal District Court for the District of Indiana to enjoin violations of § 2 of the Clayton Act, c. 323, 38 Stat. 730. U. S. Code, Title 15, § 13. From a decree dismissing the bill for want of equity, an appeal was taken to the court below. Under § 239 of the Judicial Code as amended (U. S. Code, Title 28, § 346), that court has certified the following questions concerning which instructions are desired for the proper disposition of the cause:

"Question 1. Does section 2 of the 'Clayton Act' (United States Code, Title 15, Section 13) have application to cases of price discrimination, the effect of which may be to substantially lessen competition, or tend to create a monopoly, not in the line of commerce wherein

the discriminator is engaged, but in the line of commerce in which the vendee of the discriminator is engaged?

"Question 2. Where one who makes an article and sells it, interstate, to persons engaged, interstate, in a line of commerce different from that of the maker, discriminates in price between such buyers (said discrimination not being made on account of differences in the grade, quality or quantity of the commodity sold, nor being made as only due allowance for the difference in the cost of selling or transportation, nor being made in good faith to meet competition) and the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in the line of commerce wherein the buyers are engaged, does the maker and seller of the article, making such price discrimination, transgress section 2 of the 'Clayton Act' (United States Code, Title 15, Section 13)?"

The relevant facts upon which the questions are based are set forth as follows:

"The bill charges that appellant, George Van Camp & Sons Company, is engaged, interstate, in the business of packing and selling food products in tin cans, and that appellee Van Camp Packing Company is engaged in the same business, and is a competitor of appellant; and that appellee American Can Company manufactures, in very great quantities, and sells, interstate, to food packers, tin cans used in the food packing industry, and owns the monopoly for certain machines which are necessary for sealing the cans of its manufacture, and that it sells such cans in large quantities to appellant and to appellee Van Camp Packing Company, and leases to them its machines for sealing these cans;

"That the American Can Company is unlawfully discriminating between different purchasers of its commodities, in that the price at which it offered and offers and sold

and sells its said cans to appellee Van Camp Packing Company is 20% below its publicly announced standard prices and the prices at which it contracted to sell and did and does sell its cans of the same kind to appellant, George Van Camp & Sons Company; that the American Can Company furnishes food packers, including appellant, its machines necessary for sealing its said cans at a fixed rental, and furnishes the same machines to the Van Camp Packing Company free of charge; that the American Can Company paid and pays the Van Camp Packing Company large sums of money by way of bonus, discounts, and reductions from the price of cans fixed in contracts between them, none of such bonus, discounts, or reductions being allowed or paid to appellant; and that these discriminations were and are not made on account of differences in grade, quality, or quantity of the commodity sold, nor of the machines leased, nor on account of any difference in the cost of selling or transportation, nor made in good faith to meet competition;

"That the effect of such discrimination is to substantially lessen competition, and tends to create a monopoly in the line of interstate commerce, in which the appellant, George Van Camp & Sons Company, and the appellee Van Camp Packing Company are both engaged, namely, the packing and selling of food products in tin cans.

"There is no allegation in the bill that the discriminations complained of tended to create a monopoly or substantially lessen competition in the line of commerce in which the appellee American Can Company is engaged.

"On separate motions of the several appellees on the ground that said section 2 of the 'Clayton Act' is addressed only to discriminations in price the effect of which may be to substantially lessen competition, or tend to create a monopoly in the business in which the discriminator is engaged, the District Court dismissed the bill for

want of equity, and the appeal is from the decree of dismissal."

Section 2, copied in the margin,* provides that it shall be unlawful for any person engaged in commerce, in the course of such commerce, to discriminate in price between different purchasers . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce. As applied to the present case, the word "commerce" as there used means interstate commerce. Clayton Act, § 1.

The pertinent facts, shortly stated, are—that George Van Camp & Sons Company, the complainant, and the Van Camp Packing Company are both engaged in the business of packing and selling food products in tin cans in interstate commerce. The American Can Company manufactures tin cans used in the food-packing industry and sells such cans to the other two companies and leases to them machines for sealing the cans. It sells to the packing company at a discount of twenty per cent. below the announced standard prices at which it sells cans of the same kind to the complainant; it charges complainant a

* It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided,* That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

fixed rental for the sealing machines, but furnishes them to the packing company free of charge; and it discriminates in other respects. The effect of the discrimination is to substantially lessen competition, and its tendency is to create a monopoly, in the line of interstate commerce in which complainant and the packing company are competitively engaged.

These facts bring the case within the terms of the statute, unless the words "in any line of commerce" are to be given a narrower meaning than a literal reading of them conveys. The phrase is comprehensive and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words "in *any* line of commerce" literally are satisfied. The contention is that the words must be confined to the particular line of commerce in which the discriminator is engaged, and that they do not include a different line of commerce in which purchasers from the discriminator are engaged in competition with one another. In support of this contention, we are asked to consider reports of Congressional committees and other familiar aids to statutory construction. But the general rule that "the province of construction lies wholly within the domain of ambiguity," *Hamilton* v. *Rathbone,* 175 U. S. 414, 419, 421, is too firmly established by the numerous decisions of this Court either to require or permit us to do so. The words being clear, they are decisive. There is nothing to construe. To search elsewhere for a meaning either beyond or short of that which they disclose is to invite the danger, in the one case, of converting what was meant to be open and precise, into a concealed trap for the unsuspecting, or, in the other, of relieving from the grasp of the statute some whom the legislature definitely meant to include. Decisions of this Court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances

apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression or absurdity, *United States* v. *Goldenberg,* 168 U. S. 95, 103, or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole. *Ozawa* v. *United States,* 260 U. S. 178, 194. Nothing of this kind is to be found in the present case. The fundamental policy of the legislation is that, in respect of persons engaged in the same line of interstate commerce, competition is desirable and that whatever substantially lessens it or tends to create a monopoly in such line of commerce is an evil. Offence against this policy, by a discrimination in prices exacted by the seller from different purchasers of similar goods, is no less clear when it produces the evil in respect of the line of commerce in which they are engaged than when it produces the evil in respect of the line of commerce in which the seller is engaged. In either case, a restraint is put upon "the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain." *Federal Trade Comm'n* v. *Beech-Nut Co.,* 257 U. S. 441, 454.

We have not failed carefully to consider *Mennen Co.* v. *Federal Trade Comm'n,* 288 Fed. 774, (followed in *National Biscuit Co.* v. *Federal Trade Comm'n,* 299 Fed. 733), cited as contrary to the conclusion we have reached. The decision in that case was based upon the premise that the statute was ambiguous and required the aid of committee reports, etc., to determine its meaning, a premise which we have rejected as unsound.

Both questions submitted are answered in the affirmative.

*Question No. 1, Yes.*
*Question No. 2, Yes.*

# UNITED STATES *v.* WILLIAMS.

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

No. 104. Argued December 7, 1928.—Decided January 2, 1929.

The Director of the Veterans Bureau has exclusive authority to pass upon all claims for payment of adjusted compensation certificates and his decision is final, unless wholly without evidential support or wholly dependent upon a question of law, or clearly arbitrary or capricious. P. 257.

23 F. (2d) 792, reversed.

CERTIORARI, 277 U. S. 580, to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court dismissing, for want of jurisdiction, a claim against the Government on an adjusted compensation certificate.

*Solicitor General Mitchell,* with whom *Messrs. W. Clifton Stone, Wm. Wolff Smith,* General Counsel, U. S. Veterans Bureau, and *James T. Brady* were on the brief, for the United States.

*Mr. Wm. Kaufman* submitted for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action brought in the federal District Court for the Western District of Pennsylvania to recover upon an adjusted service certificate issued, through the Veterans' Bureau to respondent's husband, under the provisions of the Adjusted Compensation Act, c. 157, 43 Stat. 121, as amended by the act of July 3, 1926, c. 751, 44 Stat. 826. Respondent's petition alleges the issue of the certificate, the death of the veteran, the interest of respondent as beneficiary, the filing of proof of her claim with the Director, and a failure and refusal of the Director to make

payment after demand upon him. A demurrer to the petition was sustained by the district court upon the ground that the case involved a pension claim, in respect of which the courts were expressly denied jurisdiction. The circuit court of appeals held otherwise, and sustained the jurisdiction of the district court on the ground that the certificate embodied an express obligation of the United States. 23 F. (2d) 792. We do not find it necessary to determine whether this view or that of the district court is correct, but dispose of the case upon a ground urged here by the government, but apparently, it is fair to say, not suggested to either court below.

The general administration of the Adjusted Compensation Act is committed to the Director of the Bureau. Under the terms of the original act, the certificate is to be issued by that officer upon certification from the Secretary of War or the Secretary of the Navy. § 501. Application first must be made to the Secretary of War or the Secretary of the Navy, as the case may be, who is authorized to transmit the same together with a certificate setting forth, among other things, the amount of the adjusted service credit. §§ 302 (a), 303 (a), as amended. From a consideration of the whole act it is clear that these officers must pass upon the facts which it is claimed justify the issue of such certificates. Section 310 of the amended act, hereafter quoted, makes it equally clear that their decisions upon these facts are final and conclusive. Section 502 authorizes a bank loan upon the security of an adjusted service certificate. If the loan be not paid at maturity, the note and certificate must be presented to the Director, who in his discretion may pay the claim and adjust the remaining balance with the veteran or his beneficiary. A fund is created in the Treasury of the United States and made available to the Director for payment of adjusted service certificates upon their maturity or the

prior death of the veterans to whom issued, and for payments to banks on account of loans made under § 502. §§ 505–507. Before any certificate can be paid it must, of course, be presented to the Director, who, necessarily, must first decide all relevant matters in respect of the right of the claimant to receive payment.

It is not necessary to go further into particulars. A review of the entire act and the amendments shows, we think, that all questions relating to the right of any person to a certificate, the amount of it, etc., and payments to be made under its terms before or at maturity, are to be determined by the appropriate executive officer as a basis for his action. The effect of the executive determination, if that were otherwise doubtful, is set at rest by the provisions of § 310 of the amended act, which reads:

"The decisions of the Secretary of War, the Secretary of the Navy, and the Director, on all matters within their respective jurisdictions under the provisions of this Act (except the duties vested in them by Title VII) shall be final and conclusive."

Under the provisions of the act, and in the light of the section just quoted, we are of opinion that exclusive authority is vested in the Director of the Bureau to entertain and pass upon all claims for payment of these certificates. It is evident that when a certificate is presented to the Director by one claiming to be the beneficiary that officer must, as a necessary prerequisite to the payment, ascertain and determine that the veteran is dead, that the person claiming payment is in fact the beneficiary, and any other matter of fact or law which may affect the right of the claimant in any given case. We may assume that the Director performed that duty here. The record does not disclose the basis for his action; but whatever it may have been, his decision is final, at least unless it be wholly without evidential support or wholly

dependent upon a question of law or clearly arbitrary or capricious. *Silberschein* v. *United States,* 266 U. S. 221, 225, and cases there cited.

For these reasons the judgment of the circuit court of appeals must be reversed and that of the district court dismissing the petition affirmed.

*It is so ordered.*

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## MISSOURI-KANSAS-TEXAS RAILROAD COMPANY *v.* MARS ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 88. Submitted November 28, 1928.—Decided January 2, 1929.

A state law (Texas, 1925 Revision, Art. 6422) providing that the property and franchises of a railroad when sold within the State and acquired for operation by a new company shall be subject to a lien for the satisfaction of claims for loss of property sustained in the operation of the railroad by the old company, *held* not in conflict with § 20a of the Interstate Commerce Act, which relates exclusively to securities. P. 260.

298 S .W. 271, affirmed.

ERROR to a decree of the Supreme Court of Texas which reversed the Court of Civil Appeals, 294 S. W. 941, in a suit to foreclose a lien on railroad properties acquired by the plaintiff in error after a receiver's sale.

*Messrs. Fred L. Wallace, Charles C. Huff,* and *Joseph H. Barwise* submitted for plaintiff in error.

*Messrs. James A. Templeton* and *Robert L. Carlock* submitted for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The predecessor of plaintiff in error was the Missouri, Kansas and Texas Railway Company of Texas. In 1915, its properties were placed in the hands of a receiver ap-

pointed by the United States court for the northern district of Texas. In 1917, defendants in error obtained a judgment in the district court of Dallas County, Texas, against that company and another carrier on a claim for damages to cattle being transported prior to the appointment of the receiver. The judgment was allowed as an unsecured claim. Pursuant to an order of court, the receiver sold the railroad properties subject, among other things, to claims under Art. 6625 of the 1911 Revised Civil Statutes of Texas (Art. 6422, 1925 Revision). The purchasers and their associates organized plaintiff in error and transferred to it the railway properties aforesaid, and that company continued to operate them in the service of the public as a common carrier. Defendants in error brought this suit to recover from plaintiff in error the amount remaining unpaid and to have foreclosed a lien therefor which they claimed to have under Art. 6625 upon the railroad properties so acquired. Plaintiff in error maintained that the state statute is repugnant to § 20a of Interstate Commerce Act, U. S. C., Tit. 49. The district court adjudged defendants in error entitled to recover, held the claim to be within the purview of Art. 6625 and a lien upon the railroad properties, and decreed foreclosure. The court of civil appeals reversed. The supreme court reversed the latter and in all things affirmed the decree of the district court. The case is here under § 237 (a), Judicial Code.

The pertinent parts of Art. 6625 follow: "In case of a sale of the property and franchises of a railroad company within this State the purchaser . . . and associates . . . may form a corporation . . . for the purpose of acquiring, owning, maintaining and operating the road so purchased . . .; and, when such charter has been filed, the new corporation shall have the powers and privileges then conferred by the laws of this State upon chartered railroads . . . The property and franchises so purchased

shall be charged with and subject to the payment of all subsisting liabilities and claims for death and personal injuries . . . for loss of and damage to the property sustained in the operation of the railroad by the sold out company . . . and for the current expenses of such operation."

The provisions of § 20a relied on by plaintiff in error are: Paragraph (2). "It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability . . . in respect of the securities of any other person . . . even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that . . . the [Interstate Commerce] Commission by order authorizes such issue or assumption." Paragraph (7) declares the jurisdiction of the Commission shall be exclusive and plenary. Paragraph (11) provides that any security issued or assumed without or contrary to the authorization of the Commission shall be void. It makes the carrier, directors and officers, who participate in such unauthorized issue or assumption liable for the damage sustained by one purchasing any such security without notice, and prescribes penalties for violations.

Plaintiff in error does not contend that the claim of the defendants in error is not covered by the terms of Art. 6625 or that, considered without regard to § 20a, it would not be effective to charge the property. The purpose of that article is to subject the property of the railroad to payment of claims of the classes specified and to prevent their defeat by a transfer of the property. And clearly § 20a relates exclusively to securities. It regulates those to be issued by the carrier and its assumption of liability or obligation in respect of those issued by others. And it declares the consequences to follow violations of the re-

quirements prescribed. It does not in any manner relate to liability for, or the payment of, claims specified in Art. 6625. Its field of operation is wholly distinct from that covered by the state enactment.

It requires no discussion or citation of authority to show that there is no conflict between Art. 6625 and the provisions of § 20a of the Interstate Commerce Act referred to. The contention of plaintiff in error is without merit.

*Decree affirmed.*

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## INTERNATIONAL SHOE COMPANY *v.* PINKUS ET AL.

ERROR TO THE SUPREME COURT OF ARKANSAS.

No. 12. Argued April 11, 1928. Reargued October 22, 1928.—Decided January 2, 1929.

1. A State is without power to make or enforce any law governing bankruptcies that impairs the obligations of contracts or extends to persons or property outside its jurisdiction, or conflicts with the national bankruptcy laws. P. 263.
2. The fact that an insolvent has received a discharge in voluntary bankruptcy proceedings within six years and, under § 14 of the Bankruptcy Act, may not receive a new one, does not preclude the filing of a new voluntary petition. P. 264.
3. The plain purpose of the Bankruptcy Act to establish uniformity necessarily excludes state regulation of the subject matter, whether interfering with the Act or complementary, additional or auxiliary. P. 265.
4. After plaintiff had recovered judgment on a debt, the debtor obtained from a state court a decree adjudging him insolvent and appointing a receiver to take and distribute his property under a state law (Arkansas, Crawford & Moses Digest, c. 93), which provides for surrender by an insolvent of all his unexempt property to be liquidated by a trustee for the payment of his debts under direction of the court, for classification of creditors and payment of their claims in a prescribed order, and for giving preference to those fully discharging the debtor in consideration of *pro rata* distribution. Plaintiff, being unable to seek relief in bank-

ruptcy because its claim was under $500.00 and all other creditors had joined in the state court proceedings, sued in that court to satisfy the judgment from the funds held by the receiver, but was denied relief upon the ground that the insolvency proceedings were not in conflict with the Bankruptcy Act, as plaintiff alleged, but were the same in effect as an assignment for the benefit of creditors.

*Held* that the state law is an insolvency law superseded by the Bankruptcy Act at least insofar as it relates to the distribution of property and releasing of claims, and that plaintiff was entitled to have its judgment paid out of the funds in the hands of the receiver. *Boese* v. *King*, 108 U. S. 379, distinguished. Pp. 264, 266. 173 Ark. 316, reversed.

ERROR to a decree of the Supreme Court of Arkansas affirming the action of the Chancery Court in dismissing a bill to enforce payment of a judgment out of funds in the hands of a receiver appointed in a proceeding under the Arkansas insolvency law.

*Mr. J. D. Williamson,* with whom *Messrs. O. C. Burnside* and *W. G. Streett* were on the brief, for plaintiff in error.

*Mr. Lamar Williamson* submitted for defendants in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In an action in the common pleas court of Chicot County, Arkansas, August 24, 1925, plaintiff in error obtained judgment against Pinkus for $463.43. The debtor was an insolvent merchant doing business in that county. He had 46 creditors; his debts amounted to more than $10,000, and his assets were less than $3,000. On the day judgment was entered, the insolvent, invoking c. 93 of Crawford and Moses' Digest, commenced a suit in the chancery court of that county praying to be adjudged insolvent and for the appointment of a receiver to take and distribute his property as directed by that statute.

On the same day, the court adjudged him insolvent and appointed a receiver, with directions to take the property and liquidate it and direct creditors to make proof of their claims "with the necessary stipulation that they will participate in the proceeds in full satisfaction of their demands." And, in pursuance of the statute, the court ordered the receiver, after the expiration of 90 days, first to pay costs, next salaries earned within 90 days, then "the claims of those who have duly filed their claims with the above stipulation, if enough funds are in your hands to pay the same, and lastly . . . to pay any and all other claims of creditors, or so much as the funds . . . will pay, all creditors of the same class receiving an equal percentage of the funds." The receiver sold the property for $2659, and gave Pinkus $500 as his exemption. The court allowed $250 as compensation for the receiver.

November 18, 1925, plaintiff in error caused execution to issue for collection of the judgment. The sheriff, being unable to find property on which to levy, returned the writ unsatisfied. Thereupon, plaintiff in error brought this suit. The complaint alleged the facts aforesaid, asserted that c. 93 had been superseded and suspended by the passage of the Bankruptcy Act, and prayed that the judgment be paid out of the funds in the hands of the receiver. The chancery court overruled the contention, held that the complaint failed to state a cause of action, and dismissed the case. Its judgment was affirmed by the highest court of the State. 173 Ark. 316. The case is here under § 237 (a), Judicial Code.

The question is whether, in the absence of proceedings under the Bankruptcy Act, what was done in the chancery court protects the property in the hands of the receiver from seizure to pay the judgment held by plaintiff in error.

A State is without power to make or enforce any law governing bankruptcies that impairs the obligation of

contracts or extends to persons or property outside its jurisdiction or conflicts with the national bankruptcy laws. *Sturges* v. *Crowninshield,* 4 Wheat. 122. *Ogden* v. *Saunders,* 12 Wheat. 213, 369. *Baldwin* v. *Hale,* 1 Wall. 223, 228, *et seq.* *Gilman* v. *Lockwood,* 4 Wall. 409. *Denny* v. *Bennett,* 128 U. S. 489, 497–498. *Brown* v. *Smart,* 145 U. S. 454, 457. *Stellwagen* v. *Clum,* 245 U. S. 605, 613.

The Arkansas statute is an insolvency law. It is so designated in its title (Acts of Arkansas, 1897) and in the revision. C. 93, *supra.* The supreme court of the State treats it as such. *Hickman* v. *Parlin-Orendorff Co.,* 88 Ark. 519. *Baxter County Bank* v. *Copeland,* 114 Ark. 316, 322. *Morgan* v. *State,* 154 Ark. 273, 279, 281. This case, 173 Ark. 316. *Friedman & Sons* v. *Hogins,* 175 Ark. 599. It provides for surrender by insolvent of all his unexempt property (§ 5885) to be liquidated by a trustee for the payment of debts under the direction of the court. It classifies creditors, prescribes the order of payment of their claims and gives preference to those fully discharging the debtor in consideration of pro rata distribution (§ 5888). *Mayer* v. *Hellman,* 91 U. S. 496, 502. *Stellwagen* v. *Clum, supra.* *Segnitz* v. *Garden City Co.,* 107 Wis. 171. *In re Weedman Stave Co.,* 199 Fed. 948, and cases cited.

The state enactment operates within the field occupied by the Bankruptcy Act. The insolvency of Pinkus was covered by its provisions. He could have filed a voluntary petition. His application to the state court for the appointment of a receiver was an act of bankruptcy, § 3(a), U. S. C., Tit. 11, § 21(a); and, at any time within four months thereafter, three or more creditors having claims amounting to $500 or over could have filed an involuntary petition. § 59(b), U. S. C., Tit. 11, § 95(b). We accept the statement made in the brief submitted on behalf of Pinkus that he had been discharged in voluntary proceedings within six years prior to the filing of the petition in the chancery court. Therefore he could

not have obtained discharge under the Bankruptcy Act, § 14, U. S. C., Tit. 11, § 32, and, in proceedings under that Act, all his creditors would have been entitled to participate in distribution without releasing the insolvent as to unpaid balances.

The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. Constitution, Art. I, § 8, cl. 4. The purpose to exclude state action for the discharge of insolvent debtors may be manifested without specific declaration to that end; that which is clearly implied is of equal force as that which is expressed. *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147, 150, *et seq. Erie R. R. Co.* v. *Winfield,* 244 U. S. 170. *Savage* v. *Jones,* 225 U. S. 501, 533. The general rule is that an intention wholly to exclude state action will not be implied unless, when fairly interpreted, an Act of Congress is plainly in conflict with state regulation of the same subject. *Savage* v. *Jones, supra. Illinois Central R. R. Co.* v. *Public Utilities Comm'n,* 245 U. S. 493, 510. *Merchants Exchange* v. *Missouri,* 248 U. S. 365. In respect of bankruptcies the intention of Congress is plain. The national purpose to establish uniformity necessarily excludes state regulation. It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national Act is in force. Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations. *Prigg* v. *Pennsylvania,* 16 Pet. 539, 617, 618. *Northern Pacific Ry.* v. *Washington,* 222 U. S. 370, 378, *et seq.*

*St. Louis, Iron Mt. & S. Ry.* v. *Edwards,* 227 U. S. 265. *Erie R. R. Co.* v. *New York,* 233 U. S. 671, 681, *et seq. New York Central R. R. Co.* v. *Winfield, supra. Erie R. R. Co.* v. *Winfield, supra. Oregon-Washington Co.* v. *Washington,* 270 U. S. 87, 101. It is clear that the provisions of the Arkansas law governing the distribution of property of insolvents for the payment of their debts and providing for their discharge, or that otherwise relate to the subject of bankruptcies, are within the field entered by Congress when it passed the Bankruptcy Act, and therefore such provisions must be held to have been superseded. In *Boese* v. *King,* 108 U. S. 379, this Court, referring to the effect of the national Act upon a state insolvency law similar to the Arkansas statute under consideration, said (p. 385): "Undoubtedly the local statute was, from the date of the passage of the Bankrupt Act, inoperative in so far as it provided for the discharge of the debtor from future liability to creditors who came in under the assignment and claimed to participate in the distribution of the proceeds of the assigned property." And see *Foley-Bean Lumber Co.* v. *Sawyer,* 76 Minn. 118. *Parmenter Manufacturing Co.* v. *Hamilton,* 172 Mass. 178. *In re Bruss-Ritter Co.,* 90 Fed. 651

In the opinion of the state supreme court, it is said that the effect of the proceedings in the chancery court was the same as if the insolvent had made an assignment for the benefit of his creditors. But the property was not handed over simply for the purpose of the payment of debts as far as it would go; it was transferred pursuant to a statute and decree imposing conditions intended to secure the debtor's discharge. As its claim was less than $500, plaintiff in error could not invoke the jurisdiction of the bankruptcy court without coöperation of other creditors. It was shown by insolvent's petition that his property was less than one-third of his debts. The amount remaining

after deducting his exemption and the costs was not sufficient to pay 20 per cent. of the claims. All creditors except plaintiff in error agreed fully to release insolvent in consideration of the distribution directed by the decree. And, as their claims were much in excess of the fund, plaintiff in error could have obtained nothing on account of its claim without giving insolvent a full release.

The decision below is not supported by *Boese* v. *King, supra.* In that case there was an assignment under the New Jersey insolvency law. Some years later creditors obtained judgment against the assignor in New York. A receiver appointed in supplementary proceedings sued the assignees in New York to compel payment of the judgment out of funds they had on deposit there. The highest court of the State denied relief, and the case was brought here on writ of error. This Court held that the assignment was sufficient to pass title; and, as the Bankruptcy Act had superseded the New Jersey insolvency law, all the creditors were entitled unconditionally to share in pro rata distribution. The receiver was held not entitled to recover because the judgment creditors could have secured equal distribution by the institution of bankruptcy proceedings, but instead they waited until after the expiration of the time allowed for that purpose, and then by the New York suit sought to obtain preference and full payment. In the course of the opinion, it is said (p. 386): "It can hardly be that the court is obliged to lend its aid to those who, neglecting or refusing to avail themselves of the provisions of the act of Congress, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure." The case now before us is essentially different. Plaintiff in error could not invoke jurisdiction of the bankruptcy court. The insolvent commenced proceedings under the Arkansas insolvency law on the day that judgment was

obtained against him. His purpose was to delay plaintiff in error and to secure full releases as provided by the statute. The state court did not treat the proceedings under the state law as a transfer of insolvent's property for unconditional distribution as was done in *Boese* v. *King*. On the contrary, the decree was the same as if the Bankruptcy Act had not been passed, and the court held that, without giving any effect to the statute, the insolvent by what was done in the chancery court could compel the same distribution and obtain for himself the same advantages as were contemplated by the insolvency law. We are of opinion that the proceedings in the chancery court cannot be given that effect. The enforcement of state insolvency systems, whether held to be in pursuance of statutory provisions or otherwise, would necessarily conflict with the national purpose to have uniform laws on the subject of bankruptcies throughout the United States.

As all the proceedings were had under the Arkansas insolvency law, we need not decide whether, independently of statute, an assignment for the benefit of creditors on the conditions specified in the decree would protect the property of the insolvent from seizure to pay the judgment. And, as the passage of the Bankruptcy Act superseded the state law, at least insofar as it relates to the distribution of property and releases to be given, plaintiff in error is entitled to have its judgment paid out of the fund in the hands of the receiver.

*Decree reversed.*

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS and MR. JUSTICE SANFORD are of opinion that the decree should be affirmed.

Syllabus.

# UNITED STATES ET AL. *v.* MISSOURI PACIFIC RAILROAD COMPANY.

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

No. 19. Argued March 5, 6, 1928. Reargued April 24, and November 19, 20, 1928.—Decided January 2, 1929.

1. An order of the Interstate Commerce Commission requiring a railroad carrier to participate in proposed through routes exceeds the authority granted by paragraph (3) of § 15 of the Interstate Commerce Act as restricted by paragraph (4), where the part of the carrier's railroad to be included is slight in length as compared with other parts over which it enjoys long hauls under existing routes between termini the same as those proposed.

   So *held* where existing routes were not found unreasonably long and where neither § 3 of the Act nor water transportation was involved. P. 276.
2. The provision of paragraph (4) forbidding the Commission to embrace in a through route substantially less than the entire length of a carrier's railroad which lies between the termini of such route can not be construed as covering only such routes as will deprive the carrier of its long haul after it has obtained possession of the traffic. P. 277.
3. Where the language of a statute is plain and unambiguous, there is no room for construction. Even if inconveniences or hardships result from following the statute as written, construction may not be substituted for legislation to relieve them. P. 277.
4. Where the language of a statute is clear and does not lead to absurd or impracticable consequences, its legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. P. 278.
5. The reasons for, and significant circumstances leading up to the enactment may, however, be noticed in confirmation of the meaning conveyed by the words used. P. 278.
6. The rule that re-enactment of a statute after it has been construed by officers charged with its enforcement impliedly adopts the construction, applies only when the construction is not plainly erroneous and to cases presenting the precise conditions passed on prior to the re-enactment. P. 279.
7. The rule attaching weight to a definitely settled administrative construction is inapplicable where the statute is not doubtful; and

if the construction has not been uniform, it will be taken into account only to the extent that it is supported by valid reasons. P. 280.

21 F. (2d) 351, affirmed.

APPEAL from a decree of a District Court of three judges permanently enjoining the enforcement of an order of the Interstate Commerce Commission establishing through routes and joint rates. The suit was brought against the United States by the above-named Railroad. The Commission and Ft. Smith, Subiaco and Rock Island Railroad intervened to defend. All parties defendant appealed.

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

Section 15 (3) and (4) was designed to empower the Commission to create new through routes and joint rates pursuant to a previous policy declared by Congress in its action in striking from § 15 the words, "provided no reasonable or satisfactory through route exists," after the decision in *Interstate Commerce Comm'n* v. *Northern Pacific,* 216 U. S. 538.

The limitation prescribed in paragraph (4) was not intended to submerge the provisions of paragraph (3) of § 15. The Court will give force and effect to each and every part of the statute.

Missouri Pacific's claim that the newly-established route "short-hauls" it, is groundless, for the simple reason that Missouri Pacific does not operate through that gateway and its main line is not part of "such proposed through route." Its much emphasized main line from Memphis to Ft. Smith lies many miles north of the Subiaco line, with a river intervening and impassable roads which leave the population of the community and the 54 miles of railroad of the Subiaco line utterly without any through routes and joint rates on westbound interstate transportation. Missouri Pacific secures the haul

on such part of its line as is embraced in "such proposed through route," that is to say, its branch from Paris to Ft. Smith; and, of course, from Ft. Smith to Kansas City, and other points beyond Ft. Smith to which it may operate its line. Traffic moving from territory east of the Mississippi River may never come into possession of Missouri Pacific until it reaches Paris.

The order covers westbound traffic only. Not acquiring the traffic at either Memphis or Ft. Smith and, if it did acquire it, not being able to handle it through the region which is served by the Subiaco line, Missouri Pacific is not in a position to make the claim that it is "short-hauled." For many years the Commission has construed the clause to mean that possession of the traffic is essential to maintain the long haul; *a fortiori,* inability to handle the traffic over "such proposed through route" by its main line and never acquiring possession of the traffic until it reaches Paris puts it beyond the power of Missouri Pacific to complain that by the new route it is "short-hauled."

The opinion and decree of the District Court failed to give force and effect to the statute in accordance with the views expressed by this Court in a series of cases which emphasize the provisions of the Interstate Commerce Act that competition among carriers shall be preserved as fully as possible.

*Mr. Daniel W. Knowlton,* with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

Section 15 (4) does not except from the mandate laid upon the Commission by § 15 (3) to establish through routes desirable in the public interest, all through routes which short-haul a carrier, but only those which deprive the carrier of its long haul after it has obtained possession of the traffic thereunder.

An interpretation of paragraph (4) permitting "carriers not yet in possession" as well as "carriers in possession" of the traffic to refuse to join in through routes that do not embrace their long-hauls, would, when applied to the railroad situation on the ground, leave it open for the frequently conflicting long-haul interests of those two classes of carriers to shut off through routes altogether between many shipping and marketing points.

A construction that could result in depriving shippers between particular points of any through route is contrary to the clear intent of the particular paragraph that some practicable through route shall be in existence or open to establishment in all cases.

A construction that could result in depriving shippers betwen particular points of any through route is likewise opposed to the trend of the Act's amendments progressively enlarging the Commission's authority to compel closer coördination of the carriers in rendering an efficient joint service.

Resort to extraneous considerations, rendered permissible by the latent ambiguity disclosed in, or attributed to, the paragraph by the interpretation of the lower court, shows that the exception should be construed as permitting "carriers in possession" only to refuse to join in through routes that do not embrace their long hauls.

That the exception is applicable only to "carriers in possession" is shown by the explanatory statement of the Senate's Interstate Commerce Committee when presenting it as an amendment to the House Bill, and that construction as given to it by a long line of Commission decisions has been impliedly sanctioned by the reënactment of the statute without alteration in the particulars construed.

Such scope as may be given the restriction will operate as an exception, not alone to paragraph (3) but also to the outstanding purpose of the Transportation Act to promote

a generally effective transportation service. Therefore the exception should be narrowly construed to render it, so far as possible, compatible with that outstanding purpose. The Commission's construction is less repugnant to the many interrelated provisions of the amended Act evidencing that purpose.

*Mr. James B. McDonough* for the Ft. Smith, Subiaco & Rock Island Railroad Company.

*Mr. H. H. Larimore,* with whom *Messrs. Edw. J. White* and *Thos. B. Pryor* were on the brief, for appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

On complaint of the Fort Smith, Subiaco and Rock Island Railroad Company, called the "Subiaco," against the Missouri Pacific Railroad Company and 353 other carriers by rail, the Interstate Commerce Commission made an order establishing through routes for westbound freight traffic over the Subiaco. The Missouri Pacific brought this suit against the United States to set aside the order. U. S. C., Tit. 28, §§ 46, 48. The Interstate Commerce Commission and the Subiaco intervened. § 212, Judicial Code. The District Court, composed of three judges, (U. S. C., Tit. 28, § 47) held that the Commission was without power to establish the routes and entered its decree granting the relief prayed. The United States and the intervenors join in this appeal. § 47, *supra.*

The sole question is whether the Commission is authorized by the Interstate Commerce Act to establish the routes complained of.

Paragraph (3) of § 15 provides: "The Commission may, and it shall, whenever deemed by it to be necessary or desirable in the public interest . . . establish through routes . . . applicable to the transportation of . . . property . . ." Paragraph (4) of that section provides: "In

establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad . . . which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established. . . ." U. S. C., Tit. 49.

The entire line of the Subiaco is in Arkansas. It is 40 miles long and extends from Paris, where it connects with a branch line of the Missouri Pacific, easterly to Dardanelle, where it meets a branch of the Chicago, Rock Island and Pacific Railway Company, extending southerly 14 miles to junction with the east and west main line of that company at Ola. The Subiaco has not been able to earn dividends, and has long sought to increase earnings by having its line made a part of through routes for interstate traffic not beginning or ending thereon.

In a proceeding initiated by the Subiaco against the Arkansas Central, whose line later became the Paris branch of the Missouri Pacific, the Commission, February 12, 1924, declared that such routes would be in the public interest, but dismissed the case for lack of proper parties defendant. 87 I. C. C. 617. The Subiaco filed a new complaint that alleged need of more revenue to enable the company to continue operations and prayed for the establishment of through westbound routes via Little Rock, Ola, Dardanelle and Paris. The Commission, Division 4, October 23, 1925, found that the company was earning a surplus over operating expenses and taxes and that on the showing there was no ground for abandonment of the line. The report shows that traffic to move over the proposed route must come from other carriers; that the Missouri Pacific, then probably not earning a fair

return, would be the principal loser, and that revenue diverted from it would largely exceed the amount that would go to the Subiaco. The Division reversed the earlier finding and dismissed the complaint. 102 I. C. C. 708. The case was reopened and upon further consideration the Commission, March 2, 1926, one of its members dissenting and two others not participating, found the proposed route desirable in the public interest, and made the order here in controversy. 107 I. C. C. 523.

It directs defendants to establish and maintain through routes westbound over the Subiaco via Ola, Dardanelle and Paris between points of origin and destination named in certain tariffs, which include places between which lie certain lines of the Missouri Pacific. The order contains a proviso: "That this order shall not be construed as requiring any defendant to participate in any through route . . . which would require it to surrender possession of traffic which it has originated or received from a connecting carrier to another carrier for transportation over a route which embraces less than the entire length of such defendant's railroad . . . which lies between the termini of such route."

The Missouri Pacific has a main line that extends from Little Rock to Fort Smith and points west. It also has lines connecting Little Rock with Mississippi River crossings at East Saint Louis, Saint Louis, Cairo, Memphis, Natchez and New Orleans. Thus, that company provides routes for traffic originating at these places and also a link in through routes for traffic originating east of the Mississippi on other lines and moving through these gateways to Fort Smith, points on the Paris branch, or points on or reached by its line extending west from Fort Smith. In each of the existing routes, the Missouri Pacific has the haul from the Mississippi to Fort Smith and points on its lines extending through that place.

There is no finding that any of these routes is too long or that the traffic covered by the order would be handled more advantageously over the proposed route. The situation in respect of all may be illustrated by the route from or via Memphis to Fort Smith and beyond. Memphis is on the east bank of the Mississippi, about due east from Little Rock, which is at the geographical center of Arkansas. Fort Smith is near and some distance north of the middle of the west boundary of the State. The order would compel the Missouri Pacific to use its Paris branch to establish a route to compete with those in which it has much longer hauls. The new route would give it a haul not more than the length of the Paris branch as against those over its lines from its Mississippi gateways to or beyond Fort Smith. Its haul from Memphis to Fort Smith is 308 miles.

The main line of the Rock Island extends from Memphis to Little Rock, thence a little south of west via Ola to points west of Arkansas. Its rails do not extend to Fort Smith, but its traffic reaches that place via Mansfield and also via Wister over the lines of the Saint Louis-San Francisco Railway and also via Howe over the Kansas City Southern Railway. There is no suggestion that the proposed through route is the only one available to shippers or that without it they would be limited to lines of the Missouri Pacific for transportation from Memphis or from its other Mississippi gateways to Fort Smith. Under the order complained of, the Rock Island would haul 222.3 miles from Memphis to Dardanelle, the Subiaco 40.3 miles from Dardanelle to Paris, and the Missouri Pacific 46.1 miles from Paris to Fort Smith. Thus the route ordered gives the Missouri Pacific a haul of only 46 miles, while the existing route gives it 308.

The Act does not give the Commission authority to establish all the through routes it may deem necessary or desirable in the public interest. The general language

of paragraph (3) is limited by paragraph (4). The latter lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. The purpose is to protect the long haul routes of carriers. It is clear that, within the meaning of paragraph (4), the mileage of the Missouri Pacific between its Mississippi River crossings and Fort Smith lies between the termini of all routes through or from such gateways westbound over the line of the Subiaco. The existing routes include these Missouri Pacific lines and give that company long hauls as compared with the length of the Paris branch. The latter is the only line of the company included in the Subiaco route. The order is plainly repugnant to the rule prescribed by that paragraph. And, as neither § 3 nor water transportation is involved and existing routes were not found unreasonably long, the proposed route is not within the exceptions specified in that paragraph.

The appellants oppose the application of paragraph (4) according to its terms and insist that it should not be construed to cover all routes which short haul the carrier, but only those which deprive the carrier of its long haul after it has obtained possession of the traffic. The proviso contained in the order, reflecting that view, falls far short of protecting the carrier's long haul routes as contemplated by paragraph (4). The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved

by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation. *United States* v. *Wiltberger,* 5 Wheat, 76, 95-96. *United States v. Fisher,* 2 Cranch 358, 386. *Lake County* v. *Rollins,* 130 U. S. 662, 670. *Caminetti* v. *United States,* 242 U. S. 470. *Ex parte Public National Bank, ante,* p. 101. *United States* v. *Colorado & N. W. R. Co.,* 157 Fed. 321, 327.

Appellants seek to support the view for which they contend by some of the legislative history of the enactment and especially by explanatory statements made by Senator Elkins in connection with the report of the majority of the Senate committee submitting the bill for the Act in question. Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. *United States* v. *Freight Ass'n,* 166 U. S. 290, 325. *Pennsylvania R. R.* v. *International Coal Co.,* 230 U. S. 184, 199. *Mackenzie* v. *Hare,* 239 U. S. 299, 308. *Caminetti* v. *United States, supra,* 490.

But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used. *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 19, 21. *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 333. *Northern Pacific Ry.* v. *Washington,* 222 U. S. 370, 380. *Mc-*

*Lean* v. *United States,* 226 U. S. 374, 381. Appellants' construction is not supported by the legislative history, reference to which is printed in the margin,* but, all essential parts considered, it strengthens the conclusion that the words used express the purpose intended to be given effect.

And appellants assert that the Commission in a long line of decisions has held that the rule declared in paragraph (4) applies only to traffic in possession of the carriers, and they argue that this construction was impliedly sanctioned by the inclusion of the provision without alteration in Transportation Act, 1920. But the rule that re-

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* See:

Sec. 4, Act of June 29, 1906, 34 Stat 589, in force until the enactment of paragraph (4) of § 15 here involved.

*Northern Pacific Ry.* v. *Interstate Commerce Commission,* decided in U. S. Circuit Court for Minnesota, June 5, 1909, affirmed in this Court, March 7, 1910. 216 U. S. 538.

Report of Interstate Commerce Commission, Dec. 21, 1909, House Documents, Vol. 111, No. 148, pp. 7, 38.

President's Special Message, Jan. 7, 1910. Messages and Papers of the Presidents, Vol. X, pp. 7821, 7826.

Statement in behalf of Interstate Commerce Commission by its Chairman, Honorable Martin A. Knapp. Hearing on S. 3776 and 5106, 61st Congress, 2nd Session, p. 205, found in: Hearings before Senate Committee on Interstate Commerce, 1906–12, vol. 15, Various Subjects. Also his statement before Committee on Interstate and Foreign Commerce, House of Representatives, printed in Hearings on Bills affecting Interstate Commerce, part 20, 1910, pp. 1174, 1178.

Statement of Senator Elkins above referred to. Congressional Record, 61st Congress, 2nd Session, pp. 3475 and 3476.

In connection with the re-enactment of § 15 (4) in Transportation Act, 1920, see:

Statement of Mr. Ben B. Cain, Vice President, American Short Line Association, before House of Representatives Committee on Interstate and Foreign Commerce. Hearings, 1919–1920, "Return of Railroads to Private Ownership." Vol. 232–3, pp. 1860, 1880. Also statement of Honorable Edgar E. Clark, member of the Interstate Commerce Commission, pp. 2857, 2868, *et seq.*

enactment of a statute after it has been construed by officers charged with its enforcement impliedly adopts the construction applies only when the construction is not plainly erroneous and to cases presenting the precise conditions passed on prior to the re-enactment. *New Haven R. R.* v. *Interstate Commerce Comm'n,* 200 U. S. 361, 401. The rule has no application in this case because, the decisions by the Commission do not show that it had given paragraph (4) the limited effect claimed by appellants; the order here involved conflicts with that provision; and, if any prior decision of the Commission held that the Act empowered it to establish a through route substantially like the one under consideration, that construction was plainly erroneous and did not attach to or become a part of the provision re-enacted.

Appellants also claim that decisions by the Commission before and since the re-enactment established a settled interpretation which should be given controlling weight in support of the order in question. It has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such construction will not be disturbed except for cogent reasons. See e. g. *Logan* v. *Davis,* 233 U. S. 613, 627. But the court is not bound by a construction so established. *Chicago &c. Ry. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97, 99. *United States* v. *Dickson,* 15 Pet. 141, 161. The rule does not apply in cases where the construction is not doubtful. And if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons. *Brown* v. *United States,* 113 U. S. 568, 571. *Merritt* v. *Cameron,* 137 U. S. 542, 551–552. *United States* v. *Alabama Railroad Co.,* 142 U. S. 615, 621. *United States* v. *Healey,* 160 U. S. 136, 145. *Studebaker* v. *Perry,* 184 U. S. 258, 268. *Houghton* v. *Payne,* 194 U. S. 88, 99.

Moreover, after careful consideration of the Commission's decisions, aided by elaborate arguments of counsel, we are unable to find that there has been established any settled interpretation of paragraph (4) in respect of the question presented here. Most of the cases cited differ widely from this one. Some decisions oppose the construction for which appellants contend. *C. & C. Traction Co.* v. *B. & O. S. W. R. R. Co.,* 20 I. C. C. 486. *Investigation of Alleged Unreasonable Rates on Meats,* 23 I. C. C. 656. *Chamber of Commerce* v. *N. Y. C. & H. R. Co.,* 24 I. C. C. 55. *Hayden Bros. Corp'n* v. *D. & S. L. R. R.,* 39 I. C. C. 94, 104. This case before Division 4, 102 I. C. C. 708. *Wilgus* v. *P. R. R. Co.,* 113 I. C. C. 617. Many deal only with the right of the original or initiating carrier to have its long haul of traffic in possession and in through routes in which its line is included, and give no support to the contention that intermediate and delivering carriers are not within the protection of paragraph (4). Appellants rely on *Waverly Oil Works Co.* v. *P. R. R. Co.,* 28 I. C. C. 621, and consider it the leading case and foundation of the line of decisions on which they rely. In that case, there was complaint against charges exacted for switching to and from industries on the Pennsylvania Railroad in Pittsburgh when the shipper desired to move its traffic from that place over other lines. The Commission did not fix such charges, but held that it had power to establish joint rates from any point on such terminals, where traffic was received by the Pennsylvania, to a point on any connecting line and vice versa. In the course of its report, the Commission illustrated the practical application of the statute where a through route is made up of two overlapping lines. It is manifest that, without back hauling, each could not have its long haul. And that was shown by a diagram in the report. P. 630. The Commission held that in such circumstances the carrier that initiates and has possession of the traffic is entitled

to its long haul and, by way of example, pointed out that the Pennsylvania would have the long haul on traffic originating on its terminals in Pittsburgh destined to a point on the Baltimore & Ohio terminals in Baltimore, and that the latter would have the long haul on traffic originating on its terminals at Baltimore and destined to a point on the Pennsylvania terminals at Pittsburgh. Plainly, that case is not similar to this. The construction for which appellants contend is indicated in these cases. First case in this controversy, 87 I. C. C. 617. *Flory Milling Co.* v. *C. N. E. Ry. Co.*, 93 I. C. C. 129. This case, 107 I. C. C. 523. *Port of New York Authority* v. *A. T. & S. F. Ry. Co.*, 144 I. C. C. 514. *Stickell & Sons* v. *W. M. Ry. Co.*, 146 I. C. C. 609.

Analysis of the decisions in detail is not necessary and would not be justified. It is enough to say that they have not been uniform and do not establish any settled interpretation that is applicable here. The construction of paragraph (4) in this case is free from doubt.

*Decree affirmed.*

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## BOTANY WORSTED MILLS *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 31. Submitted April 23, 1928. Argued November 20, 1928.—Decided January 2, 1929.

1. No compromise of tax claims is authorized by § 3229 Rev. Stats. which is not assented to by the Secretary of the Treasury. P. 288.
2. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. P. 289.
3. The taxpayer filed a return of its net income for 1917 under the Revenue Act of 1916, and paid a tax computed on the basis of this return. An audit of the taxpayer's books disclosed the necessity of an additional assessment, and after much correspondence and numerous conferences with subordinate officials of the Bureau of

Internal Revenue, an amended return, based upon the figures agreed upon in the conferences, was filed by the taxpayer and an additional assessment made on the basis of the amended return. The Secretary of the Treasury did not consent to this settlement and no opinion of the Solicitor of Internal Revenue was filed in the office of the Commissioner. The taxpayer paid the additional tax and then sued to recover part of it back as having been illegally collected. *Held:*

(1) That the informal settlement did not constitute a binding agreement. P. 289.

(2) That the taxpayer was not estopped by the settlement from recovering any portion of the tax to which it might otherwise have been entitled. *Id.*

4. In a suit to recover taxes alleged to have been illegally collected, the burden of proving the illegality rests upon the taxpayer. *Id.*
5. Extraordinary, unusual and extravagant amounts paid by a corporation to its officers in the guise and form of compensation for their services, but having no substantial relation to the measure of their services and being utterly disproportioned to their value, are not in reality payment for services, and cannot be regarded as "ordinary and necessary expenses" within the meaning of § 12a of the Revenue Act of 1916. P. 292.
6. Such amounts do not become part of the "ordinary and necessary expenses" merely because the payments are made in accordance with an agreement between the taxpayer and its officers. *Id.*
7. Where the Court of Claims does not make a finding upon the ultimate question of fact upon which the rights of the parties depend, but merely makes findings as to subsidiary circumstantial facts which bear upon it, such findings will not support a judgment unless the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference and may be held to result as a conclusion of law. P. 290.

63 Ct. Cls. 405, affirmed.

CERTIORARI, 276 U. S. 611, to a judgment of the Court of Claims dismissing a suit to recover taxes alleged to have been illegally collected.

*Mr. Nathan A. Smyth* for petitioner.

*Solicitor General Mitchell* for the United States.

A brief on behalf of *Mr. A. G. Lacy,* as *amicus curiæ,* was filed by special leave of Court on motion of the Solicitor General.

Mr. Justice Sanford delivered the opinion of the Court.

The Botany Worsted Mills, a New Jersey corporation engaged in the manufacture of woolen and worsted fabrics, made a return of its net income for the taxable year 1917 under the Revenue Act of 1916 [1] and the War Revenue Act of 1917.[2] By § 12(a) of the Revenue Act it was provided that in ascertaining the net income of a corporation organized in the United States there should be deducted from its gross income all "the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties." Under this provision the Mills deducted amounts aggregating $1,565,739.39 paid as compensation to the members of its board of directors, in addition to salaries of $9,000 each. It paid an income tax computed in accordance with this return. Thereafter, in 1920, the Commissioner of Internal Revenue assessed an additional income tax against it. Of this, $450,994.06 was attributable to his disallowance of $783,656.06 of the deduction claimed as compensation paid to the directors, on the ground that the total amount paid as compensation was unreasonable and the remainder of the deduction as allowed represented fair and reasonable compensation. The Mills, after paying the additional tax, filed a claim for refund of this $450,994.06. The claim was disallowed; and the Mills thereafter, in September 1924, by a petition in the Court of Claims sought to recover this sum from the United States, with

[1] 39 Stat. 756, c. 463. [2] 40 Stat. 300, c. 63.

interest—alleging that the disallowance of part of the compensation paid the directors was illegal.[3] After a hearing on the merits the court, upon its findings of fact, dismissed the petition upon the ground that the additional tax was imposed under an agreement of settlement which prevented a recovery. 63 C. Cls. 405. And this writ of certiorari was granted.

The first question presented is whether the Mills is precluded from recovering the amount claimed by reason of a settlement.

Sec. 3229 of the Revised Statutes,[4] provides that: "The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, . . . with his reasons therefor, with a statement of

[3] Sec. 3226 of the Revised Statutes had been previously amended by § 1318 of the Revenue Act of 1921, 42 Stat. 227, 314, c. 136, so as to provide that no suit or proceeding should be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected until a claim for refund or credit had been duly filed with the Commissioner of Internal Revenue; and further amended by § 1014(a) of the Revenue Act of 1924, 43 Stat. 253, 343, c. 234, so as to provide that such suit or proceeding might be maintained, whether or not such tax had been paid under protest or duress. And the right of the Mills to maintain this suit, although the tax had not been paid under protest or duress, is not questioned by the Government.

[4] U. S. C., Tit. 26, § 158.

the amount of tax assessed, . . . and the amount actually paid in accordance with the terms of the compromise." [5]

The Government did not claim that there had been a compromise under this statute, but contended in the Court of Claims that, irrespective thereof, an agreement of settlement had been entered into between the Mills and the Commisioner under which the Mills had accepted the partial disallowance as to the compensation paid the directors, and had also received concessions as to other disputed items the benefit of which it still enjoyed, and was therefore estopped from seeking a recovery.

As to this matter the findings of fact show that after the Mills had paid the amount of the tax shown by its original return, an investigation of its books disclosed to the Commissioner the necessity of making an additional assessment, to be determined by the settlement of questions relating to the compensation (or, as it was termed, bonus) paid to the directors, depreciation charged off on its books, and reserves charged to expenses. After much correspondence and numerous conferences extending over several months between the attorney and assistant treasurer of the Mills and the chief of the special audit section of the Bureau of Internal Revenue and others of his official associates, a compromise was agreed to as to all the differences, by which the amounts to be allowed as reasonable compensation to the directors and as depreciation were agreed upon, and the claim as to reserve was allowed. Thereupon the Mills prepared and filed an amended return based upon the figures agreed upon in the conferences, with documentary evidence which it had

[5] Since the date of the settlement here involved §§ 1312 and 1313 of the Revenue Act of 1921, § 1006 of the Revenue Act of 1924, and § 1106(b) of the Revenue Act of 1926 have dealt specifically with agreements in writing made by a taxpayer and the Commissioner, with the approval of the Secretary, that the previous determination and assessment of a tax shall be final and conclusive.

agreed to furnish; and the additional assessment was made in accordance with this return.[6]

The court, in sustaining the Government's contention, said: "With the payment of the tax under the circumstances surrounding this case the agreement, which is mentioned in the record as a 'gentleman's agreement,' became in legal effect an executed contract of settlement"; and that, as the Mills was seeking to recover on account of the particular item which it regarded as unfavorable to its interests, and at the same time hold to the advantage derived from the settlement of other items in dispute involved in the same general settlement, it should not be allowed a recovery.

The Mills contends that the Commissioner had not been given, at the time in question, any authority, either in express terms or by implication, to compromise tax cases except as provided in § 3229; that this statute in granting such authority under specific limitations as to the method to be pursued, negatived his authority to effect a valid and binding agreement in any other way; that as the Government could not have been estopped by the unauthorized transactions of its officials, the Mills likewise could not be estopped thereby; and further, that the findings are insufficient to establish an estoppel.

The Government does not here challenge any of these contentions. In the brief for the United States filed in this Court the Solicitor General states that the question whether such an informal adjustment of taxes as was made in this case is binding on the taxpayer, is submitted for decision in deference to the opinion of the Court of Claims and the importance of the question—but no argument is made in support of the Government's previous contention that the Mills was estopped from questioning

[6] The findings indicate inferentially that some tax claims of the Mills for two other years were also included in the settlement; but the precise facts do not appear.

the settlement. And, on the contrary, it is stated that—"Before and since the date of the alleged settlement in this case Congress has evidently proceeded on the theory that no adjustment of a tax controversy between representatives of the Bureau of Internal Revenue and a taxpayer is binding unless made with the formalities and with the approval of the officials prescribed by statute. The authority of officers of the United States to compromise claims on behalf of or against the United States is strictly limited. . . The statutes which authorize conclusive agreements and settlements to be made in particular ways and with the approval of designated officers raise the inference that adjustments or settlements made in other ways are not binding." And further, that "No ground for the United States to claim estoppel is disclosed in the findings."

Independently of these concessions, we are of the opinion that the informal settlement made in this case did not constitute a binding agreement. Sec. 3229 authorizes the Commissioner of Internal Revenue to compromise tax claims before suit, with the advice and consent of the Secretary of the Treasury, and requires that an opinion of the Solicitor of Internal Revenue setting forth the compromise be filed in the Commissioner's office. Here the attempted settlement was made by subordinate officials in the Bureau of Internal Revenue. And although it may have been ratified by the Commissioner in making the additional assessment based thereon, it does not appear that it was assented to by the Secretary, or that the opinion of the Solicitor was filed in the Commissioner's office.

We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of public concern, it should be attested in the files of the Commissioner's office;

and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials in the Bureau. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. *Raleigh, etc. R. R. Co.* v. *Reid,* 13 Wall. 269, 270; *Scott* v. *Ford,* 52 Ore. 288, 296.

It is plain that no compromise is authorized by this statute which is not assented to by the Secretary of the Treasury. *Leach* v. *Nichols* (C. C. A.) 23 F. (2d) 275, 277. For this reason, if for no other, the informal agreement made in this case did not constitute a settlement which in itself was binding upon the Government or the Mills. And, without determining whether such an agreement, though not binding in itself, may when executed become, under some circumstances, binding on the parties by estoppel, it suffices to say that here the findings disclose no adequate ground for any claim of estoppel by the United States.

We therefore conclude that the Mills was not precluded by the settlement from recovering any portion of the tax to which it may otherwise have been entitled.

This brings us to the question whether on the findings of fact the Mills is entitled to recover the portion of the additional tax attributable to the disallowance of $783,656.06 of the amount paid to the directors which it had claimed as a deduction.[7]

Under § 12 (a) of the Revenue Act of 1916 the Mills was not entitled to this deduction unless the amount paid constituted a part of its "ordinary and necessary expenses" in the maintenance and operation of its business and properties. And in this suit the burden of establish-

[7] This is claimed in the brief filed for the Mills; and in the oral argument its counsel specifically stated that the Mills relied on the sufficiency of the findings and made no request that the case be remanded to the Court of Claims for additional findings, as the Solicitor General had suggested.

ing that fact rested upon it, in order to show that it was entitled to the deduction which the Commissioner had disallowed, and that the additional tax was to that extent illegally assessed. The Court of Claims, however, made no finding that the amount disallowed by the Commissioner constituted a part of the ordinary and necessary expenses of the Mills. The findings are silent as to this ultimate fact—essential to a recovery by the Mills—and only show certain circumstantial facts relating to the payment made to the board of directors.

Where the Court of Claims does not make a finding upon the ultimate question of fact upon which the rights of the parties depend, but merely makes findings as to subsidiary circumstantial facts which bear upon it, such findings will not support a judgment unless the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference and may be held to result as a conclusion of law. See *United States* v. *Pugh,* 99 U. S. 265, 269; *Winton* v. *Amos,* 255 U. S. 373, 395.

The findings show that for many years it has been the practice of many corporations engaged in the woolen manufacturing business to base the compensation of the directors and executive officers upon a percentage of profits. Upon the organization of the Mills in 1890 the stockholders adopted a by-law providing that at the close of the business year the net profits should be distributed by paying a dividend of 6 per cent to stockholders and applying the balance remaining as follows: (a) placing 5 per cent in a reserve fund; (b) paying 25 per cent " as a bonus to the board of directors "; and (c) paying 70 per cent as additional dividend to the stockholders. The stockholders amended this by-law in 1903 by increasing the bonus of the board of directors to 40 per cent; in 1905, by providing, instead of a " bonus," that " compensation "

equal to 40 per cent should be "paid to the board of directors for their services"; and in 1908, by reducing such compensation to 32 per cent [that is, 30.08 per cent of the net profits.] This by-law remained in force until after the taxable year 1917; and during the entire period "compensation" was paid to the directors in accordance therewith. From the outset the determination of the total amount of profits and of the aggregate amount payable to the board of directors was made by the board itself; and it likewise determined the basis of the apportionment among the several directors of the aggregate amount payable to the board as a whole. No contract was made with any director as to what his compensation should be other than such as was implied from his election and service as a member of the board in accordance with the by-law and the customary practices of the company, which each knew. At all times each director also held a position as an executive officer or manager of a department of the Mills.

The gross assets of the Mills increased from $1,114,-149.63 in 1890 to $28,893,777.12 in 1917; and its net assets, including reserves, from $37,136.35 to $10,999,862.48. Its net income increased from $784,334.44 in 1910 to $7,953,-512.80 in 1917; and the amount paid the directors in pursuance of the by-law increased, with some fluctuations, from $268,444.19 in 1910, to $400,935.18 in 1915, $693,-617.16 in 1916, and $1,565,739.39 in 1917.[8] In 1917 there were ten members of the board, so that if the total amount had been apportioned ratably, each would have received $156,573.93. And in that year each member of the board, in addition to the part of the aggregate in fact apportioned to him individually, also received a salary of $9,000.

[8] The figures for some other years are also given in tabulated statements included in the findings.

The findings do not show the nature or extent of the services rendered by the board of directors or its individual members, either as directors, executive officers or department managers—the amounts apportioned and paid to each director—the basis of apportionment, whether the nature and extent of their individual services, the amount of their stockholdings, or otherwise—the value of their services—or the reasonableness of the purported compensation.

We do not find it necesary to determine here whether the amounts paid by a corporation to its officers as compensation for their services cannot be allowed as " ordinary and necessary expenses " within the meaning of § 12 (a), merely because, and to the extent that, as compensation, they are unreasonable in amount.[9] However this may be, it is clear that extraordinary, unusual and extravagant amounts paid by a corporation to its officers in the guise and form of compensation for their services, but having no substantial relation to the measure of their services and being utterly disproportioned to their value, are not in reality payment for services, and cannot be regarded as " ordinary and necessary expenses " within the meaning of the section; and that such amounts do not become part of the " ordinary and necessary expenses " merely because the payments are made in accordance with an agreement between the corporation and its officers. Even if binding upon the parties, such an agreement does not change the character of the purported compensation or constitute it, as against the Government, an ordinary and necessary expense. Compare 20 Treas. Dec., Int. Rev., 330; *Jacobs & Davies* v. *Anderson* (C. C. A.), 228 Fed. 505, 506;

[9] Later, by § 214(a) of the Revenue Act of 1918, 40 Stat. 1057, c. 18, it was specifically provided that the " ordinary and necessary expenses " should include " a reasonable allowance for salaries or other compensation for personal services actually rendered."

*United States* v. *Philadelphia Knitting Mills Co.* (C. C. A.), 273 Fed. 657, 658; and *Becker Bros.* v. *United States* (C. C. A.), 7 F. (2d) 3, 6.

In the light of this principle it is clear that the findings do not show, as a matter of necessary inference resulting as a conclusion of law, that the amount paid the directors in excess of the $782,083.33 allowed by the Commissioner,[10] constituted part of the ordinary and necessary expenses of the Mills. On the contrary, as this amount so greatly exceeded the amounts which, as a matter of common knowledge, are usually paid to directors for their attendance at meetings of the board and the discharge of their customary duties, and was much greater than the amounts that had been paid in prior years,[11] and as there is no showing as to the amounts paid the individual directors, in addition to the salaries of $9,000 which each received—presumably for his services as an executive officer or department manager—or as to the nature, extent or value of their services, the findings raise a strong inference that the unusual and extraordinary amount paid to the directors was not in fact compensation for their services, but merely a distribution of a fixed percentage of the net profits that had no relation to the services rendered.

Therefore, as the Mills has not sustained the burden of showing that the amount disallowed by the Commissioner was in fact part of its ordinary and necessary expenses, the judgment must, for this reason, be

*Affirmed.*

Mr. Justice Holmes agrees with the result.

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[10] The amount allowed, it may be noted, was, in itself, $481,934.02 more than the average of the amounts that had been paid in the seven years immediately preceding, and $88,466.17 more than the greatest amount that had been paid in any one year.

[11] See note 10, *supra*.

Counsel for Parties.

## UNITED STATES *v.* CARVER ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 78. Argued November 28, 1928.—Decided January 2, 1929.

Respondents' vessel, while at Melbourne, Australia, during the war, and under charter to pick up and transport a cargo of ore from New Caledonia, was denied clearance by Australian authorities at the request of the United States Shipping Board pending the Board's decision whether the vessel should be ordered to abandon the charter and return to the United States with a cargo of wheat. In this situation, the respondents accepted a charter offered by the United States Food Administration Grain Corporation to carry wheat from Melbourne to New York, having concluded, after negotiations with the Food Administration, that they would better sign the charter rather than have the United States Government take over the vessel. The freight received under the wheat charter was less than would have been received under the ore charter, and respondents sued for the difference in the Court of Claims. *Held:*

1. Clause (b) of the Act of June 15, 1917, gave no authority to cancel the contract for the carriage of ore. P. 298.

2. The Act did not provide for compensation to the ship-owners for the cancellation of such a contract. *Id.*

3. The ship-owners, by their acts, and not the Shipping Board, made it impossible to perform the ore charter. P. 299.

4. There was no requisition or taking of the vessel. *Id.*

5. The Shipping Board did not requisition the ore charter under clause (e) of the Act. *Id.*

64 Ct. Cls. 1, reversed.

CERTIORARI, 277 U. S. 578, to a judgment of the Court of Claims allowing a recovery of damages against the United States.

*Solicitor General Mitchell,* with whom *Assistant Attorney General Galloway* and *Mr. J. Frank Staley* were on the brief, for the United States.

*Mr. Frank E. Scott* for respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

Carver and others, citizens of the United States, who were at the times hereinafter mentioned, the owners of the vessel *Betsy Ross,* in 1923 brought this suit against the United States in the Court of Claims. Their petition—which was based on the Emergency Shipping Fund section of the Act of June 15, 1917, 40 Stat. 182, c. 29—alleged that in 1918 the United States Shipping Board, on behalf of the Government, made use of, requisitioned or took over the vessel from their service and business, for the use of the United States Grain Corporation in the transportation of wheat; and that "by reason of being deprived of the use of said ship" they were entitled to compensation. The court, upon its findings of fact, awarded them judgment. 64 C. Cls. 1.

The Act of 1917 provided: "The President is hereby authorized and empowered within the limits of the amounts herein authorized—(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person. (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material. . . . (e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship. Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person.

. . . Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President. . . . The President may exercise the power and authority hereby vested in him . . . through such agency or agencies as he shall determine from time to time. . . . All ships constructed, purchased, or requisitioned under authority herein . . . shall be managed, operated, and disposed of as the President may direct."

By Executive Order of July 11, 1917, No. 2664, the President, by virtue of the authority vested in him by this Act, directed, among other things, "that the United States Shipping Board shall have and exercise all power and authority vested in me in . . . said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management, and disposition of such vessels. . . . The powers herein delegated to the United States Shipping Board may, in the discretion of said Board, be exercised directly by the said Board or by it through the United States Shipping Board Emergency Fleet Corporation. . . ."

The findings show that in August, 1917, the respondents entered, simultaneously, into two separate charter parties with different companies: one providing for the transportation of lumber from British Columbia to Melbourne, Australia; and the other providing that the vessel on her return voyage should transport a cargo of chrome ore from New Caledonia to New York or Baltimore, at a stipulated rate which would yield $177,000. This return charter was approved by the United States Shipping Board. The vessel proceeded on her outward voyage, ar-

rived in Melbourne on March 9, 1918, discharged the cargo of lumber, and was ready to sail for New Caledonia on April 10. Meanwhile, on or about April 5, certain officials of the United States Shipping Board and War Industries Board and of the British and Australian Governments, had entered upon the discussion of requiring or requesting American-owned vessels, including the *Betsy Ross,* to return to an American port with cargoes of wheat; but owing to differences of opinion the discussion was continued until May 9. On April 5, the master of the vessel applied to the authorities at Melbourne for clearance papers; but they declined to grant clearance, advising the respondents' agent at Melbourne that this action was taken at the request of the United States Shipping Board, and on April 17 notified the respondents' agent that a cable had been received from the Secretary of State stating that the Shipping Board considered the vessel suitable for wheat and requested that she load wheat and not chrome ore. The respondents made various efforts to have the vessel cleared in order that she might carry out her chrome ore charter, but action on their requests was delayed until May 9, "pending a decision being reached by the United States Shipping Board that the vessel would be ordered to abandon her chrome-ore charter and return to the United States with a cargo of wheat. . . . Shortly after [the respondents] were so notified by said Australian officials," the United States Food Administration Grain Corporation, at its office in New York, submitted to the managing owner of the vessel a charter party for the transportation of a cargo of wheat from Melbourne to New York, at a stipulated rate. The respondents, as the result of their negotiation with the Food Administration "concluded that rather than have the United States Government take over" the vessel they "had better sign said wheat charter"; and they did this on May 15. On her return voyage with the cargo

of wheat the vessel arrived in New York about the time of the armistice, and the respondents were paid by the Food Administration $63,784, at the rate provided in the charter. The respondents thereupon presented to the Shipping Board their claim for an award of compensation,[1] which was disallowed in 1920. Thereafter the respondents brought this suit.

In its opinion the Court of Claims said that the United States Shipping Board Emergency Fleet Corporation[2] had required the respondents to take on a cargo of wheat for the return voyage to the United States, and by this act had cancelled the contract which the respondents had for transporting the cargo of chrome ore, and that under the Act of 1917 the Government was required to pay them just compensation for the loss which they incurred by such cancellation. And, having found that the just compensation for the cancellation of the chrome ore contract was $113,216, with interest from May 9, 1918, the respondents were given judgment for that amount.

In our opinion the findings of fact do not sustain the judgment. Taking up the several contentions here made by the respondents under clauses (a), (b) and (e) of the Act of 1917, we reach the following conclusions:

1. The Shipping Board had no authority under clause (b) of the Act and the power delegated to it by the President to cancel the respondents' contract for the shipment of chrome ore. While this clause authorized the President to cancel contracts "for the building, production or purchase of ships or material," it gave no authority to cancel a contract for the carriage of freight. And the Act did not provide for compensation to the ship owners for the cancellation of such a contract. Furthermore, the find-

[1] This was in accordance with a requirement of the Act of 1917.

[2] No reference whatever had been made to the Fleet Corporation in the findings of fact.

ings do not show that either the Shipping Board (or the Emergency Fleet Corporation) in fact cancelled this contract. The most that appears—construing the findings most favorably to the respondents—is that they were notified by the Australian officials that the Shipping Board had decided that the vessel " would be ordered to abandon the chrome ore charter and return to the United States with a cargo of wheat "; that thereupon the respondents, without waiting until the Shipping Board made such an order, concluded that it would be better to sign the wheat charter with the Grain Corporation rather than have the Government take over the vessel; and that by carrying out this wheat charter they themselves made it impossible to perform the chrome ore charter.

2. There can be no recovery under clause (e) of the Act on the theory—upon which alone the respondents' petition was based—that the Shipping Board requisitioned or took over the vessel and deprived the respondents of its use. The findings not only fail to show any requisition or taking over of the vessel, but, on the contrary, show that it remained in the possession of the respondents and was used by them for their own benefit in carrying out the wheat charter which they made with the Grain Corporation for the very purpose of anticipating and preventing the taking over of the vessel by the Government. Compare *American Smelting Co.* v. *United States,* 259 U. S. 75, 78.

And even if the Shipping Board had in fact carried out its intention of ordering the vessel to abandon the chrome ore charter, and return to the United States with a cargo of wheat, this, plainly, would not have been the placing of " an order " for the ship within the meaning of clause (a) of the Act.

3. The Shipping Board did not requisition the chrome ore charter under clause (e) of the Act. This would have

required the Shipping Board to take over the charter itself for the transportation of chrome ore. This it did not do. The charter was not appropriated or kept alive for the use of the Government. See *Omnia Co.* v. *United States,* 261 U. S. 502, 513; *Union Petroleum S. S. Co.* v. *United States* (C. C. A.), 18 F. (2d) 752, 753.

In short, the findings show no facts entitling the respondents to recover compensation from the United States under the provisions of the Act of 1917. And the judgment is

*Reversed.*

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## UNITED FUEL GAS COMPANY ET AL. *v.* RAILROAD COMMISSION OF KENTUCKY ET AL.

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

No. 1. Argued November 28, 1927. Reargued October 15, 16, 1928.—Decided January 2, 1929.

1. Federal courts having jurisdiction of a cause through questions raised under the Federal Constitution, may pass on all questions of state law involved. P. 307.
2. Parties who have procured action by a state commission under a state statute, may not assail that action in a federal court of equity upon the ground that that statute, or the one creating the commission, is void under the state constitution. P. 307.
3. A State may compel a public service company to continue to use its facilities to supply an existing need so long as it continues to do business elsewhere in the State. P. 308.
4. A public service company is bound by the common law, if not by statute, to render its service at reasonable rates; and if the rates fixed by a state commission are not shown to be confiscatory, a suit in equity to enjoin their enforcement will not lie merely because the order purporting to impose them was void for other reasons under the state or federal constitution. P. 309.
5. A public utility seeking to set aside as confiscatory a rate fixed by state authority, has the burden of proving by clear and convincing evidence the value of property on which it is constitutionally entitled to earn a fair return. P. 313.

6. In an attack on rates fixed for a company supplying gas to consumers in Kentucky which was a subsidiary of a West Virginia company owning, leasing and operating extensive natural gas fields in the latter State, it was sought to prove the value of the West Virginia gas rights in order that a portion of it might be allocated to the subsidiary, and the method adopted depended on an estimate of the quantity of available gas in the lands and a computation of the profits that would accrue if, during the next eighteen years, this were extracted, piped to a place in Pennsylvania where there was a market for fuel gas free from public regulation, and there sold at current prices. *Held* that the value, so computed, of property used in a business whose rates are regulated, could not be accepted; for not only was it made to depend on an assumed earning capacity, but also the evidence of this earning power was too speculative because, among other possible objections, it rested on predictions that the prices would remain unregulated for a long future period, and that gas, to the amount estimated, would be available as required and could be sold at those prices through that period in a market yet to be established, despite future inventions and improved business and manufacturing methods; and a prediction of what plant and equipment must be constructed and maintained to effect delivery of gas for that period, and of the cost of maintaining and operating it. P. 317.
7. A public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary or a corporation owned by its shareholders. P. 320.

13 F. (2d) 510, affirmed.

Appeal from a decree of the District Court which dismissed a bill for an injunction to restrain the Railroad Commission of Kentucky from establishing an alleged confiscatory rate for the sale of natural gas.

*Mr. John W. Davis,* with whom *Messrs S. S. Willis, Harold A. Ritz, Douglas M. Moffat,* and *Edward L. Patterson* were on the brief, for appellants.

The order requiring the plaintiffs to continue gas service to the cities after the expiration of the franchises, is invalid under the Kentucky Constitution.

The Kentucky statute, Chapter 61 of 1920, is void so far as it affects the plaintiffs, because that part of the subject-matter of such statute which the Railroad Commission undertook to enforce against the plaintiffs is not embraced in the title.

The orders are void for the reason that there was no evidence upon which they could be based or justified, nor was there any finding of essential facts upon which to predicate them.

The Kentucky statute does not provide for any judicial review of the acts of the Railroad Commission. In such a case, before a rate can be held to be extortionate, there must be evidence offered and a finding made based upon that evidence which justifies the conclusion. *Wichita R. R. & Light Co.* v. *Public Utilities Comm'n*, 260 U. S. 48; *Illinois Central R. R.* v. *Kentucky R. R. Comm'n*, 1 F. (2d) 805; *Interstate Commerce Comm'n* v. *L. & N. R. R. Co.*, 227 U. S. 88.

The court erred in fixing the value of the gas rights or leaseholds of the appellants for the reason that its finding is in conflict with the uncontradicted evidence that their value is at least $30,000,000.00.

It is well settled by the decisions of this Court that in arriving at a rate base the matter to be determined is the present fair value of the property which enters into it and not the original cost of that property, whether the latter be greater or less than the former. *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Minnesota Rate Cases*, 230 U. S. 352; *Bluefield Water Works* v. *Public Service Comm'n*, 262 U. S. 679; *Ohio Utilities Co.* v. *Public Utilities Comm'n*, 267 U. S. 359; *Board of Comm'rs* v. *N. Y. Telephone Co.*, 271 U. S. 23; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400.

If it be shown that the price provided in the contract between the two companies is reasonable, then the fact of their relationship, because of stock ownership, becomes

unimportant. *Houston* v. *Southwestern Bell Tel. Co.,* 259 U. S. 318; *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Comm'n,* 262 U. S. 276; *Indiana Bell Tel. Co.* v. *Public Service Comm'n,* 300 Fed. 190.

In order to determine the reasonableness of the price fixed in this contract, it would of course be necessary to make an inquiry as to the value of the property of the United Fuel Gas Company, its expenses of operation and the receipts therefrom. Such an inquiry was equally necessary upon the theory adopted by the court below that the combined properties are to be regarded as a unit in determining the rate base.

To meet appellants' testimony as to the value of the gas rights and properties, the appellee introduced nothing except the evidence of the amount paid by the United Fuel Company for the acreage in the beginning. This evidence, which the court below considered as the only competent evidence, is its cost long before the rise in prices and at a time when development had not proven the value of the territory for natural gas production. Cf. *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400. We submit that instead of taking the most reliable evidence as to value, the court below attributed exclusive weight to the least reliable evidence thereof. No contention is made by any of the experts for the appellees that $6,732,920.00 is anything like the present value of the property. Indeed, the appellees have not undertaken to present any evidence as to its present fair value aside from the actual cost.

Appellants' evidence of the value of the gas rights should have been accepted. *Erie* v. *Public Service Comm'n,* 278 Penn. 512; *Pennsylvania Gas Co.* v. *Public Service Comm'n,* 211 App. Div. (N. Y.) 253; *Peoples Gas & Electric Co.* v. *Public Service Comm'n,* 214 App. Div. (N. Y.) 108.

In *Charleston* v. *Public Service Comm'n,* 95 W. Va. 91, the court had no such evidence before it as was given in this case by some of the witnesses; also, the method of arriving at the estimate of the quantities of gas in the ground had not at that time been so well established and proven as it was at the time of this inquiry.

The testimony would have been competent to prove value in a condemnation suit or for any other purpose; but it is urged that some other or different character of proof must be offered when we come to show the value for rate-making purposes. It is not suggested what other kind of proof could have been offered. A reliable opinion as to the money value of such property is scarcely to be had except from those interested in the same business. The devotion of private property to the public service for compensation fixed by a public rate-making body is in the nature of the exercise of the power of eminent domain, and the same sort of evidence which would be competent and sufficient to prove value in a condemnation proceeding is allowable here.

The court erred when arriving at the value of plaintiffs' plant in not making proper allowances for interest during construction, cost of financing and overhead charges.

The court erred in refusing to allow any more than $3,000,000 for going concern value.

The court erred in holding that depletion and amortization could be amply provided for by an allowance of 4½% of the depreciable and depletable rate base, and 1½% to meet charges for depreciation, repair and replacement.

The court erred in including in the earnings of the appellants one-half of the net earnings from the extraction of gasoline by the Virginian Gasoline and Oil Company.

The court erred in holding that the rates fixed by the Railroad Commission were not confiscatory.

*Mr. John T. Diederich,* with whom *Messrs. Frank E. Daugherty,* Attorney General of Kentucky, *Overton S. Hogan,* Assistant Attorney General, and *Vernon A. Dinkle* were on the brief, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an appeal from a final decree of the District Court for eastern Kentucky denying an injunction restraining the appellee, the Railroad Commission of Kentucky, from establishing an alleged confiscatory rate for the sale of natural gas in the cities of Ashland, Catlettsburg, and Louisa, Kentucky, or in the alternative from preventing appellants from withdrawing their service in the sale and distribution of natural gas to consumers in those cities. 13 F. (2d) 510. The case comes here on direct appeal under § 238 of the Judicial Code, the decree of the district court having been entered before the effective date of the Jurisdictional Act of February 13, 1925.

The case was argued here with No. 4, *United Fuel Gas Co.* v. *Public Service Comm'n of W. Va.,* decided this date, *post,* p. 322, which involves some questions considered in the opinion in this case.

Appellant, United Fuel Gas Company, a West Virginia corporation, also appellant in No. 4, is engaged in the business of producing natural gas from gas fields located principally in West Virginia, which it sells to consumers in West Virginia, Kentucky and Ohio. A part of its business is the sale of gas wholesale to distributors in West Virginia, and has not been subjected to regulation by any public body. Its local business in Kentucky is subjected to regulation by appellee. It formerly held franchises for the sale and distribution of gas in the Kentucky cities named, all of which had expired by July, 1918. Nevertheless, it continued its service in those cities until June, 1923, when it organized appellant Warfield Natural Gas

Company, a Kentucky corporation, whose stock it owns and to which it conveyed its property in Kentucky and which has since carried on its business of distributing gas in the cities named. The United Company then purported to withdraw from all its business in Kentucky by cancelling appointments of agents to receive service of process within the state and by notifying the Secretary of State of its action.

Before the organization of the Warfield Company proceedings were had before the commission which resulted in its order directing a reduction of rates by the United Company to 80% of the former rate of 40 cents per 1,000 cubic feet, less 5 cents for prompt payment. Promptly on its organization the Warfield Company filed with the commission a new rate schedule for the cities named of 45 cents per 1,000 cubic feet, with a reduction of 5 cents for punctual payment, and petitioned the commission to establish this rate as fair and reasonable or, in the alternative, to permit it to withdraw its service from those cities. After an extensive hearing the commission denied the application and construed its earlier order as requiring a rate of 28 cents (80% of 35 cents).

The present suit was then brought in the district court. That court construed the order of the commission as fixing a 32 cent rate, which it upheld, and enjoined the commission from imposing any lower rate. From the latter part of the decree no appeal was taken.

The present appeal challenges the constitutionality of the order of the commission, as construed by the court, under the Fourteenth Amendment of the federal Constitution, both because the rate is confiscatory and because the order, which under the Kentucky statutes is not subject to judicial review, was not supported by findings of the commission. The validity of the order is also assailed on the further grounds that the part of it which required appellants to continue to render service violates the Ken-

tucky constitution and that the commission itself was never constitutionally created, and hence was without jurisdiction, because the legislative act establishing the commission and giving it its authority is in violation of § 51 of the Kentucky constitution, which provides that no legislative act shall relate to more than one subject which shall be expressed in its title.

The district court and this Court, having jurisdiction of the cause since questions are raised under the Constitution of the United States, may pass on all questions of state law involved, *Risty* v. *Chicago, Rock Island & Pacific Ry. Co.* 270 U. S. 378, 387, and must do so so far as they are necessary to a decision.

Section 163 of the Kentucky constitution provides that gas companies may not procure franchises permitting them to lay pipes in and under public streets without the consent of the appropriate municipal governing bodies and § 164 limits all franchises to periods not exceeding twenty years. Section 23 of the Statutes of Kentucky, c. 61, Acts of 1920, p. 250, subjects any public service company which has continued its service after the expiration of its franchise to the jurisdiction and authority of the Railroad Commission and forbids it to withdraw such service without permission of the commission so long as it remains in business in any part of the state. It is said that the action of the commission under this statute in effect operates as a renewal of the franchise of appellants in the cities named in a manner not in conformity with the provisions of the state constitution.

But this objection, and that as well to the constitutionality, on state grounds, of the statute creating the commission and defining its powers, are not available to appellants in the present suit. It is the rule of this Court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail

their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States. *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407; *Electric Co.* v. *Dow*, 166 U. S. 489; *Eustis* v. *Bolles*, 150 U. S. 361, *Hurley* v. *Comm'n of Fisheries*, 257 U. S. 223; *St. Louis Co.* v. *Prendergast Co.*, 260 U. S. 469. Upon like principle we think that appellants who have procured action by a state commission under a state statute may not assail that action in a federal court of equity on the ground that that statute, or the one creating the commission, is void under the state constitution. Cf. *Shepard* v. *Barron*, 194 U. S. 553. The sound discretion which controls the exercise of the extraordinary powers of a federal court of equity should not permit them to be exerted to relieve suitors on such a ground from the very action of state authorities which they have invoked.

Assuming as we do for present purposes the authority of the commission under state law to refuse its permission to appellants to withdraw, we perceive no objection under the federal Constitution or otherwise, to withholding it. Appellants do not seriously deny that the Warfield Company is but an agency organized by the United Company for the purpose of carrying on its public service business in Kentucky or that through that agency the latter is doing business in the cities named and elsewhere in the state. In these circumstances its continuance in those cities is neither forbidden nor illegal. It remained subject to state regulation, and control of it is, by state statute, vested in the commission with statewide authority. If a state may require a public service company subject to its control to make reasonable extensions of its service in order to satisfy a new or increased demand, present or anticipated, *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345; *Woodhaven Gas Light Co.* v. *Pub. Serv. Comm'n*, 269 U. S. 244; *Missouri Pac. Ry.*

*Co.* v. *Kansas,* 216 U. S. 262; *Wisconsin, etc., R. R. Co.* v. *Jacobson,* 179 U. S. 287; *Atlantic Coast Line* v. *N. Car. Corp'n Comm'n,* 206 U. S. 1, *Chicago & Northwestern Ry. Co.* v. *Ochs,* 249 U. S. 416, obviously the latter may be compelled to continue to use present facilities to supply an existing need so long as it continues to do business in the state.

The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. An important purpose of state supervision is to prevent such discriminations, see *New York & Queens Gas Co.* v. *McCall, supra,* at p. 351, and if a public service company may not refuse to serve a territory where the return is reasonable, or even in some circumstances where the return is inadequate but that on its total related business is sufficient, *Atlantic Coast Line* v. *N. Car. Corp'n Comm., supra* at p. 25; *Missouri Pac. Ry. Co.* v. *Kansas, supra* at p. 277, it goes without saying that it may not use its privileged position, in conjunction with the demand which it has created, as a weapon to control rates by threatening to discontinue that part of its service if it does not receive the rate demanded. The powers of the state, so far as the federal Constitution is concerned, were not exceeded by the action of the commission, in compelling appellants to continue their service in the cities named so long as they continued to do business in other parts of the state, and to there avail of the extraordinary privileges extended to public utilities.

The contentions also that the commission was not lawfully created under provisions of the state constitution, and that its order was void because not supported by findings, have the same and no greater force than the

objection that the rate is confiscatory. Suitors may not resort to a court of equity to restrain a threatened act merely because it is illegal or transcends constitutional powers. They must show that the act complained of will inflict upon them some irreparable injury. As the court below held, appellants, as public service companies, are bound by the common law, if not by statute, to render their service at reasonable rates. If the rates are not shown to be confiscatory they cannot complain that the order purporting to impose them was void for they have suffered no injury even though the order was unauthorized. Cf. *Northern Pacific R. R. Co.* v. *Dep't of Public Works,* 268 U. S. 39, 44; *Chicago, etc. Ry.* v. *Pub. Util. Comm'n,* 274 U. S. 344, 351. We are thus brought to the question, chiefly argued and decisive of the whole case, whether the rates complained of yield such a return upon the property used and useful in the public service as avoids confiscation.

Gas is sold by the United Company to the Warfield Company at the state line at 30 cents per 1,000 cubic feet, but in view of the history and intercorporate relations of the appellants it is not contended that this contract rate is of any controlling significance in determining the propriety of the rate fixed by the commission. For this purpose appellants do not deny that they, with respect to their entire property and business, may be treated as a unit, and we so treat them. They contend here, as in No. 4, that all their property used and useful in producing the gas in West Virginia and elsewhere and in transporting and distributing it to consumers in the Kentucky cities should enter into the calculation of the rate base.

Appellants, through ownership in fee and leases or contracts on a rental or royalty basis, control the production of natural gas from 814,910 acres of land. A part of this area, the so-termed "proven" territory, is at present being used in production, the remainder being

held in reserve as either "probable" or "unfavorable" sources of future production. Their principal items of property consist of the interest in this acreage, working capital, buildings, machinery, mains, pipes, compressors and other equipment used in the production and distribution of gas.

The valuations of the entire business in the two states made respectively, by the appellants and the court below as of December 31, 1923, are as follows:

| | |
|---|---|
| Value claimed by appellants: | |
| Physical property | $22,274,274.00 |
| Gas lands, leaseholds and rights | 36,449,176.00 |
| General overhead charges | 6,357,046.00 |
| Working capital | 990,000.00 |
| Going concern value | 8,423,105.00 |
| | $74,493,601.00 |
| Value as found or assumed by the court below: | |
| Physical property | $22,274,274.00 |
| Gas lands, leases and rights (book value) | 6,732,920.00 |
| Overheads | 4,009,370.00 |
| Working capital | 999,000.00 |
| Going concern value | 3,000,000.00 |
| | $37,015,564.00 |

As will be observed the difference in these estimates of value is due chiefly to the difference in value ascribed by each to the gas rights and leaseholds. Appellants, as will more fully appear, reached their claimed value by an estimate by experts of the profits to be derived from the sale, in an unregulated market, of the quantity of gas estimated to underlie the proven and probable areas. The court below found that the value of appellants' gas field did not exceed its "book cost" which it took to be $6,732,920. This figure, however, included oil production acreage amounting to $389,591—leaving $6,343,329 as the book value of the entire gas field.

Appellants contend that for the purpose of determining whether the rate is confiscatory, the regulated business in Kentucky must be separately considered and it is immaterial whether or not a fair return is being made on the entire business, a part of which is unregulated. By taking the value of that property used exclusively in this regulated business and allocating the gas fields and other property used jointly in the two classes of business, the former on the basis of the volume of gas supplied to each type of business, appellants conclude that, if their valuation of their gas rights be accepted, a composite percentage of 11% of the total value is to be allocated to the regulated business. To establish that the rate is confiscatory they accept the conclusions of the court below as to the value of all items of property except the gas lands and leases and, substituting for that item their own minimum valuation of $30,000,000, they arrive at a hypothetical rate base for their entire property of $60,282,644. The value of the 11% of this property properly allocable to the regulated business in Kentucky is thus set at $6,631,091. This valuation, on the basis of 14% return (1½% depreciation, plus 4½% amortization, which items the court below deemed liberal, plus an 8% return), would thus entitle appellants to earn $867,309, substantially more than the actual earnings of the regulated business shown to be $749,839 in 1923 at the 32 cent rate. Appellants do not seriously question the sufficiency of the allowance for depreciation or the 8% return. The 4½% allowed for amortization, calculated on the rate base, is more than sufficient to replace appellants' entire property at the end of 18 years, the estimated life of the gas field.

In assigning to their total property a value of $74,493,601 and in concluding that the prescribed rate is confiscatory because of its effect on the regulated business alone, appellants make certain assumptions, all of which are challenged. In the view which we take, and for present

purposes only, we likewise make those assumptions without determining their validity. They are (a) that in the case as presented present reproduction value of property used and useful in the business, if ascertainable, is to be taken as the rate base; (b) that under the circumstances of this case it is not enough that the return on appellants' business as a whole is remunerative but earnings of the property used in or properly allocated to the Kentucky regulated business must be separately considered in ascertaining whether the rate is confiscatory; (c) that both proven and probable areas of appellants' gas acreage, whether shown to be presently productive or not, if acquired in a prudent administration of appellants' business, are to be included in the valuation for rate making purposes; (d) that depreciation and amortization are to be calculated on the basis of the present value of the property rather than upon the original cost or investment; (e) that, although entitled to earn a fair return on the present value of their gas leases, the "delay rentals" paid upon them pending drilling and development are properly chargeable to operating expense.

Making these assumptions, it is apparent that the disposition of the present question must turn, as appellants argue, principally upon the value to be assigned to the gas rights, although in certain aspects of the case a minor consideration may be the proportion of profits from the sale of gasoline extracted from the gas which should properly be included in the net earnings of the regulated business.

The burden of proving the value of property on which they are constitutionally entitled to earn a fair return rests upon the appellants and, to justify judicial interference with the action of state officers in fixing the rate assailed, must be supported by clear and convincing evidence. *Knoxville* v. *Water Co.*, 212 U. S. 1, 16. Of the total of 814,910 acres embraced in the gas field, controlled by appellants or subsidiaries, 41,969 acres are owned in

fee. The remainder is controlled by lease or contract. This acreage, although concededly well selected for purposes of economical development and avoiding loss of gas by drainage, is not in a solid block; rather it is in widely scattered areas; much of it lies adjacent to or is interspersed with gas fields controlled by others. Leases for fixed periods and so long after as gas is found in paying quantities have been obtained by appellants by payment of small bonus payments. The leases vary in their terms, but a typical lease gives the lessee the right to drill for gas for ten years, with the privilege of renewal at a fixed small annual delay rental, varying from 25 cents to $2.00 per acre, materially increased in the form either of a fixed rental or a royalty if and when production is established. They are customarily renewed from eighteen months to a year before expiration and for renewal an additional bonus is paid.

The actual cost on this basis of appellants' gas field is not shown but it appears to have been substantially less than the book value assigned to it. It was stated on the argument that these leases, not only singly but in blocks, are sold in open market, but their market price appears not to have been established.

Appellants do not accept either cost or market value as the basis of value of their gas rights. Instead they urge that their assembled holdings of gas rights are unique in that they cannot be reproduced and that their value depends largely upon their peculiar nature and situation. They rest their claim to a largely enhanced value over book value upon alternative theories supported by two classes of expert testimony. Appellants' experts, on the basis of geological and mining engineering data, and especially by ascertaining the existing rock pressure of the gas in various pools and by comparing the rate of decrease of rock pressure with the amount of gas produced from these

pools in the same period of time, arrived at an estimate of the total volume of gas underlying the proven and probable territory. The results reached by this method were checked by comparison with the actual experience in gas production from selected pools and wells. As a final outcome of these calculations it was estimated that there was underlying the 136,384 acres of proven territory and available for use 249,100,000,000 cubic feet of gas, and in the 126,208 acres of probable territory 414,600,000,000 cubic feet. With respect to the probable territory, there were no production or pressure records to aid the experts in the preparation of their estimate. In calculating the volume of gas in this area they had recourse to comparison with the nearest pools in the same geological structure. This method was characterized by the witness using it as " difficult and uncertain " and as " much less trustworthy " than that applied to the proven territory.

These calculations are supplemented by testimony that in Pittsburgh there is an unregulated market for natural gas used for industrial purposes at 35 cents per 1,000 cubic feet which would, on an estimated changing schedule of annual production, absorb in eighteen years the total estimated reserve of gas in appellants' gas field. At this price, natural gas, it was said, could compete successfully in Pittsburgh, for industrial purposes, with gas produced from soft coal at the prevailing price of $2.75 a ton at the mine. After calculating the cost of getting this gas to the market, distant 130 miles from the nearest point on appellants' mains, providing for all construction costs including the cost of plant and transmission line, the gas when marketed, it was estimated, would pay a fair return upon investment, repay taxes and investment, and leave a balance, when discounted so as to give present value, of $32,458,129. A second witness, taking 30 cents as the market price of gas in Pittsburgh and deducting trans-

portation costs, concluded that the gas in the ground is worth 5 cents per 1,000 cubic feet and arrived at a higher value, $33,155,421. To this latter estimate he added the present estimated cost of acquiring the 552,319 acres of improbable or unfavorable territory at $5.96 per acre, or $3,293,754, making a total estimated present value of appellants' gas field of $36,449,176. In this connection there is evidence, which appears to be unchallenged, that the average cost of acquiring unoperated acreage during 1921 to 1923 was 83 cents per acre and that in 1923 appellants acquired 15,184 acres at a cost of 66 cents per acre.

Appellants' second class of expert testimony is that of men experienced and interested in the production and marketing of natural gas, who purported to assign to appellants' gas field what was described on the argument as its present exchange value or the price which the property would bring if sold by a willing seller to a willing buyer. Three such witnesses testified to a present value of appellants' gas field in amounts varying from $30,000,000 to $35,000,000 and a fourth fixed the value at $45,000,000. Examination of their testimony discloses that these estimates were not based on prevailing prices for gas leases or on actual sales but, as in the case of the geological and engineering experts, upon an estimated or assumed exhaustible supply of gas available to appellants until exhausted, and upon a predictable price for natural gas in unregulated markets through a future period of about eighteen years. Common characteristics of both methods of valuation, therefore, are the estimation on uncertain bases of the volume of gas available and of the price at which it may be sold through a long future period.

A point considered below and argued here is that gas in the earth is not capable of ownership, but we assume that appellants' leases and contracts give them complete legal power of control over the gas available beneath the surface of the area embraced in the gas field, so far as it may

be brought under physical control. We assume also that the gas is now present in substantially the volume indicated and we lay to one side the speculative character of the assumption that the gas in that volume, despite its fugitive character and its possible drainage into other fields not under appellants' control, will remain available for appropriation through the eighteen or more years required to exhaust the field.

Waiving these not inconsiderable difficulties in the way of establishing value, we pass to another and more serious difficulty. In both methods of valuation, the value of property used in a business whose rates are regulated is made to depend on an assumed earning capacity, and the data relied on to establish assumed earning capacity are themselves essentially speculative—so much so as to form no trustworthy basis for the computation of value.

It is true that a part of appellants' business is not regulated at present, but it does not appear that the ultimate distribution of their product to consumers in other states will be immune from regulation either because of the interstate commerce clause, *Pennsylvania Gas Co.* v. *Public Service Comm'n,* 252 U. S. 23; *Public Utilities Comm'n* v. *Landon,* 249 U. S. 236, or for other reasons, and there can be no reasonable assumption that it will be. The unique character of appellants' control over a natural product, limited in amount, asserted here as a basis of value, the obvious necessity of securing franchises or special privileges to enable them to distribute their product to consumers under the conditions assumed, and other circumstances which subject them to regulation in Kentucky and West Virginia, make inadmissible the assumption that the price to consumers would remain unregulated elsewhere.

And in other respects the assumed earning capacity is so wanting in probative force as to require its rejection in the circumstances here disclosed. It rests on a predic-

tion, feebly made, that the estimated amount of gas will be available as required through a period of eighteen years; that natural gas so transported and used as a fuel will command a price of from 30 to 35 cents per 1,000 cubic feet through that period in a market yet to be established despite the changes wrought by invention and improved business and manufacturing methods; and a further prediction not only of what plant and equipment must be constructed and maintained to effect delivery of the gas for this period to consumers in the city of Pittsburgh but also of the cost, through a like period, of the construction, maintenance and operation of that plant and equipment. Such predictions can only be made on the basis of data which are not and cannot be known, and most of which are in the highest degree speculative. Such a process of estimating value is without any known sanction.

On the record as made, appellants have failed to present any convincing evidence of value of their gas field which would enable us to assign to it any greater value than that which they appear to have assigned to it on their books. This book value, therefore, may be accepted not as evidence of the real value of the gas field, but as an assumed value named by the appellants, which, on the evidence presented cannot reasonably be fixed at any higher figure.

We likewise find no persuasive ground for not accepting as substantially correct the amount of $30,282,644 fixed by the court below as the maximum value to be assigned to those items of appellants' property other than the gas reserve, rather than $38,044,425, appellants' outside figure for those items. But to avoid unnecessary discussion of them in detail and for present purposes, appellants' valuation of all these items may be conceded to be correct. If we restate appellants' claimed valuation of their property by substituting for their estimate of the

value of the gas rights their book value (after deduction for oil acreage) of $6,343,329, we arrive at a total assumed maximum valuation of appellants' entire property of $44,387,754. Taking 12%[1] of this total, or $5,326,530, as the largest amount which could be allocated to the Kentucky business, a return upon it of 14% (8% plus 1½% depreciation, plus 4½% amortization) would amount to $745,714, an amount less than the actual return.

Appellants' also contend that the court below erroneously included in the earnings of the regulated business the sum of $65,166, or 50% of the net proceeds of the sale of gasoline extracted, before sale, from the gas sold in the regulated business, on the ground that this amount exceeded the profits from this branch of appellants' business as reflected on their books.

In the process of extracting gasoline from natural gas, the gas flows from the field to the extraction plant, where the gasoline is taken out, the residual gas being returned to the transmission system for distribution to consumers. In the production of this gasoline, therefore, joint use is made of the gas, gas field and certain facilities of the gas company. This joint use requires a prorating of joint investment and expenses and of the return from the joint

[1] Various witnesses allocated to the Kentucky regulated business an amount of property used for "production" (including the gas field) varying from 7.1% to 10.49% and a percentage of property other than "production" ranging from 9.0% to 12.07%—or for the entire property as a unit, from 8.4% to 11%. No witness testified that there was a composite percentage which could be taken generally to represent the part of appellants' entire property used in the regulated business regardless of the varying values assigned to different items of property. Appellants have used this last figure, 11%, in their calculations and do not contest its validity. This percentage appears to include some property located in Kentucky but not actually used in the local regulated business. In our own computation we have, for convenience, taken 12% as the highest possible percentage applicable and as the figure most favorable to appellants.

enterprise. Formerly, appellant United Company maintained and operated its own gasoline extracting plant. The West Virginia Public Service Commission having held that 50% of the net return from the sale of gasoline should be credited to the gas business, the United Company organized a corporation, the Virginia Gasoline & Oil Company, and conveyed to it its gasoline extraction plant, receiving the stock of the new corporation in exchange. Later it turned over this stock to its own stockholders, of which there are but two, both corporations, in the same proportions in which they held stock in the United Company. It entered into a contract with this subsidiary by which it receives one-eighth of the gross profit from the gasoline extracted. The commission and the Supreme Court of West Virginia, in *City of Charleston v. Public Service Comm'n.*, 95 W. Va. 91, in which the United Company was a party, held that 50% was a fair share of the net return of the subsidiary's business attributable to appellant United Company, and this was the conclusion adopted by the court below.

We need not labor the point that a public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary or a corporation owned by its own stockholders. Cf. *Chicago & Grand Trunk Ry. Co.* v. *Wellman,* 143 U. S. 339, 345. We recognize that a public service commission, under the guise of establishing a fair rate, may not usurp the functions of the company's directors and in every case substitute its judgment for theirs as to the propriety of contracts entered into by the utility; and common ownership is not of itself sufficient ground for disregarding such intercorporate agreements when it appears that, although an affiliated corporation may be receiving the larger share of the profits, the regulated company is still receiving substantial benefits from

the contract and probably could not have secured better terms elsewhere. *Southwestern Bell Telephone Co.* v. *Public Service Comm'n.*, 262 U. S. 276, 288; *Houston* v. *Southwestern Telephone Co.*, 259 U. S. 318.

But this case is not of that class. It is not without significance that the West Virginia court in considering this question had before it previous findings of its commission, based upon actual contracts for gasoline extraction where the parties, dealing at arms length, had agreed upon a 50% division. Credible evidence was introduced below tending to show that expenses on property used jointly by the two companies and properly allocable to the gasoline company had been borne by the gas companies to an amount in excess of the return received by them from the gasoline extraction. It likewise was shown, the evidence not being challenged by appellants, that the extracting company during the years 1917 to 1922 inclusive, after allowing appellants 50% of the net earnings for the extraction privilege, would have earned not less than 102% of its capital investment in each year. The average yearly profit during this period was 119.75%. In 1923 its net return on this basis was 80.40%. Making allowance for fluctuation in market prices and other common business hazards, we do not think it would be difficult to induce capital to seek investment on the basis of this division of net earnings. In such circumstances we think no adequate reason is shown for not including in the appellants' earnings 50% of the net proceeds from the gasoline extraction.

Appellants' computation of value and of earnings is assailed at many other points, but fully conceding, for present purposes only, every contention made by them except those which we have discussed, namely, the value of appellants' gas rights and the division of return from gasoline extraction, the appellants have failed to show

that the rate imposed is confiscatory or otherwise such as to call for the interference of a court of equity.

*Affirmed.*

MR. JUSTICE MCREYNOLDS concurs in the result.

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## UNITED FUEL GAS COMPANY *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 4. Argued November 23, 28, 1927. Reargued October 15, 16, 1928.—Decided January 2, 1929.

1. An order of a District Court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion. P. 326.
2. Evidence to prove the value of plaintiff's natural gas land, like that considered in *United Fuel Gas Co.* v. *R. R. Comm'n, ante,* p. 300, *held,* on the authority of that case, to be insufficient to support the burden of proof in a suit challenging the adequacy of rates fixed by a public commission. P. 326.

14 F. (2d) 209, affirmed.

APPEAL from a decree denying an application for a preliminary injunction in a suit by the Gas Company to restrain the Commission from interfering with the putting into effect of a new and higher schedule of gas rates.

*Mr. John W. Davis,* with whom *Messrs. Harold A. Ritz, Douglas M. Moffat, Edward L. Patterson,* and *Chester J. Gerkin* were on the brief, for appellant.

*Messrs. F. M. Livezey* and *Robert S. Spilman,* with whom *Messrs. Arthur G. Stone, Paul W. Scott,* and *George S. Wallace* were on the briefs, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

Appellant is a West Virginia corporation engaged in producing natural gas which it sells in West Virginia,

Pennsylvania, Ohio and Kentucky. A part of its business is the sale of gas at wholesale to distributors and is not regulated by any public body. Another part is the sale of gas direct to consumers in West Virginia cities and is subject to regulation by the appellee commission. In April, 1924, appellant filed with the commission a schedule increasing its rates in its "regulated" business in West Virginia. The commission, after an extensive hearing, denied this application for an increase, holding that the existing schedule yielded a fair return on appellant's property. P. S. C. W. Va. Bulletin 91. Appellant then sought, by the present suit in the District Court for the Southern District of West Virginia, an injunction restraining the commission from interfering with appellant in putting into effect its new and higher rate schedule. Application for a preliminary injunction was heard by a court of three judges upon the record before the commission and some additional testimony, and was denied. 14 F. (2d) 209. The case is here by direct appeal from the order of the district court, under § 266 of the Judicial Code.

An earlier proceeding before the commission in 1917 had resulted in its order for an increase in the rate of 5 cents per 1,000 cubic feet which, in 1923, was set aside by the Supreme Court of West Virginia. 95 W. Va. 91. A similar case, *United Fuel Gas Co.* v. *Railroad Comm'n of Kentucky,* 13 F. (2d) 510, coming here by appeal from a final decree of the District Court for eastern Kentucky, involving similar and some additional questions and denying the relief asked, was heard with this and is discussed in a separate opinion, *ante,* p. 300. The two cases involve substantially the same property and business. The issues as to valuation are identical and so far as material here the records as to them are practically the same.

Appellant, through ownership in fee and leases or contracts on a rental or royalty basis, controls the production

of natural gas from 814,910 acres of land. A part of this area, the so-termed "proven" territory, is at present being used in production, the remainder being held in reserve as either "probable" or "unfavorable" sources of future production. Its principal items of property consist of its interest in this acreage, working capital, buildings, machinery, mains, pipes, compressors and other equipment used in the production and distribution of gas.

The value as claimed by appellant and as found by the commission and the court of the total property of appellant used in both its "regulated" and "unregulated" business, follows:

Value claimed by appellant:

| | As of Dec. 31, 1924 |
|---|---|
| Physical property (production, transmission and distribution systems, etc.) | $22,274,274.00 |
| Gas lands, leaseholds, and rights | 36,449,176.00 |
| General overhead charges | 6,357,046.00 |
| New property added during 1924 | 2,044,778.00 |
| Working capital | 990,000.00 |
| Going concern value (difference between reproduction cost new and same less deterioration) | 8,423,105.00 |
| | $76,538,379.00 |

Value as found by the commission:

| | As of Dec. 31, 1923 | As of Dec. 31, 1924 |
|---|---|---|
| Physical property | $25,000,000.00 | $25,648,457.72 |
| Working capital | 990,000.00 | 990,000.00 |
| Going concern value | 3,000,000.00 | 3,000,000.00 |
| Gas rights and leaseholds (book value) | 6,343,329.67 | 6,361,511.42 |
| | $35,333,329.67 | $35,999,969.14 |

Value as found or assumed by the court below:

| | As of Dec. 31, 1923 |
|---|---|
| Physical property (production, transmission and distribution systems, overhead, etc., less depreciation) | $26,000,000.00 |
| Going concern value | 3,000,000.00 |

| | As of *Dec. 31, 1923* |
|---|---|
| Working capital | $990,000.00 |
| Assumed value of gas reserve presently used and useful in the public service ("proven" territory) | 10,317,311.39 |
| | $40,307,311.39 |

The court below made no finding as to the value of appellant's gas rights. It included in the rate base the 136,384 acres of land described by appellant's witnesses as proven territory, that is, areas which had been thoroughly tested and are now producing gas, and excluded 126,208 acres of land described as probable territory, that is, territory which had been partially tested or which appeared on the basis of geological evidence and its geographical relation to productive areas to be a probable source of natural gas. It was by this division of appellant's gas field and the inclusion of but a part in the rate base, at the full value claimed by appellant, that the court below reached its assumed valuation of the gas field of $10,317,311. The rest of the territory, consisting of 552,319 acres classified as improbable or unfavorable territory, was disregarded by the court below and appellant's own expert in estimating available gas supply.

By allocating the various items of appellant's property to the regulated business, on the basis of percentages agreed upon by the parties, the court reached the conclusion that the following was the value of the property used and useful in the regulated business:

| | As of *Dec. 31, 1923* |
|---|---|
| Tangible property | $7,530,826.00 |
| Going concern value | 847,350.00 |
| Working capital | 282,546.00 |
| Gas Reserve (proven territory only) | 2,590,677.00 |
| | $11,251,399.00 |

The court further found that a reasonable rate of return on the property in the rate base was 12.77% (8% plus

1.12% depreciation,[1] plus 3.65% amortization). It found that the net earnings from the regulated business were $1,555,593 (before deduction for depreciation and amortization) and were sufficient to pay a return of 12.77% on more than the value as found, namely on $12,377,124.

An order of a court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion. *Chicago Great Western Ry.* v. *Kendall,* 266 U. S. 94, 100; and see *Meccano, Ltd.* v. *Wanamaker,* 253 U. S. 136, 141. To support the burden resting upon it, appellant, while challenging generally the correctness of the court's valuation, places its chief reliance on the alleged erroneous valuation of its gas field. To support the claim to a much higher valuation, it relies upon the same theories and the same method of ascertaining the value of the gas field as were pressed upon us in No. 1 [*ante,* p. 300.] With respect to this item, after making the same assumptions as in that case, we reach the same conclusion, for reasons there stated at length, that there is no dependable evidence of value of appellant's gas field in excess of the value assumed on its books; that no ground is presented for assigning to it a value beyond the $6,343,329 so assumed on appellant's books, a smaller value than that used by the court in its calculations.

With respect to other conclusions of the court below, there is no serious suggestion that the court abused its discretion. In 1923 the case was before the highest court of the state. The estimates now presented to this Court

[1] The commission had allowed this percentage amounting to $404,333 as covering depreciation of plant. The court merely allowed the total amount so found as plant depreciation and did not estimate depreciation at a percentage of its own rate base, which was higher than that of the commission, the principal item of its valuation differing from that of the commission, being its assumed value of appellant's gas rights.

are based on the business of that year, and we are without information as to appellant's business and return upon it in the intervening years. We think it clear that no case is presented which would warrant interference by this Court with the order below denying interlocutory relief.

*Affirmed.*

MR. JUSTICE MCREYNOLDS concurs in the result.

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## CHASE NATIONAL BANK ET AL. v. UNITED STATES.

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 77. Argued November 27, 28, 1928.—Decided January 2, 1929.

Section 401 of the Revenue Act of 1921 imposes a tax on "the transfer of the net estate of every decedent" dying after the passage of the Act, and § 402 provides that in valuing the gross estate from which the net is computed, there shall be included the amount, over an exemption, receivable by beneficiaries as insurance under policies taken out by the decedent upon his own life. After the effective date of the Act the decedent in this case procured policies on his life payable to others but reserving to himself the right to change beneficiaries, and paid the premiums until his death. The transfer tax assessed under the Act included an amount imposed by reason of the inclusion in his estate of the proceeds of the policies less exemption. *Held:*

(1) This part of the tax is not a direct tax on the policies or their proceeds, but is a tax on the privilege of transferring property of a decedent at death. Pp. 333 et seq.

(2) The termination at death of the power of the decedent to change beneficiaries and the consequent passing to the designated beneficiaries of all rights under the policies freed from the possibility of its exercise, is the legitimate subject of a transfer tax. P. 334.

(3) The fact that the proceeds of the policies were not transferred to the beneficiaries from the decedent, but from the insurer, does not make the tax one on property. The word "transfer" in the statute, and the privilege which may constitutionally be taxed as an excise, includes the transfer of property procured

through expenditures by the decedent with the purpose, effected by his death, of having it pass to another. P. 337.

(4) In reaching this conclusion, it is of some significance that by the local law applicable to the insurer and the insured in this case, the beneficiaries' rights in the policies and their proceeds are deemed to be the proceeds of the premiums paid by the insured, and, as such, recoverable by one having an equitable claim on the premiums. P. 337.

(5) Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise. P. 338.

(6) The statutory method of fixing the tax and securing its payment is not objectionable, as arbitrary, under the Fifth Amendment even though the tax, both on the beneficiaries of the insurance and on those who share in the decedent's estate, is larger than it would be if the insurance proceeds were dealt with separately in taxing their transfer instead of being included in the gross estate from which the net estate, subject to graduated tax rates, is determined. P. 338.

RESPONSE to questions certified by the Court of Claims in a suit by executors to recover money paid as part of an estate tax.

*Messrs. Dallas S. Townsend* and *Wm. Marshall Bullitt,* with whom *Mr. Henry Walton Proffitt* was on the brief, for The Chase National Bank et al.

The policies were the property of the beneficiaries and no part of the estate. *Tyler* v. *Treasurer and Receiver General,* 226 Mass. 306; *Matter of Voorhees,* 200 App. Div. (N. Y.) 259; *Wagner* v. *Thieriot,* 203 App. Div. (N. Y.) 757; *Washington Central Bank* v. *Hume,* 128 U. S. 195.

The tax imposed is a direct tax on property by virtue of its ownership and is void because not apportioned. *Eisner* v. *Macomber,* 252 U. S. 189; *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288; *Pollock Case,* 157 U. S. 429; *Knowlton* v. *Moore,* 178 U. S. 41; *Flint* v. *Stone-*

*Tracy Co.*, 220 U. S. 150; *Brushaber* v. *Union Pacific*, 240 U. S. 19; *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189; *Frick* v. *Lewellyn*, 298 Fed. 803, affirmed upon another ground, 268 U. S. 238.

The tax is not an "excise" tax within any definition ever suggested by this Court. *Knowlton* v. *Moore*, 178 U. S. 41; *Scholey* v. *Rew*, 23 Wall. 331; *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429; *Hertz* v. *Woodman*, 218 U. S. 205; *Y. M. C. A.* v. *Davis*, 264 U. S. 47; *Edwards* v. *Slocum*, 264 U. S. 61.

The numerous decisions of this Court in federal inheritance tax cases establish the following propositions:

1. That the federal inheritance tax—whether a legacy tax as in the 1898 Act, or a net estate tax as in the 1921 Act—was held to be an excise solely because it was imposed upon the interest of the decedent which ceased by reason of death and thereupon passed to a beneficiary—from the dead to the living.

2. The property with respect to which the tax is imposed must be property of the decedent, who directed its disposition after his own death either (1) by intestacy, will, or deed to take effect at death, or (2) by conferring a power of appointment on another to dispose of it at such other's death.

3. The sole basis of sustaining such taxes as "excises" is that there is no inherent right in a decedent to direct the disposition of his property after his death; and that as the State alone authorizes or protects such disposition, it can attach to such privilege any condition it chooses, and that the federal tax is simply imposed on the exercise of the privilege.

The tax complained of in this case does not come within the definition of an "excise" tax:

1. Mr. Brown had no interest which could or did cease at his death and no interest passed from him to any beneficiary upon his death since their interest in the policies had vested in them some years previous to his death.

2. Mr. Brown neither owned the policies, nor did he exercise by will or deed to take effect at death, any rights of ownership over these policies; he neither disposed of them nor authorized another to dispose of them; there was no cessation of his interest upon his death, and no transfer of such interest to another, since the property rights in the policies were already in the beneficiaries prior to his death.

3. The falling in of these insurance policies upon Mr. Brown's death was not in any sense the exercise of a privilege granted by the State. A contract to pay money was merely performed. This was no tax on a privilege, it was a tax on the inherent and essential element of ownership, i. e., the right to take possession of one's own property, and as such was a tax on property.

The tax is so unreasonably determined that it is void, even though considered as an excise tax. It lacks equality, universality and uniformity. The statute arbitrarily makes something a part of Mr. Brown's estate which is not part of it. Mr. Brown during his lifetime could not gain possession of the proceeds of these policies, nor could he by his will exercise rights of ownership over these proceeds. The plaintiff executors had no right or power over the proceeds. The tax is assessed in this instance on Mr. Brown's estate.

The statute attempts to give the executors a cause of action against the beneficiaries to recover the amount of tax paid. The cause of action is inadequate since the executors under the statute cannot recover from the beneficiaries the full amount of the tax paid by reason of these proceeds. A mere cause of action to recover a part of the tax paid is not the equivalent of immunity from taxation.

The constitutional limitations on the power of taxation must be strictly complied with, and the power to tax cannot be made the means of imposing upon one man the burden which should be borne by another. *Loan Ass'n* v.

*Topeka,* 20 Wall. 655; *United States* v. *Railroad Co.,* 17 Wall. 322; *Hartman* v. *Greenhow,* 102 U. S. 672.

There are numerous decisions of this and other courts, sustaining excise taxes which are measured by the value or extent of tax-exempt property or property which would not of itself be taxable. It will be observed from an examination of these cases that the property which is there used as a measure of the tax is property belonging to the taxpayer against whom the tax is assessed.

There is no suggestion in any language ever used by this Court that Congress has power to impose a tax on A measured by property which does not belong to A and over which A has no control, but which belongs exclusively to B. See *Wardell* v. *Blum,* 276 Fed. 226; *Frew* v. *Bowers,* 12 F. (2d) 625. The executors of the estate of Mr. Brown cannot be distinguished from other executors and estates by reason of the policies of insurance not payable to them which are here involved, which they do not own, with reference to which they did nothing and could do nothing, and by which they did not in any way benefit.

The most that can be said in favor of the tax here in question is that it is a tax on the amount received by Mrs. Brown and her two children and that the executors are made the collectors of the tax for the United States. We invite attention, however, to the fact that the Act attempts to give the executors the right to recover only a part of the amount which the estate has to pay.

No argument can escape the bare fact that the tax on the surviving beneficiary of the policy is to be determined by the wealth of the insured decedent. If Mrs. Brown and the Brown children were taxed at the "estate tax" progressive rates on the insurance received, they would pay about $1,500 and $750 each respectively, or $3,000 in all. But merely because they held insurance on a well-to-do man's life, the tax is $9,146.76.

*Mr. Alfred A. Wheat,* with whom *Solicitor General Mitchell* was on the brief, for the United States.

The tax is an excise, not a direct tax. The only question is whether it is arbitrary and unreasonable to include in the measure of decedent's estate the proceeds of the life insurance policies.

The ownership of the policies remained in the decedent until the moment of his death. They were bought with his money and were an asset over which he had complete control while he lived and could at any moment have made payable to his estate, and if a named beneficiary should have predeceased him, they would by their terms have been so payable. In bankruptcy they would have been an asset passing to the trustee.

They bore such a direct relation to his estate after death that for many years the extent to which they should be exempt from the rights of creditors has been the subject of legislative regulation.

By common understanding they are regarded as part of the estate which a man leaves when he dies, and in England for many years have been included in the measure of death duties. Therefore, for Congress to include them was not arbitrary but was reasonable, for they bore a just and proper relation to the subject-matter of the tax.

*Mr. L. L. Hamby* filed a brief as *amicus curiæ,* by special leave of Court.

Mr. Justice Stone delivered the opinion of the Court.

This case comes here from the Court of Claims, under § 288, Title 28, U. S. Code, 43 Stat. 939, on certified questions of law concerning which instructions are desired for the proper disposition of the cause. The facts certified are: on September 13, 1922, after the effective date of the Revenue Act of 1921, Herbert W. Brown procured three insurance policies on his life aggregating $200,000, each naming his wife as beneficiary. Each policy re-

served to the insured the right to change the beneficiary.* All premiums on the policies were paid by the insured. On April 10, 1924, he died testate, leaving the plaintiffs below his executors and an estate subject to the estate tax imposed by the Revenue Act of 1921, c. 136, 42 Stat. 227. The tax as assessed by the commissioner included $9,146.76 imposed by reason of the inclusion in the estate of the proceeds of the three insurance policies, less $40,000 exemption authorized by the statute. The executors paid the tax and, upon denial of a claim for refund, brought the present suit in the Court of Claims to recover the tax as illegally assessed.

The questions certified are:

Question I: Whether the tax imposed by the final clause of section 402 (f), Revenue Act of 1921, 42 Stat. 278, on life insurance policies payable in terms to beneficiaries "other than the decedent or his estate" is a direct tax on property and void because not apportioned.

Question II: Whether the $9,146.76 tax imposed bears such an unreasonable relation to the subject matter of the tax as to render it void.

Similar questions were mooted by counsel, but not decided, in *Lewellyn* v. *Frick,* 268 U. S. 238, 251.

Section 401 of the Revenue Act of 1921 imposes a tax upon "the transfer of the net estate of every decedent" dying after the passage of the act, and § 402 provides: "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property . . . tangible or intangible . . . (f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent

* REPORTER'S NOTE.—This right was exercised as to one policy before his death by substituting children.

upon his own life." By § 406 the executor is required to pay the tax, but, if so paid, he is given by § 408 the right to recover from the beneficiaries a part of the tax, and by § 409 they are made personally liable for a share of it if not so paid.

In the present case there is no question of the construction of the statute. The tax is plainly imposed by the explicit language of §§ 401 and 402 (f) if those sections are constitutionally applied. Plaintiffs challenge the validity of the tax on the ground that it is not an excise or privilege tax but a direct tax on property, the insurance policies or their proceeds, and so is invalid because not apportioned as required by Art. I, §§ 2, 9 of the federal Constitution, and that in any case the measure of the tax and the methods of securing its payment are so arbitrary and capricious as to violate the due process clause of the Fifth Amendment.

The statute in terms taxes transfers. Like provisions in earlier acts have been generally upheld as imposing a tax on the privilege of transferring the property of a decedent at death, measured by the value of the interest transferred or which ceases at death. Cf. *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 50; *Edwards* v. *Slocum,* 264 U. S. 61, 62; *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349; *Nichols* v. *Coolidge,* 274 U. S. 531.

It is true, as emphasized by plaintiffs, that the interest of the beneficiaries in the insurance policies effected by decedent " vested " in them before his death and that the proceeds of the policies came to the beneficiaries not directly from the decedent but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the

possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled.

A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors, *Cohen* v. *Samuels,* 245 U. S. 50 (see *Burlingham* v. *Crouse,* 228 U. S. 459), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, *N. Y. Domestic Relations Law,* c. 14, Consol. Laws § 52; *Kittel* v. *Domeyer,* 175 N. Y. 205; *Guardian Trust Co.* v. *Straus,* 139 App. Div. 884, aff'd 201 N. Y. 546, is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death.

In *Saltonstall* v. *Saltonstall,* 276 U. S. 260, a tax had been imposed by state statute on the succession to a remainder interest which had vested under a trust created before the enactment of the taxing act. It was objected that the tax was void as retroactive and hence in conflict with the Fourteenth Amendment of the federal Constitution under the ruling in *Nichols* v. *Coolidge, supra,* later applied in *Untermyer* v. *Anderson,* 276 U. S. 440. But by the provisions of the trust indenture a power of disposition of the remainder had been reserved to the settlor to be exercised by him at any time during his life, with the concurrence of one trustee, and we held that the freeing of the remainder of the possibility of the exercise of that power, through its termination by the death of the settlor, effected a transfer which was the appropriate subject of a

succession tax and that the tax was not retroactive since the termination of the power which was prerequisite to the complete succession did not occur until after the enactment of the statute. The Court said (p. 271):

"So long as the privilege of succession has not been fully exercised it may be reached by the tax. See *Cahen* v. *Brewster,* 203 U. S. 543; *Orr* v. *Gilman,* 183 U. S. 278; *Chanler* v. *Kelsey, supra; Moffitt* v. *Kelly, supra; Nickel* v. *Cole, supra.* And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. *Bullen* v. *Wisconsin,* 240 U. S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another."

That, it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important for it was at least doubtful whether upon the death of the settlor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax levied exclusively on transfers, since the power was not vested in him alone, but in him and another. See *Reinecke* v. *Northern Trust Company,* decided this day, *post,* p. 339. But we think that the rule applied in *Saltonstall* v. *Saltonstall, supra,* to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferor for his own benefit. Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the

donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers.

But the plaintiffs say that the tax here must be deemed to be a tax on property because the beneficiaries' interests in the policies were not transferred to them from the decedent, but from the insurer, and hence there was nothing to which a transfer or privilege tax could apply. Obviously, the word " transfer " in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another. Sec. 402 (c) taxes transfers made in contemplation of death. It would not, we assume, be seriously argued that its provisions could be evaded by the purchase by a decedent from a third person of property, a savings bank book for example, and its delivery by the seller directly to the intended beneficiary on the purchaser's death, or that the measure of the tax would be the cost and not the value or proceeds at the time of death. It is of some significance also that by the local law applicable to the insurer and the insured in this case, a beneficiary's rights in the policy and its proceeds are deemed to be the proceeds of the premiums expended by the insured and as such recoverable in full by one having an equitable claim attaching to the premiums. *Holmes* v. *Gilman,* 138 N. Y. 369.

The plaintiffs point to no requirement, constitutional or statutory, that the termination of the power of disposition of property by death whereby the transfer of property is completed, which we have said is here the subject of the tax, must be preceded by a transfer directly from the decedent to the recipient of his bounty, of the property

subject to the power. And we see no necessity to debate the question whether the policies themselves were so transferred, for we think the power to tax the privilege of transfer at death cannot be controlled by the mere choice of the formalities which may attend the donor's bestowal of benefits on another at death, or of the particular methods by which his purpose is effected, so long as he retains control over those benefits with power to direct their future enjoyment until his death. Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, *Chanler* v. *Kelsey,* 205 U. S. 466. " To make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes." Sugden, Powers, 8th ed., 396; see Gray, Perpetuities, 3d ed. 1915, § 526 (b). And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, *Bullen* v. *Wisconsin,* 240 U. S. 625; cf. *United States* v. *Robbins,* 269 U. S. 315, 327; *Cohen* v. *Samuels, supra.*

The objection urged by plaintiffs under the second question, that the statutory method of fixing the tax and securing its payment infringes the Fifth Amendment, need not detain us. It is said that both the tax on those who share in the decedent's estate and that paid by the beneficiaries is larger than it otherwise would be if the proceeds of the insurance had not been included in the decedent's gross estate. But the increase in the tax to both is a consequence of including the amount of the policies in the gross estate in determining the net which is made the measure of the graduated transfer tax. The objection amounts to no more than saying that if the transfer of

the policies or their proceeds be taxed, they should not be included with the other property of the estate in determining the rate of the tax. As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death. *Stebbins* v. *Riley,* 268 U. S. 137. The inclusion in the gross estate of gifts made in contemplation of death under § 402 (c) has a like effect.

Other objections to the operation of the statute are not discussed either because they are not of weight or are not presented by the certified facts.

The questions propounded by the Court of Claims in form suggest that the tax is one imposed by the statute upon the policies. This we have shown is not the case. It is the transfer, which is a concomitant of the criteria laid down by the statute for imposing the tax, which is the subject of the tax. The tax is not on the policies, but we answer the question as if inquiring about the true subject of the tax.

*Both questions are answered, No.*

MR. JUSTICE MCREYNOLDS concurs in the result.

MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissent.

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## REINECKE, COLLECTOR OF INTERNAL REVENUE, *v.* NORTHERN TRUST COMPANY.

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

No. 90. Argued December 4, 5, 1928.—Decided January 2, 1929.

1. Respondent's testator in his lifetime conveyed property in trust to pay the income to himself and on his death to pay it to

designated persons until termination of the respective trusts, with remainders over. Each trust instrument reserved to the settlor alone the power to revoke the trust created by it, and provided that upon the exercise of that power the corpus of the trust must be returned to him by the trustee. The trusts were not in contemplation of death and were created before the date of the Revenue Act of 1921, but the settlor died after that date without having revoked them. *Held* subject to transfer tax under the Act. P. 345.

2. A transfer in trust subject to a power of revocation in the transferor alone, terminable at his death, is not complete until his death and hence a transfer tax applied to it, as in Revenue Act, 1921, § 422, is not retroactive where his death follows the date of the taxing statute, though the creation of the trust preceded that date. *Chase Nat'l Bank* v. *United States, ante,* p. 327, *Saltonstall* v. *Saltonstall,* 276 U. S. 260. P. 345.

3. The testator in his lifetime established several other trusts by deeds, creating life interests in income. In one the life interest was to terminate five years after his death, or on the death of the designated beneficiary should she survive that date, with remainder over. In the others the life interests were to terminate five years after his death or on the death of the respective life tenants, whichever should happen first, with remainders over. He reserved to himself power to supervise reinvestment of trust funds, to require the trustee to execute proxies to his nominee, to vote shares of stock held by the trustee, and to control leases executed by the trustee; and he also reserved power to "alter, change or modify" each trust, which was to be exercised, in the case of some of them, by himself and the single beneficiary of each trust, acting jointly, and, in the case of the remaining trust, by himself and a majority of the beneficiaries, acting jointly. The trusts were not in contemplation of death, and were created before the passage of the Revenue Act of 1921, but after the passage of the Revenue Act of 1918, which contained similar estate tax provisions; and the settlor died after the date of the 1921 Act without having modified any of them in any manner here material. *Held* not subject to the transfer tax, because:

(1) Section 402 (c) of the Revenue Act of 1921 is inapplicable to a trust created by a decedent in his lifetime, not in contemplation of death, which vested beneficial interests in others and which he was without power to modify or revoke except with the consent of all or a majority of the beneficiaries. P. 346.

(2) Since the shifting of the economic interest under such a trust was complete when the trust was made, a reservation to the settlor of power to manage the trust will not render the transfer taxable under the statute upon his death. P. 346.

(3) The donor having parted with the possession and his entire beneficial interest in the property when the trusts were created, the mere passing of possession and enjoyment from the life tenants to the remaindermen after his death, as directed, and after the enactment of the statute, was not within the taxing provisions. The clause of § 402 (c) respecting trusts intended to take effect in possession and enjoyment at or after the donor's death should be construed as limited to interests passing from his possession, enjoyment or control at his death and so taxable as transfers at death under § 401. P. 347.

(4) The statute should be construed in favor of the taxpayer and to avoid doubts as to constitutionality. P. 348.

24 F. (2d) 91, reversed in part; affirmed in part.

CERTIORARI, 277 U. S. 579, to a judgment of the Circuit Court of Appeals which affirmed the District Court in dismissing a suit to recover the amount of an estate tax alleged to have been illegally assessed and collected.

*Mr. Thomas H. Lewis, Jr.*, with whom *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt*, and *Messrs. Clarence M. Charest*, General Counsel, Bureau of Internal Revenue, and *Sewall Key* were on the brief, for petitioner.

A trust, under which the corpus can not be distributed until after the death of the settlor, is a trust "intended to take effect in possession or enjoyment at or after" the death of the settlor, within the meaning of § 402 (c) of the Revenue Act of 1921. *Shukert* v. *Allen*, 273 U. S. 545; *Vanderbilt* v. *Eidman*, 196 U. S. 480; *McCaughn* v. *Girard Trust Co.*, 11 F. (2d) 520; *Bullen* v. *Wisconsin*, 240 U. S. 625; *Nichols* v. *Coolidge*, 274 U. S. 531.

Congress has power to include in a decedent's gross estate the value of property in respect of which he has created a trust prior to the passage of the Act, reserv-

ing to himself the income for life and an unrestricted power of revocation. *Nichols* v. *Coolidge, supra; Hill* v. *Wallace,* 259 U. S. 44; *Nat'l Life Ins. Co.* v. *United States,* 277 U. S. 508; *Farmers Loan & Trust Co.* v. *Bowers,* 15 F. (2d) 706; *Matter of Schmidlapp,* 236 N. Y. 278; *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Bullen* v. *Wisconsin,* 240 U. S. 625; *Lewellyn* v. *Frick,* 268 U. S. 238.

Trusts created in 1919 during the effectiveness of § 402 (c) of the Revenue Act of 1918, which is identical with the one here involved, may be included in the gross income of a decedent's estate under § 402 (c) of the Revenue Act of 1921, as the repeal of the earlier section and its re-enactment in the Revenue Act of 1921 does not create a new law attempting to reach back, but is a continuation of the old. *Bear Lake Irrigation Co.* v. *Garland,* 164 U. S. 1; Lewis' Sutherland Statutory Construction, Vol. 1, 2d ed., § 238; *Lamb* v. *Powder River Live Stock Co.,* 132 Fed. 434; *Great Northern Ry. Co.* v. *United States,* 155 Fed. 945; *Steamship Co.* v. *Joliffe,* 2 Wall. 450.

Congress has power to include in a decedent's gross estate the value of property with respect to which a trust has been created during the effectiveness of a prior law identical with that here involved, where some present interest and a qualified right to revoke is retained by the settlor, although the income is payable to others than the settlor. *Y. M. C. A.* v. *Davis,* 264 U. S. 47; *Edwards* v. *Slocum,* 264 U. S. 61; *Pennsylvania Co.* v. *Lederer,* 292 Fed 629; *Whitlock-Rose* v. *McCaughn,* 21 F. (2d) 164.

*Messrs. J. F. Dammann, Jr.,* and *Wm. B. McIlvaine,* with whom *Mr. Stuart J. Templeton* was on the brief, for respondent.

*Mr. Elihu Root, Jr.,* filed a brief as *amicus curiae* on behalf of the Home Trust Company, by special leave of Court.

*Messrs. Edward H. Blanc, Russell L. Bradford,* and *Henry C. Eldert* filed a brief as *amici curiae* on behalf of the Farmers' Loan & Trust Company, by special leave of Court.

Mr. Justice Stone delivered the opinion of the Court.

Respondent executor brought suit in the District Court for northern Illinois to recover from petitioner, a collector of Internal Revenue, the amount of a tax alleged to have been illegally assessed and collected upon the estate of respondent's testator under the Revenue Act of 1921, c. 136, 42 Stat. 227. Judgment of the district court for the executor, upon an overruled demurrer, was affirmed by the Court of Appeals for the Seventh Circuit. 24 F. (2d) 91. This Court granted certiorari April 23, 1928, 277 U. S. 579.

Respondent's testator died May 30, 1922. On various dates between 1903 and 1919 he established seven trusts by deed which are conceded not to have been in contemplation of death. Two of them were created respectively in 1903 and 1910. They are identified in the record as Trusts No. 1831 and No. 3048, and referred to here as the "two trusts." By them the income from the trusts was reserved to the settlor for life and on his death the income of each trust was to be paid to a designated person until the termination of the trust as provided in the trust instrument, with remainders over. By the terms of each trust there was reserved to the settlor alone a power of revocation of the trusts, upon the exercise of which the trustee was required to return the corpus of the trust to him.

The remaining five trusts, designated in the record as Trusts Nos. 4477, 4478, 4479, 4480 and 4481, referred to here as the "five trusts," were created in 1919 before the passage of the Revenue Act of 1921, but after the enact-

ment of the similar provisions of the estate tax of the Revenue Act of 1918. 40 Stat. 1096, 1097. By each, life interests in the income, on terms not now important, were created. In one the life interest was terminable five years after the death of the settlor or on the death of the designated life beneficiary should she survive that date, with a remainder over. In the other four, life interests in the income were created, terminable five years after the settlor's death or on the death of the respective life tenants, whichever should first happen, with remainders over. The settlor reserved to himself power to supervise the reinvestment of trust funds, to require the trustee to execute proxies to his nominee, to vote any shares of stock held by the trustee, to control all leases executed by the trustee, and to appoint successor trustees. With respect to each of these five trusts a power was also reserved " to alter, change or modify the trust," which was to be exercised in the case of four of them by the settlor and the single beneficiary of each trust, acting jointly, and in the case of one of the trusts, by the settlor and a majority of the beneficiaries named, acting jointly.

The settlor died without having revoked either of the two trusts and with the beneficiaries and life tenants designated in the trusts surviving him, and without having modified any of the five trusts except one, and that in a manner not now material.

The commissioner, in fixing the amount of the estate for tax purposes included the corpus of all seven trusts. Section 401 of the statute imposes a tax at a graduated rate " upon the transfer of the net estate of every decedent " dying after the passage of the act. By 402 it is provided that in calculating the tax there shall be included in the gross estate all property, tangible and intangible, "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contem-

plation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act). . . ."

As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive, within the ruling of *Nichols* v. *Coolidge,* 274 U. S. 531. In that case it was held that the provisions of the similar § 402 of the 1918 Act, 40 Stat. 1097, making it applicable to trusts created before the passage of the act was in conflict with the Fifth Amendment of the federal Constitution and void, as respects transfers completed before any such statute was enacted. But in *Chase National Bank* v. *United States,* decided this day, *ante,* p. 327, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence § 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute. For that reason, stated more at length in our opinion in *Chase National Bank* v. *United States, supra,* we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed.

It is argued by respondent that § 402 by its terms does not impose any tax on the transfers involved in the five trusts and that, even if subject to the provisions of that section, they ante-dated the passage of the 1921 act, and the section as to them is retroactive and void, although they were created after the enactment of the corresponding sections of the 1918 act. The government argues that § 402 applies to all these transfers and is not retroactive

as to them because of the reserved powers to manage and to modify the trusts, which did not terminate until the death of the decedent after the passage of the statute, and that even without such reserved powers the transfers of the remainder interests were all subject to the tax because, within the language of § 402, they were "intended to take effect in possession or enjoyment at or after his death."

As the tax cannot be supported unless the statute applies in one of the two ways suggested by the government, we must necessarily determine the effect of the reserved powers and the meaning and application of the phrase quoted from § 402. If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was

made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax.

But the question much pressed upon us remains, whether, the donor having parted both with the possession and his entire beneficial interest in the property when the trust was created, the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed, and after the enactment of the statute, is included within its taxing provisions. That question, not necessarily involved, was left unanswered in *Shukert* v. *Allen,* 273 U. S. 545. There the gift of a remainder interest, having been made without reference to the donor's death, although it did in fact vest in possession and enjoyment after his death, was held not to be a transfer intended to take effect in possession or enjoyment at or after the donor's death, and for that reason not to be subject to the tax. But here the gift was intended to so take effect, although the transfer which effected it preceded the death of the settlor and was itself not subject to the tax unless made so by the circumstances that the possession or enjoyment passed as indicated.

In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. Cf. *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 50; *Edwards* v. *Slocum,* 264 U. S. 61, 62; *N. Y. Trust Co.* v. *Eisner,* 256 U. S. 345, 349. It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we

are asked to say that this statute means that he may not make a gift *inter vivos,* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.

It is of significance, although not conclusive, that the only section imposing the tax, § 401, does so on the net estate of decedents, and that the miscellaneous items of property required by § 402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death. They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment. In the light of the general purpose of the statute and the language of § 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in § 402 (c) "to take effect in possession or enjoyment at or after his death," include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under § 401. That doubt must be resolved in favor of the taxpayer. *Gould* v. *Gould,* 245 U. S. 151, 153; *United States* v. *Merriam,* 263 U. S. 179, 187. Doubts of the constitutionality of the statute, if construed as contended by the government,

would require us to adopt the construction, at least reasonably possible here, which would uphold the act. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407; *United States* v. *Standard Brewery*, 251 U. S. 210, 220; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401, 402; *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 390. The judgment below

As to the two trusts, Nos. 1831, 3048—*Reversed.*
As to the five trusts, Nos. 4477, 4478, 4479, 4480, and 4481 —*Affirmed.*

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## GLEASON *v.* SEABOARD AIR LINE RAILWAY COMPANY.

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

No. 51. Argued November 22, 1928.—Decided January 2, 1929.

1. The doctrine that a principal shall be held liable for the fraudulent representations of his agent made within the scope of the agent's authority, is not subject to an exception exonerating the principal where the agent acts with the secret purpose to benefit only himself and without the knowledge or consent of the principal. *Friedlander* v. *Texas & Pacific Ry. Co.*, 130 U. S. 146, distinguished and in part overruled. P. 353.
2. Plaintiff paid a draft attached to an "order notify" bill of lading in reliance upon notice and assurance that the goods had arrived, given to him by an agent of the defendant railway company whose duty it was to give such notices of arrival. It turned out that the draft and bill had been forged by the agent himself and by him negotiated for the purpose of defrauding the plaintiff to the agent's own advantage. *Held* that the railway company was liable for the deceit. P. 353.
3. Section 22 of the Bills of Lading Act, enlarging the implied authority of agents to issue bills of lading, has no bearing on the present case. P. 357.

21 F. (2d) 883, reversed.

CERTIORARI, 276 U. S. 612, to a judgment of the Circuit Court of Appeals which reversed a judgment recovered by Gleason in the District Court against the Railway Company in an action for deceit. The case had been removed from the state court on the ground of diversity of citizenship.

*Mr. Edward Brennan,* with whom *Mr. Walter C. Hartridge* was on the brief, for petitioner.

The following authorities were cited:

*Hern* v. *Nichols,* 1 Salk. 289; *Grammar* v. *Nixon,* 1 Str. 653; *Lloyd* v. *Grace,* 1912, A. C. 716; *Tome* v. *Parkersburg R. R. Co.,* 39 Md. 36; *Planter's Co.* v. *Merchants Nat'l Bank,* 78 Ga. 578; *Bank of Palo Alto* v. *Pacific Postal Telegraph Co.,* 103 Fed. 841; *Merchants Bank* v. *State Bank,* 10 Wall. 604; *Nat'l Bank* v. *Chicago, etc. R. R. Co.,* 44 Minn. 224; *Barwick* v. *English Joint Stock Bank,* L. R. 2 Ex. 259; *British Mutual Banking Co.* v. *Charnwood Forest R. R. Co.,* 18 Q. B. D. 714; *Limpus* v. *London Omnibus Co.,* 32 L. J. Ex. 34; *Dun* v. *City Nat'l Bank,* 58 Fed. 174; *Harriss, Irby & Vose* v. *Allied Compress Co.,* 6 F. (2d) 7; *Cleaney* v. *Parker,* 167 Ala. 134; *Dregman* v. *Morgan County Bank,* 62 Colo. 277; *Bridgeport Bank* v. *N. Y. & N. H. R. R. Co.,* 30 Conn. 231; *First Nat'l Bank* v. *Peck,* 180 Ind. 649; *Barnes* v. *Century Savings Bank,* 165 Ia. 141; *Jones* v. *Shearwood Distilling Co.,* 150 Md. 24; *Allen* v. *South Boston R. R. Co.,* 150 Mass. 200; *Engen* v. *Merchants State Bank,* 164 Minn. 293; *Berkovitz* v. *Morton-Gregson,* 112 Neb. 154; *Fifth Avenue Bank* v. *Railway Co.,* 137 N. Y. 231; *Havens* v. *Bank of Tarboro,* 132 N. C. 214; *Cincinnati* v. *City Nat'l Bank,* 56 Oh. St. 351; *City Nat'l Bank* v. *Martin,* 70 Tex. 643; *Appeal of Kisterbrock,* 127 Pa. 601; *Griswold* v. *Haven,* 25 N. Y. 595; *Farmers Bank* v. *Butchers Bank,* 16 N. Y. 125; *First Nat'l Bank* v. *Fourth Nat'l Bank,* 56 Fed. 967; *Armstrong* v. *Ashley,* 204 U. S. 272.

Wigmore, 7 Harv. L. R., 315, 383, 441; Holmes, 4 *id.* 345; 5 *id.* 1; 43 A. L. R. 615; Holmes, The Common Law, 231; Williston, Sen. Doc. 650, 62d Cong., 2d Sess. p. 26; 2 Pollock and Maitland, Hist. Eng. L. 526; 8 Holdsworth, Hist. Eng. L., 222; Baty, Vicarious Liability, 1; Mechem, Agency, §§ 1988, 1990; Pollock, Torts, 12 Ed. 76; Vance, 4 Mich. L. R., 209.

*Mr. E. Ormonde Hunter* for respondent.

The federal rule is against liability. *Friedlander* v. *Texas & Pacific R. R.,* 130 U. S. 416; *Harris, Irby & Vose* v. *Allied Compress Co.,* 6 F. (2d) 7; *Thompson-Huston Electric Co.* v. *Capital Electric Co.,* 65 Fed. 341; *The Schooner Freeman* v. *Buckingham,* 18 How. 182; *Pollard* v. *Vinton,* 105 U. S. 7; *Iron Mountain Ry. Co.* v. *Knight,* 122 U. S. 79; *Lilly* v. *Hamilton Bank,* 178 Fed. 56; *Dun* v. *City Nat'l Bank,* 58 Fed. 174; 2 C. J. 853.

The general authorities recognize this as the federal rule. 39 C. J. 1295; 2 *id.* 854; Mechem, Agency, 2d ed. 1557; Fletcher Cyc. Corp., Vol. 5, 5230; Labatt, Master and Servant, 7218.

Legislative recognition has also by statute (Bill of Lading Act of 1916) fixed and confirmed this principle of law creating a narrow and definite statutory exception to that rule instead of abrogating it. U. S. Code, § 102; *Gleason* v. *Seaboard Air Line,* 21 F. (2d) 884; 15 C. J. 937; *Hedgecock* v. *Davis,* 64 N. C. 650.

The federal doctrine and not state law is applicable to the facts in this case. *Fitch, Cornell & Co.* v. *Railroad Co.,* 155 N. Y. S. 1079.

Authorities advanced by petitioner differentiated. Either an application of local law in the federal court, or act of servant although fraudulent, done for the purpose of advancing business, or tort ratified by master either by act or estoppel *in pais: Merchants Bank* v. *State Bank,* 10 Wall. 604, not in bad faith, ratification; *Armstrong* v. *American Exchange Bank,* 133 U. S. 434, ratification

estoppel and application of the law of Ohio; *Bank of Palo Alto* v. *Pacific Postal Telegraph Co.,* 103 Fed. 841, state rule applicable; *Smith* v. *First Nat'l Bank,* 268 Fed. 781, state rule applicable, not clear act solely for agent's benefit; *Nat'l City Bank* v. *Carter,* 14 Fed. (2d) 940, state law applicable, still pending on appeal; *Manhattan Beach Co.* v. *Hornet,* 27 Fed. 484, ratification, estoppel by conduct.

Mr. Justice Stone delivered the opinion of the Court.

This case is here on certiorari, 276 U. S. 612, to review a judgment of the Circuit Court of Appeals for the Fifth Circuit, 21 F. (2d) 883, reversing a judgment for petitioner of the District Court for southern Georgia.

At the trial by jury it appeared that respondent railway company has terminals for the receipt and delivery of freight both at Charleston, S. C. and Savannah, Ga.; that McDonnell was an employee of respondent at its Savannah office, whose duty it was, and whose continuous practice it had been, to give notice to those engaged in the cotton trade, including petitioner, a cotton factor in Savannah, of the arrival of cotton at the Savannah terminal under "order notify" bills of lading. There was evidence from which the jury could have found that on March 19, 1925, McDonnell, so acting, gave petitioner notice of arrival of a shipment of cotton under a designated order notify bill of lading; that later, on the same day, a local bank presented to petitioner the described bill of lading, regular in form and properly endorsed, with an attached draft on petitioner for $10,000, which petitioner paid in reliance upon the notice of arrival given by the agent and the apparent regularity of the documents; that after presentation of the draft and before payment McDonnell had again informed petitioner, in response to an inquiry, that the cotton described in the bill of lading had arrived. There was evidence also plainly

indicating that petitioner would not have paid the draft without that assurance. The draft and the bill of lading, purporting to be issued by respondent at its Charleston office, eventually proved to have been forged and negotiated by McDonnell in Charleston, while temporarily absent from his duties in Savannah, and his entire course of conduct with respect to them, including his false notice to petitioner, was in the successful pursuance of a scheme to defraud petitioner of the amount paid by it on the draft.

The second count of petitioner's declaration, and the only one presently involved, set out a cause of action in deceit by McDonnell acting as the agent of respondent in giving the petitioner the false notice, and set up that the petitioner was induced to pay the draft by the representation that the cotton had arrived. The court, disregarding any question of want of due care on the part of respondent, instructed the jury that if it found that the false notice by McDonnell to petitioner was given within the scope of his authority and that petitioner had in fact been induced by the false statement to take up the draft, it should return a verdict for the petitioner. Judgment on the verdict for petitioner was reversed by the court of appeals on the ground that an employer is not liable for the false statements of an agent made solely to effect a fraudulent design for his own benefit and not in behalf of the employer or his business, the court saying (p. 884): "Under the general rule prevailing in the federal courts an employer is not liable for such conduct of his employee, *Friedlander* v. *Texas & Pacific Ry. Co.*, 130 U. S. 416 . . ."

In the *Friedlander* case the action was brought to recover for the non-delivery of merchandise, purported to have been received by the defendant carrier and covered by a bill of lading issued by its agent, admittedly author-

ized to issue bills of lading in the usual course of business. The bill had been fraudulently issued by the agent for his own enrichment and the described merchandise had not, in fact, been received by the defendant or its agent. The court held that there was no implied authority in the agent to issue bills of lading for merchandise not actually received, and that there was consequently no contractual obligation on the part of the carrier. As the only act of the agent complained of, the issuance of the bill of lading, was thus held not to be within the scope of his authority, that holding was sufficient to dispose of the entire case. To this extent the case has been often cited and followed. *Louisville & Nashville R. R. Co.* v. *Nat. Park Bk.*, 188 Ala. 109, 119; *Roy & Roy* v. *Northern Pacific Ry Co.*, 42 Wash. 572, 576; *contra, Bank of Batavia* v. *New York, etc. R. R. Co.*, 106 N. Y. 195. But the court in the *Friedlander* case went on to say (p. 425): "... nor is the action maintainable on the ground of tort. 'The general rule', said Willes, J., in *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, 265, 'is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.' See also *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526. The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, cannot be made responsible. *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 18 Q. B. D. 714."

The rule, applied in that case, that the authority of an agent to issue bills of lading is impliedly conditioned upon the receipt of the merchandise described in the bill, has

now been modified by statute. Section 22 [1] of the Federal Bills of Lading Act, 39 Stat. 542, applicable to bills of lading of common carriers in interstate and foreign commerce, provides that the carrier, in certain enumerated cases, shall be liable on a bill so issued, even though the merchandise is not received by the agent.

But the above quoted passage from that case, taken in conjunction with other references in the opinion to the fraudulent conduct of the agent for his own benefit, has been regarded as authority for the broader rule applied by the court below, and the present case must turn upon the sufficiency of the rule thus announced. For there was here no want of authority in the agent. His power to act for his principal was not contingent upon any act or omission of another. From the verdict we must take it that it was his duty unconditionally to answer the inquiry of petitioner as to the arrival of the goods, and concededly, if acting within the scope of his employment, the respondent would have been liable, however flagrant the agent's act, had it not been tainted by his selfish motive. *Nelson Business College* v. *Lloyd,* 60 Ohio St. 448; *Aiken* v. *Holyoke St. Ry. Co.,* 184 Mass. 269. *Binghampton Trust Co.* v. *Auten,* 68 Ark. 299.

The limitation upon the doctrine of *respondeat superior* applied by the court below finds little support other than in the passage quoted and in cases, chiefly in some of the

[1] Sec. 22. That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing of bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

lower federal courts, purporting to follow it, see *Harris, Irby & Vose* v. *Allied Compress Co.*, 6 F. (2d) 7, 9; *American Surety Co.* v. *Pauly*, 72 Fed. 470, 482; *Dun* v. *City Nat'l Bank*, 58 Fed. 174, 179; cf. *Leachman* v. *Board of Supervisors*, 124 Va. 616, 624, but in those cases it was not necessary to the decision. The state courts, including those of Georgia where the cause of action arose, have very generally reached the opposite conclusion, holding that the liability of the principal for the false statement or other misconduct of the agent acting within the scope of his authority is unaffected by his secret purpose or motives. *Planters' Rice-Mill Co.* v. *Merchants' Nat'l Bank*, 78 Ga. 574; *McCord* v. *Western Union*, 39 Minn. 181; *Havens* v. *Bank of Tarboro*, 132 N. C. 214; *Reynolds* v. *Witte*, 13 S. C. 5, 15; *Fifth Ave. Bank* v. *Forty-second St., etc. R. R. Co.*, 137 N. Y. 231; *Dougherty* v. *Wells, Fargo & Co.*, 7 Nev. 368. The English courts, after hinting at a departure from the rule as thus stated, *British Mutual Banking Co.* v. *Charnwood Forest Ry.*, 18 Q. B. D. 714; cf. *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, 265, have finally reached the same conclusion; *Lloyd* v. *Grace* [1912] A. C. 716.

And we think that the restriction of the vicarious liability of the principal adopted by the court below is supported no more by reason than by authority. Undoubtedly formal logic may find something to criticize in a rule which fastens on the principal liability for the acts of his agent, done without the principal's knowledge or consent and to which his own negligence has not contributed. But few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own. Shaw, C. J. in *Farwell* v. *Boston and Worcester Railroad Corporation*, 4 Metc. 49, 55; *Bartonshill Coal Co.* v. *Reid*, 3 Macq., 266, 283. See Pollock, Torts (1887) 67, 68; Salmond, Jurisprudence, 2d ed. 1907, 381. The

tendency of modern legislation in employers' liability and workmen's compensation acts and in the Bills of Lading Act cited, and of judicial decision as well, has been to enlarge rather than curtail the rule.

Granted the validity and general application of the rule itself, there would seem to be no more reason for creating an exception to it because of the agent's secret purpose to benefit himself by his breach of duty than in any other case where his default is actuated by negligence or sinister motives. In either case the injury to him who deals with the agent, his relationship and that of the principal to the agent's wrongful act, and the economic consequence of it to the principal in the conduct of whose business the wrong was committed, are the same.

The arguments in favor of creating such an exception are equally objections to the rule itself. Holmes, The Common Law (1882) 231, n. 3. But as we accept and apply the rule, despite those objections, we can find no justification for an exception which is inconsistent both with the rule itself and the underlying policy which has created and perpetuated it. We think that the *Friedlander* case should be overruled so far as it supports such an exception and that the judgment of the court of appeals should be reversed.

The court below also thought that Congress, by enacting § 22 of the Bills of Lading Act, to which we have referred, impliedly approved the rule now contended for by legislating on the subject and creating an exception to the rule, announced in the passage quoted from the *Friedlander* case, instead of abolishing it. But such a rule of statutory construction, whatever its scope and validity, has no application to the present case. Section 22 deals only with the former rule that agents having authority to receive merchandise and issue bills of lading were without implied authority to issue the latter except on receipt of the merchandise. It enlarged the agent's implied

authority by imposing a new liability on the principal for the agent's act in issuing the bill, even though the merchandise was not received. But respondent's liability here is not predicated on the agent's authority to issue bills which, so far as appears, he did not have, but upon his authority to notify petitioner of the arrival or non-arrival of the merchandise which he clearly did have. Congress, by enlarging, in a bills of lading act, the implied authority of an agent to issue bills of lading, can hardly be said to have dealt by implication with a general rule of liability applicable in other classes of transactions not involving bills of lading.

*Reversed.*

MR. JUSTICE SUTHERLAND concurs in the result.

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## ORIEL ET AL. *v.* RUSSELL, TRUSTEE.

## PRELA *v.* HUBSHMAN, TRUSTEE.

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

Nos. 92 and 91. Argued November 20, 21, 1928.—Decided January 14, 1929.

1. An order commanding a bankrupt to turn over to his trustee in bankruptcy books or property which he is charged with wilfully withholding but which he denies are within his possession or control, should be made only on clear and convincing evidence, exceeding a mere preponderance. P. 362.
2. In a civil proceeding to commit a bankrupt for contempt until he shall deliver books or property to his trustee in bankruptcy as commanded by a turn-over order, the order cannot be attacked collaterally by evidence that the books or papers were not in the bankrupt's possession or control at the time when it was made. P. 363.

23 F. (2d) 409, 413, affirmed.

CERTIORARI, 277 U. S. 579, to judgments of the Circuit Court of Appeals affirming orders of the District Court

committing bankrupts for contempt in failing to deliver books and property to their trustees in bankruptcy as required by orders of the court. For the opinion of the District Court in the Oriel case, see 17 F. (2d) 800.

*Mr. Hugo Levy* for petitioners in No. 92.

The evidence was insufficient even to justify a finding that the books directed to be delivered were in existence.

The summary order and the motion to punish for contempt are separate and distinct proceedings. *Johnson* v. *Goldstein,* 11 F. (2d) 702; *Stuart* v. *Reynolds,* 204 Fed. 709; *In re Haring,* 193 Fed. 168; *In re Elias,* 240 Fed. 448; *In re Marks,* 176 Fed. 1018; *Scheer* v. *Brown,* 130 Fed. 328; *Sinsheimer* v. *Simonson,* 107 Fed. 598; *In re Hyman,* 225 Fed. 1000; *In re Plaza Shoe Co.,* 15 F. (2d) 228; *In re Ahlstrom & Enholm Co.,* 26 F. (2d) 268.

The present ability to comply with the turnover order must be clearly shown and the degree of proof required in purely civil proceedings is not sufficient. It was necessary to prove the contempt beyond a reasonable doubt. Citing some of the authorities given in the next argument and also: *Ripon Knitting Co.* v. *Schreiber,* 101 Fed. 810; *In re Adler,* 129 Fed. 502; Gilbert's Collier on Bankruptcy, 13th ed., p. 655; *Ketchum* v. *Edwards,* 153 N. Y. 534; *In re Elias,* 40 App. Div. 632; *Johnson* v. *Austin,* 76 App. Div. 312; *Watertown Paper Co.* v. *Place,* 51 App. Div. 633; *Saal* v. *South Brooklyn Ry. Co.,* 122 App. Div. 364; *Andreanao* v. *Utterback,* 202 Ia. 570; *In re Chavkin,* 249 Fed. 342; *In re Stavrahn,* 174 Fed. 330; *In re Small Shoe Co.,* 16 F. (2d) 205; *Subinsky* v. *Bodek,* 172 Fed. 340.

*Mr. Benjamin Siegel* for respondent in No. 92.

*Mr. Archibald Palmer,* with whom *Mr. Max L. Rosenstein* was on the brief, for petitioner in No. 91.

In proceedings against a bankrupt for contempt for failure to obey an order requiring him to turn over money

or property to a trustee, the court should make a new and independent investigation and should consider all material evidence relating to what preceded, as well as what followed, the referee's report, and from such investigation and evidence determine whether or not the bankrupt's disobedience is wilful and contumacious, and whether or not the bankrupt has the present ability to comply. *In re Davison,* 143 Fed. 673; *In re Goodrich,* 183 Fed. 106; *In re Cole,* 163 Fed. 180; *Samuel* v. *Dodd,* 142 Fed. 68; *In re Elias,* 240 Fed. 448; *In re Haring,* 193 Fed. 168.

The acts charged to the bankrupt constitute concealment, punishable by imprisonment, and proof must be beyond a reasonable doubt. *In re Levy & Co.,* 142 Fed. 442; *In re Small Shoe Co.,* 16 F. (2d) 205; *United States ex rel. Palais* v. *Moore,* 294 Fed. 852; *In re Plaza Shoe Co.,* 15 F. (2d) 278; *In re Weber,* 200 Fed. 404.

This view is supported by the following authorities: *In re Cole,* 144 Fed. 392; *In re Goodrich,* 184 Fed. 5; *Subinsky* v. *Bodek,* 172 Fed. 340; *American Trust Co.* v. *Wallis,* 126 Fed. 464; *Kirsner* v. *Taliarferro,* 202 Fed. 51; *In re Elias,* 240 Fed. 448; *Stuart* v. *Reynolds,* 204 Fed. 709; *Samuel* v. *Dodd,* 142 Fed. 68; *Johnson* v. *Goldstein,* 11 F. (2d) 702; *In re Haring,* 193 Fed. 168; *Freed* v. *Central Trust Co.,* 215 Fed. 873; *Boyd* v. *Glucklich,* 116 Fed. 131.

The record disclosing a serious doubt of the bankrupt's ability to comply with the turn-over order, the commitment order, as a matter of law, is invalid. *In re Oriel, Confino & Co.,* 23 F. (2d) 409, dis. op.; *In re Magen,* 18 Fed. 288; *In re American Trust Co.,* 126 Fed. 464.

*Mr. George L. Cohen* for respondent in No. 91.

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

These are writs of certiorari to orders of commitment of bankrupts for contempt, one in No. 92 of Harry Oriel and Joseph Confino, and the other in No. 91 of Samuel

Prela, made by the United States District Court for the Southern District of New York, and affirmed by the Circuit Court of Appeals for the Second Circuit. They were heard together.

In the *Oriel* case, the order, the breach of which led to the commitment, was against Oriel and Confino, directing them to turn over to their trustee in bankruptcy their books for the year 1925. The turnover order was made upon the report of the Referee, October 22, 1926. The books directed to be turned over were a ledger, a purchase book and journal, a cash book and a time book. The petition was filed in August, 1926, the order to turn over granted October 22, 1926, and the order of commitment appealed from was entered March 8, 1927. The excuse offered by the bankrupts for noncompliance was that the books were not in their possession and had not been since they moved from one store to another in January, 1926, before the bankruptcy. It appeared that the only books which were missing were the books of 1925. These were necessary to sustain the entries in the books in 1926, showing the basis for the figures for the books of that critical year. The Court discredited the excuse of inability to comply. There was conflicting evidence, but after an extended hearing, the Referee found that the books of account were with the bankrupts or under their control. No appeal was taken from the turnover order, and after a failure to comply therewith, a motion followed for an order of contempt which committed them to jail, there to be confined and detained until they purged themselves. On the motion to commit, the bankrupts attempted to introduce evidence on the issue whether at the time of the turnover order they had the books in their possession or under their control. The Referee and the District Court refused to retry that issue on the ground that the turnover order could not be collaterally attacked. 17 F. (2d) 800. No attempt was made by the bankrupts to show that there was any change in respect to

the custody of the books after the turnover order. The Circuit Court of Appeals affirmed the action of the District Court. 23 F. (2d) 409.

In the *Prela* case, the bankrupt was directed to turn over to his trustees merchandise and money amounting in all to about $10,000. An appeal from the turnover order was denied by the Circuit Court of Appeals. Failure to comply resulted in a contempt order similar to that in the *Oriel* case. 23 F. (2d) 413. It was attempted to introduce in the *Prela* case, as it had been in the *Oriel* case, evidence to show that the original turnover order was wrong and witnesses were called who had been available at the original hearing but had not then been subpoenaed.

The cases are brought here on the ground of error in the District Court in holding that the turnover order could not be collaterally attacked and that the only evidence which was relevant on the motion to commit for contempt was evidence tending to show that since the turnover order, circumstances had happened disclosing the inability of the bankrupts to comply with the order. It was urged that a finding of contempt required a greater weight of evidence than a turnover order, and hence that the former could not be predicated upon the latter without a reëxamination of all the evidence. These rulings present the question before us.

We think a proceeding for a turnover order in bankruptcy is one the right to which should be supported by clear and convincing evidence. The charge upon which the order is asked is that the bankrupt, having possession of property which he knows should have been delivered by him to the trustees, refuses to comply with his obligation in this regard. It is a charge equivalent to one of fraud, and must be established by the same kind of evidence required in a case of fraud in a court of equity. A mere preponderance of evidence in such a case is not enough.

The proceeding is one in which coercive methods by imprisonment are probable and are foreshadowed. The Referee and the Court in passing on the issue under such a turnover motion should therefore require clear evidence of the justice of such an order before it is made. Being made, it should be given weight in the future proceedings as one that may not be collaterally attacked by an effort to try over the issue already heard and decided at the turnover. Thereafter on the motion for commitment the only evidence that can be considered is the evidence of something that has happened since the turnover order was made showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order.

The proceedings in these two cases have been so long drawn out by efforts on the part of the bankrupts to retry the issue presented on the motion to turn over as to be, of themselves, convincing argument that if the bankruptcy statute is not to be frittered away in constant delays and failures of enforcement of lawful orders, the rule we have laid down is the proper one.

The decision of the Court in the case of *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 442, and the discussion of Mr. Justice Lamar in that case, leave no doubt that a motion to commit the bankrupt for failure to obey an order of the Court to turn over to the receiver in bankruptcy the property of the bankrupt is a civil contempt and is to be treated as a mere step in the proceedings to administer the assets of the bankrupt as provided by law, and in aid of the seizure of those assets and their proper distribution. While in a sense they are punitive, they are not mere punishment—they are administrative but coercive, and intended to compel, against the reluctance of the bankrupt, performance by him of his lawful duty.

With reference to the character or degree of proof in establishing a civil fraud, the authorities are quite clear that it need not be beyond reasonable doubt, because it is a civil proceeding. *Lalone* v. *United States,* 164 U. S. 255, 257; *United States* v. *American Bell Telephone Co.,* 167 U. S. 224, 241; 5 Wigmore, Evidence (2d ed. 1923), § 2498, 2, 3, and the cases cited. The court ought not to issue an order lightly or merely on a preponderance of the evidence, but only after full deliberation and satisfactory evidence, with the understanding that it is rendering a judgment which is only to be set aside on appeal or some other form of review, or upon a properly supported petition for rehearing in the same court.

A turnover order must be regarded as a real and serious step in the bankruptcy proceedings and should be promptly followed by commitment unless the bankrupt can show a change of situation after the turnover order relieving him from compliance. There is a possibility, of course, of error and hardship, but the conscience of judges in weighing the evidence under a clear perception of the consequences, together with the opportunity of appeal and review, if properly taken, will restrain the courts from recklessness of bankrupt's rights on the one hand and prevent the bankrupt from flouting the law on the other. The cases on this subject are legion, with varying views, but the following seem to us to lay down more nearly the correct view. *Toplitz* v. *Walser,* 27 F. (2d) 196; *Epstein* v. *Steinfeld,* 210 Fed. 236; *Schmid* v. *Rosenthal,* 230 Fed. 818; *Frederick* v. *Silverman,* 250 Fed. 75; *Reardon* v. *Pensoneau,* 18 F. (2d) 244; *United States ex rel. Paleais* v. *Moore,* 294 Fed. 852; *In re Frankel,* 184 Fed. 539; *Drakeford* v. *Adams,* 98 Ga. 772; Collier, Bankruptcy, 652 (Gilbert's ed. 1927).

There are contempt cases where under a decree for alimony, it is necessary to resort to coercive measures to secure compliance, and the issue of fact arises as to the

ability of the contemnor to pay what is owing. The rules of evidence are much the same as here laid down for bankruptcy. *Smiley* v. *Smiley,* 99 Wash. 577; *Barton* v. *Barton,* 99 Kan. 727; *Ex parte Von Gerzabek,* 58 Cal. App. 230; *Hurd* v. *Hurd,* 63 Minn. 443; *Heflebower* v. *Heflebower,* 102 Ohio St. 674; *Fowler* v. *Fowler,* 61 Okla. 280.

The conclusive effect in a proceeding of this sort of an order of "turnover" finds its analogy in the inquiry in contempt proceedings for violating an injunction issued by a court of general jurisdiction. *Howat* v. *Kansas,* 258 U. S. 181; *Huttig Sash Co.* v. *Fuelle,* 143 Fed. 363; *People* v. *Van Buren,* 136 N. Y. 252; *Hamlin* v. *New York, N. H. & H. R. R.,* 170 Mass. 548; *Ketchum* v. *Edwards,* 153 N. Y. 534, 538; *Cape May Railroad* v. *Johnson,* 35 N. J. Eq. 422; *Saginaw Lumber Co.* v. *Griffore,* 145 Mich. 287; *Cline* v. *Whitaker,* 144 Wis. 439; *Hoskins* v. *Somerset Coal Co.,* 219 Pa. 373; *Hake* v. *People,* 230 Ill. 274; *Hilton* v. *Hilton,* 89 N. J. Eq. 472; *Root* v. *MacDonald,* 260 Mass. 344.

A number of cases can be found in the decisions of the Circuit Courts of Appeal and the District Courts indicating a hesitation and great reluctance to issue orders of commitment where there is any reasonable doubt of the ability of the bankrupt to comply with the turnover order. *Kirsner* v. *Taliaferro,* 202 Fed. 51; *Stuart* v. *Reynolds,* 204 Fed. 709; *In re Haring,* 193 Fed. 168. We think it would be going too far to adopt the severer rule of criminal cases and would render the bankruptcy system less effective. We find ourselves in general accord on this subject with the remarks of the late Circuit Judge McPherson, of the Third Circuit, who used the following language in the case of *Epstein* v. *Steinfeld,* 206 Fed. 568 [p. 569]:

"In the case in hand, the consequence is that, as the order to pay or deliver stands without sufficient reply, it

remains what it has been from the first—an order presumed to be right, and therefore an order that ought to be enforced. In the pending case, or in any other, the court may believe the bankrupt's assertion that he is not now in possession or control of the money or the goods, and in that event the civil inquiry is at an end; but it is also true that the assertion may not be believed, and the bankrupt may therefore be subjected to the usual pressure that follows willful disobedience of a lawful command, namely, the inconvenience of being restrained of his liberty. No doubt this may be unpleasant; it is intended to be unpleasant, but I see no reason why the proceeding should be condemned, as if it interfered with the liberty of the citizen without sufficient reason or excuse. I have known a brief confinement to produce the money promptly, thus justifying the court's incredulity, and I have also known it to fail. Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order, he has always been released, and I need hardly say that he would always have the right to be released, as soon as the fact becomes clear that he can not obey. Actual or virtual imprisonment for debt has ceased, but imprisonment to compel obedience to a lawful judicial order (if it appear that obedience is being willfully refused) has not yet ceased and ought not to cease, unless it should be thought expedient to destroy all respect for the courts by stripping them of power to enforce their lawful decrees."

In the two cases before us, the contemnors had ample opportunity in the original hearing to be heard as to the fact of concealment, and in the motion for the contempt to show their inability to comply with the turnover order. They did not succeed in meeting the burden which was necessarily theirs in each case, and we think, there-

fore, that the orders of the Circuit Court of Appeals in affirming the judgments of the District Court were the proper ones.

*The judgments are affirmed.*

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## STATE OF WISCONSIN ET AL. *v.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO ET AL.

## STATE OF MICHIGAN *v.* SAME.

## STATE OF NEW YORK *v.* SAME.

Nos. 7, 11, and 12 Original. Argued April 23, 24, 1928.—Decided January 14, 1929.

1. A suit between States bordering on the Great Lakes, in which the plaintiffs sought to enjoin the defendant State and its administrative agency from diverting the lake water through a sanitary canal into another watershed under a permit from the Secretary of War, alleging that the diversion, by lowering the level of the lakes and waters connecting them, inflicted great damage upon public and private riparian property in the plaintiff States and to their water-borne commerce; that it was contrary to legislation of Congress, and, if permitted thereby, was unconstitutional in that it exceeded the power of Congress to regulate commerce, preferred the ports of one State over those of other States, deprived the plaintiffs and their citizens of property without due process of law, and invaded the sovereign rights of the plaintiffs as members of the Union,—*held* a case within the original jurisdiction of this Court. P. 409.
2. Under § 10 of the Act of 1899, 26 Stat. 455, obstructions to the navigable capacity of the waters of the United States are prohibited if not affirmatively authorized by Congress; but obstructions of the kinds specified in the second and third clauses of the section are so authorized when approved by the Chief of Engineers and the Secretary of War, without further action by Congress. P. 411.
3. The authority thus conferred on executive officers is not an unconstitutional delegation as applied to determining the amount of water that may be diverted from a lake without impairing navigability. P. 414.

4. Authority for diverting water from Lake Michigan through the Chicago Sanitary Canal is not to be found in such action as Congress has taken relative to a proposed waterway between that lake and the Illinois and Mississippi Rivers, nor in its appropriations for widening and deepening the Chicago River. P. 416.
5. The Sanitary District of Chicago, an agency of the State of Illinois, operating a canal partly in the Chicago River and connected with streams leading to the Mississippi River through which the great volumes of sewage emanating from Chicago and its environs are carried to the Mississippi watershed by means of water abstracted from Lake Michigan, having been enjoined from diverting such water in excess of the amounts allowed by an existing permit from the Secretary of War or any that might be issued by him according to law, (*Sanitary District* v. *United States*, 266 U. S. 405), applied for and received from the Secretary a new permit, under the Act of March 3, 1899. The new permit was temporary and revocable and subject to the condition, among others, that a specified measure of diligence be displayed by the District in providing other means of sewage disposal, which in course of time would obviate excessive drafts on the lake water for that purpose. In a suit against the Sanitary District and the State of Illinois by other States bordering on the Great Lakes and connecting waters, in which it appeared that the continued diversions at Chicago had lowered the water level, to the damage of the plaintiffs and their citizens, *held:*

(1) Under the limited authority conferred upon him by the Act of March 3, 1899, the Secretary of War could not permit the continued withdrawal of lake water merely to aid the Sanitary District in disposing of sewage. P. 417.

(2) Support for the permit rests upon the need of preserving the navigability of the Port of Chicago, which would become unusable if the sewage were to accumulate pending provision of means other than the waterway for disposing of it, and upon maintaining navigation in the Chicago River, a part of that Port, for which a comparatively insignificant water flow may be required. P. 418.

(3) Save what may be needed for the Chicago River, the plaintiffs are entitled to have the diversions stopped by injunction, the decree, however, to be so framed as to accord a reasonable time within which the Sanitary District may provide other means of sewage disposal, reducing the diversion as the new means become operative from time to time, until the sewage shall be en-

tirely disposed of thereby, whereupon the injunction shall become final and complete. Pp. 418–420.

(4) The cause should be re-referred to the master to take testimony on the practical measures needed and the time required for their completion, and to report his conclusions for the formulation of such a decree. P. 421.

(5) States bordering on the Mississippi River and seeking as interveners to maintain the diversions in question because of their alleged beneficial effect upon the navigability of that stream, *held* to have no rightful interests in the matter. P. 420.

The first of these bills, filed July 14, 1922, by the State of Wisconsin, was amended October 5, 1925, the States of Minnesota, Ohio, and Pennsylvania becoming co-plaintiffs. The amended bill sought an injunction restraining the State of Illinois and the Sanitary District of Chicago from causing any water to be taken from Lake Michigan in such manner as permanently to divert the same from the lake. There was a further prayer, that if the Sanitary and Ship Canal should be used as a navigable waterway of the United States and be subject to the same control on the part of the United States as other navigable waterways, the defendants should be restrained from permanently diverting any water from Lake Michigan in excess of the amount which the Court should determine to be reasonably required for navigation in and through said Canal and the connecting waters to the Illinois and Mississippi Rivers, without injury to the navigable capacity of the Great Lakes and their connecting waters. It was also prayed that the defendants be restrained from dumping or draining into the canal any sewage or waste in such quantity and manner as excessively to pollute and render the canal, the Chicago, Des Plaines, and Illinois Rivers, unsanitary and injurious to the people of the plaintiff States navigating said waterways.

To the amended bill the State of Illinois filed a demurrer and the Sanitary District filed its answer, which in-

cluded a motion to dismiss. The States of Missouri, Kentucky, Tennessee, and Louisiana, by leave of Court, became intervening co-defendants and moved to dismiss the bill. The demurrer was overruled and the motions to dismiss were denied, without prejudice. 270 U. S. 634. The intervening defendants and the State of Illinois filed their respective answers. The States of Mississippi and Arkansas were permitted to intervene as defendants, and adopted the answers filed by the other interveners.

The State of Michigan, on March 8, 1926, filed its bill in this Court against the State of Illinois and the Sanitary District, for the same relief; and the defendants filed their answers on June 1, 1926.

On October 18, 1926, the State of New York filed its bill in this Court against the State of Illinois and the Sanitary District for the same relief; and on April 18, 1927, it was ordered that the answer filed by the defendants in the Michigan suit should be accepted and treated as their answer to the bill of New York, other than the third paragraph. 274 U. S. 712. On May 31, 1927, this paragraph was stricken out, without prejudice. 274 U. S. 488.

On June 7, 1926, the first cause was referred to Charles E. Hughes, Esq., as Special Master, to take the evidence and report the same to this Court with his findings of fact, conclusions of law, and recommendations for a decree, the parties in the Michigan case being granted leave to participate. 271 U. S. 650. Similar leave was granted on November 23, 1926, to the parties in the New York case. 273 U. S. 642.

After hearings, the master made his report, in which he concluded:

(1) That a justiciable controversy was presented; (2) that Illinois and the Sanitary District had no authority to make or continue the diversion in question without the consent of the United States; (3) that Congress had

power to regulate the diversion, i. e., to determine whether and to what extent it should be permitted; (4) that Congress had not directly authorized it; (5) that Congress, by the Act of March 3, 1899, had conferred authority upon the Secretary of War to regulate the diversion, provided he act not arbitrarily but in reasonable relation to the purpose of his delegated authority; (6) that the permit of March 3, 1925 (described in the opinion of the Court) was valid and effective according to its terms, the entire control of the diversion remaining with Congress. He recommended therefore that the bill be dismissed without prejudice to the rights of the plaintiffs to institute suit to prevent a diversion of water from Lake Michigan in case such diversion were made or attempted without authority of law.

The case came before the Court upon exceptions taken by the plaintiffs to the master's report.

*Mr. Nathan L. Miller,* with whom *Messrs. Albert Ottinger,* Attorney General of New York, *Albert J. Danaher,* Assistant Attorney General, and *Randall J. LeBoeuf, Jr.,* were on the brief, for plaintiffs in No. 12 Original.

The State of New York has the right for itself and in behalf of its citizens to insist that the waters of the Great Lakes-St. Lawrence Waterway flow down to it without diminution by the defendants, under the common law and under the law of riparian rights as it exists in the State of Illinois and in the State of New York.

The acts of the defendants constitute an illegal use of the waters of a natural watercourse, actionable under the law of Illinois or the law or New York. New York asks the Court to apply the same rule that the Illinois courts would apply in a similar matter properly before them.

The Great Lakes-St. Lawrence Waterway being, in fact, the boundary between the Dominion of Canada and the United States of America, the principles of international

law are particularly appropriate. The treaties recognize the importance of unobstructed navigation over the waterway. A duty imposed upon a riparian State, either by international law or treaty, to maintain the navigability of an international waterway "implies an obligation also to check within places subject to the control of such State commission of any acts which, unless restricted, would prove injurious to navigation generally." Hyde, Internat. L., § 183. This obligation would seem to render improper the tolerance of any diversion productive of such an effect even though it should occur at a point where the river ceased to be navigable and lay wholly within the domain of the acquiescent territorial sovereign. An international stream must be considered as a unity rather than from the viewpoint of the selfish needs of a particular State seeking to divert its waters. "Where a river traverses or serves as the boundary of territories of several States, the existence of the river interest, as such, becomes the more apparent, because of the common concern of all in its welfare." *Op. Cit., Ib.* This principle seems peculiarly appropriate to the controversy before the Court. Cf. Farnham, Waters and Water Rights, Vol. 1, § 6. This principle has the support of the decisions.

The Ordinance of July 13, 1787, (Art. IV) for the Government of the territory northwest of the river Ohio assures to all the States interested in the waters covered by it that no one State may obstruct their navigable capacity.

The rule that a State may not divert the waters of a natural watercourse to the injury of a downstream State or its citizens has been applied by this Court in interstate controversies where even the great consideration of navigation was lacking.

The State of New York is the owner of the lands under the waters of Lakes Erie and Ontario and the Niagara

and St. Lawrence Rivers within its limits. It has a property interest in the running water naturally flowing to such lands and its shores on the lakes and rivers of the Great Lakes-St. Lawrence Waterway. When such running water is withheld and permanently diverted into the Mississippi Watershed, the property of the State of New York is taken, and it is entitled to an injunction. Such a withholding of the running water as the acts of the defendants have caused, violates the rights of the State and its citizens guaranteed by the Constitution.

Neither Congress nor the Secretary of War has been delegated power by the States to permit this diversion for sewage and hydro-electric power development purposes to the detriment of the State of New York, and its citizens, and to the substantial injury of interstate commerce.

Reference is made to the possible impairment of navigation should Chicago be permitted to discharge its sewage into Lake Michigan. No testimony was given on this point by either side. Furthermore, any injury which might result from such a cause to the free movement of commerce would be caused to a greater degree by the discharge of the sewage into the restricted Des Plaines and Illinois rivers. Also, mention is made of the possible benefit the diversion might have upon navigation of the Mississippi River during periods of low water, but on this point the testimony was so unsatisfactory and indefinite that the Master stated it could not support a finding. These two possible benefits to commerce and navigation through the diversion are so utterly trivial in comparison with the injury which has been done by the diversion to the commerce passing over the Great Lakes-St. Lawrence Waterway, that they must be disregarded. The mere supposition that if Congress had acted, it might have considered these details; or the belief that the Secretary of War might have given them consideration, when

his permit of March 3, 1925, and his letter accompanying it showed plainly that the purpose of the diversion was to aid in solving Chicago's sewage disposal problem; are too speculative to permit any serious comparison between them and the proved damage to the commerce of the Great Lakes-St. Lawrence Waterway.

The controversy, therefore, resolves itself into a determination whether or not the Special Master's proposition is sound, that if navigation is affected, although injuriously, the Secretary of War may permit a diversion for the benefit of Chicago's sewage disposal and water power development. It is respectfully submitted that the States have not surrendered to the Federal Government the right to permit a diversion from a natural watercourse for the local purposes of a municipality and to the serious injury of a great commerce, merely because, through that injury, navigation is affected.

The cases in which this Court deals with the discretion vested in Congress to determine what constitutes an obstruction of a navigable waterway, relate to what might be described as the normal intendment of the term "obstruction." All of them, to some extent, involve the question of whether or not a bridge, or a pier, or a dam was so constructed as to impair or restrict the free navigation of a natural waterway. All dealt with an obstruction of the navigable capacity of a natural watercourse within the limits of the stream itself; and the language of the Court as to the broad discretion vested in Congress was with direct reference to this type of obstruction.

This power of the Federal Government is a trust power for the benefit of navigation. Certainly when all authority is derived from the States, Congress cannot exercise a higher degree of control than they had. For example, both New York and Illinois own lands under the Great Lakes-St. Lawrence Waterway. Yet the courts have determined that neither State may part with such

lands under water to such an extent that the right of present, or the opportunity to improve future, navigation is impaired. Grants may be made of lands for the construction of docks and wharves in aid of navigation. *In re Long Sault Development Co.,* 212 N. Y. 1, s. c., 242 U. S. 272.

If the trust in which the State holds the lands under water " is governmental and can not be alienated," surely the powers of the Federal Government, which has no property right in the beds or waters of navigable streams, must also and far more clearly be governmental and inalienable.

No question of discretion, however, is really involved in the transfer of these waters to the Mississippi watershed. If Congress should authorize this, or if the permit of the Secretary of War of March 3, 1925, should be held to lawfully permit such a transfer, it would amount to a complete abdication of the governmental control and the trust vested in the Federal Government to preserve, and, if it sees fit, to improve the navigation of the Great Lakes-St. Lawrence Waterway in the interest of the interstate and foreign commerce thereon.

The title of New York and its citizens in the waters, shores and bed of the Great Lakes-St. Lawrence Waterway admittedly is subject to the servitude that the Waterway may be improved by Congress for the benefit of navigation. In some situations, improvements might cause some local or consequential injury to particular property. Beyond this servitude, the State and its citizens have the right to expect and demand the natural and undiminished flow of the watercourse. There is no greater power in Congress, arising from the Commerce Clause, to dispose of the waters of the Great Lakes for the real or fancied benefit of some single section of the Nation, than to dispose of the lands under their navigable waters. Cf. *Pollards' Lessee* v. *Hagan,* 3 How. 212.

Entirely apart from the injury to the navigable waters over which commerce moves, there is the separate consideration of the damage to the commerce itself. Through its injunctive power, the Court has forbidden the commission of acts which might hinder the free movement of commerce among the States. Particularly striking, however, and of great force in the decision of the present controversy, is the case of *Pennsylvania and Ohio* v. *West Virginia,* 262 U. S. 553.

Even if Congress had the power under the Commerce Clause to deprive the States of their sovereign and proprietary rights in aid of a sanitation and water power project, no such power has been delegated by it to the Secretary of War, and the permit of March 3, 1925, can not be construed as having that effect.

*Messrs. William M. Potter,* Attorney General of Michigan, and *Wilber M. Brucker,* Assistant Attorney General, with whom *Mr. Arthur E. Kidder,* Assistant Attorney General, was on the brief, for plaintiff in No. 11 Original.

Congress may not legislate to affect navigation adversely, nor exercise its power over "commerce" for the purposes of sanitation or other non-navigation purposes. Inasmuch as this diversion creates an obstruction in fact, it constitutes an obstruction in law to navigable capacity.

Congress has not acted to "affirmatively authorize" such obstructions unless § 10 of the Act of March 3, 1899, can be so interpreted. Statutes purporting to affirmatively authorize obstructions to navigation should be strictly construed.

Section 10 should receive a construction which gives effect to its plain and unmistakable prohibition against obstructions to navigable capacity. The general construction of the section is to prohibit the creation of obstructions and even to regulate various acts and things not

amounting to an obstruction. Its history shows the plain intention of Congress to increase its prohibition against obstructions to navigable capacity, so as to forbid such obstructions in any navigable waters of the United States, except by affirmative act of Congress.

By the use of the language "affirmatively authorized," Congress contemplated retention of control over obstructions to navigable capacity and not a delegation of power to the Secretary of War; a positive prohibition is not an affirmative authorization. Under § 10 an affirmative act of Congress is necessary as a condition precedent to the existence of any power in the Secretary of War to authorize obstructions to navigable capacity.

Obstructions to navigable capacity of interstate waters without authority from Congress have always been unlawful. Where Congress has not authorized such an obstruction, this Court has assumed jurisdiction to enjoin.

It would be an unconstitutional application of the section to construe it as delegating authority to the Secretary of War to permit the diversion for purposes of sanitation or to "affect navigation adversely."

The language of the section is not susceptible of construction by reference to the so-called rules in aid of construction used by the Special Master. The rule of ambiguity is not applicable, the statute being plain and unambiguous.

The rule of construction based upon the practice of the War Department is not applicable because the practice has not been uniform, but has been constantly in doubt from the beginning, even to the extent exercised.

The decision of this Court in *Sanitary District* v. *United States,* 266 U. S. 405, does not construe § 10 as delegating power to the Secretary of War to affirmatively authorize an obstruction to the navigable capacity of the Great Lakes.

The fact that Congress did not act to disapprove the Secretary of War's permit of March 3, 1925, does not constitute an "affirmative act of Congress," nor a delegation of power by implication; legislative power cannot be implied so as to be exercised by another department of government.

Affirmative authorization cannot be implied from § 10 by supplying and reading into it the word "unreasonable" so as to modify the express prohibition against obstructions to navigable capacity.

Section 10 is not in and of itself an affirmative act of Congress delegating authority to the Secretary of War in cases under the second and third clauses of that section. This statute operates prospectively. *Maine Water Co.* v. *Knickerbocker Co.*, 99 Me. 473, distinguished.

Section 10 should not receive a construction delegating discretionary power to the Secretary of War to authorize obstructions to navigable capacity, because such power necessarily includes the power of eminent domain which cannot be delegated unless it affirmatively appears from action by Congress.

The ordinance of 1787 prohibits interference with the navigable capacity of the Great Lakes; Congress did not intend § 10 to modify or repeal the prohibition of this compact.

To construe § 10 as giving the Secretary of War full authority to authorize this diversion without an affirmative act of Congress is not justified in light of international relationship with Canada, including treaties and kindred acts of Congress.

Canada has a right to its portion of international waterways. The Canadian Boundary Waters Treaty of 1909 did not contemplate authorization to make abstractions affecting international waters. The Treaty bears the same construction as should be given to § 10.

The Niagara Falls Act does not contemplate extensive delegated powers to the Secretary of War.

A general consideration of American-Canadian relationships does not justify such a construction of § 10 as to authorize obstructions in international waters.

To construe § 10 as delegating power to the Secretary to permit obstructions to navigable capacity, would render that section void as an unconstitutional delegation of legislative power.

The permit of March 3, 1925, does not justify the abstraction of these waters as against the State of Michigan. Being but a revocable license, this permit can not justify the invasion of property rights.

The diversion takes plaintiffs' property without just compensation, in violation of the Fifth and Fourteenth Amendments of the Federal Constitution. The exercise of power by Congress over navigation is subject to the limitation of the Fifth Amendment. There must be just compensation.

Sovereign States own all of the land and waters within their boundaries as against any other State. The State of Michigan has also proprietary rights as a riparian owner. It has the authority to determine for itself such rules of property as it shall deem expedient with respect to waters within its boundaries, both navigable and non-navigable, and the ownership of the lands forming their beds and banks.

It has established the rule that the State is the proprietary owner of the waters of the Great Lakes within its boundaries and of the lands forming their beds and banks. In Michigan the title to riparian property outside the meander line on the Great Lakes is held in trust by the State for the use of its citizens. The State also has a right of dockage upon the Great Lakes and connecting waters, as riparian owner and also as representative of its people.

The State is entitled to have all the waters coming naturally to it, yielding only if at all to the demand of

public, commercial necessity as asserted by appropriate Congressional action.

Taking is a legal conception. A physical taking from possession and ejection of the rightful owner are not essential to it. If water is so dammed up or set back upon or over land so as to destroy its use, there is a taking. If a riparian owner is deprived of the use and ordinary flow of water in its natural height by artificial lowering of levels so as to convert what was water into land area, there is a taking.

This diversion is not an "incidental damage," nor is it *damnum absque injuria.* In each of the cases cited by the Special Master, the work was for a constitutional purpose, authorized by an Act of Congress and done by or for the Federal Government. In each the work caused an "incidental damage."

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The damages suffered by plaintiffs are:

Damage to navigation and navigation interests; damage from decay and loss of support to docks, wharves, and piers; damage to large investments in commercial summer resorts, private summer cottages, and homes in the shoreline summer resort region of Wisconsin; damage to fishing grounds, spawning beds, hunting grounds, and open marshes, which were the habitat of valuable wild life; damage to buildings in the retail and wholesale sections of Milwaukee by causing pile foundations to decay and

give away; damage to the industrial and domestic private and municipal water supplies along the lakes, necessitating reconstruction at great expense, and increased cost of pumping; damage also to the proprietary and quasi-sovereign rights of these States as owners of parks and fish hatcheries on the lake shores and as consumers of lake-borne coal for public buildings and institutions.

Illinois has appropriated a substantial portion of the public waters which belonged to plaintiffs in their sovereign capacities, and has laid bare submerged lands belonging to them in their quasi-sovereign capacities. It has appropriated their property and through extra-territorial legislation has taken the property of their citizens without compensation, and thus has invaded the territorial and quasi-sovereign rights of said States.

The Sanitary District threatens to cause a substantial increase in these damages.

The diversion and the demand therefor have been and are solely for sanitary and power purposes. It is injurious to navigation on the Drainage Canal and the Chicago River. If the Illinois waterway is ever completed, any diversion in excess of 1,000 second feet will not be for the benefit of navigation on that waterway. The diversion is not in the interests of navigation on the Illinois River.

It has no relation and is of no value to navigation on the Mississippi River.

The question of compensation works on the Great Lakes is not involved in this case, and their effectiveness is not established.

The plaintiffs present a justiciable controversy and have the requisite interest to entitle them to invoke the jurisdiction of the Court.

Illinois had no right as against the plaintiffs to divert the waters of Lake Michigan in the manner and for the purposes shown, without the consent of the United States.

*Sanitary District* v. *United States,* 266 U. S. 405; *Missouri* v. *Illinois,* 180 U. S. 208; s. c. 200 U. S. 496; *Beidler v. Sanitary District,* 211 Ill. 628; *Illinois Central R. R. Co.* v. *Illinois,* 146 U. S. 387; *Shively* v. *Bowlby,* 152 U. S. 1; *Port of Seattle* v. *Oregon,* 255 U. S. 56; *Ohio* v. *Cleveland, etc. R. R. Co.,* 94 Oh. St. 61; *In re Crawford County District,* 182 Wis. 404; *Kansas* v. *Colorado,* 185 U. S. 125; *Kansas* v. *Colorado,* 206 U. S. 46; *Wyoming* v. *Colorado,* 259 U. S. 419.

The diversion constitutes the taking of plaintiffs' property without due process of law and without just compensation in violation of the Fifth Amendment. The States have sovereign and proprietary rights over the navigable waters and the lands underlying them, within their boundaries, subject to the powers surrendered to the National Government. *Port of Seattle* v. *Oregon & Washington R. R. Co.,* 255 U. S. 56; *Shively* v. *Bowlby,* 152 U. S. 1; *United States* v. *Holt State Bank,* 270 U. S. 49. The power of the general Government is such power as has been surrendered to it by the States. The rights of the States are all the rights which have not been surrendered to the general Government.

The interest of the complaining States is a full proprietary interest as upon a public trust. The nature and extent of this proprietorship and the duty imposed upon the State as trustee has been frequently examined and declared by this Court. *Kansas* v. *Colorado,* 206 U. S. 46; *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349; *North Dakota* v. *Minnesota,* 263 U. S. 361.

Until now, no one has ever suggested that, as a means adapted to the exercise of its power of regulation, Congress has the power to declare a stretch of dry land thirty miles long, extending over the Continental Divide, to be a navigable stream and make its declaration good by affirmatively authorizing the destruction of a natural navigable water in order to transfer its quality of navigability

to the artificial structure. The Fifth Amendment is clearly a limitation upon the power of Congress under § 8 or Article I of the Constitution.

Riparian property has, implicit in its location, such a relation to the stream that it must bear the normal consequences of those improvements in the stream which are made in order to render it more serviceable for the great purposes of national commerce. This servitude derives from the location of the land and is natural and obvious. But if the land bordering upon the stream be injured by an impairment of navigability, which does not arise from an effort to improve the stream and does not in fact improve it, but is for another purpose, as for instance to provide sanitary appliances for a city or to create an artificial waterway, the damage constitutes a taking because there is no servitude in the riparian proprietors along navigable waters to endure a damage to their property for the benefit of the sanitation of a remote city or for the creation of an artificial waterway, however useful. See *Fulton Light, etc. Co.* v. *State,* 200 N. Y. 400; *Ex parte Jennings,* 6 Cow. 518; *Canal Fund Comm'rs* v. *Kempshall,* 26 Wend. 404; *Cooper* v. *Williams,* 5 Ohio 391; *Buckingham* v. *Smith,* 10 Ohio 288; *In re Dancy Drainage District,* 129 Wis. 129; *In re City of New York,* 168 N. Y. 134; *Smith* v. *Rochester,* 92 N. Y. 464; *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645; *Pine* v. *New York,* 103 Fed. 337 (affirmed, 112 Fed. 98; reversed on other grounds, 185 U. S. 93); *McChord* v. *High,* 40 Ia. 336; *Barrett* v. *Metcalf,* 12 Tex. Civ. App. 247.

The distinction suggested controls the decisions of this Court. It has consistently regarded navigable streams in their natural condition as the basis for the determination of the rights both of individual riparian proprietors and the cases of conflicting sovereignties. *United States* v. *Rio Grande Co.,* 174 U. S. 690; *United States* v. *Lynah,*

188 U. S. 445; *United States* v. *Cress,* 243 U. S. 316; *Sanguinetti* v. *United States,* 264 U. S. 146.

Clearly, if the United States has the power to create such an artificial waterway, the power is subject to the limitations of the Fifth Amendment and the damage caused to a great industrial civilization which has built itself securely about the Great Lakes could not be called incidental to the improvement of navigable waters of the United States.

Congress could not authorize the diversion from the Great Lakes-St. Lawrence watershed to the Mississippi watershed. *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349; *Wyoming* v. *Colorado,* 259 U. S. 419. It may regulate navigable waters where they are, but not carry them by artificial channels to other places to be regulated. This limitation grows stronger with each interest built up around navigable waters, in their natural condition and location, until it becomes irresistible in such a case as that at bar. The only question at issue in *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, was whether the United States had the power to veto the abstraction of Lake Michigan water to the prejudice of the navigable capacity of the Great Lakes.

Authorization of the diversion would constitute a preference of the ports of one State over those of another in violation of Article I, § 9, Clause 6 of the Constitution.

The power of Congress does not extend to the destruction of navigation or to the creation of obstructions to navigable capacity. This case represents nothing but the assertion of a naked right to obstruct or destroy navigation for an unrelated purpose. The distinction was well pointed out in *Woodruff* v. *Bloomfield Gravel Mining Co.,* 18 Fed. 753. The power is limited to the control of the navigable waters for the purpose of improving and fostering navigation. *Kansas* v. *Colorado,* 185 U. S. 125. If, however, Congress did have the power to authorize

the obstruction or destruction of navigation and navigable capacity as an abstract right, it could not exercise that power in the face of the Fifth Amendment, without compensation.

If it be assumed that Congress would have the power to divert water for purposes of navigation, Congress has no power to authorize the present diversion for purposes of sanitation and power development. *Buckingham* v. *Smith,* 10 Ohio 288; *In re Dancy Drainage District,* 129 Wis. 129; *Smith* v. *Rochester,* 92 N. Y. 464; *Walker* v. *Board of Public Works,* 16 Ohio 440; *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645; *In re City of New York,* 168 N. Y. 134. *Miller* v. *Mayer,* 109 U. S. 385, distinguished.

The power of Congress with respect to the appropriation of these waters for waterpower and sewage disposal is limited to prohibiting any appropriation which will destroy or substantially injure any of the navigable waters entrusted to its care, *Kansas* v. *Colorado,* 185 U. S. 125; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690. The power to veto does not imply the power to create or authorize.

It is said that the discharge of this sewage into these waters without treatment might, and probably would, create such a pestilential condition as to constitute an obstruction to navigation thereon. Therefore, it is concluded that Congress may prevent or authorize the removal of this nuisance and obstruction to navigation by removing the navigable waters themselves. In short, Chicago, having created, or threatened to create, an illegal nuisance or obstruction to the navigable waters of the United States, may, if she will only consent to refrain from this violation of law, dispose of her sewage at the expense of the plaintiff States. *New York* v. *New Jersey,* 256 U. S. 296, distinguished.

Congress has not given permission.

The Secretary of War had no authority under the Act of March 3, 1899, to permit the diversion. There has been no practical construction of § 10 of that Act sustaining the construction adopted by the Special Master.

There has been no judicial construction of § 10 sustaining such a power in the Secretary of War. Discussing *Cummings* v. *Chicago,* 188 U. S. 410; *Maine Water Co.* v. *Knickerbocker Co.,* 99 Me. 473; *Southern Pacific Co.* v. *Dredging Co.,* 260 U. S. 205; *The Plymouth,* 275 Fed. 483; *The Douglass,* 7 Prob. Div. 157; *Sanitary District* v. *United States,* 266 U. S. 405.

See *Hubbard* v. *Fort,* 188 Fed. 987; Koonce, of War Dept., Lecture before School of Engineers at Fort Humphrey; 27 Op. Atty. Gen. 327.

The Sanitary District has voided the permit of March 3, 1925, by violation of its terms. In any event the permit does not constitute a defense to this bill.

Construed in the light of recognized rules, the permit only purports to authorize the Sanitary District to abstract only so much of the water of the Great Lakes as will not injure their navigable capacity, but not exceeding 8,500 c. s. f. in any event. It requires the assent of the States affected, not merely Illinois.

We must distinguish between a permissive consent or waiver of the Secretary of War, and an affirmative act of the Federal Government itself. His permit was not authority to infringe property rights. Cf. *United States* v. *Chandler Co.,* 229 U. S. 53; *Scranton* v. *Wheeler,* 179 U. S. 141; *Cobb* v. *Commissioners,* 202 Ill. 427; *In re Crawford County District,* 182 Wis. 404; *Attorney General* v. *Bay Boom Co.,* 172 Wis. 363; *Hubbard* v. *Fort,* 188 Fed. 987; *Wilson* v. *Hudson County Water Co.,* 76 N. J. Eq. 543; *Commonwealth* v. *Pennsylvania R. R. Co.,* 72 Pa. Sup. Ct. 353; *Thlinket Packing Co.* v. *Harrison Co.,* 5 Alaska 471; *Columbia Salmon Co.* v. *Berg,* 5 Alaska 538; *New York* v. *New Jersey,* 256 U. S. 296.

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Between the finding of the master that defendants' diversion is one of a combination of causes contributing to injury in a substantial but undetermined amount, and plaintiffs' prediction thereon of " destruction of their navigation " and of " immense and incalculable loss," there is a wide difference which must be emphasized in any consideration of law, fact, equity and remedy in this suit.

The history of this canal and of federal, congressional and administrative action in respect thereof, while found by the master not to constitute direct congressional authorization of this diversion, nevertheless establishes that, in its relation to the national system of internal navigation, it is and ever has been a navigation project.

Congress has fostered, aided and encouraged the creation of defendants' canal and diversion, and has used the result of it.

At every critical point in its history, Congress has protected defendants' canal and diversion from interference.

No legislative or executive instrumentality of the Federal Government charged with responsibility for the regulation of navigation and commerce has ever recommended or even considered the cessation of defendants' diversion or its radical reduction. The sole purpose of such instrumentalities has been to restrain increase of diversion and to avoid ultimate commitment to any permanently increased amount of diversion pending resolution of the present period of uncertainty and development of the sanitary and navigation problems involved.

While a compelling motive of defendant Sanitary District in making the very great outlay necessary to construct the canal was disposal of sewage, said defendant was also persuaded to the method adopted by the hope of opening a great waterway to the Gulf. Defendant State of Illinois had and has had no other motive than the latter.

Defendants' canal, with its diversion and other works, aids navigation in each of the following respects:

(a) It makes possible an adequate water outlet of the Mississippi Basin to the Great Lakes.

(b) Improves present navigation on the Illinois and Mississippi Rivers, and is the only reasonably practicable method of making early and adequate navigation thereon possible.

(c) The diversion is the only presently practicable means of preventing conditions at the greatest internal center of interstate commerce of the United States, which, through pestilence on land, an unspeakably noisome condition in the Chicago River and Harbor and the lake offshore, and a lethal pollution of the waters of the whole southern end of Lake Michigan, would stand as such an obstruction to commerce and navigation as would require the immediate intervention of federal power.

Use of the diversion for water power is an incidental and harmless afterthought which does not influence the diversion or the amount of it.

The present inadequacy of federal and other navigation works in waters connecting defendants' works with the Gulf of Mexico, does not detract from the advisability of Congress' preserving the former, nor does it warrant plaintiffs' insistence on impracticable methods of lockage and other novel provisions for navigation on the Lakes-to-Gulf Waterway suggested by them.

Defendant Sanitary District has not violated the conditions of all the various permits issued to it since 1903, and

even if it had, violation of earlier permits has no effect on the validity of the existing permit; and whether violation of conditions of the latter should cause its revocation is matter of concern to the Secretary who imposed such conditions and not to plaintiffs.

It is shown that compensating works would cure all the ills complained of more effectively than cessation of diversion. Their consideration is therefore involved in this case, first, because relief from these ills and nothing more is the sole supportable prayer of plaintiffs; second, because in such circumstances the cost of them is one measure of damages; and third, because the fact of their practicability should have a persuasive if not a compelling bearing on the question of remedy.

Continuation of the diversion will create no new damage and afford no new precedent. The injunction sought would cause untold damage to defendants and to navigation, and subject the lives and health of the inhabitants of the Sanitary District to serious danger. Plaintiffs themselves recognized its impracticability in oral argument before the master.

The States have no right to sue, and the Court has no jurisdiction to entertain their suit, because the rights sought to be vindicated are merely the rights of the people of these States to navigate national waters; and, since these rights derive from their citizenship in the United States and not from citizenship in these States, plaintiffs could not bring suit on the rights of their citizens without violating the Eleventh Amendment. *New Hampshire* v. *Louisiana,* 108 U. S. 76; *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265; *Louisiana* v. *Texas,* 176 U. S. 1; *Massachusetts* v. *Mellon,* 262 U. S. 447.

The suit is, in effect, one to vindicate the freedom of interstate commerce, and no State has the right to sue for such purpose, *Louisiana* v. *Texas, supra; Oklahoma* v. *Atchison Ry.,* 222 U. S. 289; *Oklahoma* v. *Gulf, etc.*

*Ry.*, 220 U. S. 290, and especially here, when the statute confines its vindication to suit by the Attorney General of the United States. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 46; *Southern Pacific* v. *Dredging Co.*, 260 U. S. 205; *Geddes* v. *Anaconda Co.*, 254 U. S. 590; *General Investment Co.* v. *Lake Shore, etc. Ry. Co.*, 260 U. S. 261; *Haycraft* v. *United States*, 22 Wall. 81.

Plaintiffs, showing no special injury different from that of the public at large, are debarred from suing by traditional principles of equity; they must rely on suits by the Attorney General, *Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91; *Irwin* v. *Dixon*, 9 How. 10; *Mississippi, etc. Ry.* v. *Ward*, 2 Black 485; *Gilman* v. *Philadelphia*, 3 Wall. 713.

The suits are, in effect, to coerce by decree the legislative discretion of Congress and the administrative discretion of the War Department, taking the Court into the province of both of the two great co-ordinate branches of Government. In a word, what is here sought is decretal regulation of commerce and a review of a valid administrative determination. *Marbury* v. *Madison*, 1 Cranch 137; *Georgia* v. *Stanton*, 6 Wall. 50; *New Orleans* v. *Payne*, 147 U. S. 261; *Southern Pacific Co.* v. *Dredging Co.*, 260 U. S. 205; *Passaic Bridge Cases*, 3 Wall., Appendix, 782; *Missouri* v. *Illinois*, 200 U. S.. 496.

Congress has delegated to the Secretary of War power to authorize this diversion. When so authorized the diversion is lawful and the Secretary's act is immune from judicial review. This Court has interpreted the statute in consonance with defendants' contention. Administrative interpretation of the statute has consistently been in consonance with defendants' contention. The language and history of the statute support defendants' contention.

The determination of the Secretary of War that the diversion is not unlawful is not reviewable. *Marbury* v.

*Madison,* 1 Cranch 137; *Gaines* v. *Thompson,* 7 Wall. 347; *United States* v. *California Land Co.,* 148 U. S. 31.

The Court has recognized a distinction between acts in exercise of discretionary powers and acts in respect of purely ministerial duties. The rule as enunciated in *Marbury* v. *Madison, supra,* is that courts may adjudicate in matters relative to the latter, but never in matters pertaining strictly to the former, and particularly is this true when the discretionary function is in process of being exercised. *Kendall* v. *United States,* 12 Pet. 524; *Decatur* v. *Paulding,* 14 Pet. 497; *United States* v. *Lamont,* 155 U. S. 303; *United States* v. *Black,* 128 U. S. 40; *Noble* v. *Union River Logging R. R. Co.,* 147 U. S. 165; *United States* v. *Schurz,* 102 U. S. 378; *Mississippi* v. *Johnson,* 4 Wall. 475; *United States* v. *Windom,* 137 U. S. 636; *Cunningham* v. *Macon R. R. Co.,* 109 U. S. 446.

The power granted the Secretary of War is valid. *Sanitary District* v. *United States,* 266 U. S. 405; *Buttfield* v. *Stranahan,* 192 U. S. 470; *West* v. *Hitchcock,* 205 U. S. 80; *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320; *Zakoniate* v. *Wolfe,* 226 U. S. 272; *Louisville Bridge Co.* v. *United States,* 242 U. S. 409; *Inter-Mountain Rate Cases,* 234 U. S. 476; *First Nat'l Bank* v. *Union Trust Co.,* 224 U. S. 416. See *Selective Draft Law Cases,* 245 U. S. 366.

A court of equity will intervene in a matter pertaining to the exercise of a discretionary power only to determine whether there was power in the officer or fraud in the party, or whether there was clear, unreasonable, and arbitrary abuse of discretionary power exercised. *Ekiu* v. *United States,* 142 U. S. 651; *Chae Chan Pin* v. *United States,* 130 U. S. 581; *United States* v. *Ju Toy,* 198 U. S. 253; *Fok Yung Yo* v. *United States,* 185 U. S. 296; *Silberschein* v. *United States,* 266 U. S. 221; *United States* v. *California Land Co.,* 148 U. S. 31; *Foley* v. *Harrison,* 15

How. 433; *Johnson* v. *Towsley,* 13 Wall. 72; *Smelting Co.* v. *Kemp,* 104 U. S. 636; *Shepley* v. *Cowan,* 91 U. S. 330; *Moore* v. *Robbins,* 96 U. S. 530; *Quinby* v. *Conlan,* 104 U. S. 420; *Steel* v. *Smelting Co.,* 106 U. S. 447; *Lee* v. *Johnson,* 116 U. S. 48; *Wright* v. *Roseberry,* 121 U. S. 488.

Particularly, where the courts are asked to interfere with lawful administrative determinations regulating commerce, they have refused because such regulation requires uniformity of decision in order that there may be strict uniformity of rule. *Texas, etc. R. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426.

There is a particular indication in this case that Congress intended to make the decision of the Secretary of War final and to provide against any revision. In the revision of § 7 of the Act of 1890, by § 10 of the Act of 1899, the omission of the words "in such manner as shall obstruct or impair navigation" is clearly intended to remove any doubt that the Secretary's determination is final.

See *Miller* v. *Mayor,* 109 U. S. 385; *Southern Pacific Co.* v. *Dredging Co.,* 260 U. S. 205; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *The Douglass,* 7 Prob. Div. 157; *Frost* v. *Railroad Co.,* 97 Me. 76; *Maine Water Co.* v. *Knickerbocker Steam Co.,* 99 Me. 473; *The Plymouth,* 225 Fed. 483; *Louisville Bridge Co.* v. *United States,* 242 U. S. 409.

Regulation of navigation comprises something more than provision for the flotation of ships. Diversion is necessary and desirable for the flotation of commerce. It is also necessary and desirable for the sanitation of commerce. For whatever reason it was necessary or desirable for navigation, the Secretary had a right under the statute to consider the reason and decide upon it.

Congress has power to authorize the diversion. The diversion does not constitute a taking of private property.

Plaintiffs have no property in the steamship lanes along the international boundary. *Crandall* v. *Nevada,* 6 Wall. 44; *Slaughter House Cases,* 16 Wall. 36; *Frost* v. *Washington Ry.,* 97 Me. 76; *Gilman* v. *Philadelphia,* 3 Wall. 713; *Gibson* v. *United States,* 166 U. S. 269.

The doctrines of international law as applied by this Court to the relations between States, and not the common law doctrine of riparian rights, is the governing law of this case, and under those doctrines, plaintiffs have no property right to have all the water in the lakes flow to them without the slightest impairment in quantity.

The rules of private property are inapplicable to controveries between States. *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230; *Kansas* v. *Colorado,* 206 U. S. 46; *Hudson Water Co.* v. *McCarter,* 209 U. S. 349; *Rickey Co.* v. *Miller & Sax,* 218 U. S. 208; *Bean* v. *Morris,* 221 U. S. 485.

The doctrines governing suits between States are those of international law as modified by the decisions of this Court which adapt them to the relations of the quasi-sovereign States of the Union under the Constitution. *Missouri* v. *Illinois,* 200 U. S. 496; *North Dakota* v. *Minnesota,* 263 U. S. 365; *Kansas* v. *Colorado,* 185 U. S. 125, s. c. 206 U. S. 46.

At international law, an upper riparian State is under no servitude to a lower State to permit the water to flow down unimpaired in quantity. 21 Op. Atty. Gen. 274; Treaty of May 21, 1906, with Mexico, Arts. IV, V; *Minnesota Canal Co.* v. *Pratt,* 101 Minn. 197; Sen. Doc. 104, 56th Cong., 2d Sess.; *United States* v. *Rio Grande Dam Co.,* 9 N. M. 292; Sen. Doc. 154, 57th Cong., 2d Sess.

As between States of the Union, the Court will enforce the doctrine of comity (see *Kansas* v. *Colorado,* 185 U. S. 125; s. c., 206 U. S. 46) as to the waters of an interstate stream. Comity means an equitable division of burdens and benefits in the water and not a right in the lower State

to all the water. *Corrigan Transportation Co.* v. *Sanitary District,* 137 Fed. 851.

The slight incidental injury to incorporeal rights disclosed by the findings does not constitute a taking of property.

If it could be said that there was property or a taking, no injunction could be granted, because there is such *laches* and acquiescence that a court of equity would not be moved to act, and the claimants should be relegated to their suits for damages, if there are any. *New York* v. *Pine,* 185 U. S. 93; *United States* v. *Lynah,* 188 U. S. 445; *Northern Pacific R. R.* v. *Smith,* 171 U. S. 260; *Los Angeles* v. *Water Co.,* 177 U. S. 558; *Sullivan* v. *Portland, etc. R. R. Co.,* 94 U. S. 806; *Bowman* v. *Wathen,* 1 How. 189; *Piatt* v. *Vattier,* 9 Pet. 405; *Manigault* v. *Springs,* 199 U. S. 473.

It seems almost absurd to say that hindrance to the progress of steamships in the lakes constitutes appropriation of any property in connection with the claim of injury to shipping. The only other finding of injury that is in this case is the one relating to the contribution of defendants' diversion to the claimed injury in connection with fishing and hunting grounds, the availability and convenience of beaches at summer resorts and public parks.

No exceptions were filed to findings, which characterize the effects of the diversion as an "injury" only without even a suggestion that there is any appropriation or taking.

The injury mentioned in the findings of the master as to fishing and hunting grounds and availability and convenience of beaches and summer resorts and public parks, can relate only to lands which are subject to the servitude of navigation under the Commerce Clause. The fact that the diversion is from one watershed to another does not affect the servitude. The power of Congress is not limited to a particular system of waterways or by the

division between watersheds. *Stockton* v. *Baltimore, etc. R. R. Co.,* 32 Fed. 9; *Gilman* v. *Philadelphia,* 3 Wall. 713; *Gibbons* v. *Ogden,* 9 Wheat. 1; *South Carolina* v. *Georgia,* 93 U. S. 4; *Hudson County Co.* v. *McCarter,* 209 U. S. 349; *Missouri* v. *Illinois,* 200 U. S. 496; *Economy Light Co.* v. *United States,* 256 U. S. 113; *Sanitary District* v. *United States,* 266 U. S. 405.

An act of a State may be unlawful either as an unreasonable exercise of sovereignty wanting in the comity due to sister States, or as a violation of a law of the United States. But failure in this regard would not constitute a taking of property.

A State's property right in the water is not such as to sustain a suit. *Hudson Co.* v. *McCarter,* 209 U. S. 349.

Running water is not subject to ownership. *Geer* v. *Connecticut,* 161 U. S. 519.

So far as the *jus regium* applies to the public right of navigation, it is gone from the State to the United States. *Illinois Central Ry.* v. *Chicago,* 146 U. S. 387; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53.

So far as these States themselves are concerned then, their property is not taken by our diversion; first, because in withholding what would otherwise flow to them we are taking nothing; and second, because neither the corpus of the water nor the alleged right to have it flow to them is, of itself, property within the meaning of the Fifth Amendment.

As for the alleged impairment of public parks, and of private property, on the lakes, inasmuch as no duty to let the water flow exists in the relation of the States as equal sovereigns, our failure to let it flow is not a taking so far as the plaintiff States are concerned, and we think, also, so far as their citizens are concerned.

It is only if what we have done be regarded (as the master has found) as an act under the authority of the Federal Government, that the Fifth Amendment may be

considered at all, and here plaintiffs are between the horns of a dilemma. If our act is not under such authority, the argument about the Fifth Amendment vanishes. If our act is under federal authority, their whole case falls and the incidental argument about taking of property is covered by *Sanguinetti* v. *United States,* 264 U. S. 146, and there is no taking involved.

There is no restriction on the power of Congress to divert water from one watershed to another. *Missouri* v. *Illinois,* 200 U. S. 496; *Wyoming* v. *Colorado,* 259 U. S. 419.

Article I, § 9, Clause 6 of the Constitution does not inhibit this diversion because this diversion does not give preference to the ports of any State.

There is no restriction on the power of Congress to regulate navigation inherent in the fact that a particular regulation may destroy navigable capacity and, if there were, it has no application here because this diversion does not destroy navigation anywhere.

The diversion is not for the purpose of sanitation only. It is also for the purposes of navigation and, even if we examine its purpose of sanitation alone, we shall find that authorization thereof for that purpose was and is a regulation necessary and reasonably related to the protection of both navigation and interstate commerce on land. The Secretary of War was justified, under the authority delegated to him, in considering the beneficial effect upon interstate commerce of preventing the pollution of the drinking water supply of Chicago. *Bartlett* v. *Lockwood,* 160 U. S. 357; *Hoke* v. *United States,* 227 U. S. 308; *New England Co.* v. *United States,* 144 Fed. 932; *Kaukauna Power Co.* v. *Green Bay,* 142 U. S. 254.

The ordinance of 1787 does not restrict the power of Congress to authorize this diversion. *Willamette Bridge Co.* v. *Hatch,* 125 U. S. 1; *Withers* v. *Buckley,* 20 How. 84; *Economy Light Co.* v. *United States,* 256 U. S. 120; *In re Southern Wisconsin Power Co.,* 140 Wis. 245.

Congress has confined vindication of the Act of March 3, 1899, to suit by the Attorney General of the United States at the instance of the Secretary of War and certain of his subordinates.

The United States (or the Secretary of War) and the City of Chicago are necessary and indispensable parties to this suit and the case cannot properly proceed without them. *California* v. *Southern Pacific Co.*, 157 U. S. 229; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199.

Defendants do not abandon, and understand that they do not lose the opportunity, if the occasion arises, later to press certain defenses which are not argued here because they are not now material to support the findings and conclusions of the Special Master.

The questions raised by the complaint are administrative, legislative and political, and are for this reason beyond decretal regulation. Injunction is an inappropriate remedy.

*Mr. Daniel N. Kirby,* with whom *Messrs. Percy Saint,* Attorney General of Louisiana, *North T. Gentry,* Attorney General of Missouri, *H. W. Applegate,* Attorney General of Arkansas, *Rush H. Knox,* Attorney General of Mississippi, *Frank E. Daugherty,* Attorney General of Kentucky, *L. D. Smith,* Attorney General of Tennessee, and *Cornelius Lynde* were on the brief, for the intervening defendants, Mississippi River States.

Due to the economic situation of the Mississippi Valley, a diversion tending to improve and maintain navigation on that river, is a matter of recognized national importance.

Plaintiffs' arguments rest on assertions contradicting the findings of the Special Master. But the findings, being all supported by evidence, are conclusive. This includes the finding that compensating works could be built at relatively slight expense.

The urgent contentions for plaintiffs, that the permit of March 3, 1925, was issued solely for the benefit of sanitation and water power, and had no substantial relation to navigability, cannot avail to overcome the findings of the Special Master that the permit does benefit navigability in several substantial respects, and that the permit therefore rests on an adequate constitutional basis under the Commerce Clause.

There is, however, an additional and important basis having a direct relation to navigation, not mentioned by the Special Master, but shown by the record, upon which the action of the Secretary of War in issuing the permit may also rest, viz., the duties to navigate the Mississippi that are expressly imposed on the Secretary of War by §§ 201 and 500, of the Transportation Act of 1920, and by the Inland Waterways Corporation Act of June 3, 1924 (43 Stat. 360).

The Secretary of War must have authority, as a precedent to the grant of any permit, to determine whether in fact a particular alteration of navigable capacity benefits navigation as a whole. And such administrative determination is not to be set aside by a court except because of a clear and indisputable abuse of official discretion. And, on the facts in the case at bar, the alteration of navigable capacity authorized by the permit of March 3, 1925, must have been found by the Secretary to materially benefit navigation in important particulars.

The awarding of the permit raises a presumption that the work authorized improves the navigable capacity of the waterway.

The only question before this Court, on any of the interpretations of § 10 urged by plaintiffs, is whether there has, in this case, been shown to be such an abuse of administrative authority as to require this Court to set it aside. Plaintiffs do not clearly meet this question.

The Special Master's construction of § 10 of the Act of 1899 was correct.

The decision of this Court in *Sanitary District* v. *United States,* 266 U. S. 405, has determined the controlling issues of law involved in the merits of this controversy.

The admitted economic rivalry at the bottom of this controversy is itself sufficient to justify the present exercise of the congressional power to regulate commerce.

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

These are amended bills by the States of Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania and New York, praying for an injunction against the State of Illinois and the Sanitary District of Chicago from continuing to withdraw 8,500 cubic feet of water a second from Lake Michigan at Chicago.

The Court referred the cause to Charles Evans Hughes as a Special Master, with authority to take the evidence, and to report the same to the Court with his findings of fact, conclusions of law and recommendations for a decree, all to be subject to approval or other disposal by the Court. The Master gave full hearings and filed and submitted his report November 23, 1927, to which the complainants duly lodged exceptions, which have been elaborately argued.

When the first of these bills was filed, there was pending in this Court an appeal by the Sanitary District of Chicago from a decree granted at the suit of the United States by the United States District Court for the Northern District of Illinois, against a diversion from the Lake in excess of 250,000 cubic feet per minute, or 4,167 cubic feet per second. This amount had been permitted by the Secretary of War. In January, 1925, this Court affirmed the

decree, without prejudice to the granting of a further permit by the Secretary of War according to law. 266 U. S. 405. On March 3, 1925, the Secretary of War after that decree enlarged the permit for a diversion not to exceed an annual average of 8,500 cubic feet per second, upon certain conditions hereafter to be noted.

The amended bills herein averred that the Chicago diversion had lowered the levels of Lakes Michigan, Huron, Erie and Ontario, their connecting waterways, and of the St. Lawrence River above tide-water, not less than six inches, to the serious injury of the complainant States, their citizens and property owners; that the acts of the defendants had never been authorized by Congress but were violations of the rights of the complainant States and their people; that the withdrawals of the water from Lake Michigan were for the purpose of taking care of the sewage of Chicago and were not justified by any control Congress had attempted to exercise or could exercise in interstate commerce over the waters of Lake Michigan; and that the withdrawals were in palpable violation of the Act of Congress of March 3, 1899. The bills prayed that the defendants be enjoined from permanently diverting water from Lake Michigan or from dumping or draining sewage into its waterways which would render them unsanitary or obstruct the people of the complainant States in navigating them.

The State of Illinois filed a demurrer to the bills and the Sanitary District of Chicago an answer, which included a motion to dismiss. The States of Missouri, Kentucky, Tennessee and Louisiana, by leave of Court, became intervening co-defendants, on the same side as Illinois, and moved to dismiss the bills. The demurrer of Illinois was overruled and the motions to dismiss were denied, without prejudice. Thereupon the intervening defendants and the defendants, the Sanitary District and the State of Illinois, filed their respective answers. The States of

Mississippi and Arkansas were also permitted to intervene as defendants, and adopted the answers of the other interveners. The answers of the defendants denied the injuries alleged, and averred that authority was given for the diversion under the acts of the Legislature of Illinois and under acts of Congress and permits of the Secretary of War authorized by Congress in the regulation of interstate commerce. All the answers stressed the point that the diversion of water from Lake Michigan improved the navigation of the Mississippi River and was an aid to the commerce of the Mississippi Valley and sought the preservation of this aid. They also set up the defense of laches, acquiescence and estoppel, on the ground that the purposes of the canal and the diversion were known to the people and the officials of the complainant States, and that no protest or complaint had been made in their behalf prior to the filing of the original bills herein.

The Master has made a comprehensive review of the evidence before him in regard to the history of the canal, the extent and effect of the diversion, the action of the State and Federal Governments, the plans for the disposal of the sewage and waste of Chicago and the other territory within the Sanitary District, as well as the character and feasibility of works proposed as a means of compensating for the lowering of lake levels. From this review we shall take what will assist us in the consideration of the issues deemed necessary to be considered on the exceptions to the report.

We shall first consider in brief the parts taken by Congress and the State of Illinois and their respective agencies in the construction of the Sanitary District Canal and the creation of the Lake Michigan diversion.

By the Act of March 30, 1822, c. 14; 3 Stat. 659, Congress authorized Illinois to survey and mark, through the public lands of the United States, the route of a canal connecting the Illinois River with Lake Michigan, and

granted certain lands in aid of the project. A further land grant was made in 1827. The canal was completed in 1848. The canal crossed the continental divide between the Chicago and Des Plaines Rivers, on a summit level eight feet above the Lake, and then paralleled the Des Plaines River and the Upper Illinois River to La Salle, Illinois, where it entered the latter stream. The summit of the canal was supplied with water by pumps located in a plant on the Chicago River. Originally, only enough water was pumped to answer the needs of navigation in the canal, but thereafter, in 1861, the Legislature provided for improvement in the canal by excavation and a larger flow of water from Lake Michigan.

Before 1865, the Chicago River, being a sluggish stream in its lower reaches, had become so offensive because of receiving the sewage of the rapidly growing city, that for its immediate relief the municipal authorities and the canal commissioners agreed to pump water from the river in excess of the needs of navigation. By 1872 the summit level of the canal had been lowered, and it was hoped that this would result in a permanent flow of lake water through the South Branch of the Chicago River, sufficient to keep it in good condition, but the plan failed, and the canal again became grossly polluted.

In 1881, the Illinois Legislature passed a resolution authorizing the installation of pumps at the northern terminus of the canal, with a capacity of not less than 1,000 cubic feet a second, to draw water from Lake Michigan through the Chicago River and the canal. Pumps were installed and pumping was begun in 1883. For a few years this afforded sufficient dilution in the canal because of the high stage of Lake Michigan, but in 1886 the lake level began to fall, and continued to fall until 1891 when it was two feet lower than when the pumps were installed. Their capacity was thus reduced to a little more than 600 cubic feet a second. The nuisance

along the canal continued to grow. The Drainage and Water Supply Commission of the State recommended, as the most economical method for meeting the requirement, a discharge into the Des Plaines River through a canal across the continental divide, providing a waterway of such dimensions as would furnish ample dilution. The Commission pointed out that the proposed canal would, from its necessary dimensions and its regular discharge, produce a magnificient waterway between Chicago and the Mississippi River, suitable for navigation of boats having as much as 2,000 tons burden, and would give also large water power of great commercial value to the State.

The Sanitary District was organized under the Illinois Act of 1889. It was completed in 1890. It embraced an area of 185 square miles. By later acts it was increased to approximately 438 square miles, extending from the Illinois State line on the south and east to the northern boundary of Cook County on the north, with about 34 miles of frontage on Lake Michigan, embracing the metropolitan area of Chicago, consisting of a total of fifty-four cities, towns and villages.

The main drainage canal was begun in 1892, and was opened in January, 1900. Since that time the flow of the Chicago River has been reversed—that is, it has been made to flow away from Lake Michigan toward the Mississippi. As originally constructed the canal ended in a non-navigable tail-race. There was no lock at the southwestern end. But by the Act of May 14, 1903, the Illinois Legislature gave the Sanitary District the power to construct dams, water wheels, and other works appropriate to render available the power arising from the water passing through the main channel and any auxiliary channels thereafter constructed.

In 1908, the Constitution of Illinois was amended to authorize the legislature to provide for the construction of

a deep waterway or canal, from the water-power plant of the Sanitary District of Chicago, at or near Lockport, to a point on the Illinois River at or near Utica, and to provide that this power might be leased for the benefit of the State treasury. Meantime, all the sewage in the drainage district, including Evanston, was turned into the main channel, and the water directly abstracted from Lake Michigan by the Sanitary District was increased from 2,541 cubic feet a second in 1900 to 5,751 in 1909, to 7,228 in 1916, to 6,888 cubic feet a second in 1926, not including pumpage.

The Sanitary District authorities have expended in the construction of works for sewage and the deep waterway canal $109,021,613 including interest on bonds.

In 1888, Congress directed the Secretary of War to make surveys for a channel improvement in the Illinois and Des Plaines Rivers. In 1892, Congress appropriated $72,000 to complete the improvement of the harbor at Chicago, and again $25,000 in 1894. Three engineers appointed by the Secretary of War reported to him that a diversion of 10,000 cubic feet a second through the Sanitary and Ship Canal would lower the levels of the Lakes, except Lake Superior. In 1896, Congress appropriated money for dredging the Chicago River. The Sanitary District in that year asked for a permit from the Secretary of War to enlarge the cross section of the Chicago River, and announced that the work had progressed so far that this must be done to make available the artificial channel under construction from Robey Street, Chicago, to Lockport, twenty-eight miles distant. The Secretary of War granted the permit, but said that this authority was not to be interpreted as an approval of the plans of the Sanitary District of Chicago to introduce a current into the Chicago River; that the United States should not be put to any expense, and that the authority was to expire by limitation in two years. Other permits relating to the same

subject were issued by the same officer in 1897, 1898, and twice in 1899. The Act of Congress of 1899 amplified the provisions of an earlier Act of 1890 looking to the regulation, prevention, and removal by Federal authority of obstructions to navigation and alteration of capacity of the navigable waters of the United States by enacting Sections 9 and 10 thereof.

Other permits were allowed by the Secretary of War—one on December 5, 1901, allowing a diversion of 250,000 cubic feet per minute throughout the full 24 hours of each day. And in another instance on January 17, 1903, a diversion of 350,000 cubic feet per minute until March 31, 1903, was permitted, in order to carry off the accumulations of sewage deposit lining the shores along the city, with the provision that after that, the flow should be reduced to 250,000 cubic feet per minute as required by the permit of December, 1901. The Board of Engineers in 1905 reported to Congress that the effect upon the level of Lake Michigan of withdrawing 10,000 cubic feet per second for an indefinite period had been the subject of elaborate investigation and that the conclusion reached was that the final effect would be to lower the level of the Lake six inches.

An application for the flow of more water through the Calumet Sag Channel was declined by the Chief of Engineers, and was refused by the Secretary of War in March, 1907, and as the Sanitary District apparently intended to proceed with the work for which a permit had been refused, the United States brought suit in 1908 to prevent its construction and prevent the increase of the flow. Another application was refused by the Secretary of War in January, 1913, and there seems to have been another denied later.

A second bill to enjoin the Sanitary District from a diversion of more than 250,000 cubic feet per minute or its

equivalent 4,167 cubic feet a second of water from Lake Michigan was filed and was consolidated with the earlier suit, and after a long delay of six or seven years an oral opinion was given by Judge Landis of the United States District Court for the Northern District of Illinois in favor of the Government. A decree not having been entered before Judge Landis resigned, a decree was entered by Judge Carpenter in the case which was affirmed by this Court in January, 1925. *Sanitary District of Chicago* v. *United States,* 266 U. S. 405.

This Court's decree provided that the defendant, the Sanitary District of Chicago, its agents, and all other persons acting or claiming or assuming to act under its authority, should be enjoined from diverting or abstracting any waters from Lake Michigan over and above or in excess of 250,000 cubic feet per minute, to go into effect in sixty days, without prejudice to any permit that might be issued by the Secretary of War according to law.

Immediately after this decision, the Sanitary District applied to the Secretary of War for permission to divert 10,000 cubic feet a second. The exigency was set out in the petition. The Secretary of War then issued a permit on March 3, 1925, which recited that the instrument did not give any property rights either in real estate or material, or any exclusive privileges; and that it did not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State or local laws or regulations, or obviate the necessity of obtaining the State's assent to the work authorized. It certified that upon the recommendation of the Chief of Engineers, the Secretary of War, under Section 10 of the Act of 1899, authorized the Sanitary District to divert from Lake Michigan an amount of water not to exceed an annual average of 8,500 cubic feet per second, the instantaneous maximum not to exceed 11,000 cubic feet per second, upon certain conditions.

The conditions of the permit require the City of Chicago to take immediate steps to carry out sewage treatment by artificial processes, so that before the expiration of the permit they should provide the equivalent of 100% treatment of the sewage of 1,200,000 people, or one-third of the population of the city, and that this should be done under supervision of the U. S. District Engineer at Chicago, the permit to be revoked if the conditions were not complied with, and the permit to cease unless renewed on December 31, 1929. In granting the permit, the Secretary of War expressed the opinion that steps should be taken to complete the entire work of providing for disposal of all the sewage in ten years. Colonel Schultz, U. S. District Engineer at Chicago, reported that the conditions of the March 3, 1925, permit have been complied with, and the Master confirms this in his report.

In providing for the improvement of the channel of the Illinois River in the Act of January 21, 1927, c. 47; 44 Stat. 1013, Congress declared that nothing in the Act should be construed as authority for any diversion from Lake Michigan.

The Master's findings on the subject of injury to the complainants are in effect as follows:

The diversion which has taken place through the Chicago Drainage Canal has been substantially equivalent to a diversion of about 8,500 cubic feet a second for a period of time sufficient to cause, and it has caused, the lowering of the mean levels of the Lakes and the connecting waterways, as follows: Lakes Michigan and Huron approximately 6 inches; Lakes Erie and Ontario approximately 5 inches; and of the connecting rivers, bays and harbors to the same extent respectively. A diversion of an additional 1,500 cubic feet per second, or a total diversion of 10,000 cubic feet a second would cause an additional lowering in Lakes Michigan and Huron of about one inch, and in Lakes Erie and Ontario a little less than one inch, with

a corresponding additional lowering in the connecting waterways. The Master also finds that if the diversion at Chicago were ended, assuming that other diversions remained the same, the mean levels of the lakes and rivers affected by the Chicago drainage would be raised in the course of several years (about 5 years in the case of Lakes Michigan and Huron, and about one year in the case of Lakes Erie and Ontario) to the same extent as they had been lowered, respectively, by that diversion.

The Master finds that the damage due to the diversion at Chicago relates to navigation and commercial interests, to structures, to the convenience of summer resorts, to fishing and hunting grounds, to public parks and other enterprises, and to riparian property generally, but does not report that injury to agriculture is established. He says that the Great Lakes and their connecting channels form a natural highway for transportation, having a water surface of over 95,000 square miles, and a shore line of 8,300 miles, extending from Duluth-Superior, and from Chicago and Gary, to Montreal, at the head of deep-draft ocean navigation on the St. Lawrence; that there are approximately 400 harbors on the Great Lakes and connecting channels, of which about 100 have been improved by the Federal Government; that the latter improvements consist in the excavation and maintenance of channels from deep water in the lakes to the harbor entrances; that inner or local harbors are located inside of the Federal channels, and the depths in the inner harbors have been obtained and are maintained at local expense; that inner harbors are necessary to afford practical navigation; that extensive and expensive loading, unloading and other terminal facilities have been constructed in these various ports within the territory of the complainant States, on the Great Lakes, at local expense.

The Master's report says that the water-borne traffic on the Great Lakes for the year 1923 consisted of 81,466,902,000 ton-miles of water haul, and that consideration of

individual loaded boats and of their respective dimensions shows that, if water had been available for an additional six inches of draft, the fleet could have handled for the year 3,346,000 tons more than was actually transported, or to put the matter in another light, the season's business could have been done with the elimination from service of about 30 freighters of the 2,000–3,000-ton class, and that the lost tonnage of the total through business of the Lakes for 1923, incident to a 6-inch deficiency of draft, exceeded 4,000,000 tons, and that the average water-haul rate for the year was 88 cents per ton.

The great losses to which the complainant States and their citizens and their property owners have been subjected by the reductions of levels in the various Lakes and Rivers except Lake Superior are made apparent by these figures.

The pleadings question the jurisdiction of this Court and the sufficiency of the facts set forth in the bills to constitute a cause of action. These issues, although raised, are not pressed by the defendants and we concur with the Master in his conclusion that they are met completely by our previous decisions. *Missouri* v. *Illinois,* 180 U. S. 208; s. c. 200 U. S. 496; *Hans* v. *Louisiana,* 134 U. S. 1; *Sanitary District of Chicago* v. *United States,* 266 U. S. 405; *Kansas* v. *Colorado,* 185 U. S. 125; s. c. 206 U. S. 46; *New York* v. *New Jersey,* 256 U. S. 296; *Wyoming* v. *Colorado,* 259 U. S. 419; *North Dakota* v. *Minnesota,* 263 U. S. 365; *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 623; 263 U. S. 350; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237.

The controversies have taken a very wide range. The exact issue is whether the State of Illinois and the Sanitary District of Chicago by diverting 8,500 cubic feet from the waters of Lake Michigan have so injured the riparian and other rights of the complainant States bordering the Great Lakes and connecting streams by lowering their levels as

to justify an injunction to stop this diversion and thus restore the normal levels. Defendants assert that such a diversion is the result of Congressional action in the regulation of interstate commerce, that the injury, if any, resulting is *damnum absque injuria* to the complaining States. Those States reply that the regulation of interstate commerce under the Constitution does not authorize the transfer by Congress of any of the navigable capacity of the Great Lake System of Waters to the Mississippi basin, that is from one great watershed to another; second, that the transfer is contrary to the provision of the Constitution forbidding the preference of the ports of one State over those of another; and, third, that the injuries to the complainant States deprive them and their citizens and property owners of property without due process of law and of the natural advantages of their position, contrary to their sovereign rights as members of the Union. If one of these issues is decided in favor of the complaining States, it ends the case in their favor and the diversion must be enjoined. But in the view which we take respecting what actually has been done by Congress some of these objections need not be considered or passed upon.

The complainants, even apart from their constitutional objections, contend that Congress has not by statute or otherwise authorized the Lake Michigan diversion, that it is therefore illegal and that injuries by it to the complainant States and their people should be forbidden by decree of this Court. The diversion of 8,500 cubic feet a second is now maintained under a permit of the Secretary of War of March 3, 1925, acting under Section 10 of the Act of 1899, which it is contended by the complainants vests no such authority in him. They claim that the diversion is based on a purpose not to regulate navigation of the Lake, but merely to get rid of the sewage of Chicago, that this is a State purpose, not a Federal function, and should be enjoined to save the rights of complainants. If the view

urged by the complainants is right, the necessity for the use of the 8,500 cubic feet a second to save the health of the inhabitants of the Sanitary District will then present the problem of the power and discretion of a court of equity to moderate the strict and immediate rights of the parties complainant to a gradual one which will effect justice as rapidly as the situation permits. The framing of the decree will then require the careful consideration of the Court.

The complainants contend that Congress has given no authority for the diversion from Lake Michigan, even if it has power so to do by way of regulating interstate commerce. The defendants rely for this authority on the permit of the Secretary of War issued by him March 3, 1925, to the Sanitary District shortly after the decree of this Court in the *Sanitary District* v. *United States,* 266 U. S. 405. That decree forbade the diversion of the waters from Lake Michigan in excess of 4,167 cubic feet a second, but was made expressly without prejudice to any permit issued by the Secretary of War according to law. The complainants contend that the permit which allows a diversion of 8,500 cubic feet a second is not in regulation of interstate commerce, is not according to law and should be declared invalid.

The defendants base their claim of Congressional authority on § 10 of the Act of March 3, 1899, c. 425; 30 Stat. 1121, 1151—

"That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on

plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

The policy carried out in the Act of March 3, 1899, had been begun in the Act of September 19, 1890, c. 907; 26 Stat. 426, 454, 455. Sections 9 and 10 were the rearranged result of the provisions of Sections 7 and 10 of the Act of 1890. A new classification was made in Sections 9 and 10 of the Act of 1899, and substituted for Section 10 of the Act of 1890. The latter provided that the creation of any obstruction to navigable capacity was prohibited, unless " affirmatively authorized by law " and this was changed so as to read " affirmatively authorized by Congress." The change in the words of the first clause of Section 10 was intended to make mere State authorization inadequate. *Sanitary District* v. *United States,* 266 U. S. 405, 429; *United States* v. *Bellingham Bay Boom Co.,* 176 U. S. 211. It was not intended to override the authority of the State to put its veto upon the placing of obstructing structures in navigable waters within a State and both State and Federal approval were made necessary in such case. *Cummings* v. *Chicago,* 188 U. S. 410. The words " affirmatively authorized by Congress " should be construed in the light of the administrative exigencies which prompted the delegation of authority in the succeeding clauses. Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the

determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended. The Supreme Court of Maine in *Maine Water Co.* v. *Knickerbocker Steam Towage Co.*, 99 Me. 473, took the same general view in construction of the same section. It held that the broad words of the first clause of that section were not intended to limit the second and third clauses and that Congress's purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War. We concur in this view.

The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.

This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. *United States* v. *Minnesota*, 270 U. S. 181, 205; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Kern River Co.* v. *United States*, 257 U. S. 147, 154; *United States* v. *Burlington & Missouri River R. R.*, 98 U. S. 334, 341; *United States* v. *Hammers*, 221 U. S. 220, 228; *Logan* v. *Davis*, 233 U. S. 613, 627.

The practice is shown by the opinion of the Acting Attorney General, transmitted to the Secretary of War,

34 Op. Atty. Gen. 410, 416. The Secretary of War acted on this view on May 8, 1899, about two months after the passage of the Act. This was followed by the permits subsequently granted down to March 3, 1925. The fact that the Secretary of War acted on this view was made known to Congress by many reports.

But it is said the construction thus favored would constitute it a delegation by Congress of legislative power and invalid. We do not think so. The determination of the amount that could be safely taken from the Lake is one that is shown by the evidence to be a peculiarly expert question. It is such a question as this that is naturally within the executive function that can be deputed by Congress. *Southern Pacific Co.* v. *Olympian Dredging Co.,* 260 U. S. 205, 208; *Sanitary District* v. *United States,* 266 U. S. 405, 428; *Field* v. *Clark,* 143 U. S. 649, 693; *Buttfield* v. *Stranahan,* 192 U. S. 470, 496; *Union Bridge Co.* v. *United States,* 204 U. S. 364, 386; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 192; *Louisville Bridge Co.* v. *United States,* 242 U. S. 409, 424; *J. W. Hampton, Jr. & Co.* v. *United States,* 276 U. S. 394, 407.

The construction of Section 10 of the Act of March 3, 1899, was settled by this Court in the decision of the first Chicago Drainage Canal case in 266 U. S. 405, 429. The decision there reached and the decree entered can not be sustained, except on the theory that the Court decided first that Congress had exercised the power to prevent injury to the navigability of Lake Michigan and the other lakes and rivers in the Great Lakes watershed, and second that it could properly and validly confer the administrative function of passing on the issue of unlawful injury or otherwise on the Secretary of War, and that it had done so. To give any other interpretation would necessarily be at variance with our previous decision.

It is further argued by complainants that while the power of Congress extends to the protection and improvement of navigation, it does not extend to its destruction or to the creation of obstructions to navigable capacity. This Court has said that while Congress in the exercise of its power may adopt any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 62, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end. *United States* v. *River Rouge Improvement Co.,* 269 U. S. 411, 419; *Port of Seattle* v. *Oregon & Washington R. R.,* 255 U. S. 56, 63.

So complainants urge that the diversion here is for purposes of sanitation and development of power only, and therefore that it lies outside the power confided by Congress to the Secretary of War. The Master says:

"There is no doubt that the diversion is primarily for the purposes of sanitation. Whatever may be said as to the service of the diverted water in relation to a waterway to the Mississippi, or as to the possible benefit of its contribution to the navigation of that river at low water stages, it remains true that the disposition of Chicago's sewage has been the dominant factor in the promotion, maintenance and development of the enterprise by the State of Illinois and the Sanitary District. The purpose of utilizing the flow through the drainage canal to develop power is also undoubtedly present, although subordinated to the exigency of sanitation. So far as the diverted water is used for the development of power, the use is merely incidental. This Court, in *Sanitary District* v. *United States,* 266 U. S. 405, 424, in describing the channel, looked upon its interest to the Sanitary District 'primarily as a

means to dispose of the sewage of Chicago , although it was also ' an object of attention to the United States as opening water communication between the Great Lakes and the Mississippi and the Gulf.' "

The Master then considered whether there was any express authorization of the diversion now permitted, except under Sections 9 and 10 of the Act of March 3, 1899, already referred to. On this subject he said:

" Consideration by Congress of the advisability of the proposed waterway from Lake Michigan to the Illinois and Mississippi Rivers, demands by Congress for surveys, plans and estimates, the establishment of project depths, and appropriations for specified purposes, did not in my opinion constitute direct authority for the diversion in question, however that diversion, or the diversion of some quantity of water from Lake Michigan, might fit into an ultimate plan."

This conclusion of the Master is fully supported by reference to the already cited Rivers and Harbors Appropriation Act of 1927 declaring that nothing therein should authorize any Lake Michigan diversion.

The Master also says that appropriations for widening and deepening the Chicago River, and the coöperation with the Sanitary District for several years in that improvement, merely committed Congress to the work as thus actually prescribed, but did not go further, whatever the advantages of that work in connection with the purposes of the Sanitary District's Canal.

He then proceeds:

" There is nothing in any of the acts of Congress upon which the defendants rely specifying any particular quantity of water which could be diverted and it could hardly be considered a reasonable contention that the acts of Congress justified any diversion of water from Lake Michigan that the State of Illinois and the Sanitary District might see fit to make. It is manifest that it was

the view of the War Department that Congress had not acted directly and whatever the Department did was subject to such action as Congress might take."

He continues:

"This understanding that Congress has not yet acted directly so as to authorize the diversion in question has continued. It was in this view that the United States prosecuted its suit to decree in this Court to enjoin the defendants from taking more water from Lake Michigan than the Secretary of War had allowed."

In this conclusion, which the Court confirms, we are therefore remitted solely to the effect and operation of the permit of 1925 as authority for the maintenance of the diversion.

The normal power of the Secretary of War under Section 10 of the Act of March 3, 1899, is to maintain the navigable capacity of Lake Michigan and not to restrict it or destroy it by diversions. This is what the Secretaries of War and the Chiefs of Engineers were trying to do in the interval between 1896 and 1907 and 1913 when the applications for 10,000 cubic feet a second were denied by the successive Secretaries and in 1908 a suit was brought by the United States to enjoin a flow beyond 4,167 cubic feet a second. Then pending the suit, the Sanitary District disobeyed the restriction of the Secretary of War's permit and increased the diversion to 8,500 cubic feet in order to dispose of the sewage of that District. Had an injunction then issued and been enforced, the Port of Chicago almost immediately would have become practically unusable because of the deposit of sewage without a sufficient flow of water through the Canal to dilute the sewage and carry it away. In the nature of things it was not practicable to stop the deposit without substituting some other means of disposal. This situation gave rise to an exigency which the Secretary, in the interest of navigation and its protection, met by issuing a temporary

permit intended to sanction for the time being a sufficient diversion to avoid interference with navigation in the Port of Chicago. See *New York* v. *New Jersey*, 256 U. S. 296, 307, 308. The elimination and prevention of this interference was the sole justification for expanding the prior permit, the limitations of which had been disregarded by the Sanitary District. Merely to aid the District in disposing of its sewage was not a justification, considering the limited scope of the Secretary's authority. He could not make mere local sanitation a basis for a continuing diversion. Accordingly he made the permit of March 3, 1925, both temporary and conditional—temporary in that it was limited in duration and revocable at will, and conditional in that it was made to depend on the adoption and carrying out by the District of other plans for disposing of the sewage.

It will be perceived that the interference which was the basis of the Secretary's permit, and which the latter was intended to eliminate, resulted directly from the failure of the Sanitary District to take care of its sewage in some way other than by promoting or continuing the existing diversion. It may be that some flow from the Lake is necessary to keep up navigation in the Chicago River, which really is part of the Port of Chicago, but that amount is negligible as compared with 8,500 second feet now being diverted. Hence, beyond that negligible quantity, the validity of the Secretary's permit derives its support entirely from a situation produced by the Sanitary District in violation of the complainants' rights; and but for that support complainants might properly press for an immediate shutting down by injunction of the diversion, save any small part needed to maintain navigation in the river. In these circumstances we think they are entitled to a decree which will be effective in bringing that violation and the unwarranted part of the diversion to an end. But in keeping with the principles

on which courts of equity condition their relief, and by way of avoiding any unnecessary hazard to the health of the people of that section, our decree should be so framed as to accord to the Sanitary District a reasonably practicable time within which to provide some other means of disposing of the sewage, reducing the diversion as the artificial disposition of the sewage increases from time to time, until it is entirely disposed of thereby, when there shall be a final, permanent operative and effective injunction.

It is very apparent from the report of the Master and from the state legislation that the Legislature of Illinois and the Sanitary District have for a long period been strongly insistent upon such a use of the waters of Lake Michigan as would dispose of the sewage of the District and incidentally furnish a navigable water route from Lake Michigan to the Mississippi basin; and that not until 1903 was the attention of the public, and especially of the District authorities, drawn to the fact that a diversion like that now used would lower the Lake levels with injurious consequences to the Great Lakes navigation and to the complainant States. The Secretary of War and the Chief of Engineers in 1907 refused a permit by which there would be more than 4,167 feet a second diverted. Advised that the District authorities proposed to ignore that limitation, the United States brought suit against the authorities of the District to enjoin any diversion in excess of that quantity, as fixed in an earlier permit. Another application for enlargement was made to Secretary of War Stimson in 1913 and was rejected. For several years, including the inexcusable delays made possible by the failure of the Federal Court in Chicago to render a decision in the suit brought by the United States, the District authorities have been maintaining the diversion of 8,500 cubic feet per second or more on the plea of preserving the health of the District. Putting this plea

forward has tended materially to hamper and obstruct the remedy to which the complainants are entitled in vindication of their rights, riparian and other.

The intervening States on the same side with Illinois, in seeking a recognition of asserted rights in the navigation of the Mississippi, have answered denying the rights of the complainants to an injunction. They really seek affirmatively to preserve the diversion from Lake Michigan in the interest of such navigation and interstate commerce though they have made no express prayer therefor. In our view of the permit of March 3, 1925, and in the absence of direct authority from Congress for a waterway from Lake Michigan to the Mississippi, they show no rightful interest in the maintenance of the diversion. Their motions to dismiss the bills are overruled and so far as their answer may suggest affirmative relief, it is denied.

In increasing the diversion from 4,167 cubic feet a second to 8,500, the Sanitary District defied the authority of the National Government resting in the Secretary of War. And in so far as the prior diversion was not for the purposes of maintaining navigation in the Chicago River it was without any legal basis, because made for an inadmissible purpose. It therefore is the duty of this Court by an appropriate decree to compel the reduction of the diversion to a point where it rests on a legal basis and thus to restore the navigable capacity of Lake Michigan to its proper level. The Sanitary District authorities, relying on the argument with reference to the health of its people, have much too long delayed the needed substitution of suitable sewage plants as a means of avoiding the diversion in the future. Therefore they can not now complain if an immediately heavy burden is placed upon the District because of their attitude and course. The situation requires the District to devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition adequate plants for the dis-

position of the sewage through other means than the Lake diversion.

Though the restoration of just rights to the complainants will be gradual instead of immediate it must be continuous and as speedy as practicable, and must include everything that is essential to an effective project.

The Court expresses its obligation to the Master for his useful, fair, and comprehensive report.

To determine the practical measures needed to effect the object just stated and the period required for their completion there will be need for the examination of experts; and the appropriate provisions of the necessary decree will require careful consideration. For this reason, the case will be again referred to the Master for a further examination into the questions indicated. He will be authorized and directed to hear witnesses presented by each of the parties, and to call witnesses of his own selection, should he deem it necessary to do so, and then with all convenient speed to make report of his conclusions and of a form of decree.

*It is so ordered.*

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## EXCHANGE TRUST COMPANY *v.* DRAINAGE DISTRICT NO. 7, POINSETT COUNTY, ARKANSAS, ET AL.

ERROR TO THE SUPREME COURT OF ARKANSAS.

No. 114. Argued January 9, 1929.—Decided January 21, 1929.

1. Irregularties in proceedings for the annexation of new lands to a special improvement district and for assessment of benefits may be cured by an act of the legislature confirming a reassessment. P. 424.
2. A settler under the homestead law who invited and secured an annexation of his land to a state drainage district and afterwards obtained his equitable title through a final entry of the

land, is estopped from asserting that the assessment subsequently imposed on him for the benefits accruing from the drainage are void because the land was owned by the United States at the time of such annexation. *Lee* v. *Oceola Road District,* 268 U. S. 643, distinguished. P. 425.

3. Independently of estoppel, the defense of governmental immunity is inapplicable, since the drainage plan and proposed assessments affecting the land in question were filed after the homesteader had received his final certificate, and were approved, and the work done, after he had received his patent. P. 425.

175 Ark. 934, affirmed in part. Reversed in part by a consent order.

This suit was begun by Rice and revived by his above-named executor in the Chancery Court, Arkansas. Its purpose was to set aside various special assessments on Rice's land, made by the Drainage District, and others made by its co-defendant, the St. Francis Levee District, and resulting foreclosures, deeds, etc. A decree granted the plaintiff by the Chancery Court was reversed by the decree of the State Supreme Court here reviewed. The controversy with the Levee District is settled by a consent order set forth in the opinion.

*Messrs. Arthur L. Adams* and *J. A. Tellier,* with whom *Messrs. D. F. Taylor, John S. Mosby,* and *H. M. Cooley* were on the brief, for plaintiff in error.

*Mr. R. B. McCulloch* with whom *Mr. Burk Mann* was on the brief, for St. Francis Levee District.

*Mr. Charles D. Frierson* appeared and was on the brief for Drainage District No. 7.

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

Roy Rice and others were homesteaders under the United States statutes upon lands of the Government situate in Poinsett County, Arkansas. The lands were in Drainage District No. 7 of Poinsett County. Drainage

District No. 7 had been organized under a special act of the Legislature of Arkansas. Arkansas Acts of 1917, p. 1053. As originally formed, the district consisted of lands west of the St. Francis River in Poinsett County. Rice and others had their homestead locations in that county east of the St. Francis River. Their lands were flooded by the waters of a drainage district organized in Mississippi County. In order to secure protection against such flood waters, and to secure better drainage to their own lands, they petitioned the county court to allow their lands to be added to Drainage District No. 7 of Poinsett County. On March 15, 1918, the petition for annexation of the homestead lands of Rice and others east of the river was acted upon by the county court, and the order of annexation was made. It provided that there should be levied against the lands annexed assessments in accordance with the benefits which the lands should receive from the cost of the drainage. The board of directors of the original drainage district consented to this in open court. On May 24, 1919, the drainage district altered its plans so as to provide for and include in the new assessments the drainage of the territory of the original district on the west side of the river. A judgment was entered reciting the annexation of the lands and the confirmation of it by the General Assembly of Arkansas. Arkansas Special Acts, 1919, p. 52.

On June 28, 1919, the county court entered a judgment making a modification of the drainage assessments because of the change of plans. It recited that the estimated cost of the entire improvement had been increased to $3,392,000. On June 23, 1919, the county court confirmed the assessments made upon the lands annexed as well as the assessments upon the other lands in the district. Nearly all lands embraced in the annexation to the district, including the land of plaintiff, belonged to the United States at the time the original district was

organized in 1917, but prior to June 23, 1919, Rice and practically all the other homesteaders of the United States in this district received their final certificates of entry or their patents on the land herein involved. After that date, on April 5, 1922, the board of directors of the district filed a report in the county court stating that the assessment of benefits had become unequal and offered a complete re-assessment of benefits upon all the lands in the district, including the annexed lands. And on May 31, 1922, the county court made an order establishing a readjustment of the assessment of benefits. Rice died, and the Exchange Trust Company succeeded him as his executor. This suit was brought to enjoin the enforcement of the assessments on his property in the drainage district, on the ground that the assessments were made while the land in question was the property of the United States, and before Rice's title had ripened into ownership.

The plaintiff's contention was that the drainage assessments were void on the authority of *Lee* v. *Osceola & Little River Road Improvement District No. 1 of Mississippi County, Arkansas,* 268 U. S. 643. In that case it was held that a State could not impose special taxes on lands acquired by private owners from the United States on account of benefits resulting from a road improvement made before the United States parted with its title. In this case the Chancellor of the state court held that the *Lee* case applied, and enjoined the enforcement of the assessments. The Supreme Court of Arkansas held that Rice and his executor were estopped to object to the collection of the assessments. 175 Ark. 934.

Objection was made to the defects in the proceedings of annexation, but they were cured by an act of the Legislature covering the re-assessment, which was approved and confirmed March 23, 1923. It is quite clear that this

curative act was completely effective. *Read* v. *City of Plattsmouth,* 107 U. S. 568; *National Bank* v. *County of Yankton,* 101 U. S. 129; *Utter* v. *Franklin,* 172 U. S. 416; *Town of Thompson* v. *Perrine,* 103 U. S. 806.

But however this may be, it is clear that Rice and his associates deliberately sought the benefit of the annexation of the lands to the east of the river, acquired it and are now enjoying it, and that they can not now be heard to question the validity of the assessments invited by them for the very purpose of securing the benefits conferred. This fully distinguishes the *Lee* case.

Nor is it even necessary to resort to the principles of estoppel *in pais* in this case. The record shows that the lands were annexed by the county court order of March 15, 1918; that the plans for improvement east of the St. Francis River were not filed until May 24, 1919; and that the first assessment filed affecting the lands in controversy was on May 24, 1919. Neither the plans nor the assessments were approved until June 23, 1919. The first bonds issued affecting the lands here involved were issued August 1, 1919. By June, 1919, Rice and practically all the other land owners who petitioned for the annexation had received final certificates of entry from the United States. By those certificates they acquired the equitable title to the land, and that became subject to taxation and assessment, even though the legal title remained in the United States. *Irwin* v. *Wright,* 258 U. S. 219, 229; *Bothwell* v. *Bingham County,* 237 U. S. 642, 647; *Witherspoon* v. *Duncan,* 21 Ark. 240; s. c. 4 Wall. 210. Moreover, the record shows that the final certificate was issued to Rice February 14, 1919, and that a patent was issued to him June 3, 1919. It follows that the work to be done for the benefit of these lands was not done until after the full legal title had passed to Rice.

*Decree affirmed.*

There was another issue in this case when it first came here. This concerned assessments upon the St. Francis Levee District which Rice and his associates also sought to enjoin. At the argument, the parties agreed upon a consent order in respect to the Levee District as follows:

"This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, counsel for defendant in error, St. Francis Levee District, consenting, it was ordered, adjudged and decreed as follows, viz:

"That the prayer of the complaint for cancellation of decrees of foreclosure in favor of defendant in error, St. Francis Levee District, is granted and said decrees are cancelled and held for naught as clouds upon the title to said lands; and said St. Francis Levee District is forever enjoined from taxing or attempting to tax said lands to pay for improvements made or administrative or other expenses incurred prior to issuing of final certificate by the United States; that said lands are subject to tax for the cost of improvements, administrative, or other expenses of said St. Francis Levee District contracted for subsequent to the issuing of final certificate from the United States and the Supreme Court of Arkansas is reversed in so far as the judgment is inconsistent herewith, and the cause is remanded to the Supreme Court of Arkansas for further proceedings not inconsistent with this conclusion.

"Mandate will issue accordingly."

The above opinion and the agreed order dispose of the whole case so far as this Court is concerned. The Supreme Court of Arkansas will be at liberty to take such further action in the case as may be in keeping with the local law and not inconsistent with our opinion and agreed order.

# UNITED STATES *v.* COMMONWEALTH AND DOMINION LINE, LTD.

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

No. 21. Argued January 7, 1929.—Decided January 21, 1929.

In a proceeding in admiralty against the United States for collision losses, a special act granting jurisdiction to enter a decree in favor of either party for the amount of damages and costs "upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal" is to be construed strictly, and no interest could be allowed against the United States, though it filed a cross libel. *The Thekla,* 266 U. S. 328, distinguished. P. 427.

20 F. (2d) 729, reversed.

CERTIORARI, 275 U. S. 521, to a judgment of the Circuit Court of Appeals affirming an award of damages against the United States in a collision case and adding interest. The suit was brought by the present respondent under a special Act of Congress. The United States prosecuted a cross libel.

*Assistant Attorney General Farnum,* with whom *Solicitor General Mitchell,* and *Messrs. J. Frank Staley* and *John T. Fowler, Jr.,* were on the brief, for the United States.

*Mr. Allan B. A. Bradley,* with whom *Mr. George deF. Lord* was on the brief, for respondent.

Mr. JUSTICE HOLMES delivered the opinion of the Court.

This is a libel in admiralty against the United States as owner of the steam collier Proteus to recover damages caused by a collision with the libellant's vessel Port Phillip. The District Court and the Circuit Court of

Appeals agreed in finding that the Proteus alone was in fault, but the Circuit Court of Appeals modified the decree against the United States by allowing interest on the damages found. 20 F. (2d) 729. A writ of certiorari was granted by this Court to review the decision as to interest, consideration of the question to await the decision of this Court in the case of *Boston Sand and Gravel Co.* v. *United States,* which now has been decided, *ante,* p. 41, and in which interest was denied.

Jurisdiction in *Boston Sand and Gravel Co.* v. *United States* was granted by a special act authorizing judgment " for the amount of the legal damages sustained by reason of said collision, . . . upon the same principle and measure of liability with costs as in like cases in admiralty between private parties, with the same rights of appeal." It was held in view of the history of legislation that the words were to be taken strictly and that no interest could be allowed against the United States. The present suit is based upon the special Act of March 4, 1923, c. 321; 42 Stat. 1796, where the language is substantially the same, except that it is further qualified; jurisdiction of the suit is granted " to the extent only of such damages suffered other than claims for the demurrage to [the Port Phillip] and to enter a judgment or decree for the amount of such damages and costs, if any, as shall be found to be due against the United States in favor of the owner of the British steamer Port Phillip or against such owner in favor of the United States, upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal." The only ground of distinction favorable to the Port Phillip is that in this case the United States filed a cross libel. It is urged that in view of that fact the principle of *United States* v. *The Thekla,* 266 U. S. 328, applies.

But the difference between the two cases is plain. In *The Thekla* the United States came into Court of its own

motion as a libellant, and it was held that when the sovereign thus voluntarily brought itself within the jurisdiction in a collision case it should be assumed to agree that justice should be done with regard to the subject matter, and therefore that it might be held liable in damages if its vessel was in fault. The main question in the case was whether the United States could be held at all. When that point was decided interest was allowed as generally it would be allowed against a private party, there being nothing to qualify the submission found to be implied. But in the present case the United States is brought into Court to defend its property under a statute that marks the limits of the liability assumed. The cross libel is really an incident of the suit, contemplated by the very words of the special act which provide for a decree in favor of either party, and it would be absurd to say that if the United States resorted to the usual instruments of defence the statute authorized what otherwise it did not allow.

*Decree reversed.*

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## LARSON *v.* SOUTH DAKOTA.

APPEAL FROM THE SUPREME COURT OF SOUTH DAKOTA.

No. 102. Argued January 8, 1929.—Decided February 18, 1929.

1. A construction by a State Supreme Court of a contract between the State and an individual, is not binding on this Court when assailed under the Contract Clause of the Federal Constitution. P. 433.
2. A statute of South Dakota empowers municipal authorities to grant leases to operate ferries upon waters within the State to persons who shall bid and secure the highest rent for the same; declares it unlawful to operate a ferry without a license; and provides that when a lease has been granted, another shall not be granted across the same stream within two miles of the ferry landing of the first. After the plaintiff, by complying with the statute,

had acquired leases and at large expense established a profitable ferry under them, the State, pursuant to later Acts of the Legislature, constructed a free bridge within the granted limits, the effect of which was to destroy the value of his leases and business and render his investment worthless. *Held:*

(1) The exclusive ferry leases were contracts between the State and the lessee. P. 432.

(2) A public grant is to be strictly construed and nothing passes to the grantee by implication. P. 435.

(3) So construed, the ferry leases were not infringed by the building of the bridge. P. 437.

51 S. D. 561, affirmed.

The appellant, hereafter to be called the petitioner, sued the State of South Dakota, in its Supreme Court, for damages for the destruction of his ferry franchises on the Missouri River, under the authority of § 2109, South Dakota Revised Code of 1919.

Petitioner alleged in his complaint that he was granted ferry franchises under §§ 8696 to 8704 of the same Code. Section 8696 provided:

"It shall be unlawful for any person to establish, maintain or operate upon any waters within this state any ferry, upon which to convey, carry or transport any person or property for hire or reward, without first having procured a ferry lease, as provided in this article; and where but one bank or shore is in this state, the board of county commissioners of the proper county, or the governing body of the proper city or incorporated town, shall have the same authority as if the entire stream were within this state so far as the banks and waters actually within it are concerned, and when any ferry lease has been granted, no other lease shall be granted within a distance of two miles from the place described, in the application for a ferry lease, as the ferry landing across the same stream. . . ."

Section 8697 provided:

"The board of county commissioners of the proper county or the governing body of the proper city or incorporated town to whom application shall be made for a ferry

lease, in the manner hereinafter provided, shall have authority and it shall be its duty to grant a ferry lease, for the term of not exceeding fifteen years, to the person who shall bid and secure the highest amount of rent for the same. . . ."

The complaint further alleged that the State, by appropriate action of the county commissioners of Walworth County in 1916, and of those of Corson County in 1921, for a valuable consideration, granted to the petitioner exclusive leases or ferry franchises of fifteen and five years' duration respectively, and authorized him to operate a ferry upon and across the Missouri River for such toll charges as were provided by law, in an area extending two miles in either direction from the landing point; that the petitioner accepted the ferry franchises, and invested money in the purchase of ferry boats, motor boats, landings and buildings to equip the ferry, to the amount of $14,000. He further alleged that the State, pursuant to acts of its Legislature, during the years 1923 and 1924, constructed a steel and concrete bridge across the Missouri River at a site designated by law, upon and within the confines of plaintiff's exclusive ferry franchises and within two miles west of the point of the ferry landing; that the bridge is a free bridge and became usable about November 10, 1924; that the ferry had first been run at a loss, as expected, but that recently it had yielded over $5,000 a year profit; that by the construction of the bridge petitioner's business as a ferryman and his property right in his franchises were totally destroyed and the investments made by him were rendered worthless and resulted in a damage to him of $44,000, no part of which has been paid. He therefore asked judgment in that amount.

The defendant, the State, demurred to the complaint of the petitioner on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action. The Supreme Court sustained the demurrer.

The petitioner having failed to file an amended complaint the original complaint was dismissed. 51 S. D. 561.

An appeal to this Court was allowed under § 237(a) of the Judicial Code.

The petitioner contended in the state court, and contends here, that the acts of the state Legislature, under which the bridge was constructed, impaired the obligation of the contract embodied in his ferry leases or franchises and therefore were void as being in conflict with the contract clause of the Constitution of the United States.

*Mr. Wm. M. Potts,* with whom *Mr. Byron S. Payne* was on the brief, for appellant.

*Messrs. Buell F. Jones,* Attorney General of South Dakota, *Raymond L. Dillman,* and *Ray F. Drewry,* Assistant Attorneys General, were on the brief for appellee.

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

The exclusive ferry leases were contracts between the State and the petitioner. *The Binghamton Bridge,* 3 Wall. 51. Was the building of the bridge a breach of them?

The Supreme Court of the State has had the meaning of "exclusive ferry franchise" before it twice before this case, in *Nixon* v. *Reid,* 8 S. D. 507, and in *Chamberlain Ferry & Cable Bridge* v. *King,* 41 S. D. 246; but these cases did not require consideration of the effect of the term as applied to anything but ferries. The court said on that subject in the present case:

"All that is contemplated by the statute and all that was granted by the plaintiff's leases was the right to operate a ferry together with a prohibition upon the granting boards from granting other ferry leases within the granted area during the period. . . . Nowhere in

the statute can be found or implied a provision that the State was binding itself not to construct, nor authorize the construction of, a bridge across the river within the four mile area, or not to permit carriage by aviation across it. The fair and reasonable construction of the statute is that it refers solely to transportation by ferry."

Coming from the State Supreme Court, this language is very persuasive of the meaning of the statute and would indicate that in its view the building of a bridge was not a breach of the ferry contracts.

The petitioner relies on the contract clause of the Federal Constitution, and is not prevented from invoking from this Court an independent consideration of what the contract means, and whether by a proper construction, the building of a bridge impairs its obligation. *Appleby* v. *City of New York,* 271 U. S. 364, 380; *Columbia Ry. Co.* v. *South Carolina,* 261 U. S. 236, 245; *Long Sault Development Co.* v. *Call,* 242 U. S. 272, 277; *Louisiana Ry. & Navigation Co.* v. *New Orleans,* 235 U. S. 164, 170; *Mobile and Ohio R. R. Co.* v. *Tennessee,* 153 U. S. 486, 492; *Huntington* v. *Attrill,* 146 U. S. 657, 684; *New Orleans Water Co.* v. *Louisiana Sugar Co.,* 125 U. S. 18, 38; *Wright* v. *Nagle,* 101 U. S. 791, 794; *University* v. *People,* 99 U. S. 309, 321; *Bridge Proprietors* v. *Hoboken Co.,* 1 Wall. 116, 145; *The Binghamton Bridge,* 3 Wall. 51, 81; *Jefferson Bank* v. *Skelly,* 1 Black. 436, 443.

We must therefore treat the question as an open one and determine as an independent matter what the parties must be held to have had in mind in the use of the term "exclusive lease."

The chapter of the Revised Code of the State immediately preceding that which directs the letting and granting of exclusive ferry leases provides for the building of bridges over the rivers of South Dakota. This close relation of the chapters suggests that if bridges were intended to be forbidden by the contract, the parties would have

been likely to mention a bridge as a breach. But there is no mention of a bridge in the statute or contract dealing with ferries.

On the other hand, it is argued that it was so well understood by everyone, including the parties, that the erection of a bridge in the forbidden area would destroy the value of the ferry leases, and so defeat the real object of the leases, that an implication necessarily arises that a bridge would be a breach of the leases.

Reference is made to *Newburgh Turnpike Co.* v. *Miller,* 5 Johns. Ch. 101, 111, a decision by Chancellor Kent. That was a suit to enjoin as a nuisance the construction and use of a bridge over the Wallkill River, upon which the plaintiff had a toll bridge of more than ten years' standing, and the injunction was granted.

The Chancellor said:

"It was observed in the case of *Ogden* v. *Gibbons* (4 Johns. Ch. Rep. 150, 160), and shown to be a principle of the common law, that if one had a ferry by prescription, and another erected a ferry so near it, as to draw away its custom, it was a nuisance, for which the injured party had his remedy by action. The same law and remedy were applied to the case of a fair or market, in which an individual had a freehold interest, if another fair or market was erected or used within its vicinity. The same doctrine applies to any exclusive privilege created by statute: all such privileges come within the equity and reason of the principle; no rival road, bridge, ferry, or other establishment of a similar kind, and for like purposes, can be tolerated so near to the other as materially to affect or take away its custom. It operates as a fraud upon the grant, and goes to defeat it. The consideration by which individuals are invited to expend money upon great and expensive and hazardous public works, as roads and bridges, and to become bound to keep them in constant and good repair, is the grant of a right to an exclusive toll.

This right, thus purchased for a valuable consideration, can not be taken away by direct or indirect means, devised for the purpose, both of which are equally unlawful."

It will be observed that the facts there related to two bridges, and the case is not necessarily an express authority holding that an exclusive franchise for a ferry excludes a bridge. Yet it may be strongly argued from the language used that that is what the Chancellor had in mind.

We think, however, a broader question arises in the proper construction of a public grant like this. The leading case on the subject in Federal jurisprudence is that of *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 547. In that case the Legislature of Massachusetts incorporated a company to build a bridge over the Charles River where a ferry stood, granting it tolls. Years after, the Legislature incorporated another company for the erection of another bridge within 800 feet of the original one. The new bridge was to become free after a few years, and at the time of the litigation it had become actually free. The Charles River Bridge was deprived of the tolls and its value was destroyed. Its proprietors filed a bill against the proprietors of the Warren Bridge, for an injunction against the use of the bridge as an act impairing the obligations of a contract and repugnant to the Constitution of the United States. The Supreme Court of Massachusetts dismissed the bill and the case was brought by error to this Court, which affirmed the judgment of the Massachusetts court. The principle of the case is that public grants are to be strictly construed, that nothing passes to the grantee by implication. The court cited *United States* v. *Arredondo,* 6 Pet. 691, 738; *Jackson* v. *Lamphire,* 3 Pet. 280, 289; *Beaty* v. *Lessee of Knowler,* 4 Pet. 152, 165; *Providence Bank* v. *Billings and Pittman,* 4 Pet. 514, 561. In the last case Chief Justice Marshall said, of an asserted limitation on the taxing power:

". . . as the whole community is interested in retaining it undiminished, that community has a right to

insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear."

The case then before the court was held to be subject to the same rule, although one of a corporate grant. The act of incorporation was silent in respect to the contested power. The argument made in favor of the proprietors of the Charles River Bridge was the same as that of the Providence Bank, namely, that the power claimed by the State, if it existed, must be so used as not to destroy the value of the franchise granted to the corporation. The argument was rejected.

Chief Justice Taney, delivering the opinion in the *Charles River Bridge* case, said [p. 547]:

" But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a state has surrendered for seventy years its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this Court above quoted, ' that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon does not appear.' "

The same principle is declared in *Fanning* v. *Gregoire,* 16 How. 524, 534; *Wright* v. *Nagle,* 101 U. S. 791, 796; *Wheeling & Belmont Bridge Co.* v. *Wheeling Bridge Co.,* 138 U. S. 287, 293, and *Williams* v. *Mingo,* 177 U. S. 601, 603. Speaking for the Court in the last case Mr. Justice Brewer said:

"A contract binding the State is only created by clear language and is not to be extended by implication beyond the terms of the statute. *Fanning* v. *Gregoire,* 16 How. 524, is in point and decisive."

The cases above cited are not exactly on all fours with the specific issue presented here, but they serve to show with great emphasis the necessity for one who relies upon a public grant as a basis for a private right, to bring it expressly within the grant or statute.

It is clear from them that in determining the effect of a public grant to an individual the principle *ut res magis valeat quam pereat* is not to be applied in his favor or an implication to be made enlarging his grant, as seems to have been the view of Chancellor Kent in *Newburgh Turnpike Co.* v. *Miller, supra.*

The contention that an exclusive ferry franchise should be construed to cover all methods of travel and transportation across the water is rejected in *Dyer* v. *Tuskaloosa Bridge Co.,* 2 Porter 296 (Ala. 1835); *Piatt* v. *Covington & Cincinnati Bridge Co.,* 8 Bush 31 (Ky. 1871); *Snidow* v. *Board of Supervisors of Giles County,* 123 Va. 578 (1918); *Dibden* v. *Skirrow* [1908] 1 Ch. 41. There are many strong dicta to this same effect. *Morey* v. *Orford Bridge,* Smith (N. H. 1804) 91, 95; *Piscataqua Bridge* v. *New Hampshire Bridge,* 7 N. H. 35, 59 (1834); *Bush* v. *Peru Bridge Co.,* 3 Ind. 21, 24 (1851); *Parrot* v. *Lawrence,* Fed. Cas. No. 10772 (C. C. Kan. 1872) 18 Fed. Cas. 1234; *State ex rel. McPherson Bros.* v. *Superior Court,* 142 Wash. 284, 291 (1927).

The great weight of authority holds that a contractual term forbidding a ferry or a toll bridge does not exclude a railroad bridge. *Mohawk Bridge Co.* v. *Utica & Schenectady R. R.*, 6 Paige 554, 564 (N. Y. 1837); *McLeod* v. *Savannah, Albany & Gulf R. R.*, 25 Ga. 445 (1858); *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 149 (1863); *Hopkins* v. *Great Northern Ry.*, 2 Q. B. D. 224 (1877), overruling *Regina* v. *Cambrian Ry.*, L. R. 6 Q. B. 422 (1871). Contra: *Enfield Toll Bridge Co.* v. *Hartford & New Haven R. R.*, 17 Conn. 40, 45 (1845).

There is some conflicting authority on the main question. *Gates* v. *McDaniel*, 2 Stewart 211 (Ala. 1829); *Norris* v. *Farmers' & Teamsters' Co.*, 6 Cal. 590 (1856); *Menzel Estate Co.* v. *City of Redding*, 178 Cal. 475 (1918); *Blanchard* v. *Abraham*, 115 La. 989 (1906). But all of these cases are distinguishable in that the infringing bridge or ferry was established without legal authority, and there were other reasons such as obstruction to navigation, special statutes, or injury to tangible property which affected the decisions.

The strongest case for the appellant is *Mason* v. *Harper's Ferry Bridge Co.*, 17 W. Va. 396 (1880), where a statute forbidding other ferries was held to give an exclusive right to transportation over the river and hence to prohibit rival bridges as well, but the court said that the Legislature could take away at any time all the exclusive privileges of the proprietors theretofore existing.

In *Hopkins* v. *Great Northern Railway*, 2 Q. B. D. 224, 230 (1877), a railway company built a railway bridge and a foot bridge across a river one-half mile above an ancient ferry, which then went out of business. It was held that the ferry could not obtain compensation for either bridge, the railway being necessary for new traffic, and the foot bridge being used by those going to the railway station or by trespassers. There was a dictum by a court of dis-

tinguished English judges " that the owner of a ferry has not a grant of an exclusive right of carrying passengers and goods across the stream by any means whatever, but only a grant of an exclusive right to carry them across by means of a ferry."

We can hardly say, therefore, from the weight of authority, that an exclusive grant of a ferry franchise, without more, would prevent a legislature from granting the right to build a bridge near the ferry. Following the cases in this Court in its limited and careful construction of public grants, it is manifest that we must reach in this case the same conclusion.

The judgment of the Supreme Court of South Dakota is

*Affirmed.*

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## ARLINGTON HOTEL COMPANY *v.* FANT ET AL.

ERROR TO THE SUPREME COURT OF ARKANSAS.

No. 157. Argued January 17, 1929.—Decided February 18, 1929.

Land in Arkansas, on which there are hot springs valuable for the curative powers of their waters, was reserved from private appropriation by Act of Congress, passed in 1832 while Arkansas was a territory. A portion of it, which embraced the springs, was permanently reserved, in charge of the Interior Department, by an Act of Congress, passed after Arkansas had been admitted to statehood; and upon this portion, an Army and Navy Hospital, since maintained, was established by authority of Congress. Thereafter, exclusive jurisdiction over land of the permanent reservation, including the hospital and a contiguous parcel on which a hotel was being operated under lease from the United States, was ceded to the United States by the state legislature and accepted by Congress, reserving to the State power to serve civil and criminal process on the ceded tract and the right to tax, as private property, all structures or other property in private ownership there. The hotel was destroyed by fire; property of the hotel guests was consumed; and the question arose whether the landlord was liable to them as in-

surer, according to the law of Arkansas as it existed at the time of the cession, or only for negligence, according to that law as altered by an Arkansas statute after the cession. *Held:*

1. That the cession of exclusive jurisdiction was valid under Article I, § 8, Clause 17 of the Constitution, because of the federal purpose to which the springs and the hospital were devoted, and properly included the hotel and its site, which offered means whereby the public might be aided by the surplus spring waters not needed by the hospital. Pp. 449–454.

2. Therefore the statute of Arkansas modifying the liability of innkeepers, passed after the cession, did not extend over the ceded land, on which the hotel was situated. *Id.*

170 Ark. 440; 176 *id.* 612, affirmed.

ERROR to judgments of the Supreme Court of Arkansas sustaining judgments recovered against the Hotel Company by persons who were guests in the hotel and lost their personal property when the hotel burned.

*Mr. Thomas K. Martin,* with whom *Messrs. Wm. H. Martin* and *E. Hartley Wootton* were on the brief, for plaintiff in error.

The only provision in the Constitution for the exercise of exclusive legislation by the United States is found in Art. I, § 8. This Reservation was not acquired by *purchase* by the Government by the consent of the Legislature of Arkansas.

The State was admitted upon terms clearly set out in the act of admission, but reservation of jurisdiction over the Hot Springs Reservation was not among the terms.

In cases where the Government acquires land under the power of eminent domain, or by cession by the States, or by purchase, or by any means whatsoever, except by purchase by consent of the Legislature to enable it to properly function in its governmental capacity, the State may exercise any and all jurisdiction over the territory thus acquired in all cases and to any extent, subject only to the limitation that if, upon the lands so acquired, the Government shall erect any public buildings, the State may not

legislate, or otherwise exercise jurisdiction over the portions thus used, in any manner that would impair their usefulness for the governmental purposes to which they are applied. But with that exception only, the State retains jurisdiction to the same extent as over all other places within her limits. *Ft. Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525; *Chicago, etc. Ry. Co.* v. *McGlinn,* 114 U. S. 542; *Benson* v. *United States,* 146 U. S. 325.

The *Lowe Case* held that a State in ceding jurisdiction to the Government, may annex any conditions not inconsistent with the grant, and that upon and after the admission of Kansas to statehood, the Government's rights in the Ft. Leavenworth Reservation not used for military purposes were only those of an ordinary proprietor.

The United States cannot acquire jurisdiction over territory lying within a State for any purpose whatsoever, except to enable it to function within its own orbit and perform its own governmental duties and obligations. Any attempt of the State to cede other jurisdiction, or any attempt by the United States to accept and exercise it, would be contrary to our plan of government and in violation of the Constitution.

The jurisdiction ceded was not needed by the Government, nor has it been exercised for national or governmental purposes. If the exclusive jurisdiction of the State could be ceded for the real purposes intended, then no limit can be drawn as to the extent to which it might be carried. It might just as well have extended to the entire City of Hot Springs, or to Garland County, or to all property in Arkansas belonging to the United States, including all the public lands in the State and any territory in the State, even if not owned by the Government. *Williams* v. *Arlington Hotel Co.,* 15 F. (2d) 412; reversed, 22 F. (2d) 669.

The site of the Arlington Hotel has never been devoted to or used for any governmental purpose of any character.

It has always been used by the United States solely in its capacity of owner and landlord, for profit, and the United States cannot, in that capacity, acquire or accept jurisdiction of any character over it, that would remove it from subjection to the laws of the State.

"Such cession is really as much for the benefit of the State as it is of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State." That this language of the *Lowe Case,* 114 U. S. 542, was not *obiter,* see *Williams* v. *Arlington Hotel Co., supra.* And see the *McGlinn Case,* 114 U. S. 542.

Note the wide difference between the Ft. Leavenworth Reservation and the Hot Springs. The former was created and the Reservation made for "military purposes," one of the essential needs of the Government, and recognized in the Constitution as such. But in the case at bar, the tract was reserved not for the use of the United States for any purpose at all, but merely for its "future disposal," and it appears from the complaint that the United States, by leasing to the defendant, had definitely dedicated it to private purposes.

The question presented on this appeal is whether an act of the Legislature of Arkansas, general in its terms and remedial in its purposes, but enacted subsequent to the act ceding jurisdiction to the general Government, is in force on the Reservation. The only case we have been able to find in which the precise question was presented, is *Crook-Horner Co.* v. *Old Point Comfort Hotel Co.,* 54 Fed. 604. Other cases cited: *United States* v. *Tucker,* 122 Fed. 518; *Barrett* v. *Palmer,* 135 N. Y. 336, affirmed, 160 U. S. 400.

In *Benson* v. *United States,* 146 U. S. 325, there is nothing to show that the farm had been leased or was being operated for private purposes.

As indicative of the purpose for which the Hot Springs Reservation was originally made, we find that Congress provided for and caused the entire four sections reserved to be subdivided into lots, blocks and streets, which comprise the present city of Hot Springs. This, with the exception of a few hundred acres on which the Hot Springs are actually located, and on a part of which Reservation the Arlington Hotel was constructed under authority of a lease executed to it by the Department of the Interior, is a carrying out of the purposes stated in the act of reservation, i. e., "future disposal by the United States." Act of March 3, 1877, 19 Stat. 377, §§ 3, 4.

Pursuing this policy of "future disposal by the United States" a permanent Hot Springs Reservation was set aside and the Secretary of the Interior was directed to lease the site of the Arlington Hotel to the then proprietor thereof, and also to lease the sites of existing bath-houses and sites for the building of other bath-houses. By Act of Congress, March 3, 1891, 26 Stat. 842, the Secretary of the Interior was again authorized and empowered to make similar leases, and by Act of August 24, 1912, 37 Stat. 479, he was authorized to make the lease under which plaintiff in error held at the time of the fire.

With the doctrine that the courts, on a question of jurisdiction, will not inquire into, but will follow the action of the political department of the Government, no fault is found, but it is contended that the rule is not applicable in the present case.

*Messrs. Henry M. Armistead, Ashley Cockrill, A. J. Murphy,* and *Scott Wood* were on the brief for defendants in error.

It is for the political department of the Government to decide how far the jurisdiction must extend. There was more need for including the portion of the Reservation covered by the Arlington Hotel than there was for including the two railroad rights-of-way and the farm involved in the *Ft. Leavenworth Cases.*

As we construe those opinions, the use of the place by the Government must cease entirely before its jurisdiction can be declared at an end; and the mere fact that private persons or corporations are given the right to use a part of the territory does not oust the jurisdiction of the United States. The jurisdiction would necessarily continue until the adoption of an Act of Congress ceding it back to the State, or until the executive department of the United States ceased to exercise the jurisdiction and let it go back to the State. It would certainly be impractical to treat the jurisdiction as reverting to the State whenever some small part of the ceded territory was devoted to private use, and as coming back to the United States when the private use ceased.

The executive and legislative departments of the State and United States have in several instances decided that the State had the right to cede to the United States exclusive jurisdiction of the lands belonging to the United States used as public parks. See Acts of Congress, June 2, 1920, 41 Stat. 731; June 30, 1916, 39 Stat. 243; August 22, 1914, 38 Stat. 699; January 2, 1920, 41 Stat. 731.

The power is given to Congress by Art. 4, § 3, par. 2d, to use the property of the United States in the way Congress deems best for the welfare of the people of the United States. *Van Lear* v. *Eisele,* 126 Fed. 823; *Robbins* v. *United States,* 284 Fed. 39; *Camfield* v. *United States,* 167 U. S. 525. If such power is not expressly given, it will be implied. *United States* v. *Gettysburg Ry. Co.,* 160 U. S. 668.

If Congress has the power to permit the hot waters to be used as they are being used, then they are being used to carry out the purposes of the Constitution, and Congress has the right to determine what jurisdiction the Federal Government needs to best carry out such purposes. Congress has the power to establish national parks for the use of the people of the United States and

has the right to have exclusive jurisdiction of such parks whenever Congress and the State Legislature deem such jurisdiction the best way to secure to the people of the United States the benefits of these parks.

The courts cannot inquire into the reasons of the political department in matters of this kind. *Crook-Horner Co.* v. *Old Point Comfort Hotel Co.*, 54 Fed. 604, distinguished.

Section 4 of Article 4 of the Constitution does not apply; § 8, par. 17, Art. I, expressly authorizes the United States to have exclusive jurisdiction of territory within the boundaries of the States. Besides, the question of whether or not this constitutional guaranty has been violated, is a political and not a judicial question. *Mountain Timber Co.* v. *Washington*, 243 U. S. 219.

*Mr. William Waller*, with whom *Mr. Seth M. Walker* was on the brief, as *amici curiae*, on behalf of Mrs. Elsie Williams, by special leave of Court.

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

These are three suits brought in the Circuit Court of Garland County, Arkansas, against the Arlington Hotel Company, a corporation of Arkansas, in which the plaintiffs seek to recover for the losses they sustained, when guests of the hotel, in the destruction by fire of their personal property. The hotel was in Hot Springs National Park.

The complaints averred that the United States in 1904 acquired from Arkansas exclusive jurisdiction over Hot Springs Park and that under the common law, which was there in force (*Pettit* v. *Thomas*, 103 Ark. 593), an innkeeper was an insurer of his guests' personal property against fire. In 1913, the Arkansas Legislature enacted a law relieving innkeepers from liability to their guests

for loss by fire, unless it was due to negligence. The complainants contended that this act had no force in Hot Springs Park as it was within the exclusive jurisdiction of the United States, that the demurrers based thereon must be overruled and that judgments should be entered for them. The defendant denied the exclusive jurisdiction of the United States and insisted that the demurrers to the complaint were good and that the defendant was entitled to judgment. There were two hearings. The Circuit Court first sustained the demurrers. This ruling was reversed on appeal by the Arkansas Supreme Court. 170 Ark. 440. Answers were then filed. The three cases were consolidated and went to a jury, and in accord with the final ruling on the demurrers resulted in verdicts and judgments for the plaintiffs, which were affirmed by the Supreme Court. 176 Ark. 612.

By § 3 of the Act of Congress of April 20, 1832, ch. 70, 4 Stat. 505, while Arkansas was still a territory, it was provided:

"That the hot springs in said territory, together with four sections of land, including said springs, as near the centre thereof as may be, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated, for any other purpose whatever."

Arkansas was admitted to statehood in 1836 (ch. 100, 5 Stat. 50), but there was then no reservation of exclusive jurisdiction by the United States over the territory reserved from sale by the Act of 1832.

By Act of Congress of March 3, 1877, ch. 108, 19 Stat. 377, it was made the duty of United States Commissioners, after an examination of the topography of the Reservation, to lay it out into convenient squares, blocks, lots, avenues, streets and alleys, the lines of which were to correspond with the existing boundary lines of the occupants of the reservation.

Section 4 of the act provided:

"That before making any sub-division of said lands, as described in the preceding section, it shall be the duty of said board of commissioners, under the direction and subject to the approval of the Secretary of the Interior, to designate a tract of land included in one boundary, sufficient in extent to include, and which shall include all the hot or warm springs situated on the lands aforesaid, to embrace, as near as may be, what is known as Hot Springs Mountain, and the same is hereby reserved from sale, and shall remain under the charge of a superintendent to be appointed by the Secretary of the Interior: *Provided, however,* That nothing in this section shall prevent the Secretary of the Interior from fixing a special tax on water taken from said springs, sufficient to pay for the protection and necessary improvement of the same."

The Army Appropriation Act of June 30, 1882, ch. 254, 22 Stat. 121, provided:

"That one hundred thousand dollars be, and hereby is, provided for the erection of an Army and Navy Hospital at Hot Springs, Arkansas, which shall be erected by and under the direction of the Secretary of War, in accordance with plans and specifications to be prepared and submitted to the Secretary of War by the Surgeons General of the Army and Navy; which hospital, when in condition to receive patients, shall be subject to such rules, regulations, and restrictions as shall be provided by the President of the United States: *Provided further,* That such hospital shall be erected on the government reservation at or near Hot Springs, Arkansas."

The hospital and accessories were completed about the year 1886. They originally covered twenty acres and have been enlarged from time to time since then. They are within the territory described in § 4 of the Act of

March 3, 1877, *supra*, and within the territory over which Arkansas by Act of February 21, 1903 (Acts of Arkansas, 1903, Act 30), ceded exclusive jurisdiction to the United States. The language of the cession was as follows:

"Section 1. That exclusive jurisdiction over that part of the Hot Springs Reservation known and described as a part of the Hot Springs Mountain, and whose limits are particularly described by the following boundary lines . . . all in township two south, range nineteen west, in the County of Garland, State of Arkansas, being a part of the permanent United States Hot Springs Reservation, is hereby ceded and granted to the United States of America to be exercised so long as the same shall remain the property of the United States; provided, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reservation or premises; provided, further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded to the State by the Act of Congress approved March 3rd, 1901 [1891], is hereby reserved to the State of Arkansas."

By the Act of April 20, 1904, ch. 1400, 33 Stat. 187, Congress accepted this cession and directed that the land should be under the sole and exclusive jurisdiction of the United States, and all laws applicable to places under such sole and exclusive jurisdiction should have full force and effect therein:

"Provided that nothing in this Act shall be so construed as to forbid the service within said boundaries of any civil or criminal process of any court having jurisdiction in the State of Arkansas; that all fugitives from justice taking refuge within said boundaries shall on due application to the executive of said State, whose warrant may lawfully run within said territory for said purpose, be subject to the laws which apply to fugitives from justice found in the State of Arkansas."

The act further provided that it should not be so construed as to interfere with the right of the State to tax all structures and other property in private ownership within the boundaries described.

Section 2 provided that the cession should constitute a part of the Eastern United States Judicial District of Arkansas, and the District and Circuit Courts of the United States for the District should have jurisdiction of all offenses committed within the boundaries.

The Arlington Hotel was constructed upon one acre of this tract thus subsequently ceded to the United States and accepted by it, and the hotel was operated for more than fifty years under lease from the United States until its destruction by fire on April 5, 1923.

The territory included in the cession forms only a small part of the original reservation by the United States from settlement under the land laws. It includes the springs and is about 1,800 feet long and 4,000 feet wide. There is also a larger Hot Springs reservation of over 900 acres owned by the United States, but under the jurisdiction of Arkansas and reserved from sale by the Government for parks. The hospital buildings are about 1,000 feet from the site of the Arlington Hotel. By Act of Congress of March 4, 1921, ch. 161, 41 Stat. 1407, the ceded tract was given the name of the Hot Springs National Park.

The contention of the defendant is that the cession was invalid, and that no jurisdiction was thereby conferred on the United States for the reason that the only power the United States has to receive exclusive jurisdiction of land within a State is to be found in the words of Article I, Section 8, clause 17, of the Federal Constitution, as follows:

"to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings."

The leading case on the subject is *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525. The question there was whether a railroad running into the military reservation of Fort Leavenworth was subject to taxation by the State of Kansas. The United States had had exclusive jurisdiction over the land in question from 1803 by the cession of France until the admission of Kansas into the Union. For many years before such admission the land had been reserved from sale by the United States for military purposes and occupied as a military post. Until the admission of Kansas of course the governmental jurisdiction of the United States was complete. But when Kansas came into the Union in 1861 on an equal footing with the original States, the previous military reservation was not excepted from the succeeding jurisdiction of the new State. The Attorney General recommended a State cession of jurisdiction, but it was not given until February, 1875, when the Kansas Legislature enacted:

"That exclusive jurisdiction be, and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation in said State, as declared from time to time by the President of the United States, saving, however, to the said State the right to serve civil or criminal process within said Reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of said cession and Reservation; *and saving further to said State the right to tax railroad, bridge, and other corporations, their franchises and property, on said Reservation.*" Laws of Kansas, 1875, p. 95.

The last words seemed to save fully the right of the State to tax the railway. But as the Constitution provided that Congress should have power to exercise exclusive jurisdiction in all places purchased by the consent

of the Legislature of the State in which the same should be for the erection of forts, etc., the Railroad Company contended that no right to tax a railroad on the reservation could be retained by the State and that the saving clause was void.

In answering this claim, the Court pointed out that the United States without the consent of a State might purchase or condemn for its own use State land for a national purpose, and that without any consent or cession by the State, such jurisdiction would attach as was needed to enable the United States to use it for the purpose for which it had been purchased. The Court held that in such a case when the purpose ceased, the jurisdiction of the federal government ceased. But the Court further held that when a formal cession was made by the State to the United States, after the original purchase of the ownership of the land had been made, the State and the Government of the United States could frame the cession and acceptance of governmental jurisdiction, so as to divide the jurisdiction between the two as the two parties might determine, provided only they saved enough jurisdiction for the United States to enable it to carry out the purpose of the acquisition of jurisdiction. The Court therefore held that a saving clause in the language of the cession requiring that the railroad should pay taxes was not invalid but was in accord with the power of both parties and might be enforced. This decided the point in the case.

Mr. Justice Field, in elaborating the opinion, said that if the act of cession of exclusive jurisdiction adopted subsequently to the purchase of the land was followed by a failure of the United States to continue to use the land for any of the purposes for which it was purchased, the exclusive jurisdiction would lapse. This statement that, after the formal cession by the State of exclusive jurisdiction had been accepted by the United States, there was

nevertheless a reverter of the exclusive jurisdiction of the United States though conveyed in the formal cession without limitation, is said by counsel for appellees not to have been necessary for the decision.

In *Benson* v. *United States,* 146 U. S. 325, Benson was indicted in a Federal court for murder committed in the Fort Leavenworth Military Reservation within the exclusive jurisdiction of the United States, and the first question was one of jurisdiction. It was contended that the evidence showed that the murder was committed on a particular part of the Reservation which was used solely for farming purposes, but the Court held that in matters of this kind the courts followed the action of the political department of the Government; that the entire tract had been legally reserved for military purposes (*United States* v. *Stone,* 2 Wall. 525, 527) and that the character and purpose of its occupation having been officially and legally established by that branch of the Government which had control over such matters, it was not open to the courts on question of jurisdiction to inquire what might be the actual uses to which any portion of the reservation was temporarily put. There was therefore jurisdiction and the objection was overruled.

In *Palmer* v. *Barrett,* 162 U. S. 399, the United States acquired title to navy yard lands in the State of New York, the record not disclosing how. In an appropriation act Congress empowered the Secretary of War to sell and convey part of these to any purchaser, provided that they should not be sold at less price than they cost the Government, and provided that prior to the sale of the lands exclusive jurisdiction should be ceded to the United States of all the remaining lands connected with the Navy Yard belonging to the United States. The jurisdiction was ceded by the State to the United States, but the act of cession contained the proviso that the United States could " retain the use and jurisdiction as long as the prem-

ises described shall be used for the purposes for which the jurisdiction was ceded, and no longer. The land in question in the case was not to be used by the United States for a navy yard or naval hospital, but was a part of the vacant land adjoining the Navy Yard which had been leased by the United States to the City of Brooklyn for market purposes. A direct consideration was received by the United States for the lease, since it provided that a supply of water for the purposes of the Navy Yard at reduced rates would be furnished by the city to the United States during the use by the former of lands covered by the lease. This Court said [p. 404]:

"In the absence of any proof to the contrary, it is to be considered that the lease was valid, and that both parties to it received the benefits stipulated in the contract. This being true, the case then presents the very contingency contemplated by the act of cession, that is, the exclusion from the jurisdiction of the United States of such portion of the ceded land not used for the governmental purposes of the United States therein specified. Assuming, without deciding, that if the cession of jurisdiction to the United States had been free from condition or limitation, the land should be treated and considered as within the sole jurisdiction of the United States, it is clear that under the circumstances here existing, in view of the reservation made by the State of New York in the act ceding jurisdiction, the exclusive authority of the United States over the land covered by the lease was at least suspended whilst the lease remained in force."

It is apparent that the Court intended to leave open the question whether, had the cession of jurisdiction been complete and without limitation, the United States would have retained its exclusive jurisdiction.

Counsel for the plaintiffs in the present case insist that the United States has the constitutional authority to maintain exclusive jurisdiction over the tract here in ques-

tion as a national park, and that as the Government undoubtedly may use its control over all land within its exclusive jurisdiction to provide national parks, it may, where land is ceded by a State to the exclusive jurisdiction of the National Government, treat land thus ceded by the State for such a purpose as it would treat national public land which had never come within the jurisdiction of the State; that as by virtue of Article 4 of the Constitution, Section 3, Congress has power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, it may treat land ceded to it by a State for the purposes of making a national park exactly as it would treat land which had always been within its exclusive jurisdiction and subject to its disposition for park purposes. This issue may in the future become a subject of constitutional controversy, because some twenty or more parks have been created by Congress, in a number of which exclusive jurisdiction over the land has been conferred by act of cession of the State.

We do not find it necessary, however, now to examine this question. We think that the history of this Hot Springs National Park, as shown by the legislation leading to its establishment and circumstances which the Court may judicially notice, is such that the small tract whose jurisdiction is here in question may be brought within the principle of the *Lowe* case and other cases already cited.

The Hot Springs are mentioned as remarkable by Thomas Jefferson in a message to Congress on February 19, 1806, in which he transmitted a report containing a description of them. Messages, Reports, etc., 1st Sess. 9th Cong., 1806, pp. 202, 344. Their known value for remedial purposes and the appreciation of that value by Congress were shown in the Act of 1832, already cited, by which the land surrounding them was reserved for the future disposal of the United States. The purpose was evidently to make use of them for national public needs.

The analysis of the forty-four springs indicated that

these waters were of a special excellence with respect to diseases likely to be treated in a military hospital. Therefore it was that in 1882 an appropriation of $100,000 was made for the construction of an adequate hospital under the War Department. That hospital has been enlarged by appropriations from time to time since its original establishment. It was certainly a wise prevision which with the consent of the State brought within exclusive national jurisdiction the hospital buildings and accessories and all the forty-four springs from which the healing waters came in order to secure to the Government their complete police protection, preservation and control. This justified acquisition of the springs and hospital for the exclusive jurisdiction of the United States under clause 17, Section 8, Article I of the Constitution. Nor is the constitutional basis for acquisition any less effective because the springs thus kept safely available for the Federal purpose do in the abundance of their flow also supply water sufficient to furnish aid to the indigent and to those of the public of the United States who are able to pay for hotel accommodation on the little park surrounding the hospital and the springs. *Benson* v. *United States, supra,* and *Williams* v. *Arlington Hotel Co.,* 22 F. (2d) 669.

The cases relied on by the defendant are clearly distinguishable. *Williams* v. *Arlington Hotel Co.,* 15 F. (2d) 412, was overruled by the Circuit Court of Appeals, as above. In *Crook, Horner & Co.* v. *Old Point Comfort Hotel Co.,* 54 Fed. 604, there was an express reverter clause in the act of cession, which limited the use of the land to defensive purposes. *Renner* v. *Bennett,* 21 Ohio St. 431, and *State* v. *Board of Commissioners,* 153 Ind. 302, were cases where Congress had receded jurisdiction to the State. In *La Duke* v. *Melin,* 45 N. D. 349, there had been complete abandonment of a military reservation, which by Act of Congress had been opened to homesteaders.

*Affirmed.*

## NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY *v.* WHITE, ADMINISTRATOR, ET AL.

## SAME *v.* SAME.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF TENNESSEE.

Nos. 135 and 169. Argued January 11, 1929.—Decided February 18, 1929.

An ordinance requiring a railway company on every street crossed by its tracks to keep a flagman on duty to give warning of approaching trains by waving a flag in day time and a red lighted lamp at night, cannot be held to have become an unreasonable burden on interstate commerce, as applied to interstate trains, or so arbitrary as to amount to a denial of due process of law, because automatic devices of an approved modern type that are a better and cheaper means of protection have been installed by the railway, if there be reasonable ground for believing that compliance with the ordinance at the crossing in question would diminish the danger of accidents. P. 459.

Affirmed.

ERROR to and appeal from a judgment of the Supreme Court of Tennessee, affirming, with some modification, four judgments in as many personal injury cases. The writ of error was dismissed.

*Mr. Fitzgerald Hall,* with whom *Messrs. Frank Slemons and Walton Whitwell* were on the brief, for plaintiff in error and appellant.

That this ordinance was valid half a century ago—as no doubt it was—is immaterial. *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388. Electrical engineering, as well as railroading, was then in its infancy. A "human" flagman was all then known—a "mechanical" flagman was unknown.

As the ordinance directly affects both safety in operation and the expenditure of funds earned in inter-

state commerce, its validity is, in the last analysis, for this Court to determine. *Alabama etc. Ry.* v. *Jackson Ry.*, 271 U. S. 244.

Police powers may not be exerted arbitrarily. Intention, howsoever good, does not control. "The actual facts govern." *Sprout* v. *City of South Bend,* 277 U. S. 163. A State may not, even in the exercise of its police power, directly and seriously burden or unduly discriminate against interstate commerce or act unreasonably. *Colorado* v. *United States,* 271 U. S. 153; *Sanitary District* v. *United States,* 266 U. S. 405; *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298; *St. Louis-San Francisco Ry.* v. *Public Service Comm'n,* 254 U. S. 535; *LaCoste* v. *Louisiana,* 263 U. S. 545; *Chicago, etc. R. R.* v. *Wisconsin R. R. Comm'n,* 237 U. S. 220.

A state statute or a municipal ordinance may on its face appear perfectly valid, but when applied to a given state of facts, may become invalid. *Southern Ry.* v. *King* 217 U. S. 524; *Seaboard Air Line* v. *Blackwell,* 244 U. S. 310; *City of Acworth* v. *Western & Atlantic R. R.,* 159 Ga. 610.

To determine the federal question, a consideration of the facts was essential and therefore proper. *First Nat'l Bank* v. *Hartford,* 273 U. S. 548; *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389; *Chicago, Etc. R. R.* v. *Wisconsin,* 237 U. S. 220.

Since the layman does not understand the technicalities of railroad operation, the views of real experts must control. *Southern Pacific* v. *Berkshire,* 254 U. S. 415; *Chesapeake & Ohio* v. *Leitch,* 276 U. S. 429; *Toledo, etc. R. R.* v. *Allen,* 276 U. S. 165. Yet the trial judge excluded much of the evidence of those in position to know, such testimony being essential to a proper consideration and determination of the constitutional question here involved.

Such cases as *Erie R. R.* v. *Public Utilities Comm'n*, 254 U. S. 394, are irrelevant. There the State in the proper exercise of its police power was remedying a dangerous situation by the most modern method of crossing protection—the only point made by the railroad company was the enormous cost.

*Mr. Walter P. Armstrong,* with whom *Messrs. Julian C. Wilson, Elias Gates,* and *Wm. M. Colmer* were on the brief, for defendants in error and appellees.

Mr. Justice Holmes delivered the opinion of the Court.

These are actions brought against the plaintiff in error and appellant for causing the death of W. B. White and personal injuries to the other plaintiffs by running down an automobile at a grade crossing in the city of Memphis. The plaintiffs obtained judgments that were affirmed by the Supreme Court of Tennessee. W. B. White, who was killed, was driving the car, and his son, R. D. White, one of the plaintiffs, was sitting by his side. The Court states that both knew the Railway not to maintain a flagman and that they were grossly negligent in going upon the track. (*Baltimore & Ohio R. R. Co.* v. *Goodman,* 275 U. S. 66.) The Court held, however, that the proximate cause of the injuries was the Railway's failure to comply with an ordinance of Memphis requiring all railroads on every street crossed by their trains to keep a flagman constantly on duty, to give warning of approaching trains by waving a flag in daytime and a red lighted lamp by night, until the engine had crossed the street. The validity of this ordinance is the only question open before us here.

The Railway had substituted for the flagman an electric signal on one side of the street and about fifteen feet above it that gave warning by flashing a light and ringing a bell and was set in operation mechanically by the train when it came within 2,500 feet of the crossing. The contrivance

was testified to be in general use and was said to be cheaper and in some ways at least better than the old precautions. The Railway contended that the ordinance enacted at the beginning of 1880 was valid no longer in view of the modern improvement and that to enforce it now would be to enforce an unnecessary burden on interstate commerce and would be so arbitrary as to amount to a denial of due process of law. *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 400. (It may be mentioned that the train concerned was engaged in interstate commerce.) But the crossing in question was said by the Court to be a dangerous one where there was pretty constant travel by night and day, and it was held that as applied to such a crossing it could not be said that the ordinance was so indisputably unnecessary and unreasonable that the legislative judgment could be overruled.

We are compelled to take the same view. The legislative arguments in favor of the Railway are manifest and we may conjecture that it is only a matter of time before the old methods of guarding grade crossings will have disappeared unless the grade crossings precede them. But if the ordinance were passed today and came up for a decision upon its validity, it could not be denied that a man in the middle of the street or near to it and intent on stopping traffic might stop some travellers who might not notice electric signs. There is a marginal chance that occasionally a life may be saved. In this very case it is at least possible that a man on the ground would have stopped the plaintiffs, they not being intent on suicide. No doubt legislatures do neglect such marginal chances. Many modern improvements must be expected to take their toll of life. When a railroad is built experience teaches that it is pretty certain to kill some people before it has lasted long. But a Court cannot condemn a legislature that refuses to allow the toll to be taken even if it

thinks that the gain by the change would compensate for any such loss. It follows that we must affirm the judgments below. See *Zahn* v. *Board of Public Works*, 274 U. S. 325, 328.

There were some exceptions to the exclusion of evidence. But if they could be considered in any case they went only to proof that the new device is better than the old. We assume it to be so, but regard that assumption as not controlling the point considered here.

As appeal was the proper mode of bringing the cases to this Court the writs of error may be dismissed.

*Judgment affirmed.*

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## CUDAHY PACKING COMPANY *v.* HINKLE, SECRETARY OF STATE, ET AL.

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

No. 278. Argued January 7, 1929.—Decided February 18, 1929.

1. State taxation of a foreign corporation admitted to do business in a State, in the form of a filing fee and a license tax, both reckoned upon its authorized capital stock, *held* a burden on interstate commerce, and an attempt to reach property beyond the jurisdiction of the State contrary to the due process clause of the Fourteenth Amendment, in a case where the property of the corporation within the State and the part of its business there transacted (less than half of it intrastate) were but small fractions, respectively, of its entire property and of its business transacted in other parts of the Union and abroad, and where the amount of capital stock authorized was much more than the amount of the stock issued and the value of the total assets. The laws imposing the taxes fixed maximum limits of $3,000.00 each; and the taxes actually demanded were $545.00 and $580.00, respectively. P. 465.
2. A state tax that really burdens the interstate commerce of a foreign corporation and reaches property beyond the State, cannot be sustained upon the ground that it is relatively small. P. 466.

24 F. (2d) 124, reversed.

APPEAL from a decree of a District Court of three judges refusing an interlocutory injunction and dismissing the bill in a suit to enjoin state officials from proceeding to enforce penalties against the plaintiff foreign corporation for its failure to pay filing fees and license taxes prescribed by the state law.

*Messrs. J. Harry Covington* and *S. W. Brethorst,* with whom *Messrs. E. B. Palmer, Thomas M. Askren,* and *Thomas Creigh* were on the brief, for appellant.

*Mr. Levi B. Donley,* Assistant Attorney General of Washington, with whom *Mr. John H. Dunbar,* Attorney General, was on the brief, for appellees.

An excise tax may be graduated according to the amount of the authorized stock of a corporation and, if a reasonable maximum be fixed, the law will be upheld as a reasonable exercise of the state taxing power and not a burden upon interstate commerce. *Baltic Mining Co.* v. *Massachussetts,* 231 U. S. 68.

The only distinction betwen the Kansas statute, disapproved in *Western Union* v. *Kansas,* 216 U. S. 1, and the Massachusetts statute, approved in *Baltic Mining Co.* v. *Massachusetts, supra,* is that a reasonable maximum was not provided in the former. The *Baltic* case is followed and approved in *St. Louis, etc. Ry.* v. *Arkansas,* 235 U. S. 350; *Kansas City, etc. Ry.* v. *Botkin,* 240 U. S. 227; *Kansas City, etc. Ry.* v. *Styles,* 242 U. S. 111; *Virginia Ry. Signal Co.* v. *Virginia,* 246 U. S. 500.

As for the contention that the doctrine announced in the *Baltic* case, and followed by other cases, has been abandoned and overruled by later cases, see the opinion of the District Court in the case at bar, 24 F. (2d) 124.

*Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, relied upon by appellant, is authority only for the proposition that where a foreign corporation is engaged

solely in interstate commerce, the several States may not impose an excise tax upon it as a prerequisite to its engaging in such commerce, and that the *Baltic* case, in so far as it might affect such a situation, is expressly overruled. This Court has never held invalid an excise graduated in accordance with the authorized capital stock of the corporation, where the corporation was engaged in intrastate business and where a reasonable maximum fee was provided for in the statute. Cf. *Airway Corp'n* v. *Day,* 266 U. S. 71; *Looney* v. *Crane Co.,* 245 U. S. 178.

Cases involving excise taxes sought to be collected by a State from a corporation engaged solely in interstate commerce are not in point, as is true where no maximum tax is fixed. Referring to: *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146; *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147; *International Text Book Co.* v. *Pigg,* 217 U. S. 91; *Buck Stove Co.* v. *Vickers,* 226 U. S. 205; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203.

The Washington excise tax is reasonable in amount and has a reasonable maximum.

Mr. Justice McReynolds delivered the opinion of the Court.

Appellant is incorporated under the laws of Maine. Its authorized capital stock is $45,000,000. Less than $30,000,000 has been issued and the total value of the corporate property does not exceed that sum. It does an extensive business in meats and foodstuffs throughout the Union and abroad. During 1916 when the capital stock was $20,000,000 the articles of incorporation were duly filed with the proper state officer and the corporation began to carry on closely associated interstate and intrastate business in Washington. Its property therein is now worth $40,000. Gross sales by the corporation for the

year ended October 31, 1926, were $231,750,000. Of these $1,313,275 were made in Washington, less than half being intrastate.

The statutory provisions here important appear in the sections of Remington's Compiled Statutes of Washington mentioned below.

Sec. 3852 authorizes foreign corporations to do business within the State as those organized under her laws upon compliance with conditions prescribed by Secs. 3853–3854.

Sec. 3853 requires every foreign corporation to file with the Secretary of State a certified copy of its charter, etc., and Sec. 3854 requires appointment of a local agent.

Sec. 3836 (as amended by Chap. 149, Extraordinary Session, 1925) directs that every local and foreign corporation required by law to file its articles with the Secretary of State shall pay graduated filing fees, not above $3,000, reckoned upon its authorized capital stock.[1]

Sec. 3837 requires every corporation, foreign or domestic, desiring to file with the Secretary of State articles

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[1] Section 3836. Every corporation incorporated under the laws of this state, or of any state or territory of the United States or of any foreign state or country, required by law to file articles of incorporation in the office of the secretary of state, shall pay to the secretary of state a filing fee in proportion to its authorized capital stock as follows:

Capital not exceeding $50,000, fee $25;
Capital of more than $50,000, and less than $100,000, fee $40;
Capital of $100,000, or more, and less than $150,000, fee $75;
Capital of $150,000, or more, and less than $200,000, fee $100;
Capital of $200,000, or more, and less than $300,000, fee $150;
Capital of $300,000, or more, and less than $400,000, fee $200;
Capital of $400,000, or more, and less than $500,000, fee $250;
Capital of $500,000, or more, and less than $1,000,000, fee $500;
Capital of $1,000,000, or more, and less than $2,000,000, fee $750; and $10 additional for each $1,000,000, or major fraction thereof, of capital stock in excess of $2,000,000; Provided, however, That the total filing fee for filing such articles of incorporation shall in no case exceed the sum of $3,000.

amendatory or supplemental articles increasing its capital stock to pay the fees prescribed in the preceding section less any sum theretofore paid.[2]

Sec. 3841, (as amended by Chap. 149, Extraordinary Session, 1925) requires corporations, foreign and domestic, to pay annual license fees, not above $3,000, reckoned upon authorized capital stock.[3]

Secs. 3842, 3843, 3844, 3846, 3855, and 3861 provide heavy penalties for failure to pay prescribed filing fees and license taxes.

Filing fees because of the increased capital, and license taxes for 1927, both reckoned upon the authorized capital stock, were demanded of appellant. Penalties for failure to comply were threatened. By an original bill in the United States District Court, Western District of Washington, it set up the above-stated facts and asked an

[2] Section 3837. Every corporation, foreign or domestic, desiring to file in the office of the secretary of state articles amendatory or supplemental articles increasing its capital stock, or certificates of increase of capital stock, shall pay to the secretary of state the fees prescribed in the preceding section for the total amount to which the capital stock of the corporation is so increased, less the amount already paid for filing the original articles of incorporation, or original articles and amendatory or supplemental articles, or certificates of increase, and every such corporation desiring to file amendatory or supplemental articles decreasing, or certificates of decrease of capital stock, shall pay to the secretary of state a filing fee of $25. For filing of other amendatory or supplemental articles, it shall pay a fee of $10; Provided, however, That the total amount paid by any corporation for filing its original articles of incorporation and all of its articles amendatory or supplemental articles increasing its capital stock or certificates of increase of capital stock, shall in the aggregate in no case exceed the sum of $3,000, plus $10 for each separate instrument filed in addition to its original articles of incorporation.

[3] Section 3841. Every corporation incorporated under the laws of this state, and every foreign corporation, having its articles of incorporation on file in the office of the secretary of state, shall, on or before the first day of July of each and every year, pay to the secre-

appropriate injunction to prevent enforcement of the demands. A court of three judges heard the cause, denied a preliminary injunction, and dismissed the bill for want of equity.

*Looney* v. *Crane Co.*, 245 U. S. 178, 187, examined Texas statutes which required foreign corporations to pay permit and franchise taxes graduated according to authorized capital stock and declared them in conflict with the Federal Constitution because they imposed "direct burdens upon interstate commerce, and, moreover, exerted the taxing authority of the State over property and rights which were wholly beyond the confines of the State, and not subject to its jurisdiction, and therefore constituted a taking without due process." These statutes prescribed

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tary of state, for the use of the state, the following license fees in proportion to its authorized capital stock, as follows:

Capital of $50,000, or less, fee $15;

Capital in excess of $50,000, and up to and including $100,000, fee $25;

Capital in excess of $100,000, and up to and including $500,000, fee $50;

Capital in excess of $500,000, and up to and including $1,000,000, fee $100;

Capital in excess of $1,000,000, and up to and including $2,000,000, fee $150; and $10 for each $1,000,000, or fraction thereof of capital in excess of $2,000,000: Provided, however, That the total amount of such annual license fee shall in no case exceed $3,000. Every corporation failing to pay the said annual license fee, on or before the first day of July of any year, and desiring to pay the same thereafter, and before the first day of January next following, shall pay to the secretary of state, for the use of the state, in addition to the said license fee the following further fee, as a penalty for such failure, the sum of two dollars and fifty cents: Provided, however, That building and loan and savings and loan associations paying special fees provided for in the act under which same are incorporated shall not be required to pay the regular fee provided herein: Provided, further, That the annual fee required to be paid to the Department of Public Works by any public service company shall be deducted from the annual fee provided herein, and the excess only shall be collected under this act.

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no maximum tax. In other respects they were not unlike the acts here under consideration.

Unless saved by the $3,000 limitation, the Washington enactments are subject to the constitutional objections pointed out in *Looney* v. *Crane Co.*. and must be denied effect.

*Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, upheld a tax based upon authorized capital stock, but limited to $2,000, imposed by Massachusetts upon foreign corporations for the privilege of doing local and domestic business therein. Consideration was given to the fact that the corporate assets were four times the authorized capital and to the limitation. Weighing all the circumstances, the Court concluded that no direct substantial burden was imposed upon interstate commerce and that property beyond the State was not taxed.

In *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 218, we said:

"It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."

*Baltic Mining Co.* v. *Massachusetts* had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the State may be sustained if relatively small. This view did not harmonize with the principles approved by *Looney* v. *Crane Co.,* and was expressly disapproved by *Alpha Portland Cement Co.* v. *Mass.*

It follows that the decree of the court below is erroneous and must be reversed.

Whether, because reckoned upon authorized and not upon actual capital stock, the challenged legislation fails to require like fees for equal privileges within the doctrine of *Air-Way Electric Appliance Corp.* v. *Day,* 266 U. S. 71, we need not now consider.

*Reversed.*

Mr. JUSTICE BRANDEIS, dissenting.

The corporation maintains in Washington a branch office and a warehouse. There, it does a large intrastate business. Nearly one-half of the aggregate sales of $1,313,-275.74 made within the State were local and were from broken packages. It is subjected to two taxes which are separate and distinct. The filing fee is payable only once and as laid was $545. The annual license fee is $580. The latter results in a charge of about one-tenth of one per cent on the intrastate business. The corporation's pay roll there is more than a hundred times as large. These small taxes are obviously not more than a fair contribution to the necessary expenses of the State government. They are the same for foreign corporations as for domestic. In my opinion both taxes are valid.

If the statute sought to impose a tax on corporations engaged wholly in interstate commerce, or if the taxes laid a direct burden upon interstate commerce, or if they were laid upon property without the State, or if they were unjustly discriminatory, the fact that they are small in amount would, of course, be immaterial. *Sprout* v. *City of South Bend,* 277 U. S. 163, 171. But these taxes are not subject to any of those infirmities. The taxes are not laid upon interstate commerce. They are not measured by the amount of interstate commerce. They do not grow, or shrink, according to the volume of interstate commerce or of the capital used in it. They are not

furtively directed against such commerce. The taxes would be precisely the same in amount if the corporation did in Washington no interstate business whatsoever. Nor are they taxes laid upon property without the State. Indeed, they are neither property taxes nor substitutes for property taxes. They are an excise, laid solely for the privilege of doing business as a corporation. An individual doing the same business would not be required to pay either these taxes or any substitute therefor.

*General Ry. Signal Co.* v. *Virginia,* 246 U. S. 500, requires, in my opinion, that the filing fee be held valid. There, a filing fee of $1,000 on an authorized capitalization of $5,000,000 was sustained as against a foreign corporation, under a statute limiting the maximum tax to $5,000. Here, the filing fee demanded was $545 on an authorized capital nearly ten times as great; and the maximum fee demandable in any case was limited to $3,000. The *General Ry. Signal Co.* case was decided by a unanimous Court and the correctness of the decision has never been questioned.

*Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147, 154–158, requires, in my opinion, that the license fee be held valid. That case held a statute imposing an annual license tax valid as applied to all the foreign corporations which, like the Cudahy Company here, did both intrastate and interstate business. That decision was made by a unanimous Court after much deliberation. It has never been disapproved. The statute there in question is identical, so far as here material, with the Washington statute, except that the Massachusetts law fixes a maximum tax of $2,000, while here it is $3,000. But the Massachusetts statute was enacted in 1909; and the tax there challenged was laid in 1913. The Washington statute was enacted in 1925; and the tax here challenged was laid in 1926. The rise in the general price level since 1913 makes the Wash-

ington maximum relatively lower than that prescribed by Massachusetts.

The *Cheney Bros. Co.* case is entirely consistent with *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203. In the latter case, the tax held void was on a foreign corporation engaged solely in interstate commerce; and it was laid under a different statute. The situation here is also wholly unlike that considered in *Air-Way Corp'n* v. *Day,* 266 U. S. 71, 79 and in *Looney* v. *Crane Co.,* 245 U. S. 178, and cases there cited. In those cases, not only did the statutes fail to fix a maximum, but the taxes actually laid were so large as compared with the local business done as to constitute a substantial obstruction of interstate commerce. The case at bar is also unlike *International Paper Co.* v. *Massachusetts,* 246 U. S. 135. There, the statute failed to fix any maximum.

A tax proportionate to the capital of a corporation is sometimes laid in lieu of the ordinary property taxes, and in such cases is treated as a property tax. But the taxes here in question are not of that nature. I am aware that it has been said by this Court that a license fee of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business is essentially a tax on the entire business, interstate as well as intrastate; and a tax upon property outside the State. But that was said in cases where the statute did not fix any maximum. The statement seems to me legally unsound. If it were true that every tax imposed generally upon a foreign corporation doing both interstate and intrastate business taxed its interstate business and its property outside the State, then most of such corporations would largely escape taxation. By the same process of reasoning all taxes laid by a State upon property within its borders, which is used in both intrastate and interstate commerce, would be a tax on interstate commerce. But

such taxes have been universally upheld. They are valid, because, when the burden is indirect, even a large burden upon interstate commerce does not render a tax void. See *Southern Ry. Co.* v. *Watts,* 260 U. S. 519, 530; *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290.

It would be unfortunate to hold that merely because a foreign corporation, doing a local business does also interstate business, the State may not lay upon it a reasonable, non-discriminatory excise, necessarily limited to a reasonable amount, to which all domestic corporations similarly situated are subject and which can affect interstate commerce only indirectly, if at all. To hold such a tax void seems to me to ignore the wise rule of decision declared in *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 698: "The substance and not the shadow determines the validity of the exercise of the [taxing] power."

Mr. Justice Holmes joins in this opinion.

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## TAFT *v.* BOWERS, COLLECTOR OF INTERNAL REVENUE.

## GREENWAY *v.* SAME.

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

Nos. 16 and 17. Argued April 26, 1928. Reargued October 9, 1928.—Decided February 18, 1929.

1. Under par. (2), § 202 of the Revenue Act of 1921, where one who purchased shares of stock after February 28, 1913, gave them to another after December 31, 1920, when their market value had increased over the investment, and the donee afterwards sold them at a price still higher, the gain taxable to the donee is the difference between the price realized by him and the price paid by the donor. P. 481.

2. In such case, Congress has power under the Sixteenth Amendment to treat the entire increase in value, when separated from the investment by the sale, as income of the donee. P. 482.

20 F. (2d) 561, affirmed.

CERTIORARI, 275 U. S. 520, to judgments of the Circuit Court of Appeals reversing judgments in favor of the present petitioners, 15 F. (2d) 890, in actions against the Collector to recover money paid as income taxes.

*Mr. Henry W. Taft,* with whom *Mr. Clarence Castimore* was on the brief, for petitioner in No. 16.

"Income" has been defined to mean "the gain derived from capital, labor, or from both combined, provided it is understood to include profit gained through a sale or conversion of capital assets." *Eisner* v. *Macomber,* 252 U. S. 189. In order to apply this definition, we must determine first what is profit or gain to the taxpayer. The value of the gift itself is not profit or gain, but capital in the hands of the donee. *Edwards* v. *Cuba R. R. Co.,* 268 U. S. 628; *United States* v. *Oregon-Washington R. R. Co.,* 251 Fed. 211. Indeed the statute itself specifically provides that a gift is not to be included in the gross income of the donee.

Prior to the year 1921, there was no specific provision in the various Revenue Acts which fixed the basis for determining gain or loss on the sale of property acquired by gift, devise or bequest. The statute provided that the basis to determine gain on the sale of assets was cost or March 1, 1913 value. The uniform rule of the Treasury Department under those prior statutes was that the basis to be used for determining gain upon the sale of an asset acquired by gift, devise or bequest, was the value of such property when acquired. In other words, until the Revenue Act of 1921 became effective, the Department laid down the rule

that gain on the sale of property acquired by gift could be computed only by taking into consideration the value of the gift when it was acquired. This was an express recognition by the Treasury Department that a gift is a capital transaction, as pointed out in *Edwards* v. *Cuba R. R. Co.,* and *United States* v. *Oregon-Washington R. R. Co., supra,* and that the donee can have "gain" only to the extent that the proceeds in his hands exceed the value of his capital at the time of acquisition. These rulings are entitled to great weight. *United States* v. *Hill,* 120 U. S. 169.

In *Goodrich* v. *Edwards,* 255 U. S. 527, this Court held that the Income Tax Act of 1916 taxed "gains" only, and that a taxpayer could have no gain until the proceeds of the sale exceeded his cost, even though the proceeds may have exceeded the March 1, 1913, value. In *Lynch* v. *Turrish,* 247 U. S. 221, this Court passed upon the question as to whether an increase in the value of capital assets which has accrued prior to March 1, 1913, was income to a taxpayer when realized after that date at a very great increase over the cost price. In passing upon the question this Court said that there was " no increase subject to tax," allowing the taxpayer to recover his capital investment on March 1, 1913. See also *Doyle* v. *Mitchell Bros.,* 247 U. S. 179.

We see no reason for distinguishing between a case where the increase occurred prior to the passage of the taxing statute and a case where the increase occurred prior to ownership by the present taxpayer. If a taxpayer in the former case is entitled to recover his capital investment before he can have any gain, *a fortiori,* a taxpayer in the latter case should be entitled to recover his capital investment which he acquired at the date of the gift. We submit that the above decisions lay down definitely the principle that a taxpayer is entitled to recover his cost or capital investment before he can have

gain or income. If then a taxpayer's capital investment at the time of acquisition is not " income," as it is usually understood, a statute which seeks to make it such is invalid. *Eisner* v. *Macomber,* 252 U. S. 189.

The provisions in question are capricious and arbitrary and contrary to the Fifth Amendment. That the results of the application of the statute here under consideration are arbitrary and capricious is plain. Let us illustrate: A bought stock for $10. He makes a bona fide gift of it to B after December 31, 1920, when it is worth $100, and B sells the stock for $200. The statute provides that B has a gain of $190. Thus B is given no benefit whatsoever of the capital which he received at the commencement of his period of ownership, and the indirect effect of the statute is that he is taxed on a part of the value of the gift, which the statute provides in another section, § 213 (b) (3), shall not be taxed as income. So far as B is concerned, he has an actual economic gain of $200, but it has long ago been settled that an economic gain is not necessarily a taxable gain in the constitutional sense. *Gould* v. *Gould,* 245 U. S. 151; *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330; *United States* v. *Oregon-Washington R. R. Co.,* 251 Fed. 211.

Let us reverse the above example: A bought stock for $200. He gives it to B after December 31, 1920, when it is worth $100, and B, after a year, sells for $10. The statute provides that B has a loss of $190. This is absurd and unreal, because B never had anything worth $190.00 to lose. It was just this sort of unreality and disregard of actual facts that this Court refused to sanction in *Goodrich* v. *Edwards, supra,* and in the later case of *United States* v. *Flannery,* 268 U. S. 98.

Congress must not use its taxing power in such an arbitrary and capricious manner as to invade the rights of citizens under the Fifth Amendment. *Frew* v. *Bowers,* 12 F. (2d) 625; *Coolidge* v. *Nichols,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142.

The provision is not a legitimate and necessary exercise of the power ancillary to the power to levy taxes. To attempt to remedy a supposed weakness in the statute by adopting a basis for determining gain which is inherently fallacious does not answer the argument that the amount so included is not income. *Eisner* v. *Macomber, supra.* Nor is it sufficient to justify the means that the omission might have been closed by other methods of taxation, as, for example, an excise tax on the gift, as suggested by the learned Judges below.

Nor is the means justified by saying that the donee took the property impressed with a tax liability. First of all, no income tax liability with respect to the property attached to the donor at any time prior to or at the time of the gift, *People ex rel. Wilson* v. *Wendell,* 196 N. Y. (App. Div.) 596; so there was no liability to pass on. Secondly, the argument has been effectively answered in *Miles* v. *Graham,* 268 U. S. 501. There it was held that a federal judge could not be taxed on his salary contrary to the provisions of the Constitution, even though he took the judgeship after the passage of the Revenue Acts and with the knowledge that the Act attempted to tax his salary.

Furthermore, from the inception of our federal income tax laws, a clear and distinct cleavage has been made between different taxpayers. Such has become settled practice, both in the wording of the laws and in the decisions that have been made under them. The person acquiring property can never tell what liability he assumes in the way of income tax if any basis entirely foreign to him can be arbitrarily adopted for determining his gain. It is this fact that no doubt underlies the attempt in the statute and the trend in the decisions, always to draw a distinct line between separate taxpayers. If a decedent and his executor, or a decedent and his legatees, must be dealt with separately, surely there is no justification for con-

fusing the identity of a donor and a donee and treating them as one.

Neither in "common speech" nor in the "ordinary sense" (*Eisner* v. *Macomber, supra; Merchants Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509; *United States* v. *Oregon-Washington R. R.,* 251 Fed. 211) is a gift income. Income, as defined by lexicographers, comes to a person "within a specified time" or "regularly," or is the "periodical produce" or the "annual, or periodical receipts." This language would exclude a gift or a legacy or an inheritance, all of which are casual and come without regularity. It must be "as payment for services, interest from investment; revenue," or "produce of one's work, business, lands, or investments."

While the definition of income has been extended by the Income Tax Law and the decision of this Court in *Merchants Loan & Trust Co.* v. *Smietanka, supra,* so as to include accretion to capital, that decision was rendered with reference to an accretion which was a realized "gain or profit," "produced by" or "derived from" an investment; but the words used in *Stratton's Independence* v. *Howbert,* 231 U. S. 399, and applied in *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, which were approved as to the Income Tax Law in *Eisner* v. *Macomber,* 252 U. S. 189, and *Merchants Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, do not affect the essential features of an income that it (1) must be the product of invested capital or labor or services, and (2) must be reckoned for regular periods (annually, if not specified otherwise), or within some definite or specified period, as, for instance, the period during which a realized gain upon an investment is to be measured.

It was not the intention of Congress to give to the amended § 202 (b) (3) of the Revenue Act a retroactive effect so as to take account of increase in the value of the gift accruing prior to the passage of the law.

*Mr. Hiram C. Todd,* with whom *Mr. Roger S. Baldwin* was on the brief, for petitioner in No. 17.

The gist of the Government's contention is that a gift constitutes income to the donee; and that the Government could, if it saw fit, tax the entire proceeds of a sale of the gift as income of the donee; from which it follows that it can tax as income of the donee, the difference between the cost of the gift to the donor and the proceeds of the sale of the gift by the donee.

We believe this argument ignores the fundamental fact that income is derivative and complementary. It has no existence independent of the source from which it is derived and is dependent upon capital in some form or upon labor for its very existence. Citing *Eisner* v. *Macomber,* 252 U. S. 189, and definitions of "income" from various dictionaries.

If the entire proceeds of the sale of a gift constitute income to the donee, where is the capital from which the income is derived? The answer must be that the corpus of the gift is capital in the hands of the donee at the time of its receipt. But the mere conversion of such capital into money does not constitute income. *Lynch* v. *Turrish,* 247 U. S. 221.

An amount sufficient to restore the capital value that existed at the commencement of the taxing period must be withdrawn from the gross proceeds in order to determine whether there has been a gain or loss, and the amount of the gain, if any. *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179.

The popular conception of the meaning of "income" excludes property or money received by way of gift. The ordinary layman would not think of including, as a part of his income, money or property which he had received as a gift.

*Assistant Attorney General Mabel Walker Willebrandt* and *Mr. Edwin G. Davis,* with whom *Solicitor General Mitchell,* and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for respondent.

The word "income" is to be construed in its ordinary sense. *Merchants Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509.

Congress, in the various Revenue Acts, has consistently treated gifts as income; one time, as in § 4 of the Revenue Act of 1916, specifically referring to gifts as "income," but generally by exempting them from inclusion in gross income. The legislatures of certain States have regarded gifts as income.

The sale of purchased property separates income from capital. The income is measured by the difference between the investment and the selling price. If this rule be applied to the sale of property acquired by gift, the value of the gift, i. e., its selling price, will appear as income, since the donee's investment therein is zero. This conception of income is not inconsistent with the definition of income in *Eisner* v. *Macomber,* 252 U. S. 189; but in any event, that definition, as the Court there intimated, does not represent the uttermost limits of what can be regarded as income.

Congress assumed the gift of a corpus which is exempted from taxation, but it taxed the income from the gift. *Irwin* v. *Gavit,* 268 U. S. 161. In the cases at bar, the corpus was the shares of stock conveyed by gift. The increment in the value of these shares when realized by sale was income. *Eisner* v. *Macomber, supra.* That part of the increase which accrued while the stock was still held by the donor was inherently income. It was intrinsically a gift of income to the donee, and, when separated from capital and realized in the hands of the

donee by the sale of the gift, may constitutionally be taxed as income to him for the year in which realized.

Since the authority to tax given by the Sixteenth Amendment is an authority to tax "income," not "persons," a change in ownership of what is inherently income after its accrual and before realization by sale, can not affect the right of Congress to impose a tax thereon. *Atlantic Coast Line* v. *Daughton,* 262 U. S. 413; *United States* v. *Phellis,* 257 U. S. 156; *McKinney* v. *United States,* 62 Ct. Cls. 180; *Irwin* v. *Gavit,* 268 U. S. 161; *Merchants Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509.

If the corpus of the gift in these cases be construed as including the increment in the value of the shares of stock while held by the donor, still the sale of the gift resulted in a realized gain which may be constitutionally measured by taking the cost of the latest actual capital investment in the gift as a basis.

Section 202 (a) (2) of the Revenue Act of 1921 does not prescribe a capricious or arbitrary scheme of taxation, nor is it in violation of the Fifth Amendment. It is a necessary part of a complete scheme of taxation whose purpose was to prevent tax evasion or avoidance in respect to a particular type of gain.

It is not capricious to put property acquired by gift in a special class and to tax it differently from property acquired by purchase. *Bowman* v. *Continental Oil Co.,* 256 U. S. 642; *Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1; *Thomas* v. *United States,* 192 U. S. 363.

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioners, who are donees of stocks, seek to recover income taxes exacted because of advancement in the market value of those stocks while owned by the donors. The facts are not in dispute. Both causes must turn upon the effect of paragraph (2), § 202, Revenue Act, 1921, (c. 136,

42 Stat. 227) which prescribes the basis for estimating taxable gain when one disposes of property which came to him by gift. The records do not differ essentially and a statement of the material circumstances disclosed by No. 16 will suffice.

During the calendar years 1921 and 1922, the father of petitioner Elizabeth C. Taft, gave her certain shares of Nash Motors Company stock then more valuable than when acquired by him. She sold them during 1923 for more than their market value when the gift was made.

The United States demanded an income tax reckoned upon the difference between cost to the donor and price received by the donee. She paid accordingly and sued to recover the portion imposed because of the advance in value while the donor owned the stock. The right to tax the increase in value after the gift is not denied.

Abstractly stated, this is the problem—

In 1916 A purchased 100 shares of stock for $1,000 which he held until 1923 when their fair market value had become $2,000. He then gave them to B who sold them during the year 1923 for $5,000. The United States claim that, under the Revenue Act of 1921, B must pay income tax upon $4,000, as realized profits. B maintains that only $3,000—the appreciation during her ownership—can be regarded as income; that the increase during the donor's ownership is not income assessable against her within intendment of the Sixteenth Amendment.

The District Court ruled against the United States; the Circuit Court of Appeals held with them.

Act of Congress approved November 23, 1921, Chap. 136, 42 Stat. 227, 229, 237—

"Sec. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

"(1) . . .

"(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;"

"Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

"(b) Does not include the following items, which shall be exempt from taxation under this title;

"(1) . . . (2) . . .

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income); . . ."

We think the manifest purpose of Congress expressed in paragraph (2), Sec. 202, *supra,* was to require the petitioner to pay the exacted tax.

The only question subject to serious controversy is whether Congress had power to authorize the exaction.

It is said that the gift became a capital asset of the donee to the extent of its value when received and, therefore, when disposed of by her no part of that value could be treated as taxable income in her hands.

The Sixteenth Amendment provides—

"The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Income is the thing which may be taxed—income from any source. The Amendment does not attempt to define income or to designate how taxes may be laid thereon, or how they may be enforced.

Under former decisions here the settled doctrine is that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income.

Also, this Court has declared—"Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets." *Eisner* v. *Macomber,* 252 U. S. 189, 207. The "gain derived from capital," within the definition, is "not a gain accruing to capital, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested, and coming in, that is, received or drawn by the claimant for his separate use, benefit and disposal." *United States* v. *Phellis,* 257 U. S. 156, 169.

If, instead of giving the stock to petitioner, the donor had sold it at market value, the excess over the capital he invested (cost) would have been income therefrom and subject to taxation under the Sixteenth Amendment. He would have been obliged to share the realized gain with the United States. He held the stock—the investment—subject to the right of the sovereign to take part of any increase in its value when separated through sale or conversion and reduced to his possession. Could he, contrary to the express will of Congress, by mere gift enable another to hold this stock free from such right, deprive the sovereign of the possibility of taxing the appreciation when actually severed, and convert the entire property into a capital asset of the donee, who invested nothing, as though the latter had purchased at the market price? And after a still further enhancement of the property, could the donee make a second gift with like effect, etc.? We think not.

In truth the stock represented only a single investment of capital—that made by the donor. And when through sale or conversion the increase was separated therefrom, it became income from that investment in the hands of the recipient subject to taxation according to the very words of the Sixteenth Amendment. By requiring the recipient of the entire increase to pay a part into the public treasury, Congress deprived her of no right and subjected her to no hardship. She accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor. When she sold the stock she actually got the original sum invested, plus the entire appreciation; and out of the latter only was she called on to pay the tax demanded.

The provision of the statute under consideration seems entirely appropriate for enforcing a general scheme of lawful taxation. To accept the view urged in behalf of petitioner undoubtedly would defeat, to some extent, the

purpose of Congress to take part of all gain derived from capital investments. To prevent that result and insure enforcement of its proper policy, Congress had power to require that for purposes of taxation the donee should accept the position of the donor in respect of the thing received. And in so doing, it acted neither unreasonably nor arbitrarily.

The power of Congress to require a succeeding owner, in respect of taxation, to assume the place of his predecessor is pointed out by *United States* v. *Phellis,* 257 U. S. 156, 171—

"Where, as in this case, the dividend constitutes a distribution of profits accumulated during an extended period and bears a large proportion to the par value of the stock, if an investor happened to buy stock shortly before the dividend, paying a price enhanced by an estimate of the capital plus the surplus of the company, and after distribution of the surplus, with corresponding reduction in the intrinsic and market value of the shares, he were called upon to pay a tax upon the dividend received, it might look in his case like a tax upon his capital. But it is only apparently so. In buying at a price that reflected the accumulated profits, he of course acquired as a part of the valuable rights purchased the prospect of a dividend from the accumulations—bought 'dividend on' as the phrase goes—and necessarily took subject to the burden of the income tax proper to be assessed against him by reason of the dividend if and when made. He simply stepped into the shoes, in this as in other respects, of the stockholder whose shares he acquired, and presumably the prospect of a dividend influenced the price paid, and was discounted by the prospect of an income tax to be paid thereon. In short, the question whether a dividend made out of company profits constitutes income of the stockholder is not affected by antecedent transfers of the stock from hand to hand."

There is nothing in the Constitution which lends support to the theory that gain actually resulting from the increased value of capital can be treated as taxable income in the hands of the recipient only so far as the increase occurred while he owned the property. And *Irwin* v. *Gavit,* 268 U. S. 161, 167, is to the contrary.

The judgments below are

*Affirmed.*

The CHIEF JUSTICE took no part in the consideration or decision of these causes.

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## SALOMON ET AL. *v.* STATE TAX COMMISSION OF NEW YORK.

## SIMONSON ET AL. *v.* SAME.

ERROR TO THE SURROGATES' COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

Nos. 79 and 80. Argued November 28, 1928.—Decided February 18, 1929.

1. A state law imposing a graduated tax on the transfer of contingent remainders measured by the value at the testator's death of the estate transferred, undiminished by the value of the intervening life estate, and requiring the executor to deposit security for the payment of the tax, but postponing the definitive assessment and the payment of the tax until after the death of the life tenant—*held* consistent with due process of law. P. 489.
2. The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax. P. 490.
3. The graduation of the tax and the impossibility of forecasting exactly the duration of life estates may cause a lack of equivalency of tax burden as between a contingent remainder, when taxed as above stated, and a like vested remainder when the tax on the latter is based on its value separate from the intervening life estate and is paid at the testator's death; but such differences do not amount to an unjustifiable discrimination against the contingent remainderman violative of the equal protection clause. *Id.*

4. There are differences between vested and contingent remainders which justify classification in imposing inheritance taxes. P. 491.
5. The fact that a state tax law is not the best that might be conceived and produces minor inequalities and hardships does not render it invalid under the Constitution. *Id.*

Affirmed.

ERROR to judgments fixing transfer taxes, entered in the Surrogates' Court of the County of New York, on remittitur from the Court of Appeals, the latter court having affirmed judgments of the Supreme Court, Appellate Division, which had affirmed the assessments as originally made in the Surrogates' Court. See 127 Misc. 211; 219 App. Div. 656; 246 N. Y. 601, 602.

*Mr. Charles Angulo,* with whom *Mr. Edmund O. Austin* was on the brief, for plaintiffs in error in No. 79.

*Mr. Abraham L. Gutman,* with whom *Mr. Wm. V. Goldberg* was on the brief, for plaintiffs in error in No. 80.

*Mr. Seth T. Cole* for defendants in error.

Mr. JUSTICE BRANDEIS delivered the opinion of the Court.

These cases, which were argued together, present the question whether the provision in the New York Transfer Law for taxing the transfer of contingent remainders violates the due process clause or the equal protection clause of the Fourteenth Amendment. That statute imposes a graduated succcession tax. On the transfer of life estates and vested remainders the tax is measured by their respective values as of the testator's death and is payable then. The tax on the transfer of contingent remainders is not payable until the death of the life tenant; and it is measured by the value at the testator's death of the estate transferred, undiminished by the value of the intervening life estate. For the due payment of the deferred tax the

executor must furnish adequate security. The amount of the security is fixed by a temporary taxing order. Laws of 1925, c. 144, §§ 230 and 241.

It will be sufficient to state the facts and proceedings in the *Salomon* case. Meyer Hecht died in 1925 a resident of New York. He bequeathed his residuary estate in trust to his widow for life; and upon her death one equal share thereof to each child then living and to the then living issue *per stirpes* of each deceased child. The value of the residue as of the testator's death was appraised at $322,094.37. The then value of the widow's life estate therein, computed according to the standard mortality tables using five per cent interest, was appraised at $124,-957; the tax then payable was assessed thereon; and no objection is made thereto. If the future interests had been vested remainders, the tax thereon would have been payable then on an appraisal of $197,137.37; that is, on the difference between the then value of the residue and the then value of the life estate. The future interests were all contingent. The tax was not payable until the death of the life tenant. The temporary taxing order appraised their aggregate value at the widow's death as $322,094.37; that is, at the value of the residue undiminished by the value of the life estate. Security for the future payment of the tax was required to be given as the statute requires. An appeal from the appraisal was denied by the Surrogate of New York County. *Matter of Hecht,* 127 Misc. 211. His judgment was affirmed by the Appellate Division of the Supreme Court, 219 App. Div. 656. Its judgment was affirmed by the Court of Appeals, without opinion, 246 N. Y. 601, 602; and by the remittitur it became the judgment of the Surrogates' Court. That judgment is final within the meaning of § 237 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936. Compare *Wheeler* v. *Sohmer,* 233 U. S. 434; *Watson* v. *State Comptroller,* 254 U. S. 122.

The constitutional claims were duly made below; and the case is properly here.

The need of a peculiar provision for taxing the transfer of contingent remainders arises from the fact that the New York law imposes a graduated tax. The rates differ according to the amount or value of the gift to the particular beneficiary and also according to his relationship to the decedent. The lowest rate payable by a lineal descendant is one per cent, the highest four per cent. The lowest rate payable by a stranger is five per cent, the highest eight per cent. As the remainders are contingent, it is impossible to know before the contingency happens in whom the remainders will vest; and it may be impossible to determine until then the relationship of the beneficiaries to the testator and the portions of the estate which they will respectively receive. Thus the rate of taxation will remain uncertain. For this reason, the statute postpones until the contingency happens both the definitive assessment of the tax on the transfer of the contingent remainders and the payment thereof. In respect to vested remainders, there is no obstacle to requiring both assessment and payment of this graduated tax as of the testator's death. The amount of the tax can be determined then; because it is known who the vested remaindermen are, what the share of each is and what his relationship to the testator was. And the value of the remainders as of the testator's death is likewise known, being the difference between the then value of the property transferred and the computed value of the life estate.

The need of a special provision for the taxation in respect to contingent remainders and the reasonableness of the particular measure adopted in 1925 appear from the history of the legislation. Since the enactment of the Transfer Tax Law in 1885 (Ch. 483), the aim of the Legislature has been at all times to adopt a method of laying the tax which would be fair to both the life tenant

and the future interest and would protect the revenues of the State. From time to time, various methods for doing this were tried. Experience revealed their defects. Under the original law and the early amendments, the transfers to contingent remaindermen were not taxable upon the testator's death, *Matter of Cager,* 111 N. Y. 343. They were taxable at the time when they vested in possession, *Matter of Stewart,* 131 N. Y. 274. And the tax then payable was computed upon the value, as of the testator's death, of the property transferred, less the value of the intervening life estate, *Matter of Sloane,* 154 N. Y. 109. Under this method the revenue derived from the tax on the contingent remainder was less than it would have been had the remainder been a vested one. For the State lost the benefit of the money during the period intervening between the death of the testator and that of the life tenant. To overcome this loss to the State and the discrimination thereby in favor of the contingent remaindermen, the Legislature provided by Chapter 284 of the Acts of 1897 that the tax payable on the vesting of the contingent remainder should be measured by the full value of the property as of the testator's death, without deducting the value of the intervening life estate, *Matter of Seligmann,* 219 N. Y. 656. This statute, while on its face eliminating the discrimination in favor of contingent remaindermen, was found to result in serious loss of revenue to the State. Taxes escaped collection when they became due, because it proved to be impossible to ascertain currently when the contingencies happened and hence when a tax became payable. To remedy this defect, it was provided by Chapter 76 of the Laws of 1899, that the tax must be paid upon the testator's death; and that it should then be paid out of the corpus of the estate at the highest applicable rate, with a provision for paying to the remainderman the surplus with interest if it should prove that a lower rate was applicable, *Matter of Vander-*

*bilt,* 172 N. Y. 69. This provision, while fully safeguarding the State's revenues, favored the remainderman at the expense of the life tenant. *Matter of Brez,* 172 N. Y. 609. For under this provision the life tenant lost the income on the full amount deducted to ensure payment of the tax on the contingent remainder; and the remainderman received from the State with interest such part thereof as proved not to be required for the ultimate payment of the tax. Thereupon some relief to the life tenant was afforded by Chapter 800 of the Laws of 1911. But it was not until the Act of 1925 here challenged provided for appraisal of the remainder as stated, that the Legislature succeeded in devising a means of laying the tax which operated justly as between life tenant and remaindermen and safeguarded the State's revenues.

*First.* The contention that the method of taxation prescribed violates the due process clause rests upon the assertion that in measuring the transfer tax in respect to a contingent remainder by the corpus of the trust fund undiminished by the value of the intervening life estate, something is taxed which does not exist. The argument is that taxation even of an inheritance must be measured by property taxable within the jurisdiction, *Frick* v. *Pennsylvania,* 268 U. S. 473; that New York levies the tax on the transfer of title from the testator, not on its value at the time of the transfer of possession, *Matter of Davis,* 149 N. Y. 539; that the tax must, therefore, be measured by what he transferred when he transferred it; that the aggregate value of the parts transferred by the testator cannot be greater than the value of the whole; but that here the State lays a tax upon both the value of the life interest and the undiminished value of the corpus.

The argument presented is unsound, because it ignores the fact that the tax in respect to the contingent remainders is not payable until after the death of the life tenant. The temporary taxing order, entered upon the

testator's death, is made solely to ensure that the tax so deferred will be paid when ultimately assessed. The requirement may be satisfied by depositing with the State either approved securities or cash. In either event the income collected from the security prior to the time when the tax becomes payable is accounted for to the executor; and after the tax has been paid, the securities or cash remaining on deposit will be accounted for to him. By applying the applicable rate to the full value of that which comes into enjoyment and not exacting payment of the tax until then, a just result is sought. For the definitive assessment of the contingent remainder and the payment of the tax thereon are postponed to the same date. The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax. Compare *Cahen* v. *Brewster,* 203 U. S. 543.

*Second.* It is claimed that the tax violates the equal protection clause. One contention is that it unjustifiably discriminates between contingent and vested remainders in that the value of the life estate is first deducted in assessing the latter. It is true that an exact equivalency is not always achieved, because the tax is graduated according to the value of the remainder. But since the payment of the tax is postponed until the termination of the life estate the present value of the tax will tend to approximate what it would have been, if vested remainders had been given to the same persons and in the same shares that eventually go to the contingent remaindermen—assuming, of course, that the same rate of interest is used in making the calculation of both the present value of the tax and the present value of the future estate. It is true, also, that there is not an exact equivalency, since life tenants do not die at the precise termination of their life expectancies. But this uncertainty underlies the taxation of all future interests, vested

or contingent, wherever the tax is laid separately in respect to life estates and remainders. The uncertainty is unavoidable unless the State concludes to postpone laying the tax upon the remainders until they come into enjoyment, a course which it is not obliged to pursue. Moreover, there are differences between vested and contingent remainders which justify classification in imposing inheritance taxes. Compare *Stebbins* v. *Riley,* 268 U. S. 137, 141–143; *Billings* v. *Illinois,* 188 U. S. 97; *Board of Education* v. *Illinois,* 203 U. S. 553; *Beers* v. *Glynn,* 211 U. S. 477; *Keeney* v. *New York,* 222 U. S. 525.

*Third.* Several other reasons are urged why the statute should be held obnoxious to the equality clause. It is said that the tax being graduated according to amounts, there will result from the use of mortality tables discrimination between members of the same class. It is urged that since the tax is not collected until the termination of the life estate a more perfect equality would be achieved by assessing the tax on the value of the remainder, after deducting the value of the life estate, and allowing interest to the State for the actual known period during which the tax was withheld. The fact that a better taxing system might be conceived does not render the law invalid. As was said in *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69–70, "To be able to find fault with a law is not to demonstrate its invalidity . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Further, it is said that postponing payment of the tax will prove burdensome, because it involves giving security to ensure the deferred payment; and that where the security is given by the deposit of cash, the income earned thereon will probably be less than would have been earned if the money had been otherwise employed. To all such objections it may be answered that minor inequalities and

hardships are incidents of every system of taxation and do not render the legislation obnoxious to the Federal Constitution.[1] *General American Tank Car Corp.* v. *Day,* 270 U. S. 367.

Whether the State's power to tax the privilege of taking by will or descent property within its jurisdiction is in any way limited by the Fourteenth Amendment has not been argued. As we are of opinion that none of the objections urged can be sustained, we have no occasion to consider that question. Compare *Stebbins* v. *Riley,* 268 U. S. 137, 140.

*Affirmed.*

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## MICHIGAN CENTRAL RAILROAD COMPANY *v.* MIX ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 118. Argued January 10, 1929.—Decided February 18, 1929.

1. A railroad company engaged in interstate commerce cannot be subjected to an action in a state court entailing a burden upon or an obstruction of its interstate commerce, brought under the Federal Employers' Liability Act without its consent in a State where the cause of action did not arise and where the company has no railroad and where it has not been admitted to do business and transacts none other than the soliciting of freight for transportation in interstate commerce over its lines in other States. P. 494.
2. The mere fact that the plaintiff acquired a residence in the State of suit after the cause of action arose and before commencing the action, does not take the case out of this rule. P. 495.

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[1] See, also, *State Railroad Tax Cases,* 92 U. S. 575, 612; *Beli's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232; *Merchant's Bank* v. *Pennsylvania,* 167 U. S. 461, 464; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Travellers' Insurance Co.* v. *Connecticut,* 185 U. S. 364; *Beers* v. *Glynn,* 211 U. S. 477, 485; *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322, 331; *Northwestern Life Insurance Co.* v. *Wisconsin,* 247 U. S. 132, 137, 141; *Maxwell* v. *Bugbee,* 250 U. S. 525, 543; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519, 526.

3. The railroad company cannot be constrained to try such an action by a rule of local practice making its motion to quash the summons equivalent to a general appearance. P. 495.
4. Filing a petition to remove from state to federal court is not a general appearance. *Id.*

Reversed.

CERTIORARI, 277 U. S. 581, to a judgment of the Supreme Court of Missouri denying an application of the Railroad Company praying for a writ of prohibition to enjoin the judges of a lower court from trying an action against the Company, brought under the Federal Employers' Liability Act.

*Mr. Charles A. Houts,* with whom *Mr. J. W. Dohany* was on the brief, for petitioner.

*Messrs. Arthur Stahl* and *E. D. Andrews* submitted for respondents.

Mr. JUSTICE BRANDEIS delivered the opinion of the Court.

Thomas Doyle, a switchman employed by the Michigan Central Railroad, was killed in Michigan in the performance of his duties. He was then a resident of Lansing in that State; and there his wife Augusta lived with him until his death. Shortly after, she removed to Missouri; was appointed administratrix of his estate at St. Louis; and, as such, brought in the Circuit Court of that city an action for damages against the Railroad under the Federal Safety Appliance Act and the Federal Employers' Liability Act. The Railroad is a Michigan corporation. No part of its line runs into Missouri. It has not consented to be sued there; has never been admitted to do business there; and has never done any business there, except soliciting freight for transportation in interstate commerce over its lines in other States. For this limited purpose it

maintains an office at St. Louis. Upon its agent in charge of that office the sheriff made service of the summons.

The Railroad, appearing specially, filed a petition for removal of the cause to the federal court. This the state court denied. Thereupon, the Railroad filed a transcript of the record in the federal court and moved there to quash the summons. Upon objection of the administratrix, that court declined to pass on the motion and remanded the case to the state court. It did so apparently on the ground that the suit was one under the Federal Employers' Liability Act. The Railroad, again appearing specially, pressed in the state court the motion to quash. It was denied on the authority of *State ex rel. Texas Portland Cement Co.* v. *Sale,* 232 Mo. 166, and *Davis* v. *Jacksonville Southeastern Line,* 126 Mo. 69, which hold that service upon a soliciting freight agent confers jurisdiction and that a petition to remove to the federal court is equivalent to a general appearance. After denial of the motion to quash the summons this application for a writ of prohibition was filed by the Railroad, in the highest court of the State, in accordance with what appears to be the appropriate local practice. It prays that the judges of the Circuit Court be enjoined from acting in the suit commenced by Mrs. Doyle. The application for the writ of prohibition was denied without an opinion. That judgment is final within the meaning of § 237a of the Judicial Code. *Missouri ex rel. St. Louis, Brownsville & Mexico Ry. Co.* v. *Taylor,* 266 U. S. 200. This Court granted a writ of certiorari, 277 U. S. 581.

The Railroad claims that it was not subject to suit in Missouri, among other reasons, because to maintain it would violate the commerce clause. In order to show that trial of the action for damages in Missouri would entail a heavy burden upon, and unreasonably obstruct, interstate commerce, it set forth facts substantially identical with those held sufficient for that purpose in *Davis* v. *Farmers*

*Co-operative Co.*, 262 U. S. 312, and *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wells*, 265 U. S. 101. From those cases that here involved differs only in this: There, the plaintiff was a non-resident. Here, the plaintiff had become a resident in Missouri after the injury complained of, but before instituting the action. For aught that appears her removal to St. Louis shortly after the accident was solely for the purpose of bringing the suit; and because she was advised that her chances of recovery would be better there than they would be in Michigan. The mere fact that she had acquired a residence within Missouri before commencing the action does not make reasonable the imposition upon interstate commerce of the heavy burden which would be entailed in trying the cause in a State remote from that in which the accident occurred and in which both parties resided at the time.

The case is unlike others in which the jurisdiction was sustained against a non-resident railroad. In *Missouri ex rel. St. Louis, Brownsville & Mexico Ry. Co.* v. *Taylor*, 266 U. S. 200, it appeared that the shipment out of which the cause of action arose was of goods deliverable in Missouri; and also that the negligent acts complained of may have occurred within the State. In *Hoffman* v. *Missouri ex rel. Foraker*, 274 U. S. 21, the railroad was organized under the laws of the State, and operated a part of its line in the county in which the action was brought.

The contention that filing the petition for removal to the federal court was equivalent to the entry of a general appearance is obviously unsound. *General Investment Co.* v. *Lake Shore Ry. Co.*, 260 U. S. 261, 268–9; *Hassler* v. *Shaw*, 271 U. S. 195. There is also a suggestion that the motion to quash the summons made by the Railroad, in the state court after the remand, operated, under the Missouri practice, as a general appearance, *York* v. *Texas*, 137 U. S. 15; and that this precluded it from objecting to a trial of the cause within that State. We have no occasion

to enquire into the local practice. The constitutional claim sustained in *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, was not that under the Fourteenth Amendment as in *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516. It was assumed that the carrier had been found within the State. The judgment was reversed on the ground that to compel it to try the cause there would burden interstate commerce and, hence, would violate the commerce clause. No local rule of practice can prevent the carrier from laying the appropriate foundation for the enforcement of its constitutional right by making a seasonable motion. Compare *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197; *Yazoo & Mississippi Valley R. R.* v. *Mullins*, 249 U. S. 531; *Davis* v. *Wechsler*, 263 U. S. 22, 24.

*Reversed.*

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## WESTERN & ATLANTIC RAILROAD *v.* HUGHES, ADMINISTRATRIX.

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

No. 234. Argued January 18, 1929.—Decided February 18, 1929.

1. Evidence in an action by an administratrix under the Employers' Liability Act *held* sufficient to go to the jury on the question of negligence and for computing damages on the basis of the present value of anticipated benefits. P. 498.
2. When a charge to the jury correctly states the applicable rule, a party desiring more detailed instruction should request it. P. 499.

37 Ga. App. 771, affirmed.

CERTIORARI, 278 U. S. 588, to a judgment of the Court of Appeals of Georgia sustaining a recovery under the Federal Employers' Liability Act. The Supreme Court of Georgia refused a certiorari.

*Mr. Fitzgerald Hall*, with whom *Messrs. Frank Slemons* and *Walton Whitwell* were on the brief, for petitioner.

*Mr. Reuben R. Arnold* for respondent.

Mr. JUSTICE BRANDEIS delivered the opinion of the Court.

Ira L. Hughes, a travelling fireman, was killed on the Western & Atlantic Railroad while engaged in the performance of his duties. His widow as administratrix brought this action under the Federal Employers' Liability Act in a state court of Georgia. She recovered a verdict of $17,500, which was set aside as excessive by the presiding judge. At the second trial before another judge and jury a verdict was rendered for $10,000. A motion for a new trial was overruled. Judgment was entered on this verdict; and it was affirmed by the intermediate appellate court. The Supreme Court of the State refused a certiorari. This Court granted the writ. 278 U. S. 588.

Hughes was killed while riding on a locomotive moving in interstate commerce. The plaintiff claimed that he was knocked from the running board and thrown against an upright on a bridge as the train entered it; that the accident resulted from an unusual rocking of the engine from side to side due to the defective condition of the track leading to the bridge; that the Railroad had been negligent in permitting the track to remain in bad condition; and that this negligence was the proximate cause of the injury. The Railroad claimed that the alleged cause of the accident was mere speculation. It denied that the track was in bad condition; denied that its condition had produced the alleged swaying of the locomotive; denied that it had been guilty of any negligence; insisted that the accident was the result of Hughes' gross negligence and his disobedience of the company's rules; claimed that he had assumed the risk; and requested a directed verdict. The request was denied.

The Railroad asserts that the scintilla of evidence rule prevails in Georgia; and argues that the lower courts erred by applying the local rule in this case. It is true

that submission to the jury of contested issues of fact is not required in the federal courts, if there is only a scintilla of evidence, *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521, 524; that it is the duty of the judge to direct the verdict, when the testimony and all inferences which the jury could justifiably draw therefrom would be insufficient to support a verdict for the other party, *Elliott* v. *Chicago, Milwaukee & St. Paul Ry.,* 150 U. S. 245; *Small Co.* v. *Lamborn & Co.,* 267 U. S. 248, 254; and that this federal rule must be applied by state courts in cases arising under the Federal Employers' Liability Act, *Chicago, Milwaukee & St. Paul Ry.* v. *Coogan,* 271 U. S. 472, 474; *Gulf, Mobile & Northern R. R.* v. *Wells,* 275 U. S. 455, 457; *Toledo, St. Louis & Western R. R.* v. *Allen,* 276 U. S. 165, 168. We need not consider whether the rule prevailing in Georgia differs substantially from the federal rule.[1] For even under the federal rule it was proper to submit the case to the jury. The evidence introduced by the plaintiff was substantial; and was sufficient, if believed, to sustain a verdict in her favor. There was much conflict in the evidence. The first trial occupied five days. At the second trial thirty-three witnesses testified. Some of the testimony given by witnesses for the Railroad would, if believed, have entitled it to the verdict as a matter of law. Some of the testimony given by witnesses called by the plaintiff does not seem to us persuasive. But the credibility of the witnesses and the weight of the evidence were obviously matters for the jury. The defendant was not entitled to a directed verdict.

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[1] Compare Georgia Code, §§ 5926, 6082, 6087, 6088; *Central of Georgia Ry.* v. *Harden,* 113 Ga. 453, 461; *Southern Ry. Co.* v. *Myers,* 108 Ga. 165; *Skinner* v. *Braswell,* 126 Ga. 761; *Burroughs* v. *Reed,* 150 Ga. 724, 726; *Georgia Ry. & Electric Co.* v. *Harris,* 1 Ga. App. 714, 716-717; *Carter* v. *Central of Georgia Ry. Co.,* 3 Ga. App. 222; *Smith* v. *Atlantic Coast Line R. R.,* 5 Ga. App. 219, 222; *Neill* v. *Hill,* 32 Ga. App. 381.

The Railroad contends also that there was error in assessing the damages. It argues that nominal damages only were recoverable since the plaintiff failed to introduce evidence either as to the proper method of computing the present value of the anticipated benefits or as to the rate of interest which should be applied in doing so. The evidence was ample. Among other things, there were mortality tables introduced by the plaintiff and annuity tables offered by the Railroad—tables in which values were computed at both the six per cent and the seven per cent rate. The Railroad argues also that the charge failed to make it clear to the jury that, in computing the damages recoverable for the deprivation of future benefits, adequate allowance must be made, according to circumstances, for the earning power of money; that the verdict should be for the present value of the anticipated benefits; and that the legal rate of interest is not necessarily the rate to be applied in making the computation. *Chesapeake & Ohio Ry.* v. *Kelly,* 241 U. S. 485, 491; *Gulf, Colorado & Santa Fe Ry.* v. *Moser,* 275 U. S. 133. There is no room for a contention that the charge failed to state correctly the applicable rule. If more detailed instruction was desired, it was incumbent upon the Railroad to make a request therefor. *Louisville & Nashville R. R.* v. *Holloway,* 246 U. S. 525. It did not do so.

*Affirmed.*

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## HART REFINERIES *v.* HARMON, TREASURER OF THE STATE OF MONTANA.

APPEAL FROM THE SUPREME COURT OF MONTANA.

No. 210. Submitted January 15, 1929.—Decided February 18, 1929.

1. A State may tax the use as well as the sale of gasoline which has been imported into the State and has come to rest there, provided there be no discrimination against the commodity because of its origin in another State. P. 501.

2 A state law imposing an excise based on sales of gasoline that is made in the State or is brought in and has come to rest in the State, is not unduly discriminatory, contrary to the equal protection clause, because it lays no tax on the use of imported gasoline after it acquires such local status. P. 502.

81 Mont. 423, affirmed.

APPEAL from a judgment of the Supreme Court of Montana affirming a judgment against the appellant in its action against the State Treasurer to recover money paid under protest as taxes. See also *Hart Refineries* v. *Montana, post,* pp. 574, 584.

*Mr. John E. Paterson* submitted for appellant.

*Messrs. L. A. Foot,* Attorney General of Montana, and *A. H. Angstman,* Assistant Attorney General, for appellee.

Mr. JUSTICE SUTHERLAND delivered the opinion of the Court.

A Montana statute (§§ 2382 and 2383 Revised Codes 1921, as amended by c. 186, Laws 1925) levies an excise tax upon distributors and dealers engaged within the state in the business of refining, manufacturing, producing, or compounding gasoline or distillate and selling the same in the state, and also upon those engaged within the state in the business of shipping, transporting, or importing any gasoline or distillate into the state and selling the same in the state after it has been brought to rest therein. The basis of the tax is the *sale* of gasoline or distillate, and the statute, in that respect, makes no discrimination, except that it properly excludes from the operation of the tax the imported commodity while it continues subject to the commerce clause of the Constitution. *Raley & Bros.* v. *Richardson,* 264 U. S. 157, 159. Thus far the validity of the statute is conceded.

But the contention is that the statute discriminates against the Montana refiner because it is not extended

to include gasoline or distillate shipped from other states and consumed or used after it has come to rest in Montana and its status in interstate commerce has ended. Upon this ground the statute is challenged as constituting a denial of the equal protection of the laws, in contravention of the Fourteenth Amendment to the federal Constitution. The Supreme Court of Montana upheld the statute as valid, 81 Mont. 423, following its earlier decision in *State* v. *Silver Bow Refining Co.*, 78 Mont. 1, 19, where it was held that, while a tax upon the sale of imported oil after it had come to rest in the state or upon such oil as property would be valid, any attempt to lay a tax upon products shipped into the state for consumption only would be a burden upon interstate commerce.

This holding, as it was applied to the contention in the present case, seems to have been the result of a too literal reading of *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, which was cited as authority. In that case, this Court, upon a full review of the earlier cases, held that when a commodity shipped from another state had come to rest as a part of the stock in trade of the dealer, the interstate transportation was at an end, and, whether in the original packages or not, a state tax upon the commodity, either as property or upon its sale in the state, if laid on the commodity generally without regard to its origin, would not constitute a burden upon or be a regulation of interstate commerce of which the commodity had been the subject. But there is nothing in the opinion to suggest that the taxing power of the state is limited to the two kinds of taxes mentioned. Interstate transportation having ended, the taxing power of the state in respect of the commodity which was the subject of such transportation, may, so far as the commerce clause of the federal Constitution is concerned, be exerted in any way which the state's constitution and laws permit, provided, of

course, it does not discriminate against the commodity because of its origin in another state. That under such circumstances a tax may be imposed upon the use as well as upon the sale of the commodity in domestic trade, without coming into conflict with the commerce clause, was specifically determined in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 648.

But because the state legislature could have laid a tax upon the use of the commodity as well as upon its sale, it by no means follows that a failure to do so constituted a discrimination forbidden by the equal protection clause of the Fourteenth Amendment. That clause does not prohibit classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided that the classification rest upon a substantial difference so that all persons similarly circumstanced will be treated alike. Statutes which tax one class of property while exempting another class necessarily result in imposing a greater burden upon the property taxed than would be the case if the omitted property were included. But such statutes do not create an inequality in the constitutional sense. Nor is the imposition of an excise tax upon one occupation or one activity from which other and different occupations or activities are exempt, a denial of equal protection. It is enough if all in the same class are included and treated alike. These propositions are so firmly established by repeated decisions of this Court that further discussion is unnecessary. *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Home Ins. Co.* v. *New York,* 134 U. S. 594, 606; *Keeney* v. *New York,* 222 U. S. 525, 536; *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322, 329–331; *Merchants' Bank* v. *Pennsylvania,* 167 U. S. 461, 463; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92; *Pacific Express Company* v. *Seibert,* 142 U. S. 339, 350; *Southwestern Oil Co.* v. *Texas,*

217 U. S. 114, 121; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 572; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 179.

The difference between an excise tax based on sales and one based on use of property is obvious and substantial. If the state sees fit to tax one and not the other, there is nothing in the federal Constitution to prevent; and it is not for this Court to question the wisdom or expediency of the action taken or to overturn the tax upon the ground that to include both would have resulted in a more equitable distribution of the burdens of taxation.

*Judgment affirmed.*

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## GREAT NORTHERN RAILWAY COMPANY *v.* MINNESOTA.

## SAME *v.* SAME.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF MINNESOTA.

Nos. 106 and 107. Argued January 9, 1929.—Decided February 18, 1929.

A state tax on the local property of a railway company measured upon gross receipts from intrastate business, and upon gross receipts from interstate business in the proportion which the mileage of the railway within the State bears to the entire mileage of the railway over which such interstate business is done, is not a burden to interstate commerce or violative of the due process and equal protection clauses of the Fourteenth Amendment, though part of the property devoted to interstate commerce consist of docks outside of the State at the terminus of a line running from within it, and though the compensation received for the services of such docks be included in the gross receipts of that line in computing the gross receipts attributable to the taxable part of it.

So *held* where the principal, and a very lucrative, business of the line in question was hauling ore from mines in the taxing State to the terminal docks; where the line and the docks were treated by the railway as a unit, the charge for dock service being

absorbed in the charge per ton transported; and where the evidence did not show that the mileage value of the part of the line outside of the taxing State, with the docks included, was greater than the mileage value of the part within it. P. 508.

174 Minn. 3, affirmed.

ERROR to and appeal from a judgment of the Supreme Court of Minnesota sustaining a judgment for taxes in an action by the State against the Railway. See 160 Minn. 515; 273 U. S. 658. The writ of error was dismissed.

*Mr. F. G. Dorety,* with whom *Mr. Thomas Balmer* was on the brief, for plaintiff in error and appellant.

The statute, as construed to apply to the earnings in question, is unconstitutional because it assesses against the defendant, a Minnesota railway corporation, a tax upon earnings of a Wisconsin dock company separately incorporated.

Even if the Dock Company be regarded as an agency of the Railway Company, the statute, if construed as applying a mileage prorate to the entire earnings from ore service, is unconstitutional; first, because the dock property in Wisconsin, which contributes to the earnings, is approximately fifty times as valuable per mile as the average mile of track in Minnesota; second, because the services performed in and about the dock and yards in Wisconsin are many times more elaborate and costly per mile than the service performed on an average mile of track in Minnesota; third, because the portion of the charge applied by the defendant to the single mile of dock service in Wisconsin was approximately fifty times as great per mile as the charge for an average mile of rail service in Minnesota; and fourth, because a portion of the earnings is fairly attributable to an ore-treating and storage process in Wisconsin, which was not a part of, nor incident to, transportation and not related to track mile-

age, and, therefore, not subject either to mileage prorate or to any other apportionment to Minnesota.

The method of assessment being one that tends to tax earnings and property in Wisconsin, the resulting tax necessarily violates the Federal Constitution.

It is not necessary to consider whether there are any equally valuable terminals in Minnesota on other lines of the defendant handling general traffic, or whether there is any off-setting under-assessment by Minnesota on defendant's earnings from general traffic. The State has offered no evidence of such an off-set; and an under-assessment in Minnesota would be no defense against an over-assessment on other property, particularly when located in Wisconsin. The investment in the Twin City Terminals in Minnesota cannot be compared with or offset against the value of the Wisconsin ore docks.

The Wisconsin docks are used exclusively for ore, and the total investment is chargeable 100% against the ore traffic. This traffic originates entirely on a limited number of mine spurs in Minnesota, and the total investment in these spurs has been credited to Minnesota in comparing her investment in ore facilities with that of Wisconsin.

The ore line is in effect a separate railroad. Its revenue constitutes 25% of the Great Northern interstate revenue taxable by Minnesota. Its earnings are in part attributable to a treating process which is not an incident of transportation. For these reasons, we are entitled to relief in this case, notwithstanding the fact that our attack upon the mileage prorate is confined to the ore line alone. Citing: *Pittsburgh, etc. Ry.* v. *Backus,* 154 U. S. 421; *Fargo* v. *Hart,* 193 U. S. 490; *Wallace* v. *Hines,* 253 U. S. 66; *Southern Ry.* v. *Kentucky,* 274 U. S. 76; *Philadelphia, etc. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, etc. Ry.* v. *Texas,* 210 U. S. 217; *Maine* v. *Grand Trunk*

*Ry. Co.*, 142 U. S. 217; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; *Pullman Co.* v. *Richardson*, 261 U. S. 330; *Oklahoma* v. *Wells Fargo*, 223 U. S. 298.

*Mr. G. A. Youngquist*, Attorney General of Minnesota, with whom *Mr. Patrick J. Ryan* was on the brief, for defendant in error and appellee.

Mr. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case is here both by writ of error and appeal. Appeal being the proper method, the writ of error (No. 106) will be dismissed.

The action was brought by the state to recover taxes for the years 1901 to 1912, inclusive. Judgment against the company was rendered by the trial court for the years 1903 to 1912, no recovery being allowed for 1901 or 1902. Upon appeal the state supreme court affirmed the judgment. 160 Minn. 515. A writ of error from this Court was dismissed for want of jurisdiction resulting from an insufficient setting forth and waiver of claim of a substantial federal constitutional question. 273 U. S. 658. Thereafter, the state supreme court vacated its judgment, granted a reargument upon the constitutional question, and again affirmed the trial court. 174 Minn. 3. The present appeal is from the judgment of the court below last described.

In Minnesota, by statute amended from time to time but substantially in effect since 1871 (see 1 Mason's Minnesota Statutes, 1927, §§ 2246, 2247), a tax, measured by gross earnings, is laid upon all railway companies, in lieu of all taxes upon all of their property within the state. As a basis for computing the tax, each railway company is required to report annually its gross earnings upon business done upon its lines wholly within the state and upon

interstate business in the proportion which the mileage within the state bears to the entire mileage of the railway over which such interstate business is done. The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state. The state supreme court has so held. And to the same effect see *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 452.

The attack upon the statute is not that it is bad upon its face, but that, as applied to the specific facts upon which the liability of the company in the present action was sustained, it imposes a tax in respect of earnings wholly referable to certain docks in Wisconsin and a short stretch of track immediately connected therewith, and, therefore, results in laying a tax upon property outside the State of Minnesota. The contention is that the statute as thus construed and applied constitutes a burden upon interstate commerce and also violates the due process of law and equal protection of the laws clauses of the Fourteenth Amendment. The facts follow.

Among the lines owned and operated by the railway company, directly or through its subsidiaries, amounting in all to more than 2,000 miles within the state, is a road 107 miles in length running from the Mesaba Iron Range in Minnesota to, and including as part thereof, the Wisconsin docks. Eighty-seven miles of the road are in Minnesota, and 20 miles including the docks are in Wisconsin. The principal business of the road is that of hauling ore from the mines at Mesaba to the docks. For this service the tariff provides a single charge per ton of ore transported, in which the dock service is absorbed without being separately specified. For the years in question, the railway company, in reporting the gross earnings assignable to the Minnesota part of the line as proportioned to the foregoing division of the mileage, first allocated to the docks and deducted, as compensation for dock services, amounts

ranging from 15 to 25 cents per ton of ore hauled. This was done upon the theory that in calculating the gross earnings the portions of the line in the two states should be considered entirely apart from the docks, and that the amounts thus allocated and deducted constituted earnings fairly attributable to the docks and the immediately connecting track alone. Taxes were computed and paid accordingly. Subsequently, the facts being disclosed, the state brought this action for additional taxes calculated upon the amounts thus allocated and deducted.

The constitutional contention was not pressed in the trial court. No finding pertinent to that inquiry was either asked or made. The question was raised by the answer, but waived in both courts below; and we so held. But for the action of the state supreme court in granting a reargument, it would not be here now. We agree with that court that it fairly cannot be found from the evidence that the mileage value of the Wisconsin part of the line, including the docks, was in fact greater than the Minnesota part of the line. The record contains some statements in respect of the cost of the docks and in respect of expenditures in road construction, but the showing is incomplete and leaves even the question of cost in large degree a subject for conjecture.

The evidence does not show the actual use value of either the Minnesota or the Wisconsin part of the road, or their relative values. If all the facts bearing upon the matter were revealed, they well might demonstrate not only that cost, even if proved, would not be a fair measure of the use value, but that the Minnesota part of the line, mile for mile, was equal in value to that of the Wisconsin portion with the docks included. Such evidence as the record contains tends to that conclusion rather than the contrary. The road, including the docks, is a unit. The charge for transportation of ore, including dock services, is a single charge. The entire ore traffic originates and

seems to be controlled in Minnesota; and the earnings from that source comparatively are very great, suggesting at least the probability of a special use value of the Minnesota part of the line. It is competent for the state to impose a tax upon the property of the company within the state and for that purpose to measure the value of such property in the way here provided. We find nothing in the record to indicate that the tax under consideration, plus that already collected, exceeds " what would be legitimate as an ordinary tax on the property valued as part of a going concern, [or is] relatively higher than the taxes on other kinds of property." *Pullman Co.* v. *Richardson,* 261 U. S. 330, 339.

Under these circumstances, upon principles established by numerous decisions of this Court, the tax is not open to challenge as an exaction in violation of the federal Constitution. *Pullman Co.* v. *Richardson, supra,* pp. 338–339; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335, 345; *Cudahy Packing Co.* v. *Minnesota, supra,* pp. 453–455, and cases cited.

*Judgment affirmed.*

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## RICE & ADAMS CORPORATION *v.* LATHROP.

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

No. 155. Argued January 11, 1929.—Decided February 18, 1929.

In a suit to enjoin infringement of a patent and for an accounting and damages, begun within a short time before the patent is to expire, the jurisdiction of the District Court to adjudicate the claim for monetary relief as a court of equity will not be divested by a denial of a preliminary injunction if the case be such that the court properly might either grant or refuse such injunction in the exercise of its discretion. P. 512.

24 F. (2d) 1021, affirmed.

CERTIORARI, 278 U. S. 585, to a decree of the Circuit Court of Appeals affirming a decree adjudging a patent

valid and infringed and referring the cause for determination of profits and damages. A preliminary injunction was denied by the District Court and the patent expired thereafter pending the suit. That court declined to transfer to the law docket. See 6 F. (2d) 91; 21 F. (2d) 124.

*Messrs. Charles J. Staples, Wm. P. Conely, Frederick G. Mitchell,* and *Wm. D. Cushman* submitted for petitioner.

They cited: *American Falls Co.* v. *Standard Co.,* 248 Fed. 487; *Clark* v. *Wooster,* 119 U. S. 322; *Diamond Co.* v. *Seus,* 159 Fed. 497; *Kennicott* v. *Bain,* 185 Fed. 520; *Leroy* v. *DeVry Corp'n,* 16 F. (2d) 18; *Root* v. *Railway Co.,* 105 U. S. 189; *Sly* v. *Central,* 201 Fed. 683; *Standard Co.* v. *Magrane,* 259 Fed. 793; *Tompkins* v. *International Paper Co.,* 183 Fed. 773; *Tompkins* v. *St. Regis Co.,* 236 Fed. 221; *Tubular Co.* v. *Mt. Vernon Co.,* 2 F. (2d) 982; *Van Raalt* v. *Schneck,* 159 Fed. 248; *Woodmanse* v. *Williams,* 68 Fed. 489; Jud. Code, § 267; Equity Rule 22.

*Mr. Joshua R. H. Potts,* with whom *Messrs. Eugene V. Clarke* and *Howard S. Laughlin* were on the brief, for respondent.

Mr. Justice Sutherland delivered the opinion of the Court.

The question here to be determined arose in a suit in equity by respondent against petitioner, brought in the federal district court for the Western District of New York, for infringement of a patent. The bill alleged repeated and continuing infringement of the patent by petitioner, preparation and readiness to continue such infringement, and that unless petitioner was restrained respondent would suffer great and irreparable damage, etc.

It was further alleged that in a prior suit for infringement, brought by respondent against the Bowman Dairy Company, the patent had been sustained as valid and infringed; that the defense to that suit was openly conducted by petitioner, who paid all expenses as well as the judgment rendered by the final decree; that such decree, therefore, became *res judicata* as against petitioner. The prayer was for an interlocutory as well as a perpetual injunction, and for an account to be taken of profits realized by petitioner and damages sustained by respondent.

At the time suit was brought, only 41 or 42 days remained before the expiration of the patent. Two days after beginning suit, respondent moved for a preliminary injunction. After a hearing upon affidavits, the motion was denied. The court thought no injury would result to respondent by a refusal to grant the injunction at that time; that infringement had ceased; that the responsibility of petitioner was unquestioned; and that the recovery of damages would be a sufficient protection for past infringement. Subsequently, a motion by petitioner to transfer the case to the law side of the court was made and denied. The grounds for the denial were stated in an opinion by the district judge, 6 F. (2d) 91, in the course of which he said:

" In the circumstances, plaintiff had a right, at the time this action was instituted, to commence in equity and to assert that right to an injunction existed. . . . I must therefore hold that the relief sought in the bill was grantable, and it was only denied by the court in the exercise of its discretion, . . ."

The case was then proceeded with as a suit in equity. Before the trial was entered upon, the patent in the meantime having expired, petitioner renewed its motion to transfer to the law docket, which was again denied. The

trial resulted in a decree for respondent, holding the patent to be valid and infringed, 21 F. (2d) 124; and this decree was affirmed by the court below on appeal without opinion. 24 F. (2d) 1021.

The sole question for our consideration is whether, after refusing the preliminary injunction, the district court was justified in retaining jurisdiction of the case as a suit in equity. We allowed the writ and brought the case here because of an alleged conflict in respect of that matter among the decisions of the circuit courts of appeal.

The question is very nearly set at rest by *Clark* v. *Wooster,* 119 U. S. 322. There, suit was brought to restrain a patent infringement and to recover profits and damages. The patent involved expired 15 days after the bill was filed. It did not appear whether an application for an interlocutory injunction was made, but under the rules of the court there was time before the expiration of the patent within which it could have been made. The final decree established the patent and its infringement, and a reference was made to a master to take and state an account. The jurisdiction of the trial court sitting as a court of equity was challenged. This Court sustained the jurisdiction and held that it was within the discretion of the trial court under the circumstances to retain the bill as it did. The opinion then proceeds (p. 325):

"It might have dismissed the bill, if it had deemed it inexpedient to grant an injunction; but that was a matter in its own sound discretion, and with that discretion it is not our province to interfere, unless it was exercised in a manner clearly illegal. We see no illegality in the manner of its exercise in this case. The jurisdiction had attached, and although, after it attached, the principal ground for issuing an injunction may have ceased to exist by the expiration of the patent, yet there might be other grounds for the writ arising from the possession by the defendants of folding guides illegally made or procured whilst the

patent was in force. The general allegations of the bill were sufficiently comprehensive to meet such a case. But even without that, if the case was one for equitable relief when the suit was instituted, the mere fact that the ground for such relief expired by the expiration of the patent, would not take away the jurisdiction, and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort. This has often been done in patent causes, and a large number of cases may be cited to that effect; and there is nothing in the decision in *Root* v. *Railway Co.,* 105 U. S. 189, to the contrary. *Cotton Tie Co.* v. *Simmons,* 106 U. S. 89; *Lake Shore, &c. Railway* v. *Car-Brake Co.,* 110 U. S. 229; *Consolidated Valve Co.* v. *Crosby Valve Co.,* 113 U. S. 157; *Thomson* v. *Wooster,* 114 U. S. 104."

And see *Beedle* v. *Bennett,* 122 U. S. 71; *Busch* v. *Jones,* 184 U. S. 598, 599–600.

The decisions of this Court upon the point are entirely harmonious. *Root* v. *Railway Co.,* referred to in the foregoing quotation, presents no exception. There, suit was brought long after the expiration of the patent. No ground for equitable jurisdiction properly could be alleged, for, plainly, none existed, and the bill was merely for an accounting of profits and damages, the remedy at law for which was complete. Accordingly, a decree dismissing the bill was affirmed. We deem it unnecessary to review the decisions in the several circuits thought to be in conflict.

In *Clark* v. *Wooster, supra,* when the bill was filed, the patent had 15 days to run; in the present case, 41 or 42 days remained. The only substantial difference between the two cases is that here an application for an interlocutory injunction was made and denied. But the bill stated a case for equitable relief, and the order denying the interlocutory injunction constituted no bar to a subsequent application upon changed conditions. 2 High on Injunctions, (4th Ed.) § 1586. While we see nothing to prevent

a retention of jurisdiction by the chancellor based upon that contingency, we do not rest upon that ground.

An interlocutory injunction, at least ordinarily, is not a matter of strict right; but the application is addressed to the sound discretion of the court. 1 High on Injunctions, (4th Ed.) §§ 11 and 937. And here the trial court denied the application, not because it would have been error to grant it, but in the exercise of its discretion, principally based upon a balancing of the relative conveniences and inconveniences which might result. This is made clear by the trial judge, who, interpreting his own action, expressly held that the relief sought was grantable but was only denied by the court in the exercise of its discretion. That the case was one for the exercise of discretion is plain. *Id.*, § 937; *Southwestern Brush Elec. L. & P. Co.* v. *Louisiana Elec. L. Co.*, 45 Fed. 893, 895–896; *Whitcomb* v. *Girard Coal Co.*, 47 Fed. 315, 317–318; *Rousso* v. *Barber*, 276 Fed. 552, 553. The order denying the injunction, therefore, was conclusive in an appellate court; and an order granting it would have been equally so. *Buffington* v. *Harvey*, 95 U. S. 99, 100.

As applied to the question under consideration, there is no sound reason for making a distinction between a failure to obtain an interlocutory injunction, because not asked for, and a like failure, because, though asked for, it was denied only in the exercise of a discretion which might have been rightfully exercised the other way. This was plainly recognized in the *Wooster* case, where it was said that if the trial court had deemed it *inexpedient* to grant an injunction it might have dismissed the bill, " but that was a matter in its own sound discretion," which would not be interfered with by this Court unless exercised in a manner clearly illegal. (Since the adoption of Equity Rule 22, the question for the court in the case supposed would be not whether to dismiss the bill but whether to transfer the suit to the law side of the court. *Twist* v. *Prairie Oil Co.*,

274 U. S. 684, 689.) The action of the trial court here in denying the motion to transfer was within its authority, and does not call for our interference. Jurisdiction of the court sitting in equity, having been rightfully invoked, was not lost either because the interlocutory injunction was denied in the exercise of judicial discretion or by the expiration of the patent pending final decree. This conclusion finds support in the principle that "a court of equity ought to do justice completely and not by halves," and to this end, having properly acquired jurisdiction of the cause for any purpose, it will ordinarily retain jurisdiction for all purposes, including the determination of legal rights that otherwise would fall within the exclusive authority of a court of law. *Greene* v. *Louis. & Interurban R. R. Co.,* 244 U. S. 499, 520; *McGowan* v. *Parish,* 237 U. S. 285, 296; *Camp* v. *Boyd,* 229 U. S. 530, 551–552.

*Decree affirmed.*

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## FROST, DOING BUSINESS UNDER THE NAME OF MITCHELL GIN COMPANY, *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL.

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

No. 60. Argued November 26, 1928.—Decided February 18, 1929.

1. By the statutes of Oklahoma, cotton gins operated for the ginning of seed cotton for the public for profit are declared to be public utilities in a public business, and no one may engage in the business without first securing a permit from a public commission, which is empowered to regulate the business and its rates and charges, as in the case of transportation and transmission companies. *Held:* That the right of one who has complied with the statutes and secured his permit is not a mere license, but a franchise granted by the State in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the Fourteenth Amendment. P. 519.

2. While the franchise thus acquired does not preclude the State from making similar valid grants to others, it is exclusive against attempts to operate a competing gin without a permit or under a void permit, in either of which events the owner may resort to a court of equity to restrain the illegal operation as an invasion of his property rights, if it threaten an impairment of his business. P. 521.
3. An individual who obtained his permit to operate a cotton gin upon showing a public necessity therefor as required by the statute, *held* entitled to an injunction restraining the state commission from granting a permit to a corporation without such a showing under a separable provision of the statute violating the equal protection clause of the Fourteenth Amendment. *Id.*
4. A state statute regulating the business of ginning cotton for the general public for profit, which permits an individual to engage in such business only upon his first showing a public necessity therefor, but allows a corporation to engage in the same business, in the same locality, without such showing, discriminates against the individual in violation of the equal protection clause. The classification attempted is essentially arbitrary because based upon no real or substantial differences reasonably related to the subject of the legislation. P. 521.
5. A co-operative ginning corporation formed under Oklahoma Comp. Stats. 1921, § 5637, *et seq.*, having a capital stock, which, up to a certain amount, may be subscribed for by anyone; which is allowed to do business for others than its members, and to make profits and declare dividends, not exceeding 8% per annum, and to apportion the remainder of its earnings among its members ratably upon the amount of products sold by them to the corporation, is not a mutual association. P. 523.
6. A proviso added to an existing statutory provision by a subsequent legislature, and the effect of which if it were part of the original enactment would be to render the whole unconstitutional, may be treated as a separate nullity, allowing the original to stand. P. 525.
7. In such case, one who sought and obtained property rights under the original and valid part of the statute, is not estopped from attacking the proviso. P. 527.

26 F. (2d) 508, reversed.

Appeal from a final decree of the District Court, of three judges, dismissing a bill to enjoin the Corporation

Commission of Oklahoma from issuing to a corporation a license to operate a cotton gin, and to enjoin the corporation from establishing and operating one. At an earlier stage there was an order denying a preliminary injunction, which was affirmed by this Court, 274 U. S. 719.

*Messrs. Robert M. Rainey* and *Streeter B. Flynn,* with whom *Mr. Calvin Jones* was on the brief, for appellant.

*Mr. E. S. Ratliff,* with whom *Messrs. Edwin B. Dabney,* Attorney General of Oklahoma, and *J. D. Holland* were on the brief, for appellees.

Mr. Justice Sutherland delivered the opinion of the Court.

Appellant owns a cotton ginning business in the city of Durant, Oklahoma, which he operates under a permit from the State Corporation Commission. By a statute of Oklahoma, originally passed in 1915 and amended from time to time thereafter, cotton gins are declared to be public utilities and their operation for the purpose of ginning seed cotton to be a public business. Comp. Stats. 1921, § 3712. The commission is empowered to fix their charges and to regulate and control them in other respects. § 3715. No gin can be operated without a license from the commission, and in order to secure such license there must be a satisfactory showing of public necessity. § 3714 as amended by c. 109, Session Laws, 1925. The only substantial amendment to this section made by the act of 1925 is to add the proviso: " provided, that on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred (100) citizens and tax payers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

By an act of the State Legislature passed in 1917 (Comp. Stats. 1921, § 5599) co-operative agricultural or

horticultural associations not having capital stock or being conducted for profit, may be formed for the purpose of mutual help by persons engaged in agriculture or horticulture. Under a statute passed in 1919 (Comp. Stats. 1921, § 5637, *et seq.*) ten or more persons may form a corporation for the purpose of conducting, among others, an agricultural or horticultural business upon a co-operative plan. A corporation thus formed is authorized to issue capital stock to be sold at not less than its par value. The number of shares which may be held by one person, firm or corporation is limited. Dividends may be declared by the directors at a rate not to exceed eight per cent. per annum. Provision is made for setting aside a surplus or reserve fund; and five per cent. may be set aside for educational purposes. The remainder of the profits of the corporation must be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members and the amounts of the purchases of members from the corporation; but the corporation may adopt by-laws providing for the apportionment of such profits in part to non-members upon the amounts of their purchases and sales from or to the corporation.

The Durant Co-operative Gin Company, one of the appellees, was organized in 1926 under the act of 1919. After its incorporation, the company made an application to the commission for a permit to establish a cotton gin at Durant, accompanying its application with a petition signed by 100 citizens and taxpayers, as required by the statutory proviso above quoted. Appellant protested in writing against the granting of such permit and there was a hearing. The commission, at the hearing, rejected an offer to show that there was no public necessity for the establishment of an additional gin at Durant, and held that the proviso made it mandatory to grant the permit applied for without regard to necessity. Thereupon ap-

pellant brought this suit to enjoin the commission from issuing the permit prayed for and to enjoin the Durant company from the establishment of a cotton gin at Durant, upon the ground that the proviso, as construed and applied by the commission (see *Mont. Bank* v. *Yellowstone County,* 276 U. S. 499, 504), was invalid as contravening the due process and equal protection of the law clauses of the Fourteenth Amendment. The court below, consisting of three judges under § 266 Judicial Code, denied the prayer for an injunction and entered a final decree dismissing the bill. 26 F. (2d) 508.

1. We first consider the preliminary contention made on behalf of appellees that appellant has no property right to be affected by operations of the Durant company and, therefore, no standing to invoke the provisions of the Fourteenth Amendment or to appeal to a court of equity.

It already appears that cotton gins are declared by the Oklahoma statute to be public utilities and their operation for the purpose of ginning seed cotton to be public business. No one can operate a cotton gin for such purpose without securing a permit from the commission. In their regulation and control, the commission is given the same authority which it has in respect of transportation and transmission companies, and the same power to fix rates, charges and regulations. Comp. Stats. 1921, §§ 3712, 3713, 3715. Under § 3714 as amended, *supra* (laying the proviso out of consideration for the moment) the commission may deny a permit for the operation of a gin where there is no public necessity for it, and may authorize a new ginning plant only after a showing is made that such plant is a needed utility. Both parties definitely concede the validity of these provisions, and, for present purposes at least, we accept that view.

It follows that the right to operate a gin and to collect tolls therefor, as provided by the Oklahoma statute, is not

a mere license, but a franchise, granted by the state in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the Fourteenth Amendment. See *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 9; *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 40–41; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328, 329; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 64–66; *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 90–91; *McPhee & McGinnity Co.* v. *Union Pac. R. Co.*, 158 Fed. 5, 10–11.

In *California* v. *Pacific Railroad Co., supra*, pp. 40–41, a franchise is defined as " a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. . . . No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. . . . The list might be continued indefinitely."

Specifically, the foregoing authorities establish that the right to supply gas or water to a municipality and its inhabitants, the right to carry on the business of a telephone system, to operate a railroad, a street railway, city water works or gas works, to build a bridge, operate a ferry, and to collect tolls therefor, are franchises. And these are but illustrations of a more comprehensive list, from which it is difficult, upon any conceivable ground, to exclude a cotton gin, declared by statute to be a public utility engaged in a public business, the operation of which is precluded without a permit from a state governmental agency, and which is subject to the same authority as that exercised over transportation and transmission companies in respect

of rates, charges and regulations. Under these conditions, to engage in the business is not a matter of common right, but a privilege, the exercise of which, except in virtue of a public grant, would be in derogation of the state's power. Such a privilege, by every legitimate test, is a franchise.

Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights. 6 Pomeroy's Equity Jurisprudence, 3d ed., (2 Equitable Remedies) §§ 583, 584; *People's Transit Co.* v. *Henshaw,* 20 F. (2d) 87, 90; *Bartlesville El. L. & P. Co.* v. *Bartlesville I. R. Co.,* 26 Okla. 453; *Patterson* v. *Wollmann,* 5 N. D. 608, 611; *Millville Gas Co.* v. *Vineland L. & P. Co.,* 72 N. J. Eq. 305, 307. The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law.

If the proviso dispensing with a showing of public necessity on the part of the Durant and similar companies is invalid as claimed, the foregoing principles afford a sufficient basis for the maintenance of the present suit, against not only the Durant company, but the members of the commission who threaten to issue a permit for the establishment of a new gin by that company without a showing of public necessity.

2. Is, then, the effect of the proviso to deny appellant the equal protection of the laws within the meaning of the Fourteenth Amendment? As the proviso was construed

and applied by the commission and by the court below, its effect is to relieve all corporations organized under the act of 1919 from an onerous restriction upon the right to engage in a public business which is imposed by the statute upon appellant and other individuals, as well as corporations organized under general law, engaging in such business. That a greater burden thereby is laid upon the latter than upon the former is clear. Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. *Arkansas Gas Co.* v. *Railroad Comm.*, 261 U. S. 379, 384, and cases cited.

The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37. This Court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. *Quaker City Cab Co.* v. *Penna.*, 277 U. S. 389, 400; *Kentucky Corp'n* v. *Paramount Exchange*, 262 U. S. 544, 550; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 154. The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, "'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415; *Air-way Corp.* v. *Day*, 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240. That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable

and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 155." *Louisville Gas Co.* v. *Coleman, supra,* p. 37.

By the terms of the statute here under consideration, appellant, an individual, is forbidden to engage in business unless he can first show a public necessity in the locality for it; while corporations organized under the act of 1919, however numerous, may engage in the same business in the same locality no matter how extensively the public necessity may be exceeded. That the immunity thus granted to the corporation is one which bears injuriously against the individual does not admit of doubt, since by multiplying plants without regard to necessity the effect well may be to deprive him of business which he would otherwise obtain if the substantive provision of the statute were enforced.

It is important to bear in mind that the Durant company was not organized under the act of 1917, but under that of 1919. The former authorizes the formation of an association for mutual help, without capital stock, not conducted for profit, and restricted to the business of its own members, except that it may act as agent to sell farm products and buy farm supplies for a non-member, but as a condition may impose upon him a liability, not exceeding that of a member, for the contracts, debts and engagements of the association, such services to be performed at the actual cost thereof including a pro rata part of the overhead expenses. Comp. Stats. 1921, § 5608. Under this exception, the difference between a non-member and a member is not of such significance or the authority conferred of such scope as to have any material effect upon the general purposes or character of the corporation as a mutual association. As applied to corporations organized under the 1917 act, we have no reason to doubt that the

classification created by the proviso might properly be upheld. *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71. A corporation organized under the act of 1919, however, has capital stock, which, up to a certain amount, may be subscribed for by any person, firm or corporation; is allowed to do business for others; to make profits and declare dividends, not exceeding eight per cent. per annum; and to apportion the remainder of its earnings among its members ratably upon the amount of products sold by them to the corporation. Such a corporation is in no sense a mutual association. Like its individual competitor, it does business with the general public for the sole purpose of making money. Its members need not even be cotton growers. They may be—all or any of them—bankers or merchants or capitalists having no interest in the business differing in any respect from that of the members of an ordinary corporation. The differences relied upon to justify the classification are, for that purpose, without substance. The provision for paying a portion of the profits to members or, if so determined, to non-members, based upon the amounts of their sales to or purchases from the corporation, is a device which, without special statutory authority, may be and often is resorted to by ordinary corporations for the purpose of securing business. As a basis for the classification attempted, it lacks both relevancy and substance. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbi-

trary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation. *Power Co.* v. *Saunders,* 274 U. S. 490, 493; *Louisville Gas Co.* v. *Coleman, supra,* p. 39; *Quaker City Cab Co.* v. *Penna., supra,* p. 402.

3. The further question must be answered: Are the proviso and the substantive provisions which it qualifies separable, so that the latter may stand although the former has fallen? If the answer be in the negative, that is to say, if the parts of the statute be held to be inseparable, the decree below should be affirmed, since, in that event, although the proviso be bad, the inequality created by it would disappear with the fall of the entire statute and no basis for equitable relief would remain. But for reasons now to be stated we are of opinion that the substantive provisions of the statute are severable and may stand independently of the proviso.

If § 3714 *as originally passed* had contained the proviso, the effect would be to render the entire section invalid, because then the result of upholding the substantive part of the section notwithstanding the invalidity of the proviso would have been to make applicable to the Durant company and others similarly organized, the requirement in respect of a showing of public necessity, although the legislative will contemporaneously expressed as part of the same act was to the contrary. In this state of the matter, to hold otherwise would be to extend the scope of the law in that regard so as to embrace corporations which the legislature passing the statute had, by its very terms, expressly excluded, and thus to go in the face of the rule that where the excepting proviso is found unconstitutional the substantive provisions which it qualifies cannot stand. *Davis* v. *Wallace,* 257 U. S. 478, 484. "For all the purposes of construction it [the proviso] is to be regarded as part of the act. The *meaning* of the legislature must be gathered from all they have said, as well from that which

is ineffective for want of power, as from that which is authorized by law." *State ex rel. McNeal* v. *Dombaugh,* 20 Ohio St. 167, 174–175.

But the proviso here in question was not in the original section. It was added by way of amendment many years after the original section was enacted. If valid, its practical effect would be to repeal by implication the requirement of the existing statute in respect of public necessity insofar as the Durant and similar corporations are concerned. But since the amendment is void for unconstitutionality, it cannot be given that effect, "because an existing statute cannot be recalled or restricted by anything short of a constitutional enactment." *Davis* v. *Wallace, supra,* p. 485.

To this effect also is *Truax* v. *Corrigan,* 257 U. S. 312, 341–342. In that case there had been in force in Arizona, both as a state and a territory, for many years, a general statute granting authority to judges of the courts of first instance to issue writs of injunction. The statute was amended so as to except from its operation certain cases between employers and employees. The amendment was declared invalid as denying the equal protection of the laws; but the general provision of the statute as it originally stood was upheld upon the ground that it had been in force for many years and that an exception in the form of an unconstitutional amendment could not be given the effect of repealing it. And see *Waters-Pierce Oil Company* v. *Texas,* 177 U. S. 28, 47.

Here it is conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the legislature which enacted it. Without an express repeal, a different legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and, therefore, powerless to work any change in

the existing statute, that statute must stand as the only valid expression of the legislative intent.

In passing upon a similar situation, the Supreme Court of Michigan, speaking through Judge Cooley, in *Campau* v. *Detroit,* 14 Mich. 276, 286, said: "But nothing can come in conflict with a nullity, and nothing is therefore repealed by this act on the ground solely of its being inconsistent with a section of this law which is entirely unconstitutional and void." In *Carr, Auditor,* v. *State ex rel. Coetlosquet,* 127 Ind. 204, 215, the state supreme court disposed of the same point in these words: "We suppose it clear that no law can be changed or repealed by a subsequent act which is void because unconstitutional. . . . An act which violates the Constitution has no power and can, of course, neither build up nor tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality." See also *People* v. *Butler Street Foundry,* 201 Ill. 236, 257–259; *People* v. *Fox,* 294 Ill. 263, 269; *McAllister* v. *Hamlin,* 83 Cal. 361, 365; *State ex rel. Crouse* v. *Mills,* 231 Mo. 493, 498–499; *Ex parte Davis,* 21 Fed. 396, 397. The question is not affected by the fact that the amendment was accomplished by inserting the proviso in the body of the original section and reenacting the whole at length. *Truax* v. *Corrigan, supra; People* v. *Butler Street Foundry, supra,* pp. 258–259; *State ex rel. Crouse* v. *Mills, supra,* p. 499.

4. It is true that appellant applied for and obtained a permit to do business under the statute to which it was sought to attach the proviso in question. Is he, thereby, precluded from assailing the proviso upon the ground that one who claims the benefit of a statute may not assert its invalidity? It is not open to question that one who has acquired rights of property necessarily based upon a statute may not attack that statute as unconstitutional, for he cannot both assail it and rely upon it in the same proceeding. *Hurley*

v. *Commission of Fisheries*, 257 U. S. 223, 225. But here the proviso under attack, having been adopted by a subsequent act and being invalid, had no effect, as we have already said, upon the provisions of the statute. As applied to this case, it began and ended as a futile attempt by the legislature to bring about a change in the law which a previous legislature had enacted. For this purpose, and as construed and applied below, it was a nullity, wholly "without force or vitality," leaving the provisions of the existing statute unchanged. It necessarily results that appellant's rights came into being and owed their continued existence wholly to that statute, disconnected from the ineffective proviso, and it is that statute, so disconnected, which measures the extent to which he may enjoy and defend such rights. In seeking and obtaining the benefits of the statute, appellant proceeded without regard to the proviso, neither affirming nor denying nor in contemplation of law acquiescing in its validity; and his action cannot be made a basis upon which to rest a successful claim of an estoppel *in pais* or of a waiver of the right to maintain the constitutional challenge here made.

We conclude: That the proviso is unconstitutional as contravening the equal protection clause of the Fourteenth Amendment; that the remainder of the statute is separable and affords the sole rule in respect of the questions here to be determined; that the corporation commission is without power to issue permits to corporations organized under the act of 1919 without a showing of public necessity; that the Durant company is without authority to do business in the absence of a permit thus issued; and that appellant is entitled to the relief for which he prays.

*Decree reversed.*

Mr. JUSTICE BRANDEIS, dissenting.

Under § 3714 of Oklahoma Compiled Statutes 1921, as amended by c. 109 of the Laws of 1925, Frost secured

from the Corporation Commission a license to operate a cotton gin in the City of Durant.* Later, the Durant Co-operative Gin Company applied to the Commission under that statute for a license to operate a gin in the same city. In support of its application, it presented a certificate of organization under Chapter 147 of the laws of 1919 entitled "An Act providing for the organization and regulation of cooperative corporations" (Oklahoma Compiled Statutes 1921, Secs. 5637–5652), and a petition signed by one hundred citizens and taxpayers of that community requesting that the license be issued. Frost objected to the granting of a license, on the ground that there was no necessity for an additional gin in that city. The Commission ruled that, upon the showing made, it was obliged by § 3714 as so amended to issue a license, without hearing evidence as to necessity; and indicated its purpose to issue the license. Thereupon, Frost brought this suit under § 266 of the Judicial Code against the Commission, the Attorney General and the Durant Company to enjoin granting the license. A restraining order issued upon the filing of the bill.

The case was first heard by three judges upon application for an interlocutory injunction and upon defendants' motion to dismiss. Frost contended that his license had conferred a franchise; that from it there arose in him the property right to be protected against further local competition, unless existing ginning facilities were inadequate; that in the absence of a showing of necessity com-

* The stipulation of facts states: "That W. A. Frost is engaged in the cotton ginning business under the name of Mitchell Gin Company and owns and operates a cotton gin in the City of Durant, Oklahoma; that said gin is operated under and by virtue of license duly issued by the Corporation Commission of the State of Oklahoma under and by virtue of Article 40, Chapter 7, Compiled Oklahoma Statutes, 1921, as amended by Chapter 191, Session Laws of Oklahoma of 1923 and by Chapter 109 of the Session Laws of Oklahoma of 1925."

petition by the Durant Company would be illegal; and that to issue a license which authorized such competition would take Frost's property without due process of law and deny to him the equal protection of the law. The District Court denied both the injunction and the motion to dismiss; and it dissolved the restraining order. Upon direct appeal by Frost, this Court affirmed the interlocutory decree *per curiam* in *Frost* v. *Corporation Commission,* 274 U. S. 719, on the authority of *Chicago Great Western Ry. Co.* v. *Kendall,* 266 U. S. 94, 100. Thereupon, the facts being stipulated, the case was submitted in the District Court on final hearing to the same judges; and a decree was entered dismissing the bill, 26 F. (2d) 508. This appeal presents the same questions which were argued on the appeal from the interlocutory decree.

Under the Oklahoma Act of 1907 cotton gins were held subject to regulation by the Corporation Commission.[1] In 1915, the Legislature declared them public utilities and restriction of competition was introduced by prohibiting operation of a gin without a license from the Commission. That statute required that a license issue for proper gins already established, but directed that none should issue for a new gin in any community already adequately supplied, except upon "the presentation of a petition signed by not less than fifty farmer petitioners of the immediate vicinity." Session Laws 1915, c. 176 (Oklahoma Compiled Statutes 1921, §§ 3712–3718). Chapter 191 of the Session Laws of 1923 struck out of § 3714 the provision referring to farmers. But in 1925 there was inserted in lieu thereof the proviso "that on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred (100)

[1] Session Laws 1907–08, p. 756 (Comp. Stat. 1921, § 11032). See *Oklahoma Gin Co.* v. *State,* 158 Pac. 629; *Mascho* v. *Chandler Cotton Oil Co.,* 7 Annual Corp. Comm. Report 370. Compare *Harriss-Irby Cotton Co.* v. *State,* 31 Okla. 603.

citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin." Session Laws 1925, c. 109. In 1926, the Supreme Court of Oklahoma held in *Choctaw Cotton Oil Co.* v. *Corporation Commission,* 121 Okla. 51, 52, that a corporation organized under Chapter 147 of the Laws of 1919 was run co-operatively within the meaning of § 3714 as so amended.

The attack upon the statute is rested mainly upon the contention that by requiring issuance of a license to so-called co-operative corporations organized under the law of 1919, the statute as amended in 1925 creates an arbitrary classification. The classification is said to be arbitary, because the differences between such concerns and commercial corporations or individuals engaged in the same business are in this connection not material. The contention rests, I think, upon misapprehensions of fact. The differences are vital; and the classification is a reasonable one. Before stating why I think so, other grounds for affirming the judgment should be mentioned.

*First.* The bill alleges, and the parties have stipulated, that Frost was licensed under § 3714 of the Compiled Statutes as amended by the Act of 1925. The stipulation does not show that prior to the amendment he held any license. His alleged property right to conditional immunity from competition rests wholly on the statute now challenged. It is settled that one cannot in the same proceeding both rely upon a statute and assail it. *Hurley* v. *Commission of Fisheries,* 257 U. S. 223, 225. Compare *Great Falls Mfg. Co.* v. *Atty. General,* 124 U. S. 581, 598–599; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407, 411–412; *St. Louis Co.* v. *Prendergast Co.,* 260 U. S. 469, 472–473; *Buck* v. *Kuykendall,* 267 U. S. 307, 316; *Booth Fisheries Co.* v. *Industrial Commission,* 271 U. S. 208, 211; *United Fuel Gas Co.* v. *Railroad Commission,* decided January 2, 1929, *ante,* p. 300. This established rule requires affirmance of the judgment below.

*Second.* Frost claims that to grant a license to the Durant Company without a showing of public necessity would involve taking his property without due process. The only property which he asserts would be so taken is the alleged right to be immune from the competition of persons operating without a valid license. But for the statute, he would obviously be subject to competition from anyone. Whether the license issued to him under § 3714 conferred upon him the property right claimed is a question of statutory construction—and thus, ordinarily, a question of state law. "Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the State." *Hebert* v. *Louisiana,* 272 U. S. 312, 316. In the absence of a decision of the question by the highest court of the State, this Court would be obliged to construe the statute; and in doing so it might be aided by consideration of the decisions of courts of other States dealing with like statutes. But the Supreme Court of Oklahoma has decided the precise question in *Choctaw Cotton Oil Co.* v. *Corporation Commission,* 121 Okla. 51, 52. It held that a license under § 3714 does not confer the property right claimed, saying: "What property rights are taken from petitioners by licensing another gin, under the foregoing proviso? What rights of any kind could the licensing of another gin affect? It does not disturb the property of petitioners, nor prevent the free operation of their gins. The only right which could be affected by such license is the right of petitioners to operate their gin without competition, a right which is not secured to them either by the state or federal Constitution, hence the contention as to taking their property without due process of law cannot be sustained." As no property right of Frost is invaded—his suit must fail, however objectionable the statute may be.

*Third.* Frost claims that to issue a license to the Durant Company without a showing of necessity would

violate the equality clause. Whether the license was issued to Frost upon a showing of necessity does not appear. The mere granting of a license to the Durant Company later on different, and perhaps easier, terms would not violate Frost's constitutional right to equality, since he has already secured his license under the statute as written. The fact that someone else similarly situated may hereafter be refused a license, and would be thereby discriminated against, is obviously not of legal significance here. *Southern Railway Co.* v. *King,* 217 U. S. 524; *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571; *Arkadelphia Co.* v. *St. Louis S. W. Ry Co.,* 249 U. S. 134, 149; *Liberty Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71.

*Fourth.* Frost claims on another ground that his constitutional rights have been violated. He says that what the statute and the Supreme Court of Oklahoma call a license is in law a franchise; that a franchise is a contract; that where a constitutional question is raised this Court must determine for itself what the terms of a contract are; and that this franchise should be construed as conferring the right to the conditional immunity from competition which he claims. None of the cases cited lend support to the contention that the license here issued is a franchise.[2] They hold merely that subordinate political

[2] *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, 9; *California* v. *Pacific Railroad Co.,* 127 U. S. 1, 40–41; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 328–329; *Owensboro* v. *Cumberland Telephone Co.,* 230 U. S. 58, 64–66; *Boise Water Co.* v. *Boise City,* 230 U. S. 84, 90–91; *McPhee & McGinnity Co.* v. *Union Pac. R. Co.,* 158 Fed. 5, 10–11. *California* v. *Pacific Railroad Co.,* 127 U. S. 1, 40–41, merely describes the types of enterprises which may be made the subject of a franchise. The enterprises mentioned are all of the type which require the use of public property so that the permission of the State is required to condone what would otherwise be a trespass. Further, it is not maintained that the State is restricted to the issuance of franchises for the carrying on of such callings.

bodies, as well as a legislature, may grant franchises; and that violations of franchise rights are remediable, whoever the transgressor. Moreover, the limited immunity from competition claimed as an incident of the license was obviously terminable at any moment. Compare *Louisville Bridge Co.* v. *United States,* 242 U. S. 409. It was within the power of the legislature, at any time after the granting of Frost's license, to abrogate the requirement of a certificate of necessity, thus opening the business to the competition of all comers. It is difficult to see how the lesser enlargement of the possibilities of competition by a license granted under the 1925 proviso could operate as a denial of constitutional rights.

It must also be borne in mind that a franchise to operate a public utility is not like the general right to engage in a lawful business, part of the liberty of the citizen; that it is a special privilege which does not belong to citizens generally; that the State may, in the exercise of its police power, make that a franchise or special privilege which at common law was a business open to all;[3] that a special privilege is conferred by the State upon selected persons; that it is of the essence of a special privilege that the franchise may be granted or withheld at the pleasure of the State; that it may be granted to corporations only, thus excluding all individuals;[4] and that the Federal Constitution imposes no limits upon the State's discretion in this respect.[5] In *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650, the plaintiff,

[3] *Noble State Bank* v. *Haskell,* 219 U. S. 104, 112–113.

[4] *Shallenberger* v. *First State Bank,* 219 U. S. 114; *Dillingham* v. *McLaughlin,* 264 U. S. 370. Compare *Assaria State Bank* v. *Dolley,* 219 U. S. 121; *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, 416.

[5] *Bank of Augusta* v. *Earle,* 13 Pet. 519, 595; *People's Railroad* v. *Memphis Railroad,* 10 Wall. 38, 51; *California* v. *Pacific Railroad Co.,* 127 U. S. 1, 40–41; *Denver* v. *New York Trust Co.,* 229 U. S. 123, 141–142.

claiming an exclusive franchise, sought to enjoin the competition of the defendant. The Court said (p. 659), "'The right to operate gas-works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to . . . carry on the business of lighting the streets . . . without special authority from the sovereign. It is a franchise belonging to the State, and, in the exercise of the police power, the State could carry on the business itself or select one or several agents to do so.'" The demurrer to the bill was dismissed. In *New Orleans Water-Works Co.* v. *Rivers,* 115 U. S. 674, on similar facts in deciding for the plaintiff, the Court said (p. 682), "The restriction, imposed by the contract upon the use by others than plaintiff of the public streets and ways, for such purposes, is not one of which the appellee can complain. He was not thereby restrained of any freedom or liberty he had before . . ." One who would strike down a statute must show not only that he is affected by it, but that as applied to him, the statute exceeds the power of the State. This rule, acted upon as early as *Austin* v. *The Aldermen,* 7 Wall. 694, and definitely stated in *Supervisors* v. *Stanley,* 105 U. S. 305, 314, has been consistently followed since that time.

*Fifth.* Frost's claim that the Act of 1925 discriminates unjustifiably is not sound. The claim rests wholly on the fact that individuals and ordinary corporations must show inadequacy of existing facilities, while co-operatives organized under the Act of 1919 may secure a license without making such a showing, if the application is supported by a petition of one hundred persons who are citizens and taxpayers in the community. It is settled that to provide specifically for peculiar needs of farmers or producers is a reasonable basis of classification, *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *Liberty Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71. And it is conceded that the classification made by the Act of

1925 would be reasonable if it had been limited to co-operatives organized under Chapter 22 of the Laws of 1917. Thus the contention that the classification is arbitrary is directed only to co-operatives organized under the law of 1919. It rests upon two erroneous assumptions: (1) That co-operatives organized under the law of 1919 are substantially unlike those organized under Chapter 22 of the Laws of 1917; and (2) that there are between co-operative corporations under the law of 1919 and commercial corporations no substantial differences having reasonable relation to the subject dealt with by the gin legislation.

The assertion is that co-operatives organized under the law of 1919, being stock companies, do business with the general public for the sole purpose of making money, as do individual or other corporate competitors; whereas co-operatives organized under the law of 1917 are "for mutual help, without capital stock, not conducted for profit, and restricted to the business of their own members." The fact is that these two types of co-operative corporations—the stock and the nonstock—differ from one another only in a few details, which are without significance in this connection; that both are instrumentalities commonly employed to promote and effect co-operation among farmers; that the two serve the same purpose; and that both differ vitally from commercial corporations. The farmers seek through both to secure a more efficient system of production and distribution and a more equitable allocation of benefits. But this is not their only purpose. Besides promoting the financial advantage of the participating farmers, they seek through co-operation to socialize their interests—to require an equitable assumption of responsibilities while assuring an equitable distribution of benefits. Their aim is economic democracy on lines of liberty, equality and fraternity. To accomplish these objectives, both types of co-operative corporations provide for excluding capitalist control. As means to this

end, both provide for restriction of voting privileges, for curtailment of return on capital and for distribution of gains or savings through patronage dividends or equivalent devices.

In order to ensure economic democracy, the Oklahoma Act of 1919 prevents any person from becoming a shareholder without the consent of the board of directors. It limits the amount of stock which one person may hold to $500. And it limits the voting power of a shareholder to one vote. Thus, in the Durant Company, the holder of a single share of the par value of $10 has as much voting power as the holder of 50 shares. The Act further discourages entrance of mere capitalists into the co-operative by provisions which permit five per cent of the profits to be set aside for educational purposes; which require ten per cent of the profits to be set aside as a reserve fund, until such fund shall equal at least fifty per cent of the capital stock; which limit the annual dividends on stock to eight per cent; and which require that the rest of the year's profits be distributed as patronage dividends to members, except so far as the directors may apportion them to non-members.

The provisions for the exclusion of capitalist control of the nonstock type of co-operative organized under the Oklahoma Act of 1917 do not differ materially in character from those in the 1919 Act. The nonstock co-operative also may reject applicants for membership; and no member may have more than one vote. This type of co-operative is called a non-profit organization; but the term is merely one of art, indicating the manner in which the financial advantage is distributed. This type also is organized and conducted for the financial benefit of its members and requires capital with which to conduct its business. In the stock type the capital is obtained by the issue of capital stock, and members are not subjected to personal liability for the corporation's business obliga-

tions. In the nonstock type the capital is obtained partly from membership fees, partly through dues or assessments and partly through loans from members or others. And for fixed capital it substitutes in part personal liability of members for the corporation's obligations.[6] In the stock type there are *eo nomine* dividends on capital and patronage dividends. In the nonstock type the financial benefit is distributed by way of interest on loans and refunds of fees, dues and assessments. And all funds acquired through the co-operative's operations, which are in excess of the amount desirable for a "working fund," are to be distributed as refunds of fees, dues and assesments. Both acts allow business to be done for non-members; and though the nonstock association may, it is not required, to impose obligations on the non-member for the liability of the association. Thus, for the purposes here relevant, there is no essential difference between the two types of co-operatives.

The Oklahoma law of 1919 follows closely in its provisions the legislation enacted earlier in other States with a view to furthering farmers' co-operation. The first emergence of any settled policy as to the means to be employed for effecting co-operation among farmers in the United States came in 1875 when, at the annual convention of the National Grange of the Patrons of Husbandry, recommendations were formally adopted endorsing "Rochdale principles"; and a form of rules for the guidance of prospective organizers was promulgated. These provided for stock companies with shares of $5 each; that no member be allowed to hold more than 100 shares; that ownership

[6] Section 10 makes each member assume "original liability, for his per capita share of all contracts, debts, and engagements of the association existing at the time he becomes a member and created during his membership"; and "additional liability" for his pro rata share of the liability of any other member, whose liability may become uncollectible.

of a single share shall constitute the holder a member of the association; that only 8 per cent "interest" shall be paid on the capital; that the balance of the profits shall go "either to increase the capital or business of the association, or for any educational or provident purposes authorized by the asociation," or be distributed as patronage dividends; and that the patronage dividends be distributed among customers, except that non-members should receive only one-half the proportion of members.[7]

The need of laws framed specifically for incorporating farmers' co-operatives being recognized, Massachusetts enacted in 1866 the necessary legislation by a general law which differed materially from that under which commercial organizations were formed. The statute provided for co-operatives having capital stock.[8] Before 1900, ten other States had enacted laws of like character.[9] After

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[7] Nourse, The Legal Status of Agricultural Co-operation (1927), *passim*, particularly pp. 11, 21, 35–36.

[8] Mass. St., 1866, c. 290. The type was called Rochdale because it was this type of organization which the pioneers of the present co-operation among English speaking peoples used there. This law which served as a pattern for most of the co-operative incorporation laws passed by other States prior to 1900 contained fewer of the safeguards to assure preservation of co-operative principles than does the Oklahoma Act of 1919. No limitation was placed on the quantum of stock per member or on the voting privileges; and no restriction was placed on the amount of dividends to be paid on stock, the distribution of profits being left entirely to the by-laws and to the directors, save for the requirement that a portion of the earnings go into a reserve fund.

[9] Pennsylvania, Public Laws 1868, Act 62; Minnesota, Laws 1870, c. 29; Michigan, Acts 1875, No. 75, amending Act 288 of 1865 so as to include agricultural co-operatives; Connecticut, Laws 1875, c. 62; California, Laws 1878, p. 883; New Jersey, Laws 1884, p. 63; Ohio, Laws 1884, p. 54; Kansas, Laws 1887, c. 116; Wisconsin, Laws 1887, c. 126; Montana, 1895, Code (1921), §§ 6375–6385. Tennessee, Laws 1882, c. 8, fails to specify whether the co-operatives to be incorporated thereunder shall be organized with or without capital stock.

1900 many such statutes were passed. Now, only two States lack laws making specific provision for the incorporation of farmers' co-operatives.[10] Thirty-three States, at least, have enacted laws providing for the formation of co-operative associations of the stock type. All of them permit a fixed dividend on capital stock, the doing of business for non-members, and the distribution of patronage dividends.[11] Some of them, recognizing the need for elasticity, impose the single requirement that earnings be apportioned in part on a patronage basis, and leave all other provisions for organization and distribution of profits to the by-laws.[12]

Farmers' co-operative incorporation laws of the non-stock type are of much more recent origin; and are fewer

[10] Delaware and Vermont. Vermont, however, has a section in her general corporation law which makes provision for co-operative associations.

[11] Arkansas, Acts 1921, p. 702; California, Laws 1878, p. 883; Colorado, Laws 1913, p. 220; Connecticut, Laws 1875, c. 62; Florida, Acts 1917, c. 7384; Georgia, Acts 1920, p. 125; Illinois, Laws 1915, p. 325; Indiana, Laws 1913, c. 164; Iowa, Code (1924) c. 389, §§ 8459–8485; Kansas, Laws 1913, c. 137; Kentucky, Laws 1918, c. 159; Maryland, Laws 1922, c. 197; Massachusetts, Laws 1920, c. 349; Michigan, Acts 1921, No. 84, c. 4; Minnesota, Mason's Stats. (1927) § 7822–7847; Missouri, Laws 1919, p. 116; Montana, Code (1921), §§ 6375–6396; Nebraska, Comp. Stats. (1922) § 642–648; New Jersey, Laws 1884, p. 63; New York, Laws 1913, c. 454; North Carolina, Laws 1915, c. 144; North Dakota, Laws 1921, c. 43; Oklahoma, Laws 1919, c. 147; Ohio, Laws 1884, p. 54; Oregon, Oregon Laws Supp. (1927), §§ 6954–6976; Pennsylvania, Public Laws, 1887, Act 365; Rhode Island, Laws 1916, c. 1400; South Carolina, Acts, 1915, No. 152; South Dakota, Laws 1913, c. 145; Tennessee, Laws 1917, c. 142; Virginia, Laws 1914, c. 329; Washington, Laws 1913, p. 50; Wisconsin, Laws 1911, c. 368.

[12] See, for example, Nebraska, Laws 1911, c. 32; Indiana, Laws 1913, c. 164; Colorado, Laws 1913, p. 220; North Dakota, Laws 1915, c. 92; Florida, Acts 1917, c. 7384.

in number.[13] The earliest law of this character was the crude measure enacted in California in 1895.[14] Statutes of that type have been passed in about sixteen States;[15] but ten of these have also laws of the stock type.[16] The enactment of state laws for the incorporation of nonstock co-operatives and their extensive use in the co-operative marketing of commodities, are due largely to the fact that, prior to 1922, the Clayton Act, October 15, 1914, c. 323, § 6, (38 Stat. 731), limited to nonstock co-operatives the right to make a class of agreements with members which prior thereto would have been void as in restraint of

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[13] Nourse, The Legal Status of Agricultural Co-operation (1927), pp. 51–72.

[14] Laws 1895, c. 183. That this Act did not provide satisfactorily for all types of co-operative endeavor is evidenced by the fact that prior to the passage of the Clayton Act (which offered substantial advantages to non-stock corporations) several of California's largest cooperatives did not incorporate under this or the similar act of 1909 (chap. 26), but were organized on a capital stock basis, e. g., California Fruit Growers' Exchange, California raisin growers. See Nourse, The Legal Status of Agricultural Co-operation, p. 64, note.

[15] Nevada, Stat. 1901, c. 60; Michigan, Public Acts 1903, No. 171; Washington, Laws 1907, p. 255; Alabama, Acts 1909, No. 145, p. 168; California, Laws 1909, c. 26; Florida, Laws 1909, c. 5958; Oregon, Laws 1909, c. 190; Idaho, Laws 1913, c. 54; Colorado, Laws 1915, c. 57; New Mexico, Laws 1915, c. 64; Oklahoma, Laws 1917, c. 22; Texas, Laws 1917, c. 193; Louisiana, Acts 1918, No. 98; New York, Laws 1918, c. 655; Pennsylvania, Laws 1919, Act 238; Iowa, Laws 1921, c. 122. In only two of the States is the doing of business for non-members expressly prohibited. Iowa, Laws, 1921, c. 122; Texas, Laws 1917, c. 193. The rest of the statutes, though some are perhaps ambiguous in their terminology, apparently do not impose any restraint in this regard. See Nourse, The Legal Status of Agricultural Co-operation, p. 62.

[16] Michigan; Washington; California; Florida; Oregon; Colorado; Oklahoma; Pennsylvania; Iowa; New York. For the citations of these stock type laws see note 9.

trade.[17] See *Liberty Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71. Nearly one-half of the existing laws of the nonstock type were enacted between 1914 and 1922.[18] This limitation in the Clayton Act proved to be unwise. By the Capper-Volstead Act of February 18, 1922, c. 57, § 1, (42 Stat. 388), Congress recognizing the substantial identity of the two classes of co-operatives, extended the same right to stock co-operatives. The terms of this legislation are significant:

"That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

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[17] Nourse, The Legal Status of Agricultural Co-operation (1927), pp. 73–92.

[18] Colorado, Laws 1915, c. 57; New Mexico, Laws 1915, c. 64; Oklahoma, Laws 1917, c. 22; Texas, Laws 1917, c. 193; Louisiana, Acts 1918, No. 98; New York, Laws 1918, c. 655; Pennsylvania, Laws 1919, Act 238; Iowa, Laws 1921, c. 122.

"And in any case to the following:

"Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

Congress recognized the identity of the two classes of co-operatives, and the distinction between agricultural stock co-operative corporations and ordinary business corporations, also, by providing in the Revenue Act of 1926, c. 27, Part III, § 231 (44 Stat. 9), that exemption from the income tax was not to be denied "any such [co-operative] association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 per centum per annum, whichever is greater, . . . , and if substantially all such stock is owned by producers . . . ; nor shall exemption be denied any such association because there is accumulated and maintained by it a reserve . . . Such an association may market the products of nonmembers in an amount the value of which does not exceed the value of the products marketed for members." This exemption was continued in the Revenue Act of 1928, c. 852, sec. 103 (45 Stat. 812).

More than two-thirds of all farmers' co-operatives in the United States are organized under the stock type laws. In 1925 there were 10,147 reporting organizations. Of these 68.7 per cent were stock associations. In leading States the percentage was larger. In Wisconsin the percentage was 80.0; in North Dakota, 87.0; in Nebraska, 91.3; and in Kansas, 92.0. Of the farmers' co-operatives existing in Oklahoma in 1925, 87.6 per cent were stock associations.[19] The great co-operative systems of Eng-

[19] U. S. Dept. of Agriculture, Technical Bulletin No. 40 (1928), Agricultural Co-operative Associations, p. 88. The figures for Oklahoma are obtained from the worksheets from which the table on page 88 was compiled.

land, Scotland and Canada were developed and are now operated by organizations of the stock type.[20] The nonstock type of co-operative is not adapted to enterprises, which like gins require large investment in plant, and hence considerable fixed capital.[21] For this reason it was a common practice for marketing co-operatives, which had been organized as nonstock co-operatives in order to comply with the requirements of the Clayton Act above described, to form a subsidiary co-operative corporation with capital stock to carry on the incidental business of warehousing or processing which requires a large investment in plant.[22] And the fact that even the marketing of some products may be better served by the stock type of co-operative organizations is so widely recognized that most of the marketing acts provide that associations formed thereunder may organize either with or without capital stock.[23]

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[20] See Fay, Co-operation At Home and Abroad (3rd ed. 1925), pp. 279–284, 356, 362–363; Year-Book of Agricultural Co-operation in the British Empire (1927), pp. 131–204; First Annual Report on Co-operative Associations in Canada (1928), pp. 65–78.

[21] The average investment of a plant in Texas is about $40,000. Hathcock, Possible Services of Co-operative Cotton Gins (1928), p. 5.

[22] Nourse, The Legal Status of Agricultural Co-operation, p. 54, note 3.

[23] Alabama, Laws 1921, No. 31, § 2; Arizona, Laws 1921, c. 156, § 2; Arkansas, Acts 1921, No. 116, § 3; California, Laws 1923, c. 103, § 653cc; Colorado, Laws 1923, c. 142, § 3; Florida, Acts 1923, c. 9300, § 3; Georgia, Acts 1921, No. 279, § 2; Idaho, Laws 1921, c. 124, § 3; Illinois, Laws 1923, p. 286, § 3; Indiana, Laws 1925, c. 20, § 3; Kansas, Laws 1921, c. 148, § 3; Louisiana, Acts 1922, No. 57, § 3; Maine, Laws 1923, c. 88, § 3; Minnesota, Laws 1923, c. 264, § 3; Mississippi, Laws 1922, c. 179, § 3; Montana, Laws 1921, c. 233, § 3; New Hampshire, Laws 1925, c. 33, § 2; New Jersey, Laws 1924, c. 12, § 2; New Mexico, Laws 1925, c. 99, § 3; New York, Laws 1924, c. 616, § 3; North Carolina, Laws 1921, c. 87, § 3; North Dakota, Laws 1921, c. 44, § 3; Ohio, Laws 1923, p. 91, § 2; South Carolina, Acts 1921, No. 203, § 3; South Dakota, Laws 1923, c. 15, § 2; Ten-

Experience has demonstrated, also, that doing business for non-members is usually deemed essential to the success of a co-operative.[24] More than five-sixths of all the farmers' co-operative associations in the United States do business for non-members. In 1925, 86.3 per cent of the reporting oganizations did so. In leading States the percentage was even larger. In Wisconsin the percentage was 89.0; in Missouri 93.2; in Minnesota 94.1; in Nebraska 95.8; in Kansas 96.5; in North Dakota 97.0. In Oklahoma 92 per cent of all co-operatives did business for non-members.[25] Of the cotton co-operatives in the United States 93.9 per cent did business for non-members. In Texas, where co-operative ginning has received successful trial,[26] all the cotton co-operatives perform service for non-

nessee, Laws 1923, c. 100, § 3; Texas, Laws 1921, c. 22, § 3; Utah, Laws 1923, c. 6, § 3; Virginia, Laws 1922, c. 48, § 3; Washington, Laws 1921, c. 115, § 2; West Virginia, Acts 1923, c. 53, § 3; Wyoming, Laws 1923, c. 83, § 3.

[24] It is to be noted that statutes like the Bingham Cooperative Marketing Act (Acts of Kentucky, 1922, c. 1) which provide solely for the formation of marketing associations restrict the service of the association (with the exception of storage) to the products of members. But such statutes do not purport to repeal earlier laws authorizing agricultural cooperation for other purposes which allow business for non-members. That the legislatures recognize that the problems of cooperative marketing and of other types of agricultural cooperation require different treatment is demonstrated by the retention of general laws providing for agricultural cooperation after passage of the standard marketing act. In Oklahoma, for example, in the same year that the Act of 1917 was amended so as to embody some of the features of the Bingham Act, the 1919 Act was amended in unimportant particulars, thus receiving express legislative recognition of its continued usefulness. Laws of Oklahoma, 1923, c. 167, 181.

[25] U. S. Dept. of Agriculture, Technical Bulletin No. 40 (1928), Agricultural Co-operative Associations, p. 88. The figures for Oklahoma are obtained from the worksheets from which the table on page 88 was compiled.

[26] Hathcock, Development of Co-operative Gins in Northwest Texas, p. 4.

members. In Oklahoma, also, all of the cotton co-operatives reporting do busines for non-members.[27]

That no one plan of organization is to be labeled as truly co-operative to the exclusion of others was recognized by Congress in connection with co-operative banks and building and loan associations. See *United States* v. *Cambridge Loan & Building Company,* 278 U. S. 55. With the expansion of agricultural co-operation it has been recognized repeatedly. Congress gave its sanction to the stock type of co-operative by the Capper-Volstead Act and also by specifically exempting stock as well as nonstock co-operatives from income taxes. State legislatures recognized the fundamental similarity of the two types of co-operation by unifying their laws so as to have a single statute under which either type of co-operative might organize.[28] And experts in the Department of Agriculture, charged with disseminating information to farmers and legislatures, have warned against any crystallization of the co-operative plan so as to exclude any type of co-operation.[29]

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[27] U. S. Dept. of Agriculture, Technical Bulletin No. 40 (1928), Agricultural Co-operative Associations, p. 89. The figures for Oklahoma are obtained from the worksheets from which the table on page 89 was compiled.

[28] See e. g., Maryland, Laws 1922, c. 197; New York, Laws 1926, c. 231; Oregon, Supp. 1927, §§ 6954–6976. The New York Law is known as the Co-operatives Corporations Law, and consolidates all prior acts for the formation of co-operative associations. Thus, marketing co-operatives, with or without capital stock, and other agricultural co-operatives, with or without capital stock, and with or without restrictions as to business for non-members, are all organized under the same act.

[29] Chris L. Christensen, chief of the Department of Agriculture's Division of Co-operative Marketing, in Department Circular No. 403 (1926), says (p. 2), " . . . the various forms which co-operative organizations have taken demonstrate the adaptability and extensive usefulness of this form of business organization." And at page 3, "A discussion of organization types is of value only when the condi-

That in Oklahoma a law authorizing incorporation on the stock plan was essential to the development of co-operation among farmers has been demonstrated by the history of the movement in that State. Prior to 1917 there was no statute which specifically authorized the incorporation of co-operatives. In that year the nonstock law above referred to was enacted.[30] Two years passed and only three co-operatives availed themselves of the provisions of that Act. Then persons familiar with the farmers' problems in Oklahoma secured the passage of the law of 1919, providing for the incorporation of co-operatives with capital stock.[31] Within the next five years

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tions that make certain types necessary or valuable are taken into consideration. Attempts to build co-operative associations according to any special plan have met with failure in the past, and it is possible that in the future we shall see more rather than fewer types of co-operative organizations."

[30] That the draftsmen of this law were influenced by the restrictions of the Clayton Act is evidenced by the fact that some of the language of § 2 of the 1917 Act is taken *verbatim* from § 6 of the Clayton Act.

[31] The Oklahoma State Market Commission, Carl Williams, editor of the Oklahoma Farmer-Stockman, and various farm organizations lent their assistance to the legislature in drafting this law. See Second Biennial Report of Oklahoma State Market Commission (1919–1920), p. 5; Carl Williams, Letter to Division of Co-operative Marketing, Department of Agriculture, dated January 21, 1929. The Oklahoma State Market Commission says of the 1919 Act (Marketing Bulletin, April 20, 1920, p. 5), "In organizing these new corporations, the farmers had a real basis on which to organize . . . The law was written by men who understood the farmers condition and had some practical knowledge of real cooperative marketing on a business basis. The laws of Minnesota, Nebraska and other states were studied. Conditions under which cooperative associations had failed in the northern states and those which had succeeded were taken into careful consideration. The best points from the laws of the several states, which would be suitable for Oklahoma conditions were incorporated and the features of these laws which were not suitable were eliminated."

202 co-operatives were formed under it; and since then 139 more. In the twelve years since 1917 only 60 non-stock co-operatives have been organized; most of them since 1923, when through an amendatory statute, this type was made to offer special advantages for co-operative marketing.[32] Thus over 82 per cent of all co-operatives in Oklahoma are organized under the 1919 stock act. One hundred and one Oklahoma co-operative cotton gins have been organized under the 1919 stock law; not a single one under the 1917 nonstock law.[33] To deny the co-operative character of the 1919 Act is to deny the co-operative character not only of the gins in Oklahoma which farmers have organized and operated for their mutual benefit, but also that of most other co-operatives within the State, which have been organized under its statutes in harmony with legislation of Congress and pursuant to instructions from the United States Department of Agriculture. A denial of co-operative character to the stock co-operatives is inconsistent also with the history of the movement in other States and countries. For the stock type of co-operative is not only the older form, but is the type more widely used among English speaking peoples.

There remains to be considered other circumstances leading to the passage of the statute here challenged. As was said in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." Here that presumption is reinforced by facts which have been called to our attention. That evils exist in cotton ginning which are subject to drastic legislative regulation

[32] Laws 1923, c. 181.

[33] All figures here given are obtained from the files of the Department of Agriculture, Division of Co-operative Marketing.

has recently been recognized by this Court. *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129. The specific evils existing in Oklahoma which the statute here assailed was enacted to correct was the charging of extortionate prices to the farmer for inferior ginning service and the control secured of the cotton seed.[34] These conditions are partly attributable to the fact that a large percentage of the ordinary commercial gins in Oklahoma are controlled by cotton seed oil mills; which make their service as ginners incidental to that as crushers of seed; and are thereby enabled to secure the seed at less than its value.[35] That

[34] Two of the leading farm newspapers in Oklahoma are the Oklahoma Cotton Grower and the Oklahoma Farmer-Stockman, the latter edited by Carl Williams. In an editorial on February 10, 1926, the Cotton Grower urges farmers to form co-operative gins as the only way to obtain economy in ginning service. On March 1, 1927, the Farmer-Stockman contains an editorial urging, as a partial solution of the ginning problem, the placing of members on the Corporation Commission who are interested in the farmer as well as in the commercial gin. On May 15, 1927, the same paper notes the great increase in co-operative ginning in the State, and says that it is due to the extortionate prices charged by private ginners. On August 15, 1927, the Farmer-Stockman speaks of the meeting of the Corporation Commission to fix rates for ginning as the "annual farce." It is stated that the meeting is called a farce because the rate is always set high enough so as to allow grossly excessive returns to the ginners at the expense of the farmers. The editor states that the only solution for the farmer is co-operation in ginning. On September 15, 1927, the same paper states that some privately owned gins have averaged a profit of over 100 per cent on invested capital over a period of three years. On October 15, 1927, the Farmer-Stockman notes that poor ginning can cost the farmer at least four cents on each pound of cotton.

[35] The District Court said (26 F. (2d) 508, 519–520): "The ordinary commercial ginner within the State of Oklahoma may gin either as an individual, a copartnership, or a corporation; no statute, rule, or provision of law restricts him in any wise in the enjoyment of the full proceeds of the earnings under the rate fixed. He usually is engaged, not only in ginning cotton, but also in the purchase of seed

such control of gins may lead to excessive prices for the ginning service was recognized in the *Crescent Oil* case. The fact that, despite the regulatory provisions of the Public Service law, a public utility is permitted to earn huge profits indicates that something more than rate regulation may be needed for the protection of farmers. Certainly, it cannot be said that the legislature could not reasonably believe that co-operative ginning might afford a corrective for rates believed to be extortionate.

Mr. JUSTICE HOLMES and Mr. JUSTICE STONE join in this opinion.

Dissenting opinion of Mr. JUSTICE STONE.

I agree with what Mr. JUSTICE BRANDEIS has said. But there is one aspect of the decision now rendered to which I would especially direct attention. To me it would seem that there are such differences in organization, management, financial structure and practical operation between the business conducted by appellant, a single individual, and that conducted by a corporation organ-

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cotton, cotton seed after he has ginned the cotton, and frequently in the purchase of the cotton after it is ginned for profit. A ginner has a greater facility to purchase the seed than anyone else. As he gins the cotton, he catches the seed as they fall from the stand, and has the immediate means for storage and housing same. The patron, if he does not elect to sell to the ginner, must receive them and haul them away, when as a rule he has no place for storage for accumulating as much as a carload, so as to sell them to advantage. A great per cent. of the gins so operated are owned and controlled by cotton seed crushers, operating cotton seed oil mills within the state of Oklahoma; such operation of gins not being entirely for the purpose of rendering a public service, but also for collecting cotton seed at a central point. Their gin business as ginners is incidental to that as crushers of seed, to the end that they may be enabled to purchase the seed under favorable conditions. See *Choctaw Cotton Oil Co.* v. *Corporation Commission,* 121 Okl. 51, 247 P. 390; *Planters' Cotton & Ginning Co.* v. *West,* 82 Okl. 145, 198 P. 855."

ized as is appellee, as to justify the classification and discrimination made by the statute. But, assuming there were no such differences, I fail to perceive any constitutional ground on which appellant can complain of a discrimination from which he has not suffered. His real and only complaint is not that he has been discriminated against either in the grant or enjoyment of his license, but that in the exercise of his non-exclusive privilege of carrying on the cotton ginning business he will suffer from competition by the corporate appellee which, under local law, may secure a like privilege with possibly less difficulty than did appellant.

The proviso of the 1925 Act is held unconstitutional solely on the ground that " an onerous restriction upon the right to engage in a public business " was " imposed by the statute upon appellant " and others similarly situated, which was not imposed on appellee. Appellant, if he had been denied a license, or if his exercise of the privilege, when granted, were more limited by the statute than that of appellee, might invoke the equal protection clause. But he now requires no such protection for he has received his license and is in full and unrestricted enjoyment of the same privilege as that which the appellee seeks. This is not less the case even if the statute be assumed to have made it more difficult for him than for appellee to secure a license.

Whether the grant appellant has received be called a franchise or a license would seem to be unimportant, for in any case it is not an exclusive privilege. Under the Constitution and laws of Oklahoma the legislature has power to amend or repeal the franchise, Constitution of Oklahoma, Art. IX, § 47; *Choctaw Cotton Oil Co.* v. *Corporation Comm.*, 121 Okla. 51, and injury suffered through an indefinite increase in the number of appellant's competitors by non-discriminatory legislation, would clearly be *damnum absque injuria.* A similar in-

crease under the present alleged discriminatory statute would seem likewise to afford appellant no legal cause for complaint, for, a license not having been withheld from him, his position is precisely the same as though the statute authorized the grant of a license to him and to appellee on equal terms. He is suffering, not from any application of the discriminatory feature of the statute, with which alone the Constitution is concerned, see *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Arkadelphia Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134, 149, but merely from the increase in the number of his competitors, an injury which would similarly have resulted from a non-discriminatory statute granting the privilege to all on terms more lenient than those formerly accorded appellant. Of such a statute, appellant could not complain and I can find no more basis for saying that constitutional rights are impaired where the discrimination which the statute authorizes has no effect, than where the statute itself does not discriminate.

Nor would appellant seem to be placed in any better position to challenge the constitutionality of the statute by recourse to the rule that the possessor of a non-exclusive franchise may enjoin competition unauthorized by the state. Appellee's business is not unauthorized. It is carried on under the sanction of a statute to which appellant himself can offer no constitutional objection, for even unconstitutional statutes may not be treated as though they had never been written. They are not void for all purposes and as to all persons. See *Hatch* v. *Reardon,* 204 U. S. 152, 160. For appellant to say that appellee's permit is void, and that its business may be enjoined, because conceivably someone else may challenge the constitutionality of the Act, would seem to be a departure from the salutary rule consistently applied that only those who suffer from the unconstitutional application of a statute may challenge its validity. See *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 55;

*Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544; *Tyler* v. *Judges of Court of Registration,* 179 U. S. 405, 410; *Cusack Co.* v. *Chicago,* 242 U. S. 526, 530; *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 550; *Mallinckrodt Chemical Works* v. *Missouri,* 238 U. S. 41, 54; *Darnell* v. *Indiana,* 226 U. S. 390, 398.

It seems to me that a fallacy, productive of unfortunate consequences, lurks in the suggestion that one may maintain a suit to enjoin competition of a business solely because hereafter someone else might suffer from an unconstitutional discrimination and enjoin it. But, more than that, even if the license had been withheld from appellant because he could not support the burden placed upon him by the statute, I should have thought it doubtful whether he would have been entitled to have had appellee's permit cancelled—the relief now granted. He certainly could not have asked more than the very privilege which he now enjoys.

Mr. JUSTICE HOLMES and Mr. JUSTICE BRANDEIS concur in this opinion.

## DECISIONS PER CURIAM, FROM OCTOBER 1, 1928, TO AND INCLUDING FEBRUARY 18, 1929.*

No. 17, original. EX PARTE BAKELITE CORPORATION. October 8, 1928. *Per Curiam:* The motion for leave to file petition for writ of prohibition is granted and a rule to show cause is ordered to issue returnable on Monday, October 29 next. *Mr. Albert MacC. Barnes, Jr.,* for petitioner.

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No. 16, original. EX PARTE THE PUBLIC NATIONAL BANK OF NEW YORK. October 8, 1928. *Per Curiam:* The motion for leave to file petition for a writ of mandamus is granted and a rule to show cause is ordered to issue returnable on Monday, October 29, next. *Messrs. Henry L. Moses, Martin Saxe, Robert C. Beatty, Herman G. Kopald, Edward F. Colladay, Albert Ottinger,* and *Henry S. Manley* for petitioner.

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No. 116. GRAYSON ET AL. *v.* HARRIS ET AL. Error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted October 1, 1928. Decided October 8, 1928. *Per Curiam:* The writ of error is dismissed on the authority of § 237, of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating the writ of error as an application for certiorari, the same is granted. *Mr. Robert F. Blair* for defendants in error, in support of the motion. *Messrs. Robert M. Rainey, Streeter B. Flynn,* and *William Neff* for plaintiffs in error, in opposition thereto.

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* For decisions on applications for certiorari, see *post,* pp. 585, 597.

No. 295. NORMAN BREAUX LUMBER CO. *v.* REED, TAX COLLECTOR OF ADAMS COUNTY, MISSISSIPPI, and his successor in office. Error to and appeal from the Supreme Court of the State of Mississippi. Motion submitted October 1, 1928. Decided October 8, 1928. *Per Curiam:* The motion to dismiss is granted for the reason that the judgment of the state court sought here to be reviewed was based on a non-federal ground adequate to support it. *Bilby* v. *Stewart,* 246 U. S. 255, 257; *Farson, Son & Co.* v. *Bird,* 248 U. S. 268, 271. *Mr. L. T. Kennedy* for defendant in error and appellee in support of the motion. *Mr. R. C. Milling* for plaintiff in error and appellant, in opposition thereto.

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No. 284. HAWKINS *v.* PULLEY ET AL., Trustees. On petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia. October 8, 1928. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there is no federal question upon which certiorari can be issued, application for which is therefore also denied. The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody, as provided in the order of October 29, 1926. *Mr. L. Melendez King* for petitioner. No appearance for respondents.

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No. 380. GUILLOT *v.* LOUISIANA RAILWAY AND NAVIGATION CO. Error to and appeal from the Supreme Court of the State of Louisiana. October 8, 1928. *Per Curiam:* The writ of error and appeal heretofore allowed in this cause must be dismissed for the want of jurisdiction.

The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that, even if the same be treated as an application for a writ of certiorari, there is no federal question upon which such a writ can be issued, application for which is therefore also denied.

The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody, as provided in the order of October 29, 1926. *Mrs. Widow W. Guillot pro se.* No appearance for defendant in error and appellee.

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No. 390. ANDERSON ET AL. *v.* MCGILL CLUB. On petition for a writ of certiorari to the Supreme Court of the State of Nevada. October 8, 1928. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted finds that there is no federal question upon which certiorari can be issued, application for which is therefore also denied. The costs already incurred herein by direction of the Court shall be paid by the clerk from the special fund in his custody, as provided in the order of October 29, 1926. *Gladys Anderson, pro se.* No appearance for respondent.

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No. 9, original. LOUISIANA *v.* MISSISSIPPI. Argued October 8, 1928. Decided October 15, 1928. *Per Curiam:* It is ordered that this case be referred to Thomas G. Haight as the special master, with directions and authority to report the same to the Court with his findings of fact, his conclusions of law, and his recommendations for

a decree, all subject to examination, consideration, approval, modification, or other disposal by the Court.

The special master shall have authority to employ competent stenographic and clerical assistants, to fix the times and place of argument, to issue subpœnas to secure the attendance of witnesses, and to administer oaths when this may be necessary. When his report shall be completed the clerk of the Court shall cause the same to be printed, and when it is presented to the Court in printed form the parties shall be accorded a reasonable time to be fixed by the Court within which to present exceptions.

The special master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowances to him, the compensation paid to his stenographic and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. If the appointment herein made of a special master is not accepted, or if the place becomes vacant during the recess of the Court, the Chief Justice shall have authority to make a new designation, which shall have the same effect as if originally made by the Court herein. *Messrs. Percy Saint, Robert Ash,* and *John Dale* for complainant. *Messrs. Rush H. Knox, Elmer C. Sharp,* and *Hiram H. Creekmore* for defendant.

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No. 11. Standard Pipe Line Company, Inc., et al. *v.* Commissioners of Index Sulphur Drainage District. On writ of certiorari to the Supreme Court of Arkansas. Argued October 8, 9, 1928. Decided October 15, 1928. *Per Curiam:* The writ of certiorari is dismissed for the reason that the decree of the state court sought here to be reviewed was based on a nonfederal ground adequate to support it. *Bilby* v. *Stewart,* 246 U. S. 255, 257; *Farson, Son & Co.* v. *Bird,* 248 U. S. 268, 271. *Messrs. William H.*

*Arnold* and *David C. Arnold* for petitioners. *Mr. Henry Moore, Jr.,* for respondents.

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No. 30. The Consolidated Flour Mills Co. *v.* Muegge et al. Error to the Supreme Court of Oklahoma. Argued October 12, 1928. Decided October 15, 1928. *Per Curiam:* Reversed on the authority of *Wuchter* v. *Pizzutti,* 276 U. S. 13. *Messrs. Edward F. Colladay* and *John R. Beeching* for plaintiff in error. *Messrs. Lucas P. Loving* and *L. L. Hamner* for defendants in error.

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No. 253. Oyster et al. *v.* Public Utilities Comm'n. Error to the Supreme Court of the State of Ohio. October 15, 1928. *Per Curiam:* The writ of error is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating the writ of error as an application for certiorari, the same is denied. *Mr. John W. Bricker* for plaintiffs in error. No appearance for defendant in error.

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No. 274. Mackay *v.* Ohio. Error to the Supreme Court of the State of Ohio. October 15, 1928. *Per Curiam:* The writ of error is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating the writ of error as an application for certiorari, the same is denied. The mandate of the Court is directed to issue forthwith. *Messrs. Robert T. Scott* and *Frank Davis, Jr.,* for plaintiff in error. No appearance for defendant in error.

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No. 279. Bohnefeld *v.* Security National Bank. Error to and appeal from the Supreme Court of the State of Oklahoma. October 15, 1928. *Per Curiam:* The writ

of error and appeal are dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating the appeal as an application for certiorari, the same is denied. *Messrs. E. G. Wilson* and *J. M. Springer* for plaintiff in error and appellant. No appearance for defendant in error and appellee.

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No. 306. CARSON PETROLEUM CO. *v.* VIAL ET AL. Error to and appeal from the Supreme Court of the State of Louisiana. October 15, 1928. *Per Curiam:* The writ of error and appeal are dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction, with leave to file a brief supporting an application for certiorari within 15 days, with 10 days for opposing counsel to reply. *Mr. Wm. E. Leahy* for plaintiff in error and appellant. *Mr. Harry P. Sneed* for defendant in error and appellee. See *post,* p. 595.

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No. 313. M. B. GARRIS PROPERTIES, INC., ET AL. *v.* MARTIN, GOVERNOR, ET AL. Appeal from the Supreme Court of the State of Florida. October 15, 1928. *Per Curiam:* The appeal is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction, on the ground that the decree sought to be reviewed is not a final one. *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Arnold* v. *United States,* for the use of *Guimarin & Co.,* 263 U. S. 427, 434. *Mr. Charles R. Pierce* for appellant. *Mr. Fred H. Davis* for appellee.

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No. 385. MOORE (FORMERLY COBB) ET AL. *v.* DOWNING, TAX COLLECTOR, ET AL. Appeal from the Court of Civil Appeals, Eleventh Supreme Judicial District, State of

Texas. October 15, 1928. *Per Curiam:* The appeal is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction, with leave to file a brief supporting an application for certiorari within 15 days, with 10 days for opposing counsel to reply. *Mr. M. G. Cox* and *Walter Cocke* for appellants. No appearance for appellees. See *post,* p. 646.

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No. 113. DOUCET ET AL. *v.* FONTENOT, SHERIFF, ET AL. Error to the Supreme Court of the State of Louisiana. Motion submitted October 15, 1928. Decided October 22, 1928. *Per Curiam:* The motion to dismiss is granted for the reason that under § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), the case is not properly before this Court on writ of error. There is, however, a federal question, as shown by *Wadkins* v. *Producers Oil Co.,* 227 U. S. 368, and *McCune* v. *Essig,* 199 U. S. 382, and the proper method of review would be by application for a writ of certiorari. Treating the writ of error as an application for certiorari the same is denied. *Mr. Joseph George Medlenka* for defendants in error in support of the motion. *Mr. Harry P. Sneed* for plaintiff in error in opposition thereto.

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No. 37. HANSEN *v.* STIRRAT & GOETZ INVESTMENT CO. Error to the Supreme Court of the State of Washington. Argued October 19, 1928. Decided October 22, 1928. *Per Curiam*: The writ of error is dismissed for want of a substantial federal question on the authority of *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. Martin J. Lund,* with whom *Mr. Mark M. Litchman* was on the brief, for plaintiff in error. *Mr. Henry Elliott, Jr.,* with whom *Mr. J. Speed Smith* was on the brief, for defendant in error.

No. 38. CRAINE *v.* COMMONWEALTH OF VIRGINIA ET AL. On writ of certiorari to the Supreme Court of Appeals of the State of Virginia. Argued October 19, 1928. Decided October 22, 1928. *Per Curiam:* Reversed on the authority of *Brooke* v. *City of Norfolk,* 277 U. S. 27. *Mr. A. W. Patterson* for petitioner. *Mr. Leon M. Bazile,* with whom *Mr. E. Warren Wall* was on the brief, for respondents.

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No. 28. JACKSON & EASTERN RY. CO. ET AL. *v.* BURNS ET AL. Error to the Supreme Court of the State of Mississippi. Argued October 11, 1928. Decided October 22, 1928. *Per Curiam:* Writ of error dismissed for want of jurisdiction. Petition for writ of certiorari denied. *Mr. George B. Neville,* with whom *Mr. W. N. Key* was on the brief, for plaintiffs in error. *Messrs. J. N. Flowers, J. R. Rouzee,* and *Victor W. Crilbert* were on the brief for defendants in error.

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No. 35. WESTINGHOUSE ELECTRIC & MANUFACTURING CO. *v.* DE FOREST RADIO TELEPHONE & TELEGRAPH CO.; and

No. 36. WESTINGHOUSE ELECTRIC & MANUFACTURING CO. ET AL. *v.* UNITED STATES ET AL. On writs of certiorari to the Circuit Court of Appeals for the Third Circuit. Argued October 18, 19, 1928. Decided October 29, 1928. *Per Curiam:* Affirmed on the authority of *Morgan* v. *Daniels,* 153 U. S. 120; *Victor Talking Machine Co.* v. *Brunswick Balke Collender Co.,* 273 U. S. 670. *Mr. Frederick H. Wood,* with whom *Messrs. Drury W. Cooper, Thomas Ewing,* and *Alfred McCormack* were on the brief, for petitioners. *Mr. Charles E. Hughes,* with whom *Messrs. Thomas G. Haight, Samuel E. Darby, Jr.,* and *William R. Ballard* were on the brief, for respondents.

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No. 110. HUGHES *v.* STATE BOARD OF MEDICAL EXAMINERS; and

No. 111. HUGHES *v.* STATE BOARD OF MEDICAL EXAMINERS. Error to the Supreme Court of the State of Georgia. Argued October 22, 1928. Decided October 29, 1928. *Per Curiam:* The writs of error are dismised for want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. Norman I. Miller* and *George C. Spence,* with whom *Mr. George P. Whitman* was on the brief, for plaintiff in error. *Mr. J. Z. Foster* for defendants in error.

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No. 40. REMINGTON ARMS UNION METALLIC CARTRIDGE CO., INC., *v.* UNITED STATES. On writ of certiorari to the Court of Claims. Argued October 22, 23, 1928. Decided October 29, 1928. *Per Curiam:* Affirmed on the authority of § 177 of the Judicial Code. *Mr. Wm. Wallace, Jr.,* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Dwight E. Rorer* for the United States.

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No. 42. KELLEHER *v.* FRENCH. Appeal from the District Court of the United States for the District of West Virginia. Argued October 23, 1928. Decided October 29, 1928. *Per Curiam:* Affirmed on the authority of *Miller* v. *Schoene,* 276 U. S. 272. *Mr. W. R. C. Cocke,* with whom *Messrs. Randolph Harrison, Forney Johnston,* and *D. O. Dechert* were on the brief, for appellant. *Messrs. John R. Saunders* and *F. S. Tavenner* for appellee.

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No. 43. KANSAS CITY SOUTHERN RY. CO. ET AL. *v.* HOOPER, TAX COLLECTOR. On writ of certiorari to the Supreme Court of the State of Arkansas. Argued October 23, 1928. Decided October 29, 1928. *Per Curiam:* Reversed on the authority of *Montana National Bank* v.

*Yellowstone County,* 276 U. S. 499; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331; *St. Louis Iron Mountain & Southern Ry.* v. *Williams,* 251 U. S. 63; *Wadley Southern Ry.* v. *Georgia,* 235 U. S. 651; *Ex Parte Young,* 209 U. S. 123. *Mr. Frank H. Moore,* with whom *Messrs. A. F. Smith, James B. McDonough,* and *Samuel W. Moore* were on the brief, for petitioners. *Mr. E. C. Lake* for respondent.

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No. 55. STATE ROAD COMMISSION ET AL. *v.* MONONGAHELA WEST PENN PUBLIC SERVICE CO. ET AL.;

No. 56. STATE ROAD COMMISSION ET AL. *v.* BALTIMORE & OHIO R. R. CO. ET AL.; and

No. 57. STATE ROAD COMMISSION *v.* BALTIMORE & OHIO R. R. CO. ET AL. Error to the Supreme Court of Appeals of the State of West Virginia. Argued October 25, 26, 1928. Decided October 29, 1928. *Per Curiam:* The writs of error are dismissed for want of a substantial federal question on the authority of *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. Fred O. Blue,* with whom *Messrs. E. G. Smith, Lawrence R. Lynch,* and *Guy H. Burnside* were on the brief, for plaintiffs in error. *Messrs. Clyde B. Johnson, Philip P. Steptoe, Louis A. Johnson, James A. Meredith,* and *William G. Conley* for defendants in error.

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No. 45. FAIRBANKS, MORSE & CO., INC., *v.* BATON ROUGE RICE MILL, INC., ET AL. Error to the Supreme Court of the State of Louisana. Argued October 23, 1928. Decided October 29, 1928. *Per Curiam:* The writ of error is dismissed for want of a substantial federal question on the authority of *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. Walter J. Suthon, Jr.,*

with whom *Messrs. J. Blanc Monroe* and *Monte M. Lemann* were on the brief, for plaintiff in error. *Messrs. C. V. Parker* and *Joseph A. Lovet* for defendants in error.

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No. 62. Atlantic Coast Line R. R. Co. *v.* Tyner, Administrator. On writ of certiorari to the Supreme Court of the State of South Carolina. Argued October 26, 1928. Decided October 29, 1928. *Per Curiam:* Reversed and remanded for a new trial on the authority of (1) *Chicago, Milwaukee & St. Paul Ry.* v. *Coogan,* 271 U. S. 472; (2) *Southern Pacific Co.* v. *Berkshire,* 254 U. S. 415; *Chesapeake & Ohio Ry.* v. *Leitch,* 276 U. S. 429; (3) *Gulf, Colorado & Santa Fe Ry.* v. *Moser,* 275 U. S. 133. *Mr. Thomas W. Davis,* with whom *Mr. Simeon Hyde* was on the brief, for petitioner. *Messrs. Lionel Legge* and *John P. Grace* for respondent.

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No. 67. Moore, Executor, *v.* Bugbee, Comptroller. Error to the Court of Errors and Appeals of the State of New Jersey. Submitted October 26, 1928. Decided October 29, 1928. *Per Curiam:* The writ of error is dismissed for want of a properly presented substantial federal question on the authority of *St. Louis & San Francisco R. R.* v. *Shephard,* 240 U. S. 240; *Missouri Pacific R. R.* v. *Hanna,* 226 U. S. 184. *Mr. Andrew Foulds, Jr.,* for plaintiff in error. *Mr. Edward L. Katzenbach* for defendant in error.

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No. —, original. Shevenell et al., Trustees, *v.* Morton, District Judge. November 19, 1928. *Per Curiam:* The motion for leave to file petition for writ of mandamus is denied. *Mr. John Boyle, Jr.,* for petitioners. *Mr. Marcus B. May* for respondent.

No. 209. ROBERTS ET AL. *v.* DETROIT ET AL. Error to the Supreme Court of the State of Michigan. Motion submitted October 29, 1928. Decided November 19, 1928. *Per Curiam:* The motion to dismiss is granted on the authority of *Meyer* v. *Richmond,* 172 U. S. 82. Treating the writ of error as an application for certiorari the same is denied. *Messrs. Clarence E. Wilcox* and *Paul T. Dwyer* for defendants in error in support of the motion. *Mr. S. Homer Ferguson* for plaintiffs in error in opposition thereto.

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No. 72. JOURNEYMEN STONE CUTTERS ASS'N ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the Southern District of New York. Argued October 22, 1928. Decided November 19, 1928. *Per Curiam:* The appeal is dismissed for lack of a showing of service of summons and severance upon those defendants in the court below who did not join in the appeal. *Masterson* v. *Herndon,* 10 Wall. 416; *Downing* v. *McCartney,* 131 U. S. 98 App'x.; *Hardee* v. *Wilson,* 146 U. S. 179; *Garcia* v. *Vela,* 216 U. S. 598. *Mr. Jeremiah A. O'Leary,* with whom *Messrs. Frank P. Walsh, Roderick Begg,* and *Theodore R. Jaffe* were on the brief, for appellants. *Solicitor General Mitchell* and *Assistant to the Attorney General Donovan* for the United States.

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No. 52. PARKER ET AL. *v.* TAX COMMISSION OF OHIO; and

No. 53. PARKER ET AL. *v.* TAX COMMISSION OF OHIO. Error to the Supreme Court of the State of Ohio. Argued October 25, 1928. Decided November 19, 1928. *Per Curiam:* The writs of error are dismissed for want of a properly presented substantial federal question, on the authority of (1) *St. Louis & San Francisco R. R. Co.* v. *Shephard,* 240 U. S. 240; *Jett Bros. Distilling Co.* v. *City*

*of Carrollton,* 252 U. S. 1; (2) *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry.,* 228 U. S. 326; *Marvin* v. *Trout,* 199 U. S. 212. *Mr. Horace Andrews,* with whom *Messrs. Marion V. Semple* and *T. G. Thompson* were on the brief, for plaintiffs in error. *Mr. Virgil H. Gibbs,* with whom *Mr. Edward C. Turner* was on the brief, for defendants in error.

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No. 408. Coast Lumber Co. et al. *v.* Johnson et al. Appeal from the Supreme Court of the State of Idaho. November 19, 1928. *Per Curiam:* The appeal is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937) for lack of jurisdiction. Treating the appeal as an application for certiorari the same is denied for want of a substantial federal question on the authority of *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. James H. Hawley* for appellants. No appearance for appellees.

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No. 464. United Railways and Electric Co. *v.* West, Chairman, et al., etc.; and

No. 465. West, Chairman, et al., etc. *v.* United Railways and Electric Co. Appeals from the Court of Appeals of the State of Maryland. November 19, 1928. *Per Curiam:* The appeals are dismissed on the authority of § 237 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction, on the ground that the decree sought to be reviewed is not a final one. *Haseltine* v. *Central Bank of Springfield (No. 1),* 183 U. S. 130, 131; *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Arnold* v. *United States* for the use of *Guimarin & Co.,* 263 U. S. 427, 434. The petition for certiorari in No. 465 is denied for the same reason.

*Messrs. Charles McHenry Howard, W. W. Willoughby, Charles Markell,* and *Henry H. Waters* for appellant in No. 464 and appellee in No. 465. *Messrs. Raymond S. Williams* and *Thomas J. Tingley* for appellees in No. 464 and appellants in No. 465.

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No. —. In Re Disbarment of Adriaans. November 26, 1928. *Per Curiam:* Motion to revoke order of disbarment denied. *Mr. John H. Adriaans, pro se.*

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No. —, original. Brosnan *v.* Martin, Judge. November 26, 1928. *Per Curiam:* The motion for leave to file petition for a writ of mandamus and the motion for leave to proceed *in forma pauperis* are denied. *Mr. John J. Brosnan, pro se.*

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No. 531. Mayes *v.* Industrial Accident Board of Michigan et al. On petition for writ of certiorari to the Supreme Court of the State of Michigan. Motion submitted November 19, 1928. Decided November 26, 1928. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there is no federal question upon which certiorari can be issued, application for which is therefore also denied. The costs already incurred herein by direction of the Court shall be paid by the Clerk from the special fund in his custody as provided in the order of October 29, 1926. *Mr. Joseph Mayes, pro se.*

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No. 538. Lofton *v.* Mississippi. On petition for writ of certiorari to the Supreme Court of the State of Mississippi. Motion submitted November 19, 1928. Decided

November 26, 1928. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there is no federal question upon which certiorari can be issued, application for which is therefore also denied. The costs already incurred herein by direction of the Court shall be paid by the Clerk from the special fund in his custody as provided in the order of October 29, 1926. *Mr. S. Robert Young, Jr.,* for petitioner. No appearance for respondent.

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No. 50. Missouri Pacific R. R. Corp'n et al. *v.* Nebraska State Ry. Comm'n. Error to the Supreme Court of the State of Nebraska. Argued November 21, 22, 1928. Decided November 26, 1928. *Per Curiam:* The writ of error is dismissed for want of a properly presented substantial federal question, on the authority of *St. Louis & San Francisco R. R.* v. *Sheppard,* 240 U. S. 240; *Jett Bros. Distilling Co.* v. *City of Carrollton,* 252 U. S. 1; *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry.,* 228 U. S. 326. *Messrs. Anan Raymond* and *Charles F. McLaughlin,* with whom *Messrs. J. A. C. Kennedy, Francis A. Brogan, Alfred G. Ellick,* and *E. J. White* were on the brief, for plaintiffs in error. *Mr. Hugh La Master,* with whom *Mr. O. S. Spillman* was on the brief, for defendant in error.

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No. 424. Security National Bank *v.* Twinde et al. Appeal from the Supreme Court of the State of South Dakota. November 26, 1928. *Per Curiam:* The appeal is dismissed for the reason that the judgment of the state court sought here to be reviewed was based on a non-federal ground adequate to support it. *Bilby* v. *Stewart,* 246 U. S. 255, 257; *Farson Son & Co.* v. *Bird,* 248 U. S. 268, 271. *Mr. Percy L. Louchs* for appellant. No appearance for appellees.

No. 430. DIMITRY ET AL., TRUSTEES, *v.* LEWIS ET AL. Appeal from the Supreme Court of the State of Mississippi. November 26, 1928. *Per Curiam:* The appeal is dismissed for the reason that the judgment of the state court sought here to be reviewed was based on a non-federal ground adequate to support it. *Bilby* v. *Stewart,* 246 U. S. 255, 257; *Farson Son & Co.* v. *Bird,* 248 U. S. 268, 271. *Mr. R. A. Wallace* for appellants. No appearance for appellees.

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No. 438. MOWER *v.* STATE DEPARTMENT OF HEALTH. Appeal from the Supreme Court of Errors of the State of Connecticut. November 26, 1928. *Per Curiam:* The appeal is dismissed for want of a substantial federal question on the authority of *Pittsburgh, C., C. & St. L. Ry.* v. *Backus,* 154 U. S. 421, 426; *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 45; *Bragg* v. *Weaver,* 251 U. S. 57, 59. *Mr. Arthur B. O'Keefe* for appellant. *Mr. James W. Carpenter* for appellee.

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No. —, original. EX PARTE SHAKERI. December 3, 1928. *Per Curiam:* The motion for leave to file petition for writ of *habeas corpus* is denied. *Mr. Alpha Shakeri, pro se.*

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No. 369. LANCASTER IRON WORKS, INC., v. J. C. PENNEY-GWINN CORPORATION ET AL.; and

No. 370. LANCASTER IRON WORKS, INC., *v.* J. C. PENNEY-GWINN CORPORATION ET AL. Motion submitted November 26, 1928. Decided December 3, 1928. *Per Curiam:* The motion for leave to file a petition for rehearing beyond the time permitted by the rule is denied. *Messrs. John P. Stokes, Scott M. Loftin,* and *James E. Caulkins* for petitioner. *Messrs. Wm. E. Kay* and *Thomas B. Adams* for respondents.

No. 18, original. KENTUCKY *v.* INDIANA ET AL. December 3, 1928. *Per Curiam:* On consideration of the returns to the rules to show cause it is ordered that leave is granted to file the original bill of complaint and the amended bill of complaint herein and process is ordered to issue returnable on Monday, February 18, 1929. *Mr. Clifford E. Smith* for complainant. *Mr. F. H. Hatfield* for defendants.

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No. 426. GALE ET AL. *v.* NORFOLK & WESTERN RY. CO. ET AL. Appeal from the Supreme Court of the State of Ohio. December 3, 1928. *Per Curiam:* The appeal is dismissed on the authority of § 237 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Sta. 936, 937), for lack of jurisdiction. Treating the appeal as an application for certiorari the same is denied for want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. C. C. Williams, Simeon Nash,* and *James J. Boulger* for appellants. *Messrs. F. M. Rivinus* and *J. Hamilton Cheston* for appellees.

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No. 439. MCPHERSON BROTHERS CO. *v.* OKANOGAN-DOUGLAS INTER-COUNTY BRIDGE CO. Error to the Supreme Court of the State of Washington. December 3, 1928. *Per Curiam:* The writ of error is dismissed on the authority of § 237 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction. Treating the writ of error as an application for certiorari the same is denied for want of a substantial federal question on the authority of *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. Peter McPherson* for plaintiff in error. *Mr. John P. Hartman* for defendant in error.

No. 459. VERMILLION MINING CO. *v.* FRASER;

No. 460. CRETE MINING CO. *v.* DAY;

No. 461. INLAND STEEL CO. *v.* DAY; and

No. 462. INLAND STEEL CO. *v.* FRYBERGER. Appeals from the Supreme Court of the State of Minnesota. December 3, 1928. *Per Curiam:* The appeals are dismissed on the authority of *Lake Superior Consolidated Iron Mines* v. *Lord,* 271 U. S. 577. *Messrs. Wm. P. Belden* and *Horace Andrews* for appellants. *Mr. Arcadius L. Agatin* for appellee in No. 459. *Mr. Fred W. Putnam* for appellee in Nos. 460 and 461. No appearance for appellee in No. 462.

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No. 474. THEOBALD ET AL. *v.* BOARD OF COUNTY COMMISSIONERS ET AL. Error to the Supreme Court of the State of Ohio. December 3, 1928. *Per Curiam:* The writ of error is dismissed for want of a substantial federal question on the authority of *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. B. W. Gearheart* for plaintiffs in error. No appearance for defendants in error.

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No. 477. SAMBOR ET AL. *v.* PHILADELPHIA RAPID TRANSIT CO. ET AL. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. December 3, 1928. *Per Curiam:* The appeal is dismissed for want of a substantial federal question on the authority of *Maryland* v. *Baltimore & Ohio R. R. Co.,* 3 How. 534, 552; *Pawhuska* v. *Pawhuska Oil Co.,* 250 U. S. 394, 399; *Trenton* v. *New Jersey,* 262 U. S. 182, 186; *Risty* v. *Chicago Ry. Co.,* 270 U. S. 378, 390. *Mr. James J. Regan, Jr.,* for appellants. *Messrs. Frank M. Hunter* and *Frederic R. Ballard* for appellees.

No. 492. NOEL *v.* WASHINGTON SURBURBAN SANITARY COMMISSION ET AL. Appeal from the Court of Appeals of the State of Maryland. December 3, 1928. *Per Curiam:* The appeal is dismissed for want of a substantial federal question on the authority of *Wagner* v. *Baltimore,* 239 U. S. 207; *Seattle* v. *Kelleher,* 195 U. S. 351, 359; *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside* 239 U. S. 144, 147. *Messrs. Frederic D. McKenney, Wilson L. Townsend, Caesar L. Criello,* and *F. Regis Noel* for appellant. No appearance for appellees.

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No. 76. E. HENRY WEMME CO. *v.* SELLING ET AL., ETC. Error to the Supreme Court of the State of Oregon. Argued November 27, 1928. Decided December 3, 1928. *Per Curiam:* The writ of error is dismissed for want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. Thomas Mannix* and *Guy C. H. Corliss* for plaintiff in error. *Messrs. E. V. Littlefield, John C. Veatch,* and *B. E. Haney* for defendants in error.

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No. 82. SNYDER *v.* NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. Error to the Supreme Court of the State of Ohio. Argued November 28, 1928. Decided December 3, 1928. *Per Curiam:* The writ of error is dismissed for want of a substantial federal question on the authority of *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. Frederick A. Henry* for plaintiff in error. *Messrs. Wm. H. Boyd* and *Thomas H. Hogsett,* with whom *Mr. Leslie Nichols* was on the brief, for defendant in error. See *post,* p. 578.

No. 14, original. COLORADO *v.* KANSAS ET AL. Argued November 26, 1928. Decided December 3, 1928. *Per Curiam:* The motion to dismiss is denied without prejudice to any question and with leave to the defendants to answer within ninety days. *Messrs. F. Dumont Smith* and *John G. Egan,* with whom *Messrs. Wm. A. Smith, Chester I. Long,* and *Lawrence Lewis* were on the brief, for defendants in support of the motion. *Messrs. Fred A. Sabin* and *James G. Rogers,* with whom *Messrs. Wm. L. Boatright, Ralph L. Carr, Henry A. Dubbs,* and *Platt Rogers* were on the brief, for complainant in opposition thereto.

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No. 87. WICK ET AL. *v.* SUPERIOR COURT OF THE STATE OF WASHINGTON, ETC. Error to the Supreme Court of the State of Washington. December 4, 1928. *Per Curiam:* Writ of error dismissed with costs for want of a final judgment. *Mr. Joseph D. Sullivan* for plaintiffs in error. *Messrs. F. G. Dorety, Frank T. Post, Edwin C. Matthias, Charles S. Albert,* and *Thomas Balmer* for defendant in error. See *post,* p. 575.

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No. 490. HART REFINERIES *v.* MONTANA. Appeal from the Supreme Court of the State of Montana. December 10, 1928. *Per Curiam:* On examination of the statement intended to show jurisdiction of this appeal, the Court finds that the claim of a federal question upon which this cause and the appeal are based is frivolous and the appeal is dismissed upon the authority of *Raley & Bros.* v. *Richardson,* 264 U. S. 157, 159. *Mr. John E. Patterson* for appellant. No appearance for appellee. See *post,* p. 584.

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No. 83. AMERICAN RAILWAY EXPRESS CO. *v.* FLEISCHMANN, MORRISS & CO., INC.;

No. 84. AMERICAN RAILWAY EXPRESS CO. *v.* RICHMOND HARDWARE CO.;

No. 85. AMERICAN RAILWAY EXPRESS CO. *v.* G. T. ELLIOTT, INC.; and

No. 86. AMERICAN RAILWAY EXPRESS CO. *v.* NEWCOMB. Error to the Supreme Court of Appeals of the State of Virginia. Argued November 28 and December 3, 1928. Decided December 10, 1928. *Per Curiam:* The writs of error are dismissed for want of a substantial federal question on the authority of *Wuchter* v. *Pizzutti,* 276 U. S. 13. *Mr. Wyndham R. Meredith,* with whom *Mr. Charles W. Stockton* was on the brief, for plaintiff in error. *Mr. A. W. Patterson* for defendant in error in No. 83. No appearance for defendants in error in Nos. 84, 85, and 86.

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No. 352. BRAUNSTEIN *v.* NEW YORK, ETC. Error to and appeal from the Court of Appeals of the State of New York. Argued December 4, 1928. Decided December 10, 1928. *Per Curiam:* The writ of error and the appeal are dismissed for want of a properly presented federal question on the authority of *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 246; *Marvin* v. *Trout,* 199 U. S. 213, 223; *Hiawassee Power Co.* v. *Carolina-Tennessee Power Co.,* 252 U. S. 341, 343. *Mr. Jay Leo Rothschild* for plaintiff in error and appellant. *Mr. Charles J. Dodd* for defendant in error and appellee.

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No. 87. WICK ET AL. *v.* SUPERIOR COURT ET AL. Error to the Supreme Court of the State of Washington. Argued December 4, 1928. Decided December 10, 1928. *Per Curiam:* The writ of error is dismissed on the authority of § 237 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), because the judgment sought to be reviewed is not final within the meaning of this section, however it may be regarded in state procedure; *Grays Harbor Logging Co.* v. *Coates Fordney Logging Co.,* 243 U. S. 251; *Washington ex rel. McPherson*

*Bros. Co.* v. *Superior Court,* 274 U. S. 726; *Washington ex rel. Terry* v. *Superior Court,* 276 U. S. 626. *Mr. Joseph D. Sullivan* for plaintiffs in error. *Messrs. F. G. Dorety, Frank T. Post, Edwin C. Matthias, Charles S. Albert,* and *Thomas Balmer* for defendants in error.

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No. 93. Seaboard Air Line Ry. Co. *v.* Johnson. On writ of certiorari to the Supreme Court of the State of Alabama. Argued December 5, 1928. Decided December 10, 1928. *Per Curiam:* The Court finds that the writ of certiorari heretofore issued in this case was improvidently granted, and it is dismissed. *Mr. Robert E. Steiner, Jr.,* with whom *Messrs. Benjamin P. Crum* and *Leon Weil* were on the brief, for petitioner. *Mr. Richard T. Rives,* with whom *Mr. Wm. W. Hill* was on the brief, for respondent.

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No. 95. New York, Chicago and St. Louis R. R. Co. *v.* Granfell. On writ of certiorari to the Court of Appeals of the State of Ohio, Eighth Judicial District. Argued December 6, 1928. Decided December 10, 1928. *Per Curiam:* The Court finds that the writ of certiorari heretofore issued in this case was improvidently granted, and it is dismissed. *Mr. W. T. Kinder* for petitioner. *Mr. R. B. Newcomb* for respondent.

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No. 97. New York and New Jersey Water Co. et al. *v.* Passaic Consolidated Water Co. Appeal from the Court of Errors and Appeals of the State of New Jersey. Argued December 6, 7, 1928. Decided December 10, 1928. *Per Curiam:* The appeal is dismissed for want of a substantial federal question on the authority of *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.*

*Robert H. McCarter* for appellants. *Mr. Frederick J. Faulks,* with whom *Mr. J. N. Bishop, Jr.,* was on the brief, for appellee.

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No. 511. EXCHANGE DRUG CO. *v.* MCNEEL, CHAIRMAN, ET AL. Appeal from the Supreme Court of the State of Alabama. January 2, 1929. *Per Curiam:* The appeal is dismissed on the authority of § 237 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction, on the ground that the decree sought to be reviewed is not a final one. *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Arnold* v. *United States* for the use of *Guimarin & Co.,* 263 U. S. 427, 434. *Mr. Robert Benson Evins* for appellant. No appearance for appellees.

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No. 519. WESTERN & ATLANTIC R. R. *v.* HENDERSON ET AL. Appeal from the Supreme Court of the State of Georgia. January 2, 1929. *Per Curiam:* The appeal is dismissed for want of a substantial federal question on the authority of *Mobile, Jackson & Kansas City R. R.* v. *Turnipseed,* 219 U. S. 35. *Messrs. Fitzgerald Hall, John L. Tye,* and *Frank Slemons* for appellant. *Mr. Reuben R. Arnold* for appellees. [Rehearing granted. January 21, 1929.]

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No. 100. WRIGHT, ADMINISTRATOR, *v.* GRAND TRUNK R. R. Co. On writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. Argued December 7, 1928. Decided January 2, 1929. *Per Curiam*: Affirmed on the authority of *Union Pacific Ry. Co.* v. *Wyler,* 158 U. S. 285. *Mr. Harold W. Armstrong,* with whom *Mr. Thomas A. E. Weadock* was on the brief, for petitioner. *Mr. Leo J. Carrigan,* with whom *Mr. Harold R. Martin* was on the brief, for respondent.

No. 82. SNYDER *v.* NEW YORK, CHICAGO & ST. LOUIS R. R. Co. Error to the Supreme Court of the State of Ohio. January 2, 1929. *Per Curiam:* The judgment of dismissal, heretofore entered in this cause on the 3d day of December, 1928, is hereby vacated and set aside, and the following substituted therefor:

This case is affirmed on the ground that § 407 of the Transportation Act of 1920, 41 Stat. 480 ch. 91, amending § 5 of the Interstate Commerce Act, has not as yet become applicable to cases like this. *Mr. Frederick A. Henry* for plaintiff in error. *Messrs. Leslie Nichols, Thomas H. Hogsett,* and *Wm. H. Boyd* for defendant in error. See *ante,* p. 573.

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No. 173. ARIZONA SUPERIOR MINING Co. *v.* ANDERSON. Error to the Supreme Court of the State of Arizona. Motion submitted January 2, 1929. Decided January 7, 1929. *Per Curiam:* The motion to dismiss is granted for the reason that no federal question was raised below. *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Wall* v. *Chesapeake & Ohio Ry.,* 256 U. S. 125. *Mr. Francis M. Hartman* for defendant in error in support of the motion. *Mr. James P. Levin,* with whom *Messrs. Wm. J. Hughes* and *J. W. Faulkner* were on the brief, for plaintiff in error in opposition thereto.

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No. 600. YOUNG *v.* STAPLES ET AL. Appeal from the District Court of the United States for the Western District of Texas. January 7, 1929. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there is no jurisdiction for the appeal, and it is accordingly dismissed on the authority of § 238 of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 938).

The costs already incurred herein by direction of the Court shall be paid by the Clerk from the special fund in his custody as provided in the order of October 29, 1926. *Mr. Henry Young, pro se.* No appearance for appellees.

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No. 609. BALTUFF *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. January 7, 1929. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there is no basis for certiorari, application for which is therefore also denied.

The costs already incurred herein by direction of the Court shall be paid by the Clerk from the special fund in his custody as provided in the order of October 29, 1926. *Mr. Eduarda K. Baltuff, pro se.* No appearance for the United States.

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No. 504. HORTON ET AL. *v.* PRENDERGAST, COMMISSIONER, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND CHAIRMAN, ETC., ET AL. Appeal from the Court of Appeals of the State of New York. January 7, 1929. *Per Curiam:* The appeal is dismissed for want of a substantial federal question on the authority of *Offield* v. *New York, New Haven and Hartford R. R.*, 203 U. S. 372, 375; *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32. *Mr. Allen S. Hobbard* for appellants. *Messrs. Albert Ottinger, Albert J. Danaher,* and *Henry Purcell* for appellees.

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No. 114. EXCHANGE TRUST CO., EXECUTOR, *v.* DRAINAGE DISTRICT NO. 7 ET AL. Error to the Supreme Court of the State of Arkansas. January 9, 1929. *Per Curiam:* This

cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, counsel for defendant in error, St. Francis Levee District, consenting, it was ordered, adjudged, and decreed as follows, viz:

That the prayer of the complaint for cancellation of decrees of foreclosure in favor of defendant in error, St. Francis Levee District, is granted, and said decrees are cancelled and held for naught as clouds upon the title to said lands; and said St. Francis Levee District is forever enjoined from taxing or attempting to tax said lands to pay for improvements made or administrative or other expenses incurred prior to issuing of final certificate by the United States; that said lands are subject to tax for the cost of improvements, administrative, or other expenses of said St. Francis Levee District contracted for subsequent to the issuing of final certificate from the United States, and the Supreme Court of Arkansas is reversed in so far as the judgment is inconsistent herewith, and the cause is remanded to the Supreme Court of Arkansas for further proceedings not inconsistent with this conclusion.

Mandate will issue accordingly. *Messrs. Arthur Adams* and *J. A. Tellier* for plaintiff in error. *Messrs. Burk Mann, Charles D. Frierson,* and *R. B. McCulloch* for defendants in error. See *ante,* p. 421.

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No. 376. Firemen's Insurance Co. *v.* Conway, Superintendent of Insurance. Appeal from the District Court of the United States for the Southern District of New York. Argued January 7, 1929. Decided January 14, 1929. *Per Curiam:* Affirmed on the authority of *Meccano, Ltd.,* v. *Wanamaker,* 253 U. S. 136, 141; *Chicago, Great Western Ry.* v. *Kendall,* 266 U. S. 94, 100; *Foster-Fountain Packing Co.* v. *Haydel, ante,* p. 1. *Mr. John W. Davis,* with whom *Mr. Wendell P. Barker* was on the

brief, for appellant. *Mr. Henry S. Manley,* with whom *Messrs. Albert Ottinger, Hamilton Ward,* and *Claude T. Dawes* were on the brief, for appellee.

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No. 103. EMPIRE GAS & FUEL CO. ET AL. *v.* SAUNDERS ET AL. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Argued January 8, 1929. Decided January 14, 1929. *Per Curiam:* The Court finds that the writ of certiorari heretofore issued in this case was improvidently granted, and it is dismissed. *Messrs. David B. Trammel, J. W. Finley,* and *Warren T. Spies* submitted for petitioners. *Mr. Charles C. Cook,* with whom *Mr. S. D. Stennis, Jr.,* was on the brief, for the respondents.

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No. 105. EASTERN AND WESTERN LUMBER CO. ET AL. *v.* PATTERSON, GOVERNOR, ET AL.; and

No. 194. EASTERN AND WESTERN LUMBER CO. ET AL. *v.* PATTERSON, GOVERNOR, ET AL. Error to and appeal from the Supreme Court of the State of Oregon. Argued January 8, 1929. Decided January 14, 1929. *Per Curiam:* Affirmed on the authority of *Wisconsin & Michigan Ry.* v. *Powers,* 191 U. S. 379, 385. *Mr. James G. Wilson,* with whom *Messrs John F. Reilly* and *James B. Kerr* were on the brief, for plaintiffs in error in No. 105. *Mr. James G. Wilson* for appellants in No. 194. *Mr. Willis S. Moore,* with whom *Mr. I. H. Van Winkle* was on the brief, for defendants in error and appellees.

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No. 109. WOOTEN *v.* BREVARD COUNTY. Appeal from the Supreme Court of the State of Florida. Motion submitted January 2, 1929. Decided January 14, 1929. *Per Curiam:* The appeal is dismissed (1) for want of a substantial federal question on the authority of *Shul-*

*this* v. *McDougal,* 225 U. S. 561, 569; *Hebert* v. *Louisiana,* 272 U. S. 312, 316–317; (2) because the affirmance below was based on a nonfederal ground adequate to support it. *Bilby* v. *Stewart,* 246 U. S. 255, 257. *Mr. L. C. Crofton* for appellee in support of the motion. *Messrs. W. E. Kay, Thomas B. Adams,* and *Henry C. Clark* for appellant in opposition thereto.

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No. 108. State Trust & Savings Bank *v.* Dunn, Trustee. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Argued January 9, 1929. Decided January 14, 1929. *Per Curiam:* Reversed for the reason that there is no federal jurisdiction over the cause. *Wood* v. *Wilbert,* 226 U. S. 384; *Weidhorn* v. *Levy,* 253 U. S. 268; *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 266 U. S. 426. *Mr. Webster Atwell* for petitioner. *Mr. W. F. Rutledge, Jr.,* also appeared. No appearance for respondent.

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No. 160. Virginian Ry. Co. *v.* Kirk. On writ of certiorari to the Supreme Court of Appeals of the State of West Virginia. Argued January 11 and 14, 1929. Decided January 21, 1929. *Per Curiam:* The Court finds that the writ of certiorari heretofore issued in this case was improvidently granted, and it is dismissed. *Mr. Homer T. Hall,* with whom *Mr. W. H. T. Loyall* was on the brief, for petitioner. *Mr. John R. Pendleton,* with whom *Mr. Wm. Cody Fletcher* was on the brief, for respondent.

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No. 147. Graysburg Oil Co. *v.* Texas. Error to the Supreme Court of the State of Texas. Argued January 16, 17, 1929. Decided January 21, 1929. *Per Curiam:* Reversed on the authority of *Panhandle Oil Co.* v. *Missis-*

*sippi ex rel. Knox,* 277 U. S. 218. *Mr. Victor Keller* for plaintiff in error. *Mr. D. A. Simmons,* with whom *Mr. Claude Pollard* was on the brief, for defendant in error.

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No. 161. HUNT *v.* HUNT. Error to the Supreme Court of the State of Colorado. Submitted January 17, 1929. Decided January 21, 1929. *Per Curiam:* The writ of error is dismissed for want of a substantial federal question on the authority of *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. Wayne C. Williams* for plaintiff in error. *Mr. Patrick H. Laughran* for defendant in error.

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No. 208. MORGAN *v.* WISCONSIN TAX COMMISSION. Appeal from and error to the Supreme Court of the State of Wisconsin. Argued January 17, 1929. Decided January 21, 1929. *Per Curiam:* The appeal and writ of error are dismissed on authority of § 237 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction, to await the decision of the Court on the papers as an application for certiorari as provided in § 237 (a) of the Judicial Code. *Mr. Perry J. Stearns,* with whom *Messrs. Wm. E. Black* and *Charles C. Russell* were on the brief, for appellant and plaintiff in error. *Messrs. John W. Reynolds* and *Franklin E. Bump* for appellee and defendant in error.

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No. 230. JORGENSEN-BENNETT MFG. CO. *v.* KNIGHT, SHERIFF, ET AL. Appeal from the Supreme Court of the State of Tennessee. Argued January 18, 1929. Decided January 21, 1929. *Per Curiam:* The appeal is dismissed on authority of § 237 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for

lack of jurisdiction. Treating the appeal as an application for certiorari, the same is denied. *Mr. R. G. Brown,* with whom *Mr. Abe D. Walddner* was on the brief, for appellant. *Messrs. L. D. Smith* and *W. F. Barry, Jr.,* for appellees.

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No. 490. HART REFINERIES *v.* MONTANA. Appeal from the Supreme Court of the State of Montana. February 18, 1929. *Per Curiam:* Upon consideration of the jurisdictional statement heretofore filed, and following the view expressed by the Supreme Court of Montana, we entered an order dismissing the appeal in this case as frivolous upon the authority of *Raley & Bros.* v. *Richardson,* 264 U. S. 157, 159. Upon the authority of *Hart Refineries* v. *Harmon,* decided this day, *ante,* p. 499, presenting precisely the same question, that order is now vacated and the judgment below is affirmed. *Mr. John E. Patterson* for appellant. No appearance for appellee.

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No. —, original. EX PARTE TOMSON. February 18, 1929. *Per Curiam:* The motion for leave to file a petition for a writ of mandamus is denied on the authority of *Ex parte Collins,* 277 U. S. 565; *Ex parte Public National Bank,* 278 U. S. 101. *Mr. John E. Laskey* for petitioner.

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No. 205. STOKELY ET AL. *v.* MISSISSIPPI ET AL. Appeal from the Supreme Court of Mississippi. Submitted January 15, 1929. Decided February 18, 1929. *Per Curiam:* The appeal is dismissed for want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. Marcellus Green, Garner W. Green,* and *Chalmers Potter* for appellants. *Mr. Rush H. Knox* for appellees.

## PETITIONS FOR CERTIORARI GRANTED, FROM OCTOBER 1, 1928, TO AND INCLUDING FEBRUARY 18, 1929.

No. 116. GRAYSON ET AL. *v.* HARRIS ET AL. See *ante,* p. 555.

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No. 133. THE CHESAPEAKE AND OHIO RY. CO. *v.* STAPLETON. October 8, 1928. Petition for writ of certiorari to the Court of Appeals of the State of Kentucky granted. *Mr. LeWright Browning* for petitioner. *Mr. George B. Martin* for respondent.

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No. 155. RICE AND ADAMS CORP. *v.* LATHROP. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Charles J. Staples* and *Wm. P. Conley* for petitioner. *Mr. Joshua R. H. Potts* for respondent.

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No. 160. THE VIRGINIAN RY. CO. *v.* KIRK. October 8, 1928. Petition for writ of certiorari to the Supreme Court of the State of West Virginia granted. *Messrs. W. H. T. Loyall* and *H. T. Hall* for petitioner. *Messrs. Wm. Cody Fletcher* and *John R. Pendleton* for respondent. See *ante,* p. 582.

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No. 164. COUNTY OF SPOKANE ET AL. *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Supreme Court of the State of Washington granted. *Messrs. Charles W. Greenough* and *A. O. Colburn* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. J. Louis Monarch* for the United States.

No. 183. LEONARD *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Court of Claims granted. *Messrs. George A. King, William B. King,* and *George R. Shields* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Alfred A. Wheat* and *Wm. W. Scott* for the United States.

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No. 195. UNITED STATES *v.* PERSSON. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Mitchell* for the United States. *Messrs. J. Harry Covington* and *Dean G. Acheson* for respondent.

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No. 196. UNITED STATES *v.* NICOLICH. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Mitchell* for the United States. *Messrs. Walker B. Spencer, J. Harry Covington,* and *Dean G. Acheson* for respondent.

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No. 203. CHIN MON EX REL. CHIN YUEN *v.* TILLINGHAST, COMMISSIONER OF IMMIGRATION. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. E. F. Damon* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

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No. 219. DELAWARE, LACKAWANNA AND WESTERN R. R. Co. *v.* KOSKE. October 8, 1928. Petition for writ of certiorari to the Court of Errors and Appeals of the State of New Jersey granted. *Mr. Frederic B. Scott* for petitioner. *Messrs. I. Faerber Goldenhorn* and *Saul Nemser* for respondent.

No. 220. JOHNSON *v.* UNITED STATES SHIPPING BOARD EMERGECY FLEET CORPORATION. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Silas B.* Axtel and *Charles A. Ellis* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Messrs. J. Frank Staley* and *Chauncey G. Parker* for respondent.

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No. 182. LEWIS ET AL. *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is granted, but the argument is to be limited to the question of jurisdiction and the determination whether the trial took place in accordance with the act of February 16, 1925, and § 59 of the Judicial Code, properly construed, and whether the right of petitioner under the Sixth Amendment to the Constitution was infringed thereby. *Messrs. Finis E. Riddle* and *R. L. Davidson* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

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No. 128. SANITARY REFRIGERATOR CO. *v.* WINTERS ET AL. October 15, 1928. The petition for a rehearing in this case is granted. The order entered October 8, 1928, denying the petition for a writ of certiorari herein is revoked and a writ of certiorari in this case is granted. *Mr. E. Hayward Fairbanks* for petitioner. *Mr. John Boyle, Jr.,* for respondents.

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No. 225. ATLANTIC COAST LINE R. R. CO. *v.* DRIGGERS, ADMINISTRATRIX. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of South Carolina granted. *Messrs. Thomas W. Davis* and *Simeon Hyde* for petitioner. *Mr. J. D. E. Meyer* for respondent.

No. 226. GONZALEZ *v.* THE ROMAN CATHOLIC ARCHBISHOP OF MANILA. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. Howard Thayer Kingsbury, Frederic R. Coudert,* and *Allison D. Gibbs* for petitioner. *Messers. George J. Gillespie* and *William D. Guthrie* for respondent.

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No. 234. WESTERN & ATLANTIC R. R. *v.* HUGHES, ADMINISTRATRIX. October 15, 1928. Petition for writ of certiorari to the Court of Appeals of the State of Georgia granted. *Messrs. Fitzgerald Hall, Frank Slemons,* and *John L. Tye* for petitioner. *Mr. Reuben R. Arnold* for respondent.

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No. 238. UNITED STATES *v.* NEW YORK CENTRAL R. R. Co.; and

No. 304. UNITED STATES *v.* NEVADA COUNTY NARROW GAUGE R. R. Co. October 15, 1928. Petitions for writs of certiorari to the Court of Claims granted. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Charles E. Stewart* for the United States. *Messrs. Ben B. Cain, George H. Fernald, Jr., Frederick H. Wood,* and *Clarence M. Oddie* for respondents.

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No. 251. POSADAS, COLLECTOR, *v.* WARNER, BARNES & Co., LTD.; and

No. 252. POSADAS, COLLECTOR, *v.* MENZI. October 15, 1928. Petition for writs of certiorari to the Supreme Court for the Philippine Islands granted. *Messrs. William Cattron Rigby, J. A. Hull,* and *Edward A. Kreger* for petitioner. *Messrs. Martin Taylor, Clyde Alton DeWitt,* and *Eugene Arthur Perkins* for respondents.

No. 261. WALLACE *v.* MOTOR PRODUCTS CORP'N ET AL. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Alfred Lucking* and *Howell Van Auken* for petitioner. *Messrs. Charles B. Warren* and *Sherwin A. Hill* for respondents.

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No. 267. ITHACA TRUST CO., EXECUTOR, *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Simon Lyon, R. H. B. Lyon,* and *A. F. Prescott, Jr.,* for petitioner. *Solicitor General Mitchell* and *Mr. Gardner P. Lloyd* for the United States.

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No. 272. W. A. MARSHALL & CO., INC., *v.* STEAMSHIP "PRESIDENT ARTHUR," ETC. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. George Wright Hinckley* for petitioner. *Messrs. John M. Woolsey, Samuel D. Stein, Chauncey E. Treadwell, Saul S. Myers,* and *William J. Hughes* for respondent.

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No. 290. UNITED STATES *v.* WOOLEN. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Mitchell* and *Assistant Attorney General Farnum* for the United States. *Mr. Samuel A. Godsby* for respondent.

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No. 299. FLINK *v.* PALADINI ET AL. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. H. W. Hutton* and *R. T. Lynch* for petitioner. *Mr. Ira S. Lillick* for respondents.

No. 312. DOUGLAS *v.* NEW YORK, NEW HAVEN AND HARTFORD R. R. Co. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of New York granted. *Mr. Thomas J. O'Neill* for petitioner. *Mr. John M. Gibbons* for respondent.

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No. 414. LOUISVILLE & NASHVILLE R. R. Co. *v.* CHATTERS; and

No. 415. SOUTHERN RAILWAY Co. ET AL. *v.* CHATTERS. October 15, 1928. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Harry McCall, A. M. Warren, George Denegre, Victor Leovy, Henry H. Chaffe,* and *James Hy. Bruns* for petitioner in No. 414. *Messrs. H. O'B. Cooper, J. Blanc Monroe, Monte M. Lemann, Walter J. Suthon, Jr., L. E. Jeffries,* and *S. R. Prince,* for petitioners in No. 415. *Messrs. George Piazza* and *St. Clair Adams* for respondent.

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No. 455. NEW YORK CENTRAL R. R. Co. *v.* JOHNSON; and

No. 456. NEW YORK CENTRAL R. R. Co. *v.* JOHNSON. October 15, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted, but the argument is to be limited to the question whether the alleged misconduct of counsel for the plaintiffs in their arguments to the jury was so unfairly prejudicial to the defendant as to justify a new trial. *Messrs. Sidney C. Murray* and *Albert S. Marley* for petitioner. *Messrs. John H. Atwood, Oscar S. Hill,* and *Price Wickersham* for respondents.

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No. 325. PAMPANGA SUGAR MILLS *v.* TRINIDAD, COLLECTOR. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the Philippine Islands granted.

*Messrs. Quinton Paredes, Felipe Bueneamino, Jr., Oscar Sutro,* and *Louis Titus* for petitioner. *Messrs. Wm. Cattron Rigby, Edward A. Kreger,* and *John A. Hull* for respondent.

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No. 335. COMPANIA GENERAL DE TABACOS DE FILIPINAS *v.* COLLECTOR OF INTERNAL REVENUE. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. Clyde A. DeWitt, E. Arthur Perkins, F. W. Clements,* and *Lawrence H. Cake* for petitioner. *Messrs. Wm. Cattron Rigby, Edward A. Kreger,* and *John A. Hull* for respondent.

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No. 347. RIEHLE, RECEIVER, *v.* MARGOLIES. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Harry F. White* and *F. Wright Moxley* for petitioner. *Mr. Nathan Burkan* for respondent.

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No. 361. GOKHALE *v.* UNITED STATES. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Meyer Kraushaar* and *Emanuel Celler* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

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No. 363. FEDERAL TRADE COMMISSION *v.* KLESNER ET AL. October 22, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Mitchell* and *Mr. Robert E. Healy* for petitioner. *Messrs. Alfred Klesner* and *Clarence R. Ahalt* for respondents.

No. 372. UNITED STATES PRINTING AND LITHOGRAPH Co. *v.* GRIGGS, COOPER & Co. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Ohio granted. *Messrs. Frank F. Dinsmore* and *Walter F. Murray* for petitioner. *Messrs. S. Howard Morphy* and *Orris P. Cobb* for respondent.

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No. 375. UNITED STATES *v.* CALIFORNIA COOPERATIVE CANNERIES. October 2, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Mitchell* and *Assistant to the Attorney General Donovan* for the United States. *Messrs. Frank J. Hogan* and *Nelson T. Hartson* for respondent.

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No. 407. COMMISSIONER OF INTERNAL REVENUE *v.* OLD COLONY R. R. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Clarence M. Charest* for petitioner. *Messrs. James S. Y. Ivins* and *Kingman Brewster* for respondent.

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No. 416. UNITED STATES EX REL. CLAUSSEN *v.* DAY, COMMISSIONER OF IMMIGRATION. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Silas B. Axtell* and *Charles A. Ellis* for petitioner. *Solicitor General Mitchell, Asistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

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No. 450. MORRIS & Co. ET AL. *v.* SKANDINAVIA INSURANCE Co. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit

granted. *Messrs. John M. Lee, Marcellus Green, Garner Wynn Green,* and *Chalmers Potter* for petitioners. *Messrs. T. Catesby Jones, Palmer Pillans,* and *Oscar Houston* for respondent.

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No. 364. ALBERTO *v.* NICOLAS. October 29, 1928. Petition for writ of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. Wm. Cattron Rigby, J. A. Hull,* and *Edward A. Kreger* for petitioner. *Messrs. Henry J. Richardson, Pedro Queraro,* and *Harold R. Young* for respondent.

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No. 440. UNITED STATES *v.* GALVESTON, HARRISBURG & SAN ANTONIO RY. CO. October 29, 1928. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Louis R. Mehlinger* for the United States. *Messrs. Wm. R. Harr* and *Charles H. Bates* for respondent.

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No. 454. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO. *v.* ROCK. October 29, 1928. Petition for writ of certiorari to the Appellate Court of the State of Illinois, First District and/or Supreme Court of the State of Illinois granted. *Messrs. John E. Palmer* and *Henry S. Mitchell* for petitioner. *Mr. Herbert H. Patterson* for respondent.

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No. 479. GRANT, RECEIVER, *v.* A. B. LEACH & CO., INC. October 29, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. James P. Wilson* for petitioner. *Messrs. Wm. L. Day, Conrad H. Poppenhusen, Edward R. Johnson,* and *Henry J. Darby* for respondent.

No. 482. WEISS, COLLECTOR OF INTERNAL REVENUE, *v.* WIENER; and

No. 483. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE, *v.* WIENER. October 29, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Clarence M. Charest* for petitioners. *Mr. James S. Y. Ivins* for respondent.

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No. 495. ATLANTA AND CHARLOTTE AIR LINE RY. CO. ET AL. *v.* GREEN. October 29, 1928. Petition for writ of certiorari to the Supreme Court of the State of South Carolina granted. *Messrs. S. R. Prince, H. O'B. Cooper, F. G. Tompkins,* and *L. E. Jeffries* for petitioners. *Mr. Horace L. Bomar* for respondent.

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No. 198. KARNUTH, DIRECTOR OF IMMIGRATION, ET AL. *v.* UNITED STATES EX REL. ALBRO ET AL. November 19, 1928. The petition for a rehearing is granted. The order entered October 8, 1928, denying the petition for a writ of certiorari in this case is revoked and a writ of certiorari herein is granted. *Solicitor General Mitchell* for petitioners. *Messrs. Preston M. Albro, Charles D. Council,* and *George W. Offutt* for respondents.

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No. 481. LUCAS, COLLECTOR OF INTERNAL REVENUE, *v.* ALEXANDER. November 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Clarence M. Charest* for petitioner. *Messrs. Elwood Hamilton* and *George V. Triplett* for respondent.

No. 484. UNITED STATES *v.* SCHWIMMER. November 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Mitchell* and *Mr. Henry B. Hazard* for the United States. *Olive H. Robe* for respondent.

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No. 306. CARSON PETROLEUM CO. *v.* VIAL, SHERIFF, ETC. November 26, 1928. Petition for writ of certiorari to the Supreme Court of the State of Louisiana granted. *Mr. Wm. E. Leahy* for petitioner. *Mr. Harry P. Sneed* for respondent.

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No. 506. GULF REFINING CO. *v.* ATLANTIC MUTUAL INSURANCE CO. November 26, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Ira A. Campbell* and *Roger B Siddall* for petitioner. *Mr. J. M. Richardson Lyeth* for respondent.

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No. 547. WINTERS ET AL. *v.* DENT HARDWARE CO. December 3, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. John Boyle, Jr.,* for petitioners. *Mr. E. Hayward Fairbanks* for respondent.

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No. 501. POWERS-KENNEDY CONTRACTING CORP. ET AL. *v.* CONCRETE MIXING AND CONVEYING CO. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit; and

No. 528. CONCRETE MIXING & CONVEYING CO. *v.* R. C. STORRIE & CO. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. December 10, 1928. The petitions for writs of certiorari in these cases are granted, the two cases to be heard as one.

*Messrs. John D. Morgan* and *Alan M. Jackson* for petitioners in No. 501. *Messrs. Stephen J. Cox* and *Lynn A. Williams* for respondent in No. 501. *Messrs. Lynn A. Williams, Stephen J. Cox, Clifford C. Bradbury,* and *Albert G. McCabe* for petitioner in No. 528. *Mr. Charles E. Townsend* for respondent in No. 528.

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No. 524. MARYLAND CASUALTY CO. *v.* JONES. December 10, 1928. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is granted, but the consideration of the cause shall be limited to the question whether the Circuit Court of Appeals erred in failing to review the rulings of the District Court in the progress of the trial, excepted to at the time and duly presented by a bill of exceptions. *Messrs. Walter L. Clark* and *John Ralph Wilson* for petitioner. *Mr. Nat Schmulowitz* for respondent.

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No. 532. CENTRAL NEW ENGLAND RY. CO. *v.* BOSTON & ALBANY R. R. CO. January 2, 1929. Petition for writ of certiorari to the Superior Court for Suffolk County, State of Massachusetts, granted. *Messrs. John L. Hall* and *Marcier Jenckes* for petitioner. *Messrs. Lowell A. Mayberry* and *George H. Fernald, Jr.,* for respondent.

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No. 545. STANDARD OIL CO. ET AL. *v.* CITY OF MARYSVILLE ET AL. January 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Thomas F. Doran, Roy F. Osborn, Earle W. Evans, C. W. Martyn,* and *R. R. Vermillion* for petitioners. *Messrs. Edgar C. Bennett* and *Harry W. Colmery* for respondents.

No. 526. UNITED STATES *v.* JOHN BARTH CO. ET AL. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Mitchell* for the United States. *Messrs. Louis Quarles, Richard S. Doyle, Malcolm K. Whyte,* and *S. Sidney Stein* for respondents.

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No. 559. BECHER *v.* CONTOURE LABORATORIES, INC., ET AL. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. O. Ellery Edwards* for petitioner. *Mr. Robert Moers* for respondents.

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No. 595. SUTTER ET AL. *v.* MIDLAND VALLEY R. R. CO. January 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Harry W. Hart* for petitioners. *Mr. O. E. Swan* for respondent.

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No. 565. OKANOGAN INDIANS ET AL. *v.* UNITED STATES. January 21, 1929. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Wm. S. Lewis, A. R. Serven,* and *John G. Carter* for petitioners. *Solicitor General Mitchell* for the United States.

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## PETITIONS FOR CERTIORARI DENIED OR DISMISSED FROM OCTOBER 1, 1928, TO AND INCLUDING FEBRUARY 18, 1929

No. 284. HAWKINS *v.* PULLEY ET AL., TRUSTEES. See *ante,* p. 556.

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No. 380. GUILLOT *v.* LOUISIANA RAILWAY AND NAVIGATION CO. See *ante,* p. 556.

No. 390. ANDERSON ET AL. *v.* MCGILL CLUB. See *ante*, p. 557.

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No. 120. SCHAINMAN *v.* DEAN, TRUSTEE. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Clarence A. Linn* for petitioner. No appearance for respondent.

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No. 121. ROXBURGHE *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Roger Hinds* and *Edward F. Clark* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar* for the United States.

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No. 122. DOLLAR STEAMSHIP LINE *v.* MATSON NAVIGATION CO. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ira S. Lillick* for petitioner. *Mr. William Denman* for respondent.

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No. 123. THE VICTOR-AMERICAN FUEL CO. *v.* HUERFANO AGENCY CO. ET AL. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Kenaz Huffman* for petitioner. *Mr. Jesse G. Northcutt* for respondents.

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No. 124. THURLOW ET AL. *v.* WAITE PHILLIPS CO. ET AL.;

No. 125. DOUTHIT *v.* WAITE PHILLIPS CO. ET AL.; and

No. 126. NELSON ET AL. *v.* WAITE PHILLIPS CO. ET AL. October 8, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied.

*Messrs. Chester I. Long, F. Dumont Smith, Austin M. Cowan,* and *W. E. Stanley* for petitioners. *Messrs. Samuel W. Hayes, David A. Richardson, Wm. H. Zurck, John H. Brennan, R. B. F. Hummer,* and *T. A. Noftzger* for respondents.

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No. 127. PHILLIPS *v.* PHILLIPS. October 8, 1928. Petition for writ of certiorari to the Supreme Court of the State of California denied. *Mr. William Grant* for petitioner. *Mr. John L. McNab* for respondent.

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No. 128. SANITARY REFRIGERATOR CO. *v.* WINTERS ET AL. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. E. Hayward Fairbanks* for petitioner. *Mr. John Boyle, Jr.,* for respondents. See *ante,* p. 587.

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No. 134. HENDERSON *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John Henderson, pro se. Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

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No. 136. WASHINGTON *v.* THE STATE OF FLORIDA. October 8, 1928. Petition for writ of certiorari to the Supreme Court of the State of Florida denied. *Mr. Louis Marshall* for petitioner. *Mr. Fred H. Davis* for respondent.

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No. 137. NEW YORK EX REL. HAYES *v.* MCLAUGHLIN, POLICE COMMISSIONER, ETC. October 8, 1928. Petition for writ of certiorari to the Supreme Court of the State

of New York denied. *Messrs. Harold Harper* and *Ben A. Matthews* for petitioner. *Messrs. Joab H. Banton* and *George Gordon Battle* for respondent.

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No. 138. ZEMURRAY *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Monte M. Lemann, Edward B. Burling,* and *Spencer Gordon* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

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No. 139. CHASE *v.* BARTLETT, GUARDIAN. October 8, 1928. Petition for writ of certiorari to the Supreme Court of the State of North Carolina denied. *Mr. Karl D. Loos* for petitioner. *Messrs. Henry S. Conrad* and *L. E. Durham* for respondent.

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No. 140. CALIFORNIA WINE ASS'N *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Joseph A. Cantrel* and *Stanleigh P. Friedman* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

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No. 141. IRVING *v.* BARKER. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. Waguespack* for petitioner. No appearance for respondent.

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No. 142. THE BELT RY. CO. *v.* PFEIFER, ADMINISTRATRIX, ETC. October 8, 1928. Petition for writ of certiorari to the Appellate Court of the State of Illinois, First District, denied. *Mr. Allen G. Mills* for petitioner. *Mr. Charles C. Spencer* for respondent.

No. 143. HEWES ET AL. *v.* S. DEICHES & Co. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Charles F. Perkins* and *Arthur A. Olson* for petitioners. *Mr. George P. Fisher* for respondent.

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No. 144. MUDD *v.* PERRY ET AL. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Orion L. Rider, A. R. Serven, John Barry,* and *W. R. Bleakmore* for petitioner. *Messrs. N. E. McNeill* and *Charles B. Rogers* for respondents.

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No. 145. LAUGHARN, TRUSTEE, ETC., *v.* CHANDLER. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Louis J. Canepa* for petitioner. No appearance for respondent.

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No. 146. UNION PACIFIC R. R. Co. *v.* BOWERS. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry W. Clark* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. Clarence M. Charest,* and *J. Louis Monarch* for respondent.

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No. 149. TYLER COUNTY, TEXAS, ET AL. *v.* TOWN. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. D. Gordon* for petitioners. *Mr. W. S. Hunt* for respondent.

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No. 150. CUDAHY PACKING Co. *v.* CITY OF OMAHA ET AL. October 8, 1928. Petition for writ of certiorari to

the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. A. C. Kennedy* and *George T. Buckingham* for petitioner. *Messrs. John Lee Webster* and *Dana B. Van Dusen* for respondents.

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No. 152. GREEN *v.* VICTOR TALKING MACHINE CO. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph F. Murray* for petitioner. *Mr. George W. Schurman* for respondent.

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No. 153. ALBERT PICK & CO. *v.* HOLT ET AL., TRUSTEES, ETC. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Samuel E. Hirsch* and *Frank P. Hobgood, Jr.,* for petitioner. *Mr. W. Cleveland Davis,* for respondents.

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No. 154. LYON *v.* TRAVELLER'S PROTECTIVE ASS'N OF AMERICA. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Charles A. Hines* for petitioner. *Mr. Robert A. Holland, Jr.,* for respondent.

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No. 156. AMERICAN SURETY CO. *v.* COVE IRRIGATION DISTRICT. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Sterling M. Wood* for petitioner. *Mr. Wm. M. Johnston* for respondent.

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No. 158. NEVADA-CALIFORNIA-OREGON RY. CO. *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. M. C. El-*

*liott* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

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No. 162. UNITED STATES FIDELITY & GUARANTY CO. *v.* BLANKENHORN ET AL. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Maxwell McNutt* for petitioner. *Mr. W. F. Williamson* for respondents.

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No. 163. REED *v.* NATIONAL SURETY CO. October 8, 1928. Petition for writ of certiorari to the Superior Court for the County of Suffolk, State of Massachusetts, denied. *Mr. Franklin F. Phillips* for petitioner. *Mr. George H. Brown* for respondent.

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No. 167. DISTRICT OF COLUMBIA *v.* WILKINSON. October 8, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Wm. W. Bride* and *Robert L. Williams* for petitioner. *Mr. Wm. Meyer Lewin* for respondent.

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No. 168. BRADY ET AL. *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Clyde Taylor* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

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No. 170. GAPPA *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Clarence J. Hartley* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. J. Louis Monarch* for the United States.

No. 171. CAPITAL TRACTION CO. *v.* NEWMYER, ADMINISTRATOR, ETC. October 8, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Frank J. Hogan* and *Edmund L. Jones* for petitioner. *Mr. Alvin L. Newmyer, pro se.*

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No. 172. ROSENBERGER *v.* MCCAUGHN, COLLECTOR OF INTERNAL REVENUE. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Bynum E. Hinton* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. J. Louis Monarch* for respondent.

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No. 175. FOURTH AND CENTRAL TRUST CO., EXECUTOR, *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. S. C. Williams* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Ralph C. Williamson* for the United States.

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No. 176. WAXMAN *v.* POLLOCK ET AL. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Abraham P. Waxman, pro se. Mr. Arthur F. Driscoll* for respondents.

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No. 177. SOUTHERN SURETY CO. *v.* UNITED STATES. October 8, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. L. H. Salinger* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 180. UNITED STATES EX REL. JORDAN *v.* GLASS, UNITED STATES MARSHAL, ETC.;

No. 188. UNITED STATES EX REL. MAYER *v.* GLASS, UNITED STATES MARSHAL, ETC.;

No. 202. UNITED STATES EX REL. QUINN *v.* GLASS, UNITED STATES MARSHAL, ETC.;

No. 206. UNITED STATES EX REL. LOUGHRAN *v.* GLASS, UNITED STATES MARSHAL, ETC.; and

No. 207. UNITED STATES EX REL. LORD *v.* GLASS, UNITED STATES MARSHAL, ETC. October 8, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Reese H. Harris* for petitioners in Nos. 180 and 188. *Mr. Clarence Balentine* for petitioner in No. 202. *Mr. W. J. Martin* for petitioner in Nos. 206 and 207. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for respondent.

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No. 181. SCHLIFF BROS. *v.* EAGLE AND STAR BRITISH DOMINIONS INSURANCE CO., LTD. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Benjamin Rease* and *Louis Marshall* for petitioners. *Messrs. Jacob B. Engel* and *Solomon J. Rosenblum* for respondent.

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No. 184. SOUTHERN PACIFIC CO. *v.* INDUSTRIAL COMMISSION OF UTAH ET AL. October 8, 1928. Petition for writ of certiorari to the Supreme Court of the State of Utah denied. *Mr. Emmett M. Bagley* and *Paul H. Ray* for petitioner. *Mr. Harvey H. Cluff* for respondents.

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No. 185. LEE ET AL. *v.* UNITED STATES;

No. 199. KUHN *v.* UNITED STATES; and

No. 359. DUCK *v.* UNITED STATES. October 8, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frank J. Hennessy* and *Marshall B. Woodward* for petitioners in No. 185. *Mr. Harold C. Faulkner* for petitioner in No. 199. *Mr. Harry Gottesfeld* for petitioner in No. 359. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. John T. Fowler, Jr.,* for the United States.

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No. 187. T. HOGAN & SONS, INC., *v.* L. BOYERS' SONS CO.; and

No. 217. L. BOYERS' SONS CO. *v.* T. HOGAN & SONS, INC. October 8, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Eli J. Blair* for petitioner in No. 187 and respondent in No. 217. *Mr. E. C. Sherwood* for respondent in No. 187 and petitioner in No. 217.

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No. 189. MCFARLAND, COUNTY TREASURER, ET AL. *v.* THE CENTRAL NATIONAL BANK OF TOPEKA, KANSAS. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Eugene S. Quinton* and *Alfred B. Quinton* for petitioners. *Messrs. S. M. Brewster* and *J. L. Hunt* for respondent.

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No. 190. CHIN THYN *v.* LOISEL, U. S. MARSHAL. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alex W. Swords* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 191. BARNES *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. M. H. Boutelle* and *A. H. David* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

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No. 192. COUNTY OF DELAWARE, PENNSYLVANIA, *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION; and

No. 193. SCHOOL DISTRICT OF TINICUM TOWNSHIP, PENNSYLVANIA, *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION. October 8, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Donald S. Edmonds* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. J. Frank Staley* for respondent.

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No. 197. SALISBURY *v.* ATCHISON, TOPEKA & SANTA FE R. Co. October 8, 1928. Petition for writ of certiorari to the Supreme Court of the State of Kansas denied. *Messrs. J. H. Brady, T. F. Railsback,* and *J. Francis O'Sullivan* for petitioner. No appearance for respondent.

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No. 198. KARNUTH, DIRECTOR OF IMMIGRATION, ET AL. *v.* UNITED STATES, EX REL. ALBRO. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Mitchell* for petitioners. *Messrs. Preston M. Albro, Charles D. Council,* and *George W. Offutt* for respondent. See *ante* p. 594.

No. 200. LeCrone, Receiver, *v.* United States. October 8, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. George N. Baxter* and *Thomas Sterling* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Percy M. Cox* for the United States.

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No. 201. United States Fire Insurance Co. *v.* Sullivan. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frederick D. Silber* for petitioner. *Messrs. Clement L. Waldron, Harry Silverman,* and *L. Ross Newkirk* for respondent.

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No. 204. U. S. Industrial Chemical Co. et al. *v.* Theroz Co. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Charles E. Hughes, F. P. Warfield, Hersey Egginton,* and *Lawrence Bristol* for petitioners. *Mr. Livingston Gifford* for respondent.

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No. 211. Oregon ex rel. Van Winkle, Attorney General, *v.* Siegmund, County Judge. October 8, 1928. Petition for writ of certiorari to the Supreme Court of the State of Oregon denied. *Messrs. I. H. Van Winkle* and *Willis S. Moore* for petitioner. *Messrs. Irvine L. Lenroot, John H. Carson,* and *Guy Cordon* for respondent.

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No. 212. Wallenstein et al. *v.* United States. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward P. Stout* for petitioners. *Solicitor General*

*Mitchell* and *Assistant Attorney General Mabel Walker Willebrandt* for the United States.

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No. 213. STEIDLE, ADMINISTRATOR, *v.* READING CO. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles A. Ludlow* for petitioner. *Mr. Edward L. Katzenbach* for respondent.

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No. 214. MATTHEISSEN *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. S. M. Rinaker* and *M. F. Gallagher* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Gardner P. Lloyd* and *Fred K. Dyar* for the United States.

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No. 215. JAMES A. SACKLEY CO. *v.* UNITED STATES. October 8, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Wm. M. Williams* and *Matthias Concannon* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar* for the United States.

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No. 216. C. B. COTTRELL & SONS CO. *v.* CLAYBOURN PROCESS CORP'N. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. E. C. Seward* for petitioner. *Mr. Louis Quarles* for respondent.

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No. 218. RUBIN *v.* MIDLINSKY. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Jacob G. Grossberg* for petitioner. *Mr. Frederick D. Silber* for respondent.

No. 221. ALEXANDER ECCLES & CO. *v.* STRACHAN SHIPPING CO. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edward C. Brennan* for petitioner. *Messrs. Samuel B. Adams* and *A. Pratt Adams* for respondent.

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No. 222. PAN AMERICAN PETROLEUM & TRANSPORT CO. *v.* STEAMSHIP "VIRGINIA," ET AL. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Chauncey I. Clark* and *Frederic Conger* for petitioner. *Mr. James K. Symmers* for respondents.

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No. 223. WASHINGTON AND OLD DOMINION RY. *v.* MCPHERSON. October 8, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Wilton J. Lambert* for petitioner. *Mr. Crandal Mackey* for respondent.

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No. 224. NORTHERN OKLAHOMA RYS. ET AL. *v.* MISSOURI-KANSAS-TEXAS R. R. CO. October 8, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Guy Patten* for petitioners. *Messrs. Joseph M. Bryson, Charles S. Burg,* and *Maurice D. Green* for respondent.

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No. 351. NATIONAL SURETY CO. ET AL. *v.* JARVIS, TREASURER. October 8, 1928. The petition for a writ of certiorari to a decree of the Circuit Court of Appeals for the Ninth Circuit is denied. The brief of counsel for the respondent in this case contains language of which complaint is made by opposing counsel for the petitioners. The brief for the respondent betrayed great impatience at the language and claims of the petitioners' brief, and

urged penalty for delay thereby caused. An examination of petitioners' brief shows no words like those complained of, and yet the respondent characterizes them most severely. Because no page references are made by respondent's counsel to the record in accord with the rules, to sustain his criticism, and because the brief of petitioners complained of does not contain the words criticized, we deem it proper to animadvert upon the bad temper and recklessness of respondent's counsel in making such unsupported statements. We must insist that arguments in this Court, either oral or written, though often properly in sharp controversy, shall be gracious and respectful to both the Court and opposing counsel, and be in such words as may be properly addressed by one gentleman to another.

The brief of respondent in this case is ordered to be stricken from the files as not printed in accordance with the rules, and also for the reasons stated.

Suggestion has been made that there should be issued against the author of the offending brief in this case a rule to show cause why he should not be committed for contempt, but it is thought that this expression of the Court will be sufficient to prevent recurrence. *Messrs. Henderson Stockton* and *Thomas A. Flynn* for petitioners. *Mr. Isaac Barth* for respondent.

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No. 227. BALLARD & BALLARD CO. *v.* MUNSON STEAMSHIP LINE. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James Garnett* for petitioner. *Mr. Cletus Keating* for respondent.

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No. 228. JOHNSON ET AL. *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Paul F. Myers* for petitioners. *So-*

*licitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Dwight E. Rorer* for the United States.

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No. 229. BENESE *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John E. Jackson* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

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No. 231. T. B. HORD GRAIN CO. *v.* BLAIR, COMMISSIONER OF INTERNAL REVENUE. October 15, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Earle W. Wallick* and *Ben Jenkins* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. Clarence M. Charest* and *J. Louis Monarch* for respondent.

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No. 232. MESCE *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Maclay Hoyne* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar* for the United States.

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No. 233. CONSOLIDATED GAS, ELECTRIC LIGHT AND POWER CO. *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Charles Markell* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

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No. 235. BURTON ET AL. *v.* HAAS ET AL. October 15, 1928. Petition for writ of certiorari to the Circuit Court

of Appeals for the Fifth Circuit denied. *Mr. Frank S. Quinn* for petitioners. No appearance for respondents.

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No. 236. POSTE *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Edward B. Burling, Spencer Gordon,* and *Henry Gumble* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Gardner P. Lloyd* and *McClure Kelley* for the United States.

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No. 237. NEW RIVER COLLIERIES CO. ET AL. *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Ira Jewell Williams, Ira Jewell Williams, Jr., Charles L. Guerin,* and *Francis S. Brown* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. James J. Lenihan* for the United States.

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No. 239. GORBEA, TRUSTEE, ET AL. *v.* CREDITO Y AHORRO PONCENO. October 15, 1928. Petition for writ of certiorari to Circuit Court of Appeals for the First Circuit denied. *Mr. Hugh R. Francis* for petitioners. *Messrs. Jose A. Poventud, Hollis R. Bailey,* and *Alberto S. Poventud* for respondents.

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No. 240. MARCO ET AL. *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Thomas P. White* and *Harold C. Faulkner* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 241. CALIFORNIA *v.* MOUSE. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of California denied. *Mr. U. S. Webb* for petitioner. No appearance for respondent.

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No. 242. NEW YORK, CHICAGO AND ST. LOUIS R. R. Co. *v.* BIERMACHER. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. W. T. Kinder* for petitioner. *Mr. David F. Anderson* for respondent.

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No. 243. MISSOURI SOUTHERN R. R. Co. *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Horace S. Whitman* and *George H. Parker* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Louis R. Mehlinger* for the United States

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No. 244. IRELAND *v.* KEISTER ET AL. October 15, 1928. Petition for writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied. *Mr. P. M. Ireland pro se.* No appearance for respondents

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No. 245. CHAI, ALIAS HIN, *v.* BURNETT, IMMIGRATION INSPECTOR. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. A. G. M. Robertson* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. George C. Butte* for respondent.

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No. 246. STOUT LUMBER Co. *v.* HAYES. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. D.*

*Wilkinson, W. S. Wilkinson,* and *C. H. Lewis* for petitioner. No appearance for respondent.

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No. 247. BENWAY *v.* MICHIGAN. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles A. Meyer* for petitioner. *Mr. Wilbur M. Brucker* for respondent.

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No. 248. BAKER & TAYLOR CO. *v.* UNITED STATES; and No. 249. BAKER & TAYLOR CO. *v.* BOWERS. October 15, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William E. Russell* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. J. Louis Monarch* for the United States in No. 248 and respondent in No. 249.

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No. 250. WYOMING NATIONAL BANK OF CASPER *v.* OMAHA NATIONAL BANK OF OMAHA, ET AL. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edgar M. Morsman, Jr.,* for petitioner. *Messrs. Halleck F. Rose, Arthur R. Wells,* and *Paul L. Martin* for respondents.

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No. 254. BABCOCK ET AL. *v.* WILKERSON, DISTRICT JUDGE. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry S. Robbins* for petitioners. *Messrs. Horace K. Tenney* and *James M. Sheean* for respondent.

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No. 255. ORENSTEIN AND KOPPEL AKTIENGESELLSCHAFT ET AL. *v.* KOPPEL INDUSTRIAL CAR & EQUIPMENT CO. October 15, 1928. Petition for writ of certiorari

to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur Garfield Hays* for petitioners. *Messrs. Albert Stickney* and *Robert J. Dodds* for respondent.

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No. 256. TERMINAL R. R. ASS'N *v.* POTTERFIELD, ADMINISTRATRIX. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. J. L. Howell* for petitioner. *Mr. Sidney Thorne Able* for respondent.

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No. 257. CITY and COUNTY OF DENVER *v.* DENVER TRAMWAY CORP'N. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas H. Gibson* for petitioner. *Messrs. Gerald Hughes* and *Clayton C. Dorsey* for respondent.

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No. 258. OVERLANDER *v.* OVERLANDER ET AL. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Kansas and/or District Court of the State of Kansas, Doniphan County, 22d Judicial District, denied. *Mr. Jacob A. Overlander* for petitioner. No appearance for respondents.

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No. 259. SUGRUE ET AL. *v.* CRILLEY, ETC. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Illinois denied. *Messrs. George R. Sherriff, James Hamilton Lewis,* and *Andrew R. Sherriff* for petitioners. *Mr. Werner W. Schroeder* for respondent.

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No. 262. SAADI *v.* CARR. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William H. Wylie* for peti-

tioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

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No. 263. TRIUMPH TRAP CO., INC. *v.* GIBBS. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles H. Wilson* and *Louis Marshall* for petitioner. *Messrs. H. A. Howson* and *Hubert Howson* for respondent.

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No. 264. DAVENPORT OIL CO. *v.* DAVENPORT. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Levi Cooke* for petitioner. No appearance for respondent.

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No. 265. PARIDY ET AL. *v.* CATERPILLAR TRACTOR CO., substituted as defendant for the HOLT MFG. CO. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward E. Longan* for petitioners. *Messrs. Frank T. Miller* and *Allen L. Chickering* for respondent.

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No. 266. HOPKINS *v.* WASHINGTON. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Washington denied. *Mr. Charles H. Miller* for petitioner. No appearance for respondent.

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No. 268. WALKER MFG CO. *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Marvin Farrington* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Ralph C. Williamson* for the United States.

No. 269. PETTIBONE-MULLIKEN CO. *v.* GUARANTY TRUST CO. ET AL. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Nathan L. Miller, Kemper K. Knapp,* and *J. H. Hershberger* for petitioner. *Messrs. Edwin S. S. Sunderland* and *Warren S. Sarter* for respondents.

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No. 270. KAISHA *v.* OLIVIER STRAW GOODS CORP'N. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Drandall* for petitioner. *Mr. Henry N. Langley* for respondent.

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No. 271. GORDON *v.* UNITED STATES; and

No. 301. CLAYTON, ALIAS DOUCETT, *v.* UNITED STATES. October 15, 1928. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. David V. Cahill* and *Louis Halle* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Mabel Walker Willebrandt* for the United States.

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No. 275. WILLIAM C. ATWATER & CO., INC., *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. J. Harry Covington, John L. Steinbugler,* and *Spencer Gordon* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. James J. Lenihan* for the United States.

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No. 276. MACHIN ET AL. *v.* NICOLLET HOTEL ET AL. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. M. H. Boutelle* for petitioners. *Mr. J. B. Faegre* for respondents.

No. 277. PARKER *v.* SINCLAIR. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Peter Q. Nyce, Dudley W. Strickland, Joseph D. Houston,* and *Chester I. Long* for petitioner. *Messrs. Martin W. Littleton, G. T. Sanford, Edward H. Chandler,* and *R. W. Ragland* for respondent.

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No. 280. SHELLENBARGER *v.* OHIO. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. James A. White* for petitioner. *Mr. Edwin C. Turner* for respondent.

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No. 281. BOSLER ET AL. *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Arthur L. Adams* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Farnum* for the United States.

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No. 282. COLLA AND DECOLA *v.* BANK OF ITALY. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. Osborne Mitchell* for petitioners. *Mr. L. A. Manchester* for respondent.

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No. 283. TUCKER *v.* ALEXANDER, COLLECTOR OF INTERNAL REVENUE. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles H. Garnett* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Clarence M. Charest* for respondent.

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No. 285. SOUND MOTOR BOAT SERVICE, INC., *v.* UNITED STATES. October 15, 1928. Petition for writ of certi-

orari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Louis Halle* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Arthur W. Henderson* for the United States.

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No. 286. SELDIN *v.* THREADNEEDLE INSURANCE CO. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wendell P. Barker* and *Frank I. Tierney* for petitioner. *Messrs. Jacob B. Engel* and *Soloman J. Rosenblum* for respondent.

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No. 287. BEAUMONT, SOUR LAKE & WESTERN RY. CO. *v.* MAGNOLIA PROVISION CO.;

No. 288. TEXAS & NEW ORLEANS R. R. CO. ET AL. *v.* MAGNOLIA PROVISION CO.; and

No. 289. TEXAS & NEW ORLEANS R. R. CO. *v.* HOUSTON PACKING CO. October 15, 1928. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Richard H. Wilmer, W. L. Cook,* and *U. N. Streetman* for petitioner in No. 287. *Messrs. Richard H. Wilmer, H. M. Garwood,* and *J. H. Tallichet* for petitioners in No. 288. *Mr. Richard H. Wilmer* for petitioner in No. 289. *Mr. R. C. Fulbright* for respondents.

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No. 291. ZENITH-DETROIT CORP'N *v.* STROMBERG MOTOR DEVICES CO. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph H. Chorte, Jr., William J. Belknap,* and *Earle L. Parmelee* for petitioner. *Messrs. Wm. Houston Kenyon* and *Charles A. Brown* for respondent.

No. 293. BARTON *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. E. B. Barton, pro se. Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

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No. 294. KANSAS CITY SOUTHERN RY. CO. *v.* NECTAUX. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George Janvier* for petitioner. *Mr. S. P. Jones* for respondent.

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No. 297. SOUTHERN PACIFIC CO. *v.* FRANKLIN. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of California denied. *Mr. Henley C. Booth* for petitioner. No appearance for respondent.

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No. 298. BRADY *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Roy L. Daily* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

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No. 300. MCCANDLESS *v.* UNITED STATES BOARD OF TAX APPEALS. October 15, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Tracy L. Jeffords* and *Edwin C. Dutton* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Mabel Walker Willebrandt* for respondent.

No. 302. THOMAS *v.* TRIMBLE ET AL. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Messrs Claude A. Niles* and *Creekmoore Wallace* for petitioner. *Messrs. T. J. Flannelly* and *F. B. Burford* for respondents.

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No. 303. FURNESS, WITHY & Co. *v.* SUTHERLAND, ALIEN PROPERTY CUSTODIAN, ETC., ET AL. October 15, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. John M. Woolsey, Charles Henry Butler, Charles T. Cowenhoven, Jr., John A. Kratz,* and *Delbert M. Tibbetts* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. Thomas E. Rhodes* for respondents.

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No. 307. CARLO *v.* BESSEMER & LAKE ERIE R. R. Co. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. J. Thomas Hoffman* for petitioner. *Mr. Wm. A. Seifert* for respondent.

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No. 308. POINDEXTER, ADMINISTRATRIX, *v.* CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. Co. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Messrs. Patrick Henry Cullen* and *Thomas T. Fauntleroy* for petitioner. *Messrs. Charles A. Houts, H. N. Quigley,* and *S. W. Baxter* for respondent.

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No. 309. WILSON, ADMINISTRATRIX, *v.* MISSOURI PACIFIC R. R. Co. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri

denied. *Mr. Patrick Henry Cullen* for petitioner. *Messrs. Edward J. White* and *Harry R. Stocker* for respondent.

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No. 310. ILLINOIS STATE TRUST CO. *v.* MISSOURI PACIFIC R. R. CO. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Messrs. Patrick Henry Cullen* and *Thomas T. Fauntleroy* for petitioner. *Messrs. Edward J. White* and *Merritt U. Hayden* for respondent.

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No. 311. INDIANA QUARTERED OAK CO. *v.* FEDERAL TRADE COMMISSION. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles Neave* and *F. Granville Munson* for petitioner. *Solicitor General Mitchell* for respondent.

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No. 314. BANK LINE, LIMITED, *v.* PORTER ET AL. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Charles R. Hickox, Edward R. Baird, Jr.,* and *John M. Woolsey* for petitioner. *Messrs. T. Catesby Jones, D. Roger Englar, Henry H. Little,* and *Henry N. Langley* for respondents.

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No. 315. AKTIESELSKABET DEA *v.* WRIGHTSON, AS MANAGING OWNER OF AMERICAN SCHOONER "COPPERFIELD." October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John W. Griffin* for petitioner. *Mr. Alex T. Howard* for respondent.

No. 316. TRICKETT ET AL. *v.* KAW VALLEY DRAINAGE DISTRICT ET AL. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Fred Robertson* for petitioners. *Messrs. Thomas A. Polloch* and *L. S. Harvey* for respondents.

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No. 317. CITIZENS' WHOLESALE SUPPLY CO. *v.* WELBER CO. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Ohio denied. *Mr. Simeon Nash* for petitioner. *Mr. James I. Boulger* for respondent.

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No. 318. MCPHERSON BROTHERS CO. *v.* OKANOGAN-DOUGLAS INTER-COUNTY BRIDGE CO. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Peter McPherson* for petitioner. *Messrs. Sam R. Sumner* and *John P. Hartman* for respondent.

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No. 409. NOYES ET AL. *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles Noyes* and *E. R. Mason* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Mabel Walker Willebrandt* for the United States.

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No. 411. AMERICAN SURETY CO. *v.* JAMES A. DICK CO. ET AL. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Francis C. Wilson* for petitioner. *Mr. C. J. Roberts* for respondents.

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No. 419. MAYOR *v.* CENTRAL VERMONT RY. CO. October 15, 1928. Petition for writ of certiorari to the Circuit

Court of Appeals for the Second Circuit denied. *Mr. Paul Koch* for petitioner. *Mr. J. W. Redmond* for respondent.

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No. 420. RYAN, ADMINISTRATOR, ET AL. *v.* CORMANY ET AL. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Tennessee denied. *Messrs. J. A. Fowler* and *Malcolm McDermott* for petitioners. *Mr. Robert Burrow* for respondents.

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No. 425. LUN *v.* NAGLE, COMMISSIONER OF IMMIGRATION. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Clarence Wood* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

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No. 434. HUSAR *v.* UNITED STATES. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Milton T. U'Ren* and *Leo R. Friedman* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

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No. 435. SCHMUTZ *v.* ILLINOIS EX REL. CHICAGO BAR ASSOCIATION. October 15, 1928. Petition for writ of certiorari to the Supreme Court of the State of Illinois denied. *Mr. John T. Murray* for petitioner. *Mr. Morse Ives* for respondent.

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No. 443. TEXAS CO. *v.* GULF REFINING CO. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Liv-*

*ingston Gifford* for petitioner. *Messrs. Melville Church, Alfred M. Houghton,* and *John E. Green, Jr.,* for respondent.

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No. 445. RATLIFFE ET AL. *v.* MEYERS ET AL. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. D. Gordon* for petitioners. *Messrs. Will E. Orgain* and *Beeman Strong* for respondents.

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No. 449. HEINTZ ET AL. *v.* SMITH, ADMINISTRATRIX. October 15, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Paul Bakewell* for petitioners. *Mr. E. Howard McCaleb* for respondent.

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No. 253. OYSTER ET AL. *v.* PUBLIC UTILITIES COMM'N. See *ante,* p. 559.

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No. 274. MACKAY *v.* OHIO. See *ante,* p. 559.

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No. 279. BOHNEFELD *v.* SECURITY NATIONAL BANK. See *ante,* p. 559.

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No. 113. DOUCET ET AL. *v.* FONTENOT, SHERIFF, ET AL. See *ante,* p. 561.

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No. 320. AMERICAN BAPTIST HOME MISSION SOCIETY *v.* BARNETT, ETC., ET AL. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. P. P. Campbell* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Parmenter,* and *Messrs. Carrol G. Walter* and *Almond O. Cochran* for respondents.

No. 323. W. L. SLAYTON & Co. *v.* WINSTON COUNTY, ALABAMA, ET AL. October 22, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lewis R. Graham* for petitioner. No appearance for respondents.

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No. 324. HUNTER *v.* BAKER ET AL. October 22, 1928. Petition for writ of certiorari to the Court of Appeals of the State of Maryland denied. *Mr. Harvey R. Spessard* for petitioner. No appearance for respondents.

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No. 326. ENGEMOEN *v.* REA ET AL. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Blendy B. Arnold* for petitioner. *Messrs. Xenophon P. Wilfley, Fred L. Williams,* and *Earl F. Nelson* for respondents.

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No. 327. STAPLETON *v.* READING CO. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles A. Ludlow* for petitioner. *Mr. Edward L. Katzenbach* for respondent.

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No. 328. APPLE ET AL. *v.* AMERICAN NATIONAL BANK OF ARDMORE, OKLAHOMA. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. W. D. Potter* for petitioners. *Mr. Wm. B. Johnson* for respondent.

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No. 329. AUXILIARY SCHOONER "MISTINGUETTE," ETC., *v.* UNITED STATES;

No. 330. 416 CASES WHISKEY, ETC., *v.* UNITED STATES; and

No. 331. 63 KEGS OF MALT, ETC., *v.* UNITED STATES. October 22, 1928. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. David V. Cahill* and *Louis Halle* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Arthur W. Henderson* for the United States.

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No. 332. WETZLER ET AL., ETC., *v.* TOLFREE, ETC. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. F. Gwynn Gardiner* and *Raymond J. Mawhinney* for petitioners. *Messrs. Frederick P. Fish* and *Henry R. Ashton* for respondent.

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No. 333. DAWSON, ADMINISTRATRIX, *v.* READING CO. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Wm. L. Houston* for petitioner. No appearance for respondent.

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No. 334. NORTHERN LIFE INSURANCE CO. *v.* SCHWARTZ. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. F. Eldred Boland* and *Samuel Knight* for petitioner. No appearance for respondent.

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No. 336. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION *v.* SMITH; and

No. 337. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION *v.* CATZ AMERICAN SHIPPING CO. INC. October 22, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit

denied. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Messrs. Chauncey G. Parker* and *J. Frank Staley* for petitioner. *Mr. John C. Prizer* for respondents.

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No. 338. BENITEZ *v.* PHILIPPINE ISLANDS. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Gabriel Benitez, pro se. Messrs. Wm. Cattron Rigby* and *John A. Hull* for respondent.

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No. 339. CHESAPEAKE & OHIO RY. CO. *v.* WAID. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. C. W. Strickling* for petitioner. No appearance for respondent.

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No. 340. HEIDBRINK ET AL. *v.* CHARLES W. HARDESSEN CO. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frank W. Whiteley* for petitioners. *Mr. George E. Kirk* for respondent.

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No. 341. HATMAKER *v.* DRY MILK CO. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. James R. Hatmaker, pro se. Mr. Hanz v. Briesen* for respondent.

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No. 342. GREAT AMERICAN INSURANCE CO. *v.* JOHNSON ET AL. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Philip P. Steptoe* and *Louis A. Johnson* for petitioner. No appearance for respondents.

No. 343. RICHARDS *v.* UNITED STATES. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Ralph A. Smith* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Clarence M. Charest* for the United States.

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No. 345. MONTGOMERY WARD & Co., INC., *v.* GIBBS. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Charles H. Wilson* and *Louis Marshall* for petitioner. *Messrs. H. A. Howson* and *Hubert Howson* for respondent.

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No. 346. COOK-O'BRIEN CONSTRUCTION CO. *v.* CRAWFORD. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Louis H. Chalmers* and *Thomas G. Nairn* for petitioner. *Mr. James P. Lavin* for respondent.

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No. 348. BONDURANT ET AL. *v.* MUTUAL LIFE INSURANCE CO.;

No. 349. BONDURANT ET AL. *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO.; and

No. 350. BONDURANT ET AL. *v.* PHELPS, CLERK OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY. October 22, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. V. Gregory* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Farnum* and *Mr. Guston T. Fitzhugh* for respondents.

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No. 353. PORTO RICAN AMERICAN TOBACCO CO. *v.* GALLARDO, TREASURER. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First

Circuit denied. *Mr. J. Granville Meyers* for petitioner. *Messrs. Wm. Cattron Rigby* and *John A. Hull* for respondent.

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No. 354. SANFORD *v.* AMERICAN SEATING CO. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James Hamilton Lewis* for petitioner. *Mr. Wm. E. Hann* for respondent.

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No. 360. MISSOURI EX REL. MISSOURI PACIFIC R. R. CO. *v.* DANUSER ET AL. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Messrs. Harry R. Stocker* and *Edw. J. White* for petitioner. No appearance for respondents.

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No. 362. MISSOURI EX REL. HURST ET AL. *v.* DAUES ET AL. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Messrs. Charles M. Hurst* and *Christian N. Steffen* for petitioners. No appearance for respondents.

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No. 365. HUNN, EXECUTOR, ET AL. *v.* LEWIS ET AL. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Irwin R. Blaisdell* for petitioners. *Mr. H. H. Stipp* for respondents.

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No. 366. CONSOLIDATION COAL CO. *v.* SOCIETA COMMERCIALE DI NAVIGAZIONE, ETC. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Edward R. Baird, Jr.,* and *Russell T. Mount* for petitioner. *Messrs. Braden Vandeventer* and *Floyd Hughes* for respondent.

No. 367. REED *v.* LOUISIANA OIL REFINING CORP'N. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. D. Wilkinson* and *Huey P. Long* for petitioner. *Mr. Elias Goldstein* for respondent.

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No. 368. ST. LOUIS MERCHANTS BRIDGE TERMINAL RY. CO. *v.* VAN LOON. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. J. L. Howell* for petitioner. *Mr. Sidney Thorne Able* for respondent.

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No. 369. LANCASTER IRON WORKS, INC., *v.* J. C. PENNEY GWINN CORP'N ET AL.; and

No. 370. LANCASTER IRON WORKS, INC., *v.* J. C. PENNEY-GWINN CORP'N ET AL. October 22, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John P. Stokes, Scott M. Loftin,* and *James E. Calkins* for petitioner. *Messrs. Wm. E. Kay* and *Thomas B. Adams* for respondents.

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No. 373. WABASH RAILWAY CO. *v.* WESTOVER. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Messrs. Homer Hall* and *N. S. Brown* for petitioner. *Mr. Wm. H. Douglass* for respondent.

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No. 374. MOORE ET AL., ETC. *v.* UNITED STATES, ETC., ET AL. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. D. Roger Englar* and *Ira A. Campbell* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Messrs. Larocque* and *J. Frank Staley* for the United States.

No. 378. KEYES, RECEIVER, *v.* FIRST NATIONAL BANK OF ABERDEEN, SOUTH DAKOTA. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Charles O. Bailey, John H. Voorhees, Ray F. Bruce,* and *Theodore M. Bailey* for petitioner. *Messrs. John Junell* and *Egbert S. Oakley* for respondent.

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No. 379. SHIELDS *v.* UNITED STATES. October 22, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. M. M. Doyle* and *Frederick A. Thuce* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

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No. 381. SOCIETA NAZIONALE DI NAVIGAZIONE, ETC. *v.* RHEINSTROM BROTHERS CO. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Homer L. Loomis* for petitioner. *Messrs. Oscar R. Houston* and *Ezra G. Benedict Fox* for respondent.

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No. 382. HUMPHREYS OIL CO., ET AL. *v.* TATUM ET AL. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Clyde A. Sweeton* for petitioners. *Messrs. J. D. Williamson* and *N. B. Williams* for respondents.

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No. 383. CHICAGO, INDIANAPOLIS AND LOUISVILLE RY. CO. *v.* STIERWALT. October 22, 1928. Petition for writ of certiorari to the Appellate Court of the State of Indiana denied. *Messrs. Edmund F. Trabue* and *Alfred Evens* for

petitioner. *Messrs. Tom Davis* and *Ernest A. Michel* for respondent.

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No. 384. HAAR *v.* UNITED STATES. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. A. A. Lawrence, T. M. Cunningham, Jr.,* and *P. P. Campbell* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. Clarence M. Charest* and *Sewall Key* for the United States.

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No. 386. MARYLAND CASUALTY CO. *v.* SCHOOL DISTRICT NO. 1 OF THE CITY OF HAYWARD, WISCONSIN. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Wisconsin denied. *Mr. Francis E. McGovern* for petitioner. *Mr. W. T. Doar* for respondent.

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No. 387. E. MACHLETT & SON *v.* CLAUDE NEON LIGHTS, INC. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. S. E. Darby, Jr.,* and *Dean S. Edmonds* for petitioner. *Messers. Edwin J. Prindle, Thomas Ewing,* and *Wm. Bohleber* for respondent.

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No. 388. ORDER OF THE UNITED COMMERCIAL TRAVELERS OF AMERICA *v.* GARBUSH. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. A. V. Rieke* for petitioner. *Mr. George H. Sullivan* for respondent.

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No. 391. LEWIS *v.* JONES, ADMINISTRATOR. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs.*

*Robert H. Talley* and *David Meade White* for petitioner. *Mr. S. S. Patteson* for respondent.

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No. 392. ANACONDA COPPER MINING CO. *v.* CARSON INVESTMENT CO. ET AL. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles E. Hughes, L. O. Evans, Arthur A. Olson,* and *Wm. Wallace, Jr.,* for petitioner. *Messrs. George W. Wickersham, Frank H. Hitchcock, John H. Miller,* and *A. W. Boyken* for respondents.

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No. 394. NAKDIMEN *v.* FIRST NATIONAL BANK ET AL. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Arkansas denied. *Mr. James B. McDonough* for petitioner. *Mr. John P. Woods* for respondents.

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No. 395. DEHANAS ET AL. *v.* CORTEZ-KING BRAND MINES CO. ET AL. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joseph W. Howell* for petitioners. No appearance for respondents.

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No. 396. MOROSS ET AL. *v.* HILLSDALE COUNTY, STATE OF MICHIGAN. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Amariah F. Freeman* for petitioners. *Mr. Clare Retan* for respondent.

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No. 397. GILLAM, MASTER, ETC. *v.* UNITED STATES. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied.

*Messrs. Frank D. Moore* and *Carl E. Whitney* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Arthur W. Henderson* for the United States.

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No. 398. KLINGLE *v.* MINNESOTA. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Harlace E. Leach* for petitioner. *Mr. G. A. Youngquist* for respondent.

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No. 401. LAU AH LEONG *v.* FUNG DAI KIM AH LEONG. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. S. Hasket Derby, Harry Irwin,* and *A. G. M. Robertson* for petitioner. *Mr. Ira L. Dwers* for respondent.

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No. 402. CONKLIN, ADMINISTRATRIX, *v.* UNITED STATES ET AL. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles H. Sooy* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Farnum* for the United States.

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No. 404. W. R. GRACE & CO. *v.* NEW ORLEANS AND SOUTH AMERICAN S. S. CO. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. D. Roger Englar* and *Ezra G. Benedict Fox* for petitioner. *Mr. Russell T. Mount* for respondent.

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No. 405. PHILLIPS ET AL., EXECUTORS, *v.* GNICHTEL, COLLECTOR OF INTERNAL REVENUE. October 22, 1928.

Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Earl A. Darr* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Willebrandt,* and *Messrs. Clarence M. Charest* and *S. Dee Hanson* for respondent.

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No. 406. TALAG *v.* NATHORST. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Jose Abad Santos* for petitioner. *Messrs. Wm. Cattron Rigby* and *John A. Hull* for respondent.

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No. 410. STANLEY'S INCORPORATED STORE No. 3 *v.* EARL. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Aubrey Lawrence* for petitioner. No appearance for respondent.

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No. 412. CHERNIK *v.* CLYDE STEAMSHIP CO. October 22, 1928. Petition for writ of certiorari to the Court of Appeals of the State of New York denied. *Mr. Joseph Townsend England* for petitioner. *Mr. Ray Rood Allen* for respondent.

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No. 413. FREEMAN ET AL., RECEIVERS, *v.* FRASHER, ADMINISTRATRIX. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Colorado denied. *Messrs. Milton Smith, Elmer L. Brock,* and *E. R. Campbell* for petitioners. *Mr. J. J. Laton* for respondent.

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No. 417. STINEMAN *v.* PENINSULA STATE S. S. CO. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr.*

*Jacob Louis Morewitz* for petitioner. No appearance for respondent.

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No. 418. BERGERON *v.* TRAVELERS INSURANCE CO. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Karl J. Knoeppler* for petitioner. *Mr. J. A. C. Kennedy* for respondent.

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No. 421. FEDERAL TELEPHONE & TELEGRAPH CO. *v.* WILKS, ADMINISTRATRIX. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of New York, County of Erie, denied. *Mr. Welles V. Moot* for petitioner. *Mr. Ernest W. McIntyre* for respondent.

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No. 427. WILLIAMS, ADMINISTRATOR, *v.* PENN MUTUAL LIFE INSURANCE CO.; and

No. 428. WILLIAMS, ADMINISTRATOR, *v.* PENN MUTUAL LIFE INSURANCE CO. October 22, 1928. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George C. Bedell* and *Isaac Stewart* for petitioner. *Messrs. P. O. Knight, C. Fred Thompson, A. G. Turner,* and *James F. Glen* for respondent.

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No. 447. QUINN *v.* DAVIS, ET VIR. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Austin Barnes* for petitioner. *Mr. Will E. Orgain* for respondent.

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No. 393. ROUSE, EXECUTOR, *v.* UNITED STATES. October 22, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Charles Markell* for petitioner. *Solicitor General Mitchell, Assistant Attorney General*

*Galloway,* and *Mr. Dwight E. Rorer* for the United States.

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No. 437. BAUGH *v.* UNITED STATES. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James H. Hawley* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

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No. 441. BECK ET AL. *v.* MILWAUKEE COUNTY, WISCONSIN, ET AL.; and

No. 442. BECK ET AL. *v.* WISCONSIN. October 22, 1928. Petition for writs of certiorari to the Supreme Court of the State of Wisconsin denied. *Messrs. Louis Quarles* and *Malcolm K. Whyte* for petitioners. *Messrs. John W. Reynolds, Franklyn E. Bump, Eugene Wengert,* and *Daniel W. Sullivan* for respondents.

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No. 444. THE ROBERT DOLLAR CO. *v.* AMERICAN ASIATIC CO. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ira S. Lillick* for petitioner. *Mr. R. M. Fitzgerald* for respondent.

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No. 28. JACKSON & EASTERN RY. CO. ET AL. *v.* BURNS ET AL. See *ante,* p. 562.

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No. 446. REED *v.* NARCOMERY, NÉE LEADER, ET AL. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. R. J. Roberts* for petitioner. *Messrs. J. B. Campbell* and *W. W. Pryor* for respondents.

No. 448. SATTERTHWAIT ET AL., RECEIVERS, *v.* MCMAN OIL AND GAS CO. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Charles E. Hughes, J. M. McCormick, T. R. Boone, Robert H. Richards, John H. Stone,* and *John B. King* for petitioners. *Messrs. R. L. Batts, A. H. Carrigan, Harry H. Rogers, John Rogers,* and *A. H. Britain* for respondent.

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No. 452. CASWELL ET AL. *v.* MAGNOLIA PETROLEUM CO. ET AL. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Texas denied. *Messrs. A. D. Lipscomb* and *C. W. Howth* for petitioners. *Messrs. U. H. Francis, Wallace Hawkins,* and *Barry Mohun* for respondents.

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No. 453. THE BOARD OF TRUSTEES OF THE ANTON CHICO LAND GRANT *v.* BROWN ET AL. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of New Mexico denied. *Messrs. Irvine L. Lenroot, Stephen B. Davis,* and *C. J. Roberts* for petitioner. No appearance for respondents.

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No. 463. BRICE, ADMINISTRATRIX, *v.* TEXAS CO. October 22, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. K. T. McConnico* and *John A. Pitts* for petitioner. *Messrs. J. M. Anderson* and *John B. Keeble* for respondent.

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No. 468. MOBILE AND OHIO R. R. CO. *v.* ILLINOIS FUEL CO. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Carl Fox* for petitioner. *Messrs. Daniel N. Kirby* and *Donald C. Strachan* for respondent.

No. 471. HARRIS *v.* LOUISIANA. October 22, 1928. Petition for writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. Loys Charbonnet* for petitioner. *Messrs. Percy Saint* and *Eugene Stanley* for respondent.

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No. 377. COLE STORAGE BATTERY CO. *v.* UNITED STATES. October 29, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Marvin Farrington* and *Harry C. Kinne* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Ralph C. Williamson* for the United States.

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No. 389. BAKELITE CORP'N *v.* FRISHER & CO., ET AL. October 29, 1928. Petition for writ of certiorari to the Court of Customs Appeals denied. *Mr. Albert MacC. Barnes* for petitioner. *Mr. Meyer Kraushaar* for respondents.

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No. 431. MANTLE LAMP CO. *v.* UNITED STATES. October 29, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Marvin Farrington* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States

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No. 436. TAYLOR *v.* BURR PRINTING CO. October 29, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry A. Craig* for petitioner. *Mr. Lucius F. Robinson* for respondent.

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No. 451. DREHER ET AL *v.* LOUISIANA. October 29, 1928. Petition for writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. Eldon S. Lazarus* for petitioners. No appearance for respondent.

No. 457. BUDLONG *v.* BUDLONG; and

No. 458. BUDLONG *v.* BUDLONG. October 29, 1928. Petitions for writs of certiorari to the Superior Court of Newport County, State of Rhode Island, denied. *Jessie M. Wilson* for petitioner. *Mr. Arthur M. Allen* for respondent.

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No. 467. TEXAS & NEW ORLEANS CO. *v.* TILLEY. October 29, 1928. Petition for writ of certiorari to the Supreme Court of the State of Texas denied. *Messrs. Charles H. Bates* and *J. H. Tallichet* for petitioner. *Messrs. Charles Mortimer Smithdeal* and *Alexander White Spence* for respondent.

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No. 470. EICH *v.* CZERVONKO ET AL. October 29, 1928. Petition for writ of certiorari to the Supreme Court of the State of Illinois denied. *Messrs. Harry W. Standidge* and *Justus Chancellor* for petitioner. *Messrs. Sherman C. Spitzer* and *George Gillette* for respondents.

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No. 485. THAW *v.* THAW. October 29, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John W. Davis, David H. Taylor,* and *Robert B. Knowles* for petitioner. *Messrs David A. Reed, Horace L. Bomar,* and *Matthew C. Fleming* for respondent.

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No. 488. MCGEORGE *v.* ISLAND DEVELOPMENT CO. ET AL. October 29, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for he Third Circuit denied. *Mr. James Mercer Davis* for petitioner. *Mr. Albert E. Steinem* for respondents.

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No. 209. ROBERTS ET AL. *v.* DETROIT ET AL. See *ante,* p. 566.

No. 408. COAST LUMBER CO. ET AL. *v.* JOHNSON ET AL. See *ante*, p. 567.

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No. 465. WEST, CHAIRMAN, ET AL, *v.* UNITED RAILWAYS AND ELECTRIC CO. See *ante*, p. 567.

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No. 319. EMMANUEL *v.* UNITED STATES. November 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. N. B. K. Pettingill* for petitioner. *Solicitor General Mitchell* for the United States.

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No. 476. SHEVENELL ET AL., TRUSTEES, *v.* GEORGE J. KELLY, INC. November 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. John Boyle, Jr.*, for petitioners. *Mr. Marcus B. May* for respondent.

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No. 400. EVERLASTIK, INC., *v.* UNITED STATES. November 19, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Raymond M. Hudson* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Dwight E. Rorer* for the United States.

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No. 433. LUPFER ET AL. *v.* UNITED STATES. November 19, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Louis Titus, George V. Triplett, Jr.,* and *J. Barrett Carter* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Ralph C. Williamson* for the United States.

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No. 472. FAJARDO SUGAR CO. *v.* HOLCOMB, AUDITOR. November 19, 1928. Petition for writ of certiorari to

the Circuit Court of Appeals for the First Circuit denied. *Messrs. David A. Buckley, Jr.,* and *Dean Hill Stanley* for petitioner. *Messrs. Wm. Cattron Rigby* and *John A. Hull* for respondent.

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No. 475. HUEBSCHMAN, ETC. *v.* PINAUD, INC. November 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Marion Butler* and *Alexander J. Feild* for petitioner. *Mr. Daniel L. Morris* for respondent.

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No. 478. PUGET SOUND POWER & LIGHT CO. *v.* VON HERBERG ET AL. November 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James B. Howe* for petitioner. No appearance for respondents.

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No. 480. JOHNSON, ADMINISTRATRIX, *v.* TERMINAL R. R. ASS'N. November 19, 1928. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Sidney Thorne Able* for petitioner. No appearance for respondent.

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No. 486. NEW YORK TRUST CO. ET AL. *v.* CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK ET AL. November 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John W. Davis* and *Edwin S. S. Sunderland* for petitioners. *Messrs. Henry R. Platt, Richard J. Higgins, Powell C. Groner, Silas H. Strawn, Walter H. Jacobs, Gilbert E. Porter,* and *Buell McKeever* for respondents.

No. 487. LeMoyne *v.* Curtis. November 19, 1928. Petition for writ of certiorari to the Appellate Court of the State of Illinois, First District, denied. *Mr. Philip H. Treacy* for petitioner. *Mr. Alfred T. Carton* for respondent.

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No. 489. F. W. Woolworth Co. *v.* Calkins. November 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frederic H. Stinchfield* for petitioner. No appearance for respondent.

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No. 493. W. & J. Sloane Mfg. Co. *v.* Armstrong Cork Co. November 19, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Emerson R. Newell, Frederick P. Fish,* and *Owen J. Roberts* for petitioner. *Messrs. Clarence P. Byrnes* and *George E. Stebbins* for respondent.

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No. 494. Erie R. R. Co. *v.* Pillsbury Flour Mills Co. November 19, 1928. Petition for writ of certiorari to the Supreme Court of the State of New York denied. *Messrs. Wm. C. Cannon* and *Theodore Kiendl* for petitioner. *Mr. Van Vechten Veeder* for respondent.

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No. 531. Mayes *v.* Industrial Accident Board et al. See *ante,* p. 568.

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No. 538. Lofton *v.* Mississippi. See *ante,* p. 568.

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No. 371. Hardware Underwriters et al. *v.* United States. November 26, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Joseph S.*

*Brooks* and *Daniel V. Howell* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Edwin G. Davis* and *Charles R. Pollard* for the United States.

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No. 385. Moore (formerly Cobb) et al. *v.* Downing, Tax Collector, et al. November 26, 1928. Petition for writ of certiorari to the Court of Civil Appeals, 11th Supreme Judicial District, State of Texas, denied. *Messrs. M. G. Cox* and *Walter Cocke* for petitioners. No appearance for respondents.

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No. 432. Nyberg, Administrator, *v.* United States. November 26, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Marvin Farrington* and *Harry F. White* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Dwight E. Rorer* for the United States.

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No. 473. Leona Ramos y Fajardo et al. *v.* Francisco Icasiano y Bello et al. November 26, 1928. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Jose Abad Santos* for petitioners. No appearance for respondents.

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No. 496. Cline Electric Mfg. Co. et al. *v.* Kohler. November 26, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Drury W. Cooper* and *Wesley G. Carr* for petitioners. *Messrs. Silas H. Strawn, Edward W. Everett,* and *Donald M. Carter* for respondent.

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No. 497. Chesapeake & Ohio Ry. Co. *v.* Webb. November 26, 1928. Petition for writ of certiorari to the Su-

preme Court of Appeals of the State of West Virginia denied. *Mr. C. W. Sterling* for petitioner. *Mr. A. A. Lilly* for respondent.

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No. 498. BROWN ET AL. *v.* VEIGEL, COMMISSIONER OF BANKS. November 26, 1928. Petition for writ of certiorari to the Supreme Court of the State of Minnesota denied. *Messrs. Montreville J. Brown* and *Wm. H. Oppenheimer* for petitioners. No appearance for respondent.

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No. 500. IDEAL CUP CORP'N *v.* TULIP CUP CORP'N ET AL. November 26, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Hanz v. Briesen* for petitioner. *Mr. J. Austin Stone* for respondents.

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No. 502. DIETRICH, ETC. *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION. November 26, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Richard B. Cavanaugh* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. J. Frank Staley* for respondent.

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No. 503. VALZ ET AL. *v.* SHEEPSHEAD BAY BUNGALOW CORP'N ET AL. November 26, 1928. Petition for writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Louis Marshall* for petitioners. *Messrs. Morgan J. O'Brien, Clarence F. Corner, George E. Brower,* and *John V. Hewitt* for respondents.

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No. 505. CENTRAL RAILROAD CO., ETC. *v.* EASTERN STEAMSHIP LINES. November 26, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the

Second Circuit denied. *Messrs. Pierre M. Brown* and *Horace L. Cheyney* for petitioner. *Messrs. Clarence B. Smith* and *Henry M. Hewitt* for respondent.

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No. 507. LARSON *v.* CROWTHER. November 26, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Amasa C. Paul* for petitioner. *Mr. F. A. Whiteley* for respondent.

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No. 508. RADIO CORP'N OF AMERICA *v.* LORD, RECEIVER, ET AL. November 26, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John W. Davis, Thurlow M. Gordon, Frederick P. Fish,* and *James R. Sheffield* for petitioner. *Mr. Samuel E. Darby, Jr.,* for respondents.

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No. 509. GUARANTY TRUST CO. *v.* AACHEN & MUNICH FIRE INSURANCE CO. November 26, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Wm. C. Cannon* for petitioner. *Mr. Hartwell Cabell* for respondent.

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No. 510. INTERNATIONAL INDEMNITY CO. *v.* LEHMAN ET AL. November 26, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Weymouth Kirkland* and *Robert N. Golding* for petitioner. *Mr. Franklin D. Jones* for respondents.

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No. 516. HUCKABY *v.* CLARK, RECEIVER. November 26, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Finis E. Riddle* for petitioner. *Messrs. Charles L. Yancey* and *W. C. Hughes* for respondent.

No. 520. SOCIÉTÉ ANONYME D'ARMEMENT D'INDUSTRIE ET DE COMMERCE, ETC. *v.* JAMES MCWILLIAMS BLUE LINE ET AL. November 26, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. T. Catesby Jones* and *Leonard J. Matteson* for petitioner. *Messrs. Anthony V. Lynch, Jr.*, and *W. H. McGrann* for respondents.

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No. 426. GALE ET AL. *v.* NORFOLK & WESTERN RY. CO. ET AL. See *ante*, p. 571.

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No. 439. MCPHERSON BROTHERS CO. *v.* OKANOGAN-DOUGLAS INTER-COUNTY BRIDGE CO. See *ante*, p. 571.

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No. 178. ELLIS *v.* ASSOCIATED INDUSTRIES INSURANCE CORP'N. December 3, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. H. Carrigan* for petitioner. No appearance for respondent.

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No. 515. DEWEY COUNTY *v.* UNITED STATES. December 3, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank McNulty* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Parmenter,* and *Mr. Capo-Rodriguez* for the United States.

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No. 518. ST. LOUIS MERCHANTS BRIDGE TERMINAL RY. CO. *v.* WOODS. December 3, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. J. L. Howell* for petitioner. *Mr. W. H. Douglas* for respondent.

No. 521. DeSousa et al., etc. *v.* Crocker First National Bank. December 3, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. T. T. C. Gregory* for petitioners. *Messrs. Edward Hahfeld* and *Herbert W. Clark* for respondent.

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No. 522. Vendetti *v.* United States. December 3, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles H. Miller* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Mabel Walker Willebrandt* for the United States.

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No. 523. Kindlund et al. *v.* Washington. December 3, 1928. Petition for writ of certiorari to the Supreme Court of the State of Washington denied. *Mr. Charles H. Miller* for petitioners. *Mr. Ewing D. Colvin* for respondent.

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No. 93. Seaboard Air Line Ry. Co. *v.* Johnson. See *ante,* p. 576.

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No. 95. New York, Chicago and St. Louis R. R. Co. *v.* Granfell. See *ante,* p. 576.

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No. 517. Sawyear et al. *v.* United States. December 10, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John J. Sullivan* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. J. Louis Monarch* for the United States.

No. 542. DAY *v.* UNITED STATES. December 10, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Will Steel* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Mabel Walker Willebrandt* for the United States.

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No. 512. SARTORIS *v.* UTAH CONSTRUCTION CO. ET AL.; and

No. 543. SOUTHERN PACIFIC CO. *v.* SARTORIS. January 2, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Horace M. Street* for petitioner in No. 512 and respondent in No. 543. *Messrs. Thomas B. Dozier* and *Frank C. Cleary* for respondents in No. 512 and petitioner in No. 543.

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No. 533. YOUNG & GLENN, INC., ET AL. *v.* NEW YORK & CUBA MAIL STEAMSHIP CO. January 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Oscar R. Houston* for petitioners. *Mr. Van Vechten Veeder* for respondent.

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No. 539. PURITAN COAL MINING CO. ET AL., ETC. *v.* MCCORMICK, COLLECTOR OF TAXES. January 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. M. J. Martin* for petitioners. *Mr. F. W. Magrady* for respondent.

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No. 540. MEEK *v.* BEEZER ET AL.; and

No. 541. GINTER ET AL *v.* BEEZER ET AL. January 2, 1929. Petition for writs of certiorari to the Circuit Court

of Appeals for the Third Circuit denied. *Messrs. Ellis L. Orvis, Mortimer C. Rhone,* and *Arthur C. Dale* for petitioners. No appearance for respondents.

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No. 609. BALTUFF *v.* UNITED STATES. See *ante,* p. 579.

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No. 83. AMERICAN RAILWAY EXPRESS CO. *v.* FLEISCHMANN, MORRISS & CO., INC.;

No. 84. AMERICAN RAILWAY EXPRESS CO. *v.* RICHMOND HARDWARE CO.;

No. 85. AMERICAN RAILWAY EXPRESS CO. *v.* G. T. ELLIOTT, INC.;

No. 86. AMERICAN RAILWAY EXPRESS CO. *v.* NEWCOMB. January 7, 1929. Petition for writs of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Messrs. Wyndham R. Meredith* and *Charles W. Stockton* for petitioner. *Mr. A. W. Patterson* for respondent in No. 83. No appearance for respondents in Nos. 84, 85, and 86.

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No. 544. KEARNS ET AL. *v.* UNITED STATES. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John F. Dore* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

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No. 546. CENTRAL ARGENTINE RY. *v.* SUZUKI ET AL. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John M. Woolsey* for petitioner. *Messrs. George C. Sprague, Charles C. Burlingham,* and *Peter S. Carter* for respondents.

No. 549. AMERICAN SURETY CO. *v.* MULLENDORE, RECEIVER. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Sterling M. Wood* for petitioner. *Messrs. Charles H. Laud* and *Wm. B. Leavitt* for respondent.

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No. 551. BOYLE, TRUSTEE *v.* GRAY ET AL.; and

No. 552. BOYLE, TRUSTEE *v.* WEATHERBEE ET AL. January 7, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Maurice E. Rosen* and *Joseph B. Jacobs* for petitioner. *Mr. Joseph F. Gould* for respondents.

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No. 553. HOTCHKISS ET AL. *v.* SUPERIOR COURT ET AL. January 7, 1929. Petition for writ of certiorari to the Supreme Court of the State of California denied. *Eloise B. Cushing* for petitioners. *Messrs. R. M. Fitzgerald* and *Charles A. Beardsley* for respondents.

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No. 554. C. F. CHILDS AND CO. *v.* HARRIS TRUST AND SAVINGS BANK. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Louis L. Dent* and *Charles Y. Freeman* for petitioner. *Mr. Henry Fitts* for respondent.

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No. 556. DOBSON, ADMINISTRATRIX, *v.* UNITED STATES;

No. 557. EGBERT, ADMINISTRATRIX, *v.* UNITED STATES; and

No. 558. HASELDEN, EXECUTOR, *v.* UNITED STATES. January 7, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied.

*Messrs. T. Catesby Jones* and *James W. Ryan* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. J. Frank Staley* for the United States.

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No. 561. Bermuda & West Indies Steamship Co. *v.* Oceanic Steam Navigation Co. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. W. H. McGrann* for petitioner. *Mr. Chauncey F. Clark* for respondent.

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No. 562. Standard Oil Co. *v.* Cates, Administrator. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. C. W. Tillett* and *Charles W. Tillett, Jr.,* for petitioner. No appearance for respondent.

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No. 564. DeLano *v.* Tulsa et al. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. M. Longworthy* for petitioner. *Messrs. John Rogers* and *Randolph Shirk* for respondents.

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No. 566. Codman *v.* Miles, Former Collector of Internal Revenue; and

No. 567. Codman *v.* Tait, Collector of Internal Revenue. January 7, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John R. Lazenby* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. Clarence M. Charest* and *S. Dee Hanson* for respondents.

No. 569. SWIFT *v.* MOBLEY, STATE SUPERINTENDENT OF BANKS, ET AL. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Stephen C. Upson* for petitioner. No appearance for respondents.

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No. 570. KIMBALL *v.* RATHBONE CO. January 7, 1929. Petition for writ of certiorari to the Supreme Court of the State of Nebraska denied. *Mr. O. S. Spillman* for petitioner. *Mr. C. Petrus Peterson* for respondent.

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No. 575. KANSAS CITY TERMINAL RY. CO. ET AL. *v.* CENTRAL UNION TRUST CO., TRUSTEE, ETC., ET AL. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Samuel W. Sawyer, Bruce Scott, Edward J. White, Gardiner Lathrop, N. H. Loomis,* and *E. E. McInnis* for petitioners. *Messrs. Joseph M. Bryson, Arthur H. Van Brunt, Edward Cornell, Charles E. Hotchkiss, George H. Williams, Charles A. Hout, Charles P. Williams, Nicholas Kelley, H. C. McCollom, Edward H. Blanc, W. W. Miller,* and *Perry D. Trafford* for respondents.

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No. 580. HUDSON TRUST CO. ET AL. *v.* DAVIS, TRUSTEE. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George W. Wickersham* and *Lionel P. Kristeller* for petitioners. *Mr. Thomas G. Haight* for respondent.

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No. 581. MEAD-MORRISON MFG. CO. *v.* MARCHANT, TRUSTEE. January 7, 1929. Petition for writ of certi-

orari to the United States Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edward F. McClennen* and *Arthur P. French* for petitioner. *Messrs. George W. Wickersham* and *Kenneth M. Spence* for respondent.

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No. 582. GENERAL ELECTRIC CO. *v.* DEFOREST RADIO CO. ET AL. January 7, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Hubert Howson, Albert G. Davis, Frederick P. Fish,* and *Charles Neave* for petitioner. *Messrs. Thomas G. Haight* and *Samuel E. Darby, Jr.,* for respondents.

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No. 103. EMPIRE GAS & FUEL CO. ET AL. *v.* SAUNDERS ET AL. See *ante,* p. 581.

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No. 560. UNITED STATES ET AL. *v.* BAKER ET AL. January 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Wm. Cattron Rigby, John A. Smith,* and *Edward A. Kreger* for petitioners. *Messrs. Frank Davis, Jr., Seifude M. Stellwagen, Nelson Grammans, Wm. D. Harris,* and *Wm. J. Neale* for respondents.

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No. 573. POTOMAC ELECTRIC POWER CO. *v.* RUDOLPH ET AL.; and

No. 574. WASHINGTON RAILWAY & ELECTRIC CO. *v.* RUDOLPH ET AL. January 14, 1929. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. S. R. Bowen* and *John S. Barbour* for petitioners. *Messrs. Wm. W. Bride* and *Francis H. Stephens* for respondents.

No. 577. GALLIHER & HUGUELY, INC., ET AL. *v.* HARPER, ET AL. January 14, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. H. Winship Wheatley* and *James A. O'Shea* for petitioners. *Mr. L. A. Bailey* for respondents.

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No. 160. VIRGINIAN RY. CO. *v.* KIRK. See *ante*, p. 582.

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No. 230. JORGENSEN-BENNETT MFG. CO. *v.* KNIGHT, SHERIFF, ET AL. See *ante*, p. 583.

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No. 583. PAUCHOQUE LAND CORP. *v.* LONG ISLAND STATE PARK COMMISSIONER ET AL. January 21, 1929. Petition for writ of certiorari to the Court of Appeals of the State of New York denied. *Messrs. Joseph S. Auerbach, Martin A. Schenck,* and *Wm. J. Hughes, Jr.,* for petitioner. *Mr. Walter H. Pollak* for respondents.

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No. 588. PEACOCK ET AL. *v.* WOFFORD. January 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Norman I. Miller* for petitioners. *Mr. A. O. B. Sparks* for respondent.

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No. 589. MINIS, EXECUTOR, ET AL. *v.* UNITED STATES. January 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Wm. L. Clay* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar* for the United States.

No. 592. OVERLANDER *v.* OVERLANDER ET AL. January 21, 1929. Petition for writ of certiorari to the Supreme Court of the State of Kansas and/or the District Court of Doniphan County denied. *Mr. Jacob A. Overlander, pro se.* No appearance for respondents.

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No. 593. DI BELLA *v.* UNITED STATES. January 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Halle* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

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No. 594. LUNDQUIST *v.* CHICAGO, ROCK ISLAND & PACIFIC RY. CO. January 21, 1929. Petition for writ of certiorari to the Supreme Court of the State of Iowa denied. *Mr. F. M. Miner* for petitioner. *Messrs. M. L. Bell, W. F. Dickinson, J. G. Gamble,* and *Alden B. Howland* for respondent.

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No. 596. HASKELL *v.* GYPSY OIL CO. January 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. H. L. Stuart, W. A. Ledbetter,* and *R. R. Bell* for petitioner. No appearance for respondent.

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No. 598. CONTINENTAL CASUALTY CO. *v.* WILLIS. January 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Joseph M. Hurt, Jr.,* for petitioner. No appearance for respondent.

No. 613. SMITH *v.* REISHMAN ET AL. January 21, 1929. Petition for writ of certiorari to the Circuit Court of Kanawha County of the State of West Virginia denied. *Mr. Claude L. Smith* for petitioner. No appearance for respondents.

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No. 599. SULLIVAN EX REL. BEW *v.* TILLINGHAST, COMMISSIONER OF IMMIGRATION. February 18, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Wm. H. Lewis* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

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No. 602. SELF *v.* PRAIRIE OIL & GAS CO. February 18, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Charles B. Rogers* and *L. O. Lytle* for petitioner. *Messrs. T. J. Flannely, Preston C. West, Nathan A. Gibson, Joseph L. Hull* and *A. O. Davidson* for respondent.

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No. 605. NEAL ET AL., TRUSTEES, ETC. *v.* UNITED STATES. February 18, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Wm. Harold Hitchcock* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Clarence M. Charest* for the United States.

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No. 607. BARBER ASPHALT PAVING CO. *v.* STANDARD ASPHALT & RUBBER CO.; and

No. 608. STANDARD ASPHALT & RUBBER CO. *v.* BARBER ASPHALT PAVING CO. February 18, 1929. Petitions for

writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. John W. Davis, Henry N. Paul,* and *Charles Neave* for petitioner in No. 607 and respondent in No. 608. *Messrs. Thomas G. Haight, Alexander F. Reichmann, Frank L. Belknap,* and *Wm. F. Hall* for respondent in No. 607 and petitioner in No. 608.

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No. 630. PARKS, TRUSTEE, ET AL. *v.* KNAPP, RECEIVER. February 18, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. A. Fosnes* for petitioners. *Mr. Oluf Gjerset* for respondent.

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## CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 1, 1928, TO AND INCLUDING FEBRUARY 18, 1929.

No. 25. CHAPMAN *v.* UNITED STATES. On writ of certiorari to the Court of Claims. October 1, 1928. Judgment vacated and the cause remanded to the Court of Claims with directions to enter judgment for the petitioner, with interest, on motion of *Solicitor General Mitchell* for the respondent, and mandate granted. *Mr. Sanford Robinson* for petitioner.

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No. 344. DOWELL *v.* CALIFORNIA. On petition for a writ of certiorari to the Supreme Court of the State of California. October 1, 1928. Petition for writ of certiorari dismissed on motion of *Mr. Joseph I. McMullen* for the petitioner. No appearance for respondent.

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No. 5. PHILADELPHIA EX REL. FUREY ET AL. *v.* PHILADELPHIA RAPID TRANSIT CO. ET AL., ETC. Appeal from the District Court of the United States for the Eastern Dis-

trict of Pennsylvania. October 1, 1928. Dismissed with costs, on motion of *Mr. James J. Regan, Jr.*, for appellants. *Messrs. Frederic L. Ballard* and *Frank M. Hunter* for appellees.

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No. 6. MILLER & LUX, INC. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL., ETC. Error to the Supreme Court of the State of California. October 1, 1928. Dismissed with costs, per stipulation of counsel. *Mr. Adolphus E. Graupner* for plaintiff in error. *Mr. Carl I. Wheat* for defendants in error.

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No. 9. WISCONSIN EX REL. BERGER *v.* CAREY, AS COUNTY CLERK OF THE COUNTY OF MILWAUKEE, ETC.; and

No. 10. WISCONSIN EX REL. BERGER *v.* CAREY, AS COUNTY CLERK OF THE COUNTY OF MILWAUKEE, ETC. Error to the Supreme Court of the State of Wisconsin. October 1, 1928. Dismissed with costs, per stipulation of counsel. *Mr. Edgar L. Wood* for plaintiff in error. *Messrs. Eugene Wengert* and *Franklin E. Bump* for defendant in error.

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No. 66. BEACH *v.* BEACH ET AL. Error to the Supreme Court of Errors of the State of Connecticut. October 1, 1928. Dismissed with costs, under paragraph 2 of Rule 13. *Mr. Harold Remington* for plaintiff in error. *Mr. E. Barrett Prettyman* for defendants in error.

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No. 112. MONTANA EX REL. INGERSOLL *v.* CLAPP, AS PRESIDENT OF THE STATE UNIVERSITY AT MISSOULA, MONTANA, ET AL. Error to the Supreme Court of the State of Montana. October 1, 1928. Dismissed with costs, under paragraph 2 of Rule 13. *Mr. C. E. Pew* for plaintiff in error. *Messrs. L. A. Foot* and *A. H. Angstman* for defendants in error.

No. 292. GENERAL REFRACTORIES CO. *v.* ASHLAND FIRE BRICK CO. On petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. October 1, 1928. Petition for writ of certiorari dismissed on motion of *Messrs. Augustus B. Stoughton* and *John H. Holt* for petitioner. No appearance for respondent.

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No. 165. JACKSON *v.* EVANS. On petition for writ of certiorari to the Supreme Court of the State of Louisiana. October 8, 1928. Dismissed. *Mr. J. D. Wilkinson* for petitioner. *Mr. F. W. Clements* for respondent.

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No. 241. CALIFORNIA *v.* MOUSE. Appeal from the Supreme Court of the State of California. October 8, 1928. Dismissed with costs on motion of *Mr. U. S. Webb* for appellant. No appearance for appellee.

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No. 47. OLIVER CADILLAC CO. *v.* CHRISTOPHER, BUILDING COMMISSIONER ET AL. Error to the Supreme Court of the State of Missouri. October 15, 1928. Dismissed with costs on motion of *Messrs. S. L. Swarts* and *Daniel Bartlett* for plaintiff in error. *Messrs. Oliver Santi* and *Julius T. Muench* for defendants in error.

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No. 548. FARRIS *v.* UNITED STATES. Appeal from the District Court of the United States for the District of Idaho. November 19, 1928. Docketed and dismissed and mandate granted on motion of *Solicitor General Mitchell* for the United States.

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No. 361. GOKHALE *v.* UNITED STATES. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. November 19, 1928. The judgments of the

District Court of the United States for the Northern District of New York and of the Circuit Court of Appeals for the Second Circuit in this cause vacated and set aside, and the cause remanded to the District Court of the United States for the Northern District of New York with direction to dismiss the bill of complaint, pursuant to stipulation filed herein, and on motion of *Solicitor General Mitchell* in that behalf. *Messrs. Meyer Kraushaar* and *Emanuel Celler* for petitioner. *Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* were on the brief with the Solicitor General for the United States.

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No. 81. INTER-CITY COACH CO. *v.* ATWOOD ET AL. Appeal from the District Court of the United States for the District of Rhode Island. November 19, 1928. Dismissed with costs, on motion of *Mr. Edward H. Kelly* for appellant. No appearance for appellees.

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No. 550. KELSEY *v.* OHIO. Error to the Supreme Court of the State of Ohio. November 23, 1928. Docketed and dismissed with costs, and mandate granted, on motion of *Mr. James C. Connell* for defendant in error.

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No. 499. ROSEFF ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. November 26, 1928. Dismissed on motion of *Mr. Emanuel Van Dernoot* for petitioners.

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No. 399. UNITED STATES *v.* MARYLAND CASUALTY CO. On certificate from the Circuit Court of Appeals for the Ninth Circuit. December 10, 1928. Dismissed on motion of *Solicitor General Mitchell* in that behalf. *Mr. Walter L. Clark* for the Maryland Casualty Co.

No. 14. TOMICH ET AL. *v.* UNION TRUST CO. ET AL. Appeal from the District Court of the United States for the District of Montana. January 2, 1929. Dismissed with costs pursuant to paragraph 2 of Rule 13. *Mr. John A. Shelton* for appellants. No appearance for appellees.

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No. 119. FAUNTLEROY, FORMER COLLECTOR OF INTERNAL REVENUE, *v.* ELMER CANDY CO., INC. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. January 7, 1929. Judgment reversed, on confession of error, and cause remanded for further proceedings, on motion of *Solicitor General Mitchell* in behalf of *Mr. W. Parker Jones* and *Mr. Henry W. Robinson* for the respondent. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. Clarence M. Charest* and *J. Louis Monarch* for petitioner.

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No. 525. UNITED STATES *v.* WHYEL ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. January 7, 1929. Dismissed, on motion of *Solicitor General Mitchell,* with whom *Assistant Attorney General Mabel Walker Willebrandt* and *Mr. J. Louis Monarch* were on the brief, for the United States. No appearance for respondents.

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No. 527. HEINER, COLLECTOR OF INTERNAL REVENUE, *v.* HENRY WILHELM CO. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. January 7, 1929. Dismissed, on motion of *Solicitor General Mitchell* for the petitioner. No appearance for respondent.

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No. 534. BRAUTI ET AL., ETC., *v.* WESTWOOD LUMBER CO. Error to the District Court of the United States for the District of Oregon. January 7, 1929. Dismissed with

costs, for failure to comply with Rule 12. *Mr. Arthur I. Moulton* for plaintiffs in error. No appearance for defendant in error.

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No. 535. HOWELL ET AL. *v.* WESTWOOD LUMBER CO. Error to the District Court of the United States for the District of Oregon. January 7, 1929. Dismissed with costs, for failure to comply with Rule 12. *Mr. Arthur I. Moulton* for plantiffs in error. No appearance for defendant in error.

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No. 536. OWEN ET AL., ETC., *v.* WESTWOOD LUMBER CO. Error to the District Court of the United States for the District of Oregon. January 7, 1929. Dismissed with costs, for failure to comply with Rule 12. *Mr. Arthur I. Moulton* for plaintiffs in error. No appearance for defendant in error.

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No. 537. BANNISTER *v.* WESTWOOD LUMBER CO. Error to the District Court of the United States for the District of Oregon. January 7, 1929. Dismissed with costs, for failure to comply with Rule 12. *Mr. Arthur I. Moulton* for plaintiff in error. No appearance for defendant in error.

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No. 151. LOVELAND, EXECUTOR, ET AL. *v.* UNITED STATES. On writ of certiorari to to Circuit Court of Appeals for the Third Circuit. January 14, 1929. Judgment reversed on confession of error, and cause remanded for further proceedings, on motion of *Solicitor General Mitchell* for the United States. *Messrs. Shelton Pitney, John R. Hardin, Jr.*, and *Waldron M. Ward* for petitioners.

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No. 290. UNITED STATES *v.* WOOLEN. On writ of certiorari to the Circuit Court of Appeals for the Sixth Cir-

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No. 203. CHIN MON EX REL. CHIN YUEN *v.* TILLINGHAST, COMMISSIONER OF IMMIGRATION. On writ of certiorari to the Circuit Court of Appeals for the First Circuit. February 18, 1929. Dismissed pursuant to Rule 13. *Mr. E. F. Damon* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

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No. 584. BRICTSON MFG. CO. PETITIONER, *v.* CLOSE ET AL.;

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